2019

THE CASE LAW SUMMARIES IN THIS BOOK HAVE BEEN EDITED FROM SUMMARIES AVAILABLE ON THE DEPARTMENT OF CRIMINAL JUSTICE TRAINING WEBSITE. FOR ADDITIONAL MATERIALS, AND OTHER USEFUL LINKS AND DOCUMENTS,

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

FULL CITATIONS:

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

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

2019

TABLE OF CONTENTS

KENTUCKY

PENAL CODE

PENAL CODE – KRS 506 – INCHOATE

Reyes v. Com., 2019 WL 413611 (Ky. App. 2019)

FACTS: At about 2 a.m. on November 16, 2016, Officer Fehler (Independence PD) responded to a burglary at a Sprint store. A GPS tracker was taken from the store. Kenton County PD followed the signal from the stolen GPS device. Officer Fehler responded to a location where Officer Snipes had stopped a truck based on the GPS signal. Officer Fehler could see a box containing cell phones and electronic devices behind the front seat in plain view, along with other items in the bed. Reyes was hiding in the cab.

Reyes, Torres and Legon (Torres and Legon were in the truck) were indicted on Burglary, Theft and related charges. Torres absconded and Legon entered a plea in exchange for testifying against the other two. Legon claimed Reyes was his older brother and that the three of them went to the store. It was undisputed that Reyes did not enter the store, but instead waited in the truck while Legon and Torres committed the burglary.

Reyes was convicted of complicity and appealed.

ISSUE: Is assisting someone else to commit a crime complicity?

HOLDING: Yes.

DISCUSSION: Burglary in the Third Degree requires actual entry into a building. However, under KRS 502.020, complicity involves aiding another in committing the offense. Reyes acted as a lookout while the other two entered the store and committed the crime. However, the Court noted the three went to an unfamiliar area (Northern Kentucky) to commit a crime at an obviously closed store, and Reyes made no attempt to flee the scene or contact the police during the crime. Further, Reyes' intent was to assist the others in committing a theft and that they caused damage to the store in the process.

The Court held that complicity charges were appropriate and upheld his convictions.

PENAL CODE – KRS 508 – ASSAULT

<u>Litsey v. Com.</u>, 2019 WL 1167987 (Ky. 2019)

FACTS: On July 3, 2016, Officer Besednjak (Shepherdsville PD) ran the plate of the vehicle in front of him and discovered the registered owner (Litsey) had a suspended OL. The officer initiated a traffic stop, and the vehicle pulled over in a gas station parking lot. Additional officers arrived in support of the stop, and one took Litsey's keys and placed them on top of her vehicle. During that time, Officer Besednjak learned Litsey had additional felony warrants and he so informed the other officers.

Officer Besednjak walked back to Litsey's car to remove Litsey from it. Litsey claimed she needed to roll up her windows, but instead grabbed the keys from the top of the vehicle. As Officer Besednjak tried to get the keys away from Litsey and get her out of the vehicle, Litsey got the car started. At the time, the officer was partially inside the vehicle. Litsey took off at a high rate of speed, dragging the officer for a short distance. The officer fell from the vehicle and injured his back – Litsey also ran over his leg. He regained his feet and encouraged fellow officers to pursue, and he did so as well. The officers were unable to catch up with Litsey given the conditions. Litsey and her passenger, Lamb, drove at a high speed for several minutes, hid behind a building and turned off the lights. Litsey ultimately fled on foot.

Litsey was eventually apprehended at charged with Assault 1st, Wanton Endangerment 1st, fleeing police and related offenses. At trial, the officer testified as to his serious injuries, including the removal of a cervical disk as a result of hitting his back on the curb when he was thrown from the vehicle. Officer Besednjak was pursuing retirement disability as a result of his injuries at the time of the trial as he is was (and is) in chronic pain. Lamb testified that they were both highly impaired on drugs at the time, but that she was frightened during the altercation and tried to get Litsey to stop. Litsey was convicted first-degree assault, wanton endangerment in the first degree, fleeing police, operating without a valid license, and being a PFO II. Litsey appealed.

ISSUE: Is wanton conduct sufficient for assault 1st, when it results in a serious injury?

HOLDING: Yes.

DISCUSSION: Litsey argued that she should have received a directed verdict on the assault and wanton endangerment charges. (The latter charge named Lamb as the victim.) With respect to wanton endangerment, the Court held it was reasonable to believe Litsey placed Lamb at serious risk by driving impaired at a high rate of speed, and having slept for several weeks (due to the drugs). Although her exact speed could not be determined, Litsey drove fast enough to evade police. Lamb begged her to stop and she refused.

With respect to the assault charge, Litsey claimed she was not aware of the danger her actions posted to Officer Besednjak. Clearly, by her own admission, she knew he was trying to wrest the keys out of his hand and the officer was partially inside the vehicle with her. Litsey admitted she just wanted to get away and was not thinking of any danger to him. Body camera footage clearly showed the situation as it occurred and the danger to the officer. The Court agreed that her wanton conduct was sufficient to prove the assault, and noted that "her actions resulted in serious physical injury to the officer who now has little to no prospect of returning to his duties as a police officer."

The Court upheld her convictions and her PFO status.

PENAL CODE - KRS 508 – WANTON ENDANGERMENT

Culver v. Com., 590 S.W.3d 810 (Ky. 2019)

FACTS: On December 15, 2012, Bardstown police were searching for a vehicle that fled the scene of a domestic. A little after 2 a.m., Officer Medley spotted a vehicle in a church parking lot, parked next to a red vehicle, and saw a man get into the first vehicle. He found the red car, still parked, had a broken window. Officer Medley radioed Officer Phillips to stop the vehicle that had left the scene. Both officers then pursued the vehicle for a total of about 8 miles at speeds over the posted speed limit. Ultimately, Culver was apprehended and charged with wanton endangerment and fleeing and evading. Both officers testified as to the circumstances of the chase and the danger they felt they were in during the chase. During the chase, a Nelson County deputy attempted to engage, but was involved in an accident. Culver was also charged with breaking into the red car. Culver was convicted of all charges, although the first degree wanton endangerment charge for the

deputy was amended to second degree. The Court of Appeals affirmed and the Kentucky Supreme Court accepted discretionary review.

ISSUE: In the context of a pursuit, must evidence that the suspect created a substantial risk of serious physical injury or death required to support a charge of wanton endangerment?

HOLDING: Yes**.**

DISCUSSION: The Court looked at:

> … whether the conduct of the pursuit satisfied the elements of wanton endangerment, which requires that the behavior display "under circumstances manifesting extreme indifference to the value of human life, . . . wantonly engage[d] in conduct which create[d] a substantial danger of death or serious physical injury to another person." Fleeing and Evading required also mandates at the least, the wanton state of mind, under circumstances that "[b]y fleeing or eluding, he [caused], or create[d] substantial risk, of serious physical injury or death to [a] person or property."[1]

The Kentucky Supreme Court reviewed several similar cases and ruled that there was sufficient evidence, in the form of the officers' testimony, that Culver created a substantial risk to the officers and others, noting that each case was unique. The Supreme Court further noted that speed and conditions were critical, along with the presence of traffic control devices. The Court held it was "undisputed that the pursuit happened in the dark, while traveling down the highway and curvy side roads, and that the officers' speed reached 10-25 m.p.h. over the speed limit while pursuing a faster-traveling Culver." Hence, speed was not the sole factor. The testimony of the officers, "viewed in harmony with the other circumstances of the pursuit" was enough to allow the jury to decide whether the chase created a substantial risk of serious injury or death to" the officers.

The Supreme Court upheld his convictions.

PENAL CODE – KRS 514 – THEFT

Dunlap v. Com., 2019 WL 1870640 (Ky. App. 2019)

FACTS: On July 6, 2016, Dunlap was stopped at a Lexington Kroger for shoplifting. She showed a receipt, but it was for a different Kroger and different items. Dunlap was taken to the loss prevention office to wait for Lexington police. Officer Kanis gave Dunlap Miranda.[2] During the course of the interaction, the officer placed the receipt on the desk, with her citation book. Dunlap asked to speak with her attorney and a call was made to the name she provided. The man, Gormley, arrived in a few minutes and they asked to confer in private. Officer Kanis, believing Gormley was an attorney, allowed them to do so. Through the window in the door, Officer Kanis saw Gormley pick up the receipt and hand it to Dunlap, who tucked t into her shirt. When they ended their talk, Officer Kanis asked for the receipt, but both denied having it.

[1] KRS 520.095(l)(a)4.
[2] Miranda v. Arizona, 384 U.S. 436 (1966).

Dunlap was charged with Theft and Tampering, and convicted of both. She appealed.

ISSUE: May you be charged with theft when you are caught before leaving the premises?

HOLDING: Yes

DISCUSSION: Dunlap argued that there was no indication she intended to commit a theft as she never actually left the market, although she avoided the checkout and was in the vestibule when caught. KRS 514.030 allows a charge as she bypassed the point of sale and set off a security sensor, which locked the wheels on the bascart. She was moving items to another cart when caught. The Court agreed that an actual taking is not required, only unlawful control. Her actions satisfied the elements. With respect to the Tampering charge, related to the receipt, the Court agreed that it was reasonable to believe that she was attempted to remove or destroy an item pending a criminal proceeding. She attempted to convince the jury that she had no idea it was going to be used against her. The circumstances, however, suggested otherwise. The Court agreed and noted she was not hiding the items she'd tried to shoplift, but instead, the physical evidence that she intended shoplifting in the first place.

The Court upheld her charges.

PENAL CODE – KRS 519 - TAMPERING

<u>Smith v. Com.</u> , Ky. App. 2018

FACTS: On September 4, 2016, Trooper Peace (KSP) stopped Smith on a state highway in Jenkins. She had only one headlight and while the vehicle had Virginia plates, they had been cancelled. She had no license, proof of insurance or registration, had slurred speech and powder residue on her nose. As she stepped out, a small blue container fell from her clothes and she stepped on it. When he retrieved it, the trooper found it had methamphetamine and Xanax tablets; she admitted to having taken both earlier.

Smith consented to a search and found a quantity of Percocet, Xanax and a pipe. She was convicted of drug trafficking, tampering and related charges. She then appealed the Tampering charge.

ISSUE: Is it Tampering to attend to conceal an incriminating item?

HOLDING: Yes

DISCUSSION: Smith argued that simply dropping the item did not constitute tampering, but the court noted that she didn't drop it, she attempted to conceal it or destroy it. That, the court agreed was sufficient for Tampering.

The Court also agreed that there was a double jeopardy argument with possession of the Percocet and possession outside a lawful container and vacated the latter.

The Court affirmed the Tampering and most of the other offenses, although the fines were suspended as she was indigent.

PENAL CODE – KRS 524 – TAMPERING

Clark v. Com., 567 S.W.3d 565 (Ky. 2019)

FACTS: On the day in question, several individuals gather at JB Clark's home. JD Clark (the defendant and JB's son), Rowe, Clare (JD's sister and Rowe's girlfriend) and Goble were present. Discord arose and JB tried to choke Rowe. JD approached and shot and killed Rowe. Goble fled and called 911, and heard two more shotgun blasts as he ran. Clare indicated that "JD told her that if Rowe laid another hand on her, he was going to hurt Rowe." She witnessed JD shoot Rowe and also called 911, claiming that they were "trying to bury" Rowe and "burn him." Another witness indicated that JD had made threats toward Rowe.

Law enforcement officers found JD at Prince's home. He denied the shooting at first, but ultimately changed his story, but he never actually confessed. Both JD and JB were charged with murder and tampering with physical evidence. JD was convicted of both charges and appealed.

ISSUE: Does moving a body constitute tampering?

HOLDING: Yes

DISCUSSION: JD was charged with tampering for his handling of Rowe's body after the shooting, as it had been dragged outside and was scraped up. The Court agreed that moving the body was sufficient to indicate that JD (and perhaps others) had moved the body and by doing so changed its condition. There was also evidence indicating an effort to clean up some of the blood with rags and a towel. The Court held the conviction for tampering was proper.

With respect to the murder charges, the Court held that although the instructions were not as detailed as they should have been, and perhaps did not fully cover the distinction between perfect and imperfect protection of another, the instructions were sufficient. The Court also held that some 15 photos of Rowe's body and the scene were properly admitted, given that Rowe's body was moved.

The Court upheld JD Clark's convictions.

Plank v. Com., 2019 WL 3992729 (Ky. App. 2019)

FACTS: In September 2015 Plank was placed under the supervision of Kentucky Probation and Parole. On March 10, 2017, Probation Officers Walton and Eldridge visited Plank at her parents' home. Plank's mother went to wake Plank. It was undisputed that Plank was properly taking several sedatives as prescribed and was groggy at being awakened. Officer Walton found Plank in the kitchen drinking a glass of water. Officer Walton required Plank to produce a urine sample, which the officer used to administer field test. Plank tested positive for amphetamines. Walton confirmed

the results with her colleague, Eldridge, and told Plank it would be officially tested at the lab. Per procedure, Walton handed the sample back to Plank to transfer to the official test vial. As Plank did so, she filled the test vial almost full and then suddenly dumped both on the sink and turned on the faucet, washing it away. She then said "oops" – although "there is some contention as to whether this statement was made in good faith."

The officers arrested Plank for tampering with physical evidence. Plank was tested at the detention center and those tests were negative. She was convicted and appealed.

ISSUE: Does destroying evidence intended to be tested constitute tampering?

HOLDING: Yes.

DISCUSSION: The Court examined whether Plank intended "to impair the availability of physical evidence in an official proceeding." Under KRS 524.100 "extraneous bodily fluids, once extracted, are indeed physical evidence."[3] A urine test under this circumstances would be "considered to yield unique test results because of the constant state of change which exists in the chemical composition of the body." Certainly Plank understood the consequences of a positive drug test as well.

Finally, Plank argued that in her groggy state, she became confused because she always disposed of samples in the past by pouring them down the toilet. However, the Court of Appeals believed "any attempt to conflate a toilet and a sink should not be entertained, as one would hardly expect to conflate their general usage." The officer, in addition, described her as "alert and attentive."

The Court upheld this conviction.

Phelps v. Com., 2019 WL 3763633 (Ky. App. 2019)

FACTS: Phelps shared a home with his wife, son and four stepchildren. The home had only one bathroom so it was common for one person to otherwise be in the bathroom while someone else was in the shower. Allegedly, Phelps knocked and told his 16-year-old stepdaughter he was coming in to use the toilet while she was in the shower and asked her if she was showering or bathing. She looked up and saw Phelps holding his phone above the shower curtain and she could see herself on the screen. He left, returned, and did it again. She did not see her private areas on the screen. The victim stayed with a friend that night and reported this incident to the police the next day. She testified he posted an apology on her Facebook page but then deleted it.

Officer Patterson (Somerset PD) took the report and obtained a warrant. When Officer Patterson explained to Phelps why he was there, "Phelps spontaneously stated that it must have been about him holding his cell phone up while he was fixing the light fixture in the bathroom while the victim was showering." The phone was seized. Phelps gave a recorded statement in which he claimed he noticed wiring hanging from a fixture and he reached up to fix it, while holding the phone, He acknowledged he was checking Facebook and email and might have accidentally activated the video recording feature. Investigator Bell (OAG) testified he found no child pornography or videos of the

[3] Page v. Com., 149 S.W.3d 416 (Ky. 2004).

victim on the phone on the first examination, but the second time, after an update in the software, he found 220 videos with 60 deletions. One of the deleted videos was shot during the time in question.

Phelps testified that the first time, he used the phone to push up dangling wiring. The second time, he admitted, he did shoot a few seconds of video and then immediately deleted it, without viewing it. He said that "he did not know what he was thinking" and immediately regretted it. Phelps stated they often had conversations in the bathroom, though.

Phelps was convicted of promoting a sexual performance by a minor, tampering and voyeurism. He appealed.

ISSUE: Is deleting potential evidence on an electronic device tampering?

HOLDING: Yes.

DISCUSSION: The Court of Appeals held that Phelps admitted to making the recording, which alone was enough for the conviction. With respect to tampering, Phelps argued he deleted it because it was wrong, not because it was evidence. The Court of Appeals noted that it was reasonable for the jury to believe it was deleted to avoid prosecution. Although Phelps did not "destroy" it in the usual sense by deleting it, it was put in storage to be overwritten. With respect to the promoting charge, there was no indication he caught images of the girl's private areas, but she was certainly naked. The Court of Appeals held that it was reasonable to think that by waving his phone down over the shower curtain, he was certainly trying to collect images.

With respect to voyeurism, Phelps used his phone to make a video, which he then deleted. It was reasonable for the jury to find that private areas were filmed as a result.

The convictions were affirmed.

Com. v. James, 586 S.W.3d 717 (Ky. 2019)

FACTS: On the day in question, Det. Jenkin (KSP) was investigating drug activity. He arrived at the James' home with two other troopers. Det. Jenkin spotted James approaching the residence, but he "appeared to change direction and go down an alley when he spotted" the troopers. The detective exited his vehicle and yelled at James to stop, but James continued to walk away, keeping his hands near his waistline. Det. Jenkin spotted several items falling from James' waistline, the last item being a "black cylindrical item." Det. Jenkin drew his weapon and ordered James to show his hands. James eventually complied and he was arrested. At the area where James dropped items, Det. Jenkin spotted several items, including a glass pipe with methamphetamine residue and a black empty diabetic test-strip canister. James admitted to possessing the black canister (he was diabetic), but not the pipe.

James was charged with possession of the pipe and the residue, and tampering. James was convicted and appealed. The Court of Appeals ruled James should have been granted a directed

verdict on all three charges, finding insufficient evidence that James was in constructive possession of any of the items. The Kentucky Supreme Court granted discretionary review.

ISSUE: Is more needed than simply dropping items needing for Tampering?

HOLDING: Yes.

DISCUSSION: The Kentucky Supreme Court held that "[t]he circumstantial evidence presented at trial would allow a reasonable jury to conclude that James was in actual possession of the glass pipe, which he then discarded upon seeing officers approach him." James deliberately failed to stop when Jenkins, in plainclothes but a clearly marked KSP vest, called for him to do so. Trooper Jenkins found the black canister, which he saw in plain view, within inches of the pipe. The Supreme Court looked to other cases, including U.S. v. Garcia, and found the evidence sufficient for possession.[4] In an appeal based on a denial of a directed verdict motion, as this was, it is necessary that the court view all the evidence, both direct and circumstantial, in the light most favorable to the prosecution." The Supreme Court agreed that while the evidence in this case was not as strong the evidence in Garcia, the evidence was sufficient to allow the jury to draw the inference that James was in actual possession of the pipe.

With respect to tampering, the Supreme Court held that merely dropping an item, without any concealment or destruction, was insufficient to qualify for a violation of KRS 524.100. The Supreme Court noted that "[w]hile this Court has applied the tampering statute in numerous contexts, until now, it has not addressed whether the criminal-act element is met in the unique set of facts this case presents: a person, in plain view of an officer, drops or tosses away evidence of a possessory crime in a manner that makes the evidence easily retrievable by law enforcement."

The tampering statute focuses on two words, conceal and remove, and looked to how other states had ruled on such issues. The Supreme Court agreed that abandonment, in clear view of an officer, with nothing more, was not enough for tampering. The Supreme Court emphasized, however, that in some circumstances, this could constitute tampering, particularly if the tossing away of the evidence makes the item difficult to recover, such as when tossed from a moving vehicle or deliberately hidden.

The Supreme Court reversed the Court of Appeals in part by reinstating the drug convictions, but affirmed the reversal of the conviction for tampering.

McGuire v. Com., --- S.W.3d ---- (Ky. 2019) (Petition for Rehearing Pending 12/11/2019)

FACTS: When Officer Isonhood spotted McGuire on a street corner in Henderson, Isonhood knew there was an outstanding arrest warrant for McGuire. Isonhood attempted to arrest, but McGuire took off with the officer giving chase. Officer Isonhood caught McGuire and took him down, eventually tasing him. McGuire ran again and Isonhood saw him "throw his arm away from the right side of his body." Eventually Isonhood was able to capture McGuire.

[4] 758 F.3d 714 (6th Cir. 2014).

Upon searching McGuire, the officer found unused small baggies and cash in small denominations. Officer Isonhood retraced his steps and searched where he believed McGuire might have thrown something and found both methamphetamine and marijuana ten feet to the right of McGuire's flight path and in the correct direction to have been thrown.

McGuire was charged with trafficking, fleeing and evading, tampering, and other charges. McGuire was convicted and appealed.

ISSUE: Is more needed than simply dropping items needing for tampering?

HOLDING: Yes.

DISCUSSION: First, McGuire argued it was improper for the officer to testify that the quantity of methamphetamine found was inconsistent with personal use. The Supreme Court agreed that such testimony did not invade the province of the jury as to ultimate guilt or innocence and was routinely admitted in such cases. The Supreme Court noted that qualification is not specifically necessary in such cases, and that the officer's years of experience in such matters was sufficient to admit what was his opinion testimony.

With respect to the tampering charge, McGuire argued that simply tossing an item did not constitute tampering under KRS 524.100. The Supreme Court agreed with this argument, holding that McGuire had not destroyed and changed the item in anyway.

In Com. v. James, the Supreme Court noted that tampering did not apply "where a defendant merely drops, throws down, or abandons drugs in the vicinity of the defendant and in the presence and view of the police, this conduct does not constitute tampering by either concealment or removal that will support an evidence-tampering charge." Because the officer was able to quickly and easily retrieve the evidence, the Supreme Court held that tampering was not appropriate.

The Supreme Court reversed the tampering conviction but affirmed the remaining convictions.

PENAL CODE – KRS 525 - CRUELTY TO ANIMALS

Morgan v. Com., 2019 WL 2896651 (Ky. App. 2019)

FACTS: On February 6, 2016, Morgan was hosting cockfighting events on his property in Calloway County. He was charged with second-degree cruelty to animals, but argued that "spectating or otherwise engaging in cockfighting activity does not constitute cruelty to animals because birds are exempt from the statutory definition of an animal." The trial court denied the motion to dismiss. Morgan was indicted in December on felony gambling charges while the prior action was still pending, with second-degree cruelty to animals also a change in that case. Morgan entered a conditional guilty plea pursuant to Alford[5] plea and appealed.

[5] North Carolina v. Alford, 400 U.S. 25 (1970).

ISSUE: Does cockfighting constitute cruelty to animals?

HOLDING: Yes.

DISCUSSION: The Court noted:

Under KRS 525.130(1):

> A person is guilty of cruelty to animals in the second degree when except as authorized by law he intentionally or wantonly:
>
> (a) Subjects any animal to or causes cruel or injurious mistreatment through abandonment, participates other than as provided in KRS 525.125 in causing it to fight for pleasure or profit (including, but not limited to being a spectator or vendor at an event where a four (4) legged animal is caused to fight for pleasure or profit).

KRS 446.010(2) defines "animal" as 'every warm-blooded living creature except a human being.'"

Morgan argued that under the LRC notes to the statute, a procedural situation negated the idea that birds were not animals under the law. The Court of Appeals held that the legislature had not amended the statute to exempt birds. As such, in Munn v. Com., "the General Assembly's failure to amend the definition is indicative of its intent to include birds in the definition of animal."[6]

The Court affirmed this conviction.

PENAL CODE – KRS 527 – FIREARMS

Higgs v. Com., 2019 WL 3763544 (Ky. App. 2019)

FACTS: In 2015, while driving through Kentucky, Higgs made eye contact with Trooper Williams (KSP). The trooper noted that "Higgs had a noticeable emotional reaction upon making eye contact with him, which prompted Williams to conduct a records check on the license plate on Higgs's vehicle." Trooper Williams discovered the vehicle was apparently not insured and executed a traffic stop. The trooper ordered Higgs out of the vehicle. He then approached the passenger, Higgs' quasi-wife, and spotted a glass pipe in plain view. She confirmed having "dab" – marijuana wax - and when her purse was searched, live ammunition was found. She admitted there was a rifle "buried" somewhere in the detritus in the back seat. Ultimately law enforcement found the rifle, more ammunition, a handgun and an improvised explosive device – and with the latter, they called the KSP Hazardous Materials Unit.

Higgs, a convicted felon, was charged with the guns and having a weapon of mass destruction, as well as drug and driving offenses. He moved to suppress and was denied. At trial, Higgs explained others loaded the vehicle and he was unaware of the explosive device and that the guns belonged to his companion. He stipulated he was a convicted felon and at trial, he was asked about his knowledge of the illegality of his possession of a firearm, which he denied, launching instead into

[6] 889 S.W.2d 49 (Ky. App. 1994).

"his own interpretation of the Second Amendment." (With that, the Court allowed him to be impeached with the nature of his out-of-state felonies, at least one of which was for possessing a firearm as a convicted felon.) Higgs was convicted and appealed.

ISSUE: Does the charge of use of a weapon of mass destruction require intent to place the device?

HOLDING: Yes.

DISCUSSION: The Court of Appeals agreed with Higgs that charging him separately for a handgun and a rifle, found together, was double jeopardy. However, this holding did not affect his ultimate sentence. Instead, the Court of Appeals reversed the conviction on a separate issue, holding that it was improper under impeachment to solicit information about a defendant's prior convictions for the same offense as he never actually denied he had felony convictions. Nor did the Court agree it was harmless error and reversed the conviction.

With respect to the weapon of mass destruction charge, the Court ruled that the statute, which had "been the subject of scant analysis," referenced the "placing" of such devices, not simply possession. As the statutes did not provide a clear definition, either in the statute itself or KRS 446, the word must be interpreted "according to the common and approved usage of language." The definition of place, the Court agreed, was problematical, as the General Assembly had created a differentiation between the possession of such devices, in KRS 237.040 and the use of it in KRS 527.210 (under which he was charged). The Court agreed Higgs' definition of placement but specifically did not "preclude prosecution for the intentional placement of such a device within a vehicle for the purpose of using the vehicle itself as a mobile weapon, such as occurred in the infamous Oklahoma City bombing in 1995." While he denied even knowing it was in the vehicle, the Court determined that "the Commonwealth's case fell short of establishing an essential element of the offense charged – placement. Law enforcement officers testified that the bomb was found buried under the couple's luggage in the trunk of the vehicle. Importantly, Higgs testified that he was merely passing through Kentucky on the way to Alabama. While Higgs may have possessed or transported the device, there is no specific evidence to support an inference that he placed or used it within the Commonwealth of Kentucky."

The Court noted that KRS 527.210, which requires placement, is a step higher than KRS 237.040, so that logically, the General Assembly wished to address the difference. "Given the wide-spread damage these weapons can cause, it would seem prudent to make mere possession a crime as well, rather than the added element of intent. Finally, Higgs argued that the stop began with a license check which indicated the vehicle was uninsured. The Court of Appeals noted the progression of the stop, with each step building upon the one before. The court agreed the legal stop which led to the legal questioning of the passenger was appropriate.

The conviction was reversed. The Court held that Higgs should be resentenced for one count of possession of a firearm and that the conviction for the improvised explosive would be reversed.

NON PENAL CODE

CONTROLLED SUBSTANCES

McAlpin v. Com. , Ky. 2019

FACTS: On February 10, 2011, Officers went to McAlpin's Louisville apartment in search of Durham. The latter was a wanted parolee, and her father had given officer's McAlpin's address. Durham answered when they knocked. During the arrest, they did a "safety sweep" to confirm no one else was there but did see syringes and spoons. Two men arrived, Koger and Duerr, the former also stayed with McAlpin on occasion. As neither had any warrants or anything illegal on their person or in their vehicles, they were allowed to leave, although they were admitted heroin users. Later, it was determined that one of the spoons and clothing found at the apartment belonged to Koger. McAlpin arrived and again, nothing illegal was found on his person or in his vehicle, although allegedly, he had abused pills in the past. Durham claimed all the contraband, including heroin residue and cotton, at the apartment was hers, other than the spoon that belonged to Koger.

Durham was arrested and McAlpin was cited, although the citation was not filed, apparently. He was indicted over a year later and convicted for drug possession and possession of paraphernalia. The latter charge was vacated by the appellate court as untimely. He also appealed his possession conviction.

ISSUE: Must evidence be carefully documented to be admitted under constructive possession for drug cases?

HOLDING: Yes

DISCUSSION: Among other issues, McAlpin argued there was insufficient evidence to find him guilty of possession of heroin. The Court differentiated between actual and constructive possession and agreed McAlpin was not found in actual possession. It was also agreed that while it was McAlpin's apartment, others regularly resided there with him, and he did not have exclusive control of the property. In such joint control, further evidence is needed to prove that McAlpin "knew the substance was present and had it under his control." In this case, the heroin present was in the form of residue only, and testimony did not quantify or specify precisely where the heroin residue was even found, as the report was not specific as to which spoon and which piece of cotton it was located on, or where those items were located in the apartment.

The Court agreed that there was insufficient evidence and vacated his conviction.

Hackworth v. Com., 2019 WL 2563021 (Ky. App, 2019)

FACTS: KSP spotted marijuana plants from the air, in a patch in Elliott County. A trooper rappelled down from the helicopter and was joined by other troopers. About 75 plants were found, 5-6 feet tall and not yet flowering. They were in a field behind a fence. Trooper Rollins photographed the plants as they were being removed and another trooper went to the nearby house. He spoke to

Hackworth, Jr., age 15, who stated his father was not home. Contact information was left with the son, but the father did not call KSP.

After a lab test confirmed marijuana, Hackworth, Sr. was indicted for cultivation of marijuana. He was convicted and appealed.

ISSUE: Is a person presumed to be aware of marijuana plants in close proximity to their home, on their property?

HOLDING: Yes

DISCUSSION: Among other issues, Hackworth argued he was unaware of the plants. The court noted that the plants were less than 25 feet from his back door, and his son indicated he knew the plants were there. The plants were clearly visible from the house and accessible to it. They were "healthy and well maintained," and a hose was nearby, as was a pesticide sprayer. A survey from the PVA indicated Hackworth owned the property.

The Court upheld the conviction.

Wilson v. Com., 2019 WL 3059968 (Ky. App. 2019)(Depublished case)

FACTS: On April 13, 2017, a Lexington officer responded to a call that two females were slumped over inside a car that was parked in the caller's driveway. The caller had tried to rouse them with no luck and she did not know them. The officer tried to rouse them as well. The officer observed a plastic lid with residue in plain view, along with tourniquets. Wilson finally woke up and refused medical care, but was confused with slurred speech. On June 6, 2017, Wilson was indicted on various drug charges. She moved to dismiss charges of possession of a controlled substance and possession of drug paraphernalia because those charges originated with a 911 call by a third party due to her apparent drug overdose. The motion to dismiss was denied. Wilson entered a conditional guilty plea and appealed.

ISSUE: If medical assistance is summoned for an unknown situation, does that give amnesty under KRS 218A.133?

HOLDING: No.

DISCUSSION: The Court examined whether "medical assistance was sought for a drug overdose" within the meaning of KRS 218A.133. In this case, the caller did not know what was going on, but only that the occupants were nonresponsive. The court held the statute did not apply and upheld the plea.

DRIVING UNDER THE INFLUENCE

Lopez v. Com., 2019 WL 6250421 (Ky. App. 2019)

FACTS: On January 20, 2018, in Knox County, Lopez collided with a vehicle head-on: Lopez was driving the wrong way. In the other vehicle, Tiffany Cummins was driving with her husband, Chad, as a passenger. Both were Tiffany and Chad were injured. Lopez left the scene on foot and, when brought back to the scene, he refused FSTs. Lopez denied being drunk and blamed his conduct (unsteady, etc.) on having been in a wreck. Lopez was taken to the hospital where he refused a blood draw. (At trial, Lopez claimed not to have been taken to the hospital.)

Lopez was convicted of a myriad of charges and appealed.

ISSUE: May a suspect's refusal to submit to a blood draw be used against the suspect as evidence of operating a motor vehicle under the influence?

HOLDING: Yes.

DISCUSSION: First. Lopez argued that the officer should have obtained a warrant upon his refusal to consent. The Court of Appeals held that a warrant is only required if consent is not given and nothing requires an officer get a warrant before asking, or after if consent is not given. The Court of Appeals held that refusal to take a blood test was admissible as evidence of guilt.

After addressing several alleged prosecutorial errors, the Court of Appeals affirmed the convictions.

Iraola-Lovaco v. Com., 586 S.W.3d 241 (Ky. 2019)

FACTS: In December 2015, Iraola-Lovaco was arrested after speeding and driving up a sidewalk and striking several cars and a utility pole on Winchester Road in Lexington. Officer Bellamy (Lexington) found Iraola-Lovaco a short distance away, sitting in a wrecked car with blood and vomit covering the windshield. The car was also blocking traffic. Iraola-Lovaco admitted that he struck the pole. Officer Bellamy advised him of Miranda rights and administered FSTs. Iraola-Lovaco failed four of the five FSTs and was arrested. Iraola-Lovaco claimed he only had a single beer and did not think he had hit any people. Three victims were transported for serious injuries and two individuals lost a leg.

Almost 3 hours after the initial crash, Iraola-Lovaco had a blood draw. The blood test revealed a BAC of .078. Extrapolated, Iraola-Lovaco would have been at about a .105 to .116 BAC at the time of the incident.

Iraola-Lovaco was convicted of second-degree assault and DUI first offense. A charge of leaving the scene was amended to a misdemeanor. An appeal followed.

ISSUE: Is evidence of observations made during Field Sobriety Tests admissible?

HOLDING: Yes.

DISCUSSION: Iraola-Lovaco argued that it was improper for Officer Bellamy to call the FSTs "tests" and that the officer testified he "failed" the tests. The case had not been based on the *per se* rule and the officer conceded that the subject was not "falling down drunk" and that he was looking for the "little things" to indicate impairment.

The Supreme Court noted:

> Kentucky law is clear that evidence of FSTs is admissible and that officers observing a defendant's driving and physical condition may offer opinion testimony that the defendant was intoxicated.

Officer Bellamy testified at length as to the five tests he administered, and that based on his training and experience, Iraola-Lovaco was impaired. The officer properly did not try to equate a certain BAC to what he observed, just that he was intoxicated. The Supreme Court did not find that the use of certain nomenclature rendered that testimony invalid and affirmed the convictions.

Mattingly v. Com., 2019 WL 6972903 (Ky. 2019)

FACTS: On September 27, 2017, Mattingly (age 63) pulled into a car sales lot in Columbia and began to urinate in public view. Withers, the owner, approached Mattingly and asked him to go elsewhere. Withers realized that Mattingly was slurring his speech and "seemed unstable," but attributed the instability to Mattingly's age. Withers became alarmed when Mattingly drove erratically upon leaving the lot. Withers contacted Officer Brockman of the Columbia PD.

Officer Brockman located Mattingly and stopped him. Mattingly admitted to consuming a "couple of beers" and refused to do any FSTs. Brockman attempted a PBT. After several botched attempts with the PBT, Brockman got a reading of alcohol. Mattingly had bloodshot eyes, was "thick-tongued," and was belligerent. Officer Brockman arrested Mattingly and took him to the local hospital. He read the implied consent warning under KRS 189A.105. Mattingly refused all tests. Taken to the jail, Mattingly also refused an Intoxilyzer test.

Mattingly was convicted of DUI, fourth offense, which was enhanced into a PFO 1 due to Mattingly's other previous convictions for felony offenses. Mattingly appealed.

ISSUE: Should an officer discuss the actual science of DUI tests?

HOLDING: No.

DISCUSSION: First, Mattingly argued it was improper for the prosecutor to mention his refusals in closing argument, and that the prosecutor was referencing the PBT. The Supreme Court agreed that while refusal to take a PBT should not be mentioned, the prosecutor was referencing the official tests only (as indicated by the context in connection to the hospital visit).

The Supreme Court also addressed Officer Brockman's testimony as to his training in giving FSTs. Specifically, the Supreme Court addressed his testimony on the HGN, to which the defense counsel had objected as the officer was not a medical expert on the "science behind the test." The trial court directed Officer Brockman testify concerning what he was looking for in doing the tests, and he did so. (The defense objected to the jury learning that Officer Brockman is also a licensed EMT, as part of his training and experience.) The Supreme Court held that it was not proper or necessary to mention the science behind FSTs, and properly the trial court's direction with respect to the officer's testimony was appropriate. Defense counsel did not request an admonition on the issue.

The Supreme Court noted that Kentucky has yet to specifically address the issue as to whether expert testimony is needed on the HGN. Some states have done so, others have not. However, the Supreme Court noted that since Mattingly refused the HGN test, the issue was moot.

The Supreme Court affirmed Mattingly's conviction and enhanced sentence.

McCubbin v. Com., 2019 WL 5853733 (Ky. App. 2019)

FACTS: Shortly before midnight on June 12, 2015, Officer Morgan (Cave City PD) executed a traffic stop of McCubbin's vehicle based upon observations of erratic driving. From the encounter and McCubbin's admissions, Officer Morgan arrested McCubbin for possession of a controlled substance, drug paraphernalia and DUI. McCubbin consented to a blood test that returned positive for methamphetamine.

McCubbin was sentenced to diversion but, repeatedly failed her conditions. She was charged with offenses over two years later. She unsuccessfully argued that the blood test must be suppressed under Birchfield v. North Dakota.[7] McCubbin entered a conditional guilty plea and appealed.

ISSUE: Should consent for a DUI blood draw be documented in the record?

HOLDING: Yes.

DISCUSSION: The crux of McCubbin's argument was that her consent was not voluntary because she gave consent after she was given the implied-consent warning. Since the last Kentucky case on the warning, the U.S. Supreme Court had emphasized that a blood test is a search.[8] As such, a warrant is required for a blood draw unless the facts of the case fall within a "well-recognized exception" to the warrant requirement."

The Court of Appeals noted, however, that consent was one of the well-recognized exceptions to the need for a warrant. In Birchfield, the U.S. Supreme Court approved of the "general concept of implied-consent laws that merely impose civil penalties and evidentiary consequences on motorists who refuse to comply." Kentucky's law does not impose separate criminal penalties for refusal, but may, if the individual is convicted, subject them to enhanced penalties. In Com. v. Brown, the Court of Appeals held that the "Commonwealth may rely on the presumption of implied consent only

[7] 136 S.Ct. 2160 (2016.

[8] Missouri v. McNeely, 569 U.S. 141 (2013). *See also* Schmerber v. California, 384 U.S. 757 (1966).

where there is evidence establishing that: (1) there was probable cause to believe that the defendant was operating a motor vehicle under the influence of an intoxicant; and (2) the defendant was advised of his or her right to withdraw consent to a blood test as required by KRS 189A.105(2)(a).[9] The warnings required by KRS 189A.105(2)(a) implicitly permit a DUI suspect to withdraw consent to a blood test, but the suspect *may* face additional consequences for doing so, and then only upon conviction.

The Court of Appeals noted that the record was silent on whether McCubbin consented to the blood test at all. The Court of Appeals held that "once the Commonwealth establishes that the defendant gave express consent to the taking of a blood sample, the Commonwealth need only show by a preponderance of the evidence that the consent given was freely and voluntarily obtained without any threat or express or implied coercion.[10] A determination of whether consent was voluntary requires a finding that the consent was "an independent act of free will."[11]

The Court of Appeals remanded the matter to the trial court to determine if McCubbin did, in fact, give a voluntary and express consent or whether her consent was presumed.

Larue / Covey v. Com., 2019 WL 103959 (Ky. App. 2019)

FACTS: The cases involved Larue and Covey were consolidated for review. Larue was found apparently unconscious in his car in Lawrence County. The deputy was able to rouse Larue, who then got out. He was observed to be visibly impaired and did not successfully complete FSTs. He was taken to the hospital and given the implied consent warning. Larue submitted to the test and was found to have taken oxycodone. He was charged with DUI and requested suppression, arguing that his rights under Birchfield were denied. He was denied and entered a conditional guilty plea. He then appealed, and the Lawrence Circuit Court affirmed the trial court.

In Covey's case, she was found sitting in a parked car in Covington. She admitted to having had several alcoholic beverages. She failed FSTs and was taken to the hospital for a blood test. She too was given the implied consent warning, and submitted to the test. She was found to have a BA of .15. She made the same motion, and was also denied. She entered a conditional guilty plea and appealed.

ISSUE: Is the Kentucky implied consent warning constitutional?

HOLDING: Yes.

DISCUSSION: Both cases were argued under the precepts of Birchfield v. North Dakota.[12] Covey argued that although Kentucky doesn't have a separate criminal penalty for refusal, that the doubling of the mandatory minimum if convicted is essentially just that. The Court noted it had rejected that argument in Com. v. Brown on the same issue and that the sentence was contingent

[9] 560 S.W.3d 873, 878 (Ky. App. 2018) (citing KRS 189A.103).
[10] Cook v. Com., 826 S.W.2d 329 (Ky. 1992).
[11] Baltimore v. Com., 119 S.W.3d 532 (Ky. App. 2003).
[12] 579 U.S. --- (2016).

on conviction.[13] Larue argued that the language of the warning was "deceptive and coercive," by noting that the warning was somewhat defective, as it noted that the jail sentence might be doubled for an offender, when a first time offender (as Larue was) might get no jail time at all. The Court acknowledged that it was not inherently coercive, however. The deputy denied that he told Larue that he would be "automatically guilty" if he refused the test and that Larue willingly consented. The Court concluded that Kentucky's implied consent does not violate the Fourth Amendment, and although the warning was defective, it was not unconstitutional.

The Court affirmed the convictions.

Dowdy v. Com., Ky. App. 2019

FACTS: On March 5, 2017, Deputy Doss (Calloway County SO) responded to a crash. Dowdy, the driver of one of the two involved vehicles, was already under EMS care when the deputy arrived – she appeared under the influence with glassy eyes, slurred speech and no recall of the crash. (The other driver, also seriously injured, was alert and could speak about the crash.) A witness reported the Dowdy vehicle being driven erratically and into oncoming traffic prior to the crash. Deputy Doss requested a search warrant for Dowdy's medical records and her BA was shown to be .206. He filed charged on Wanton Endangerment and DUI (later amended to second offense). Assault charges were added later. Dowdy moved to suppress her medical records, obtained through the search warrant. She asserted the warrant was not based on probable cause and an improper way to obtain the records. The motion was denied. Dowdy took a conditional guilty plea and appealed.

ISSUE: May medical records be released pursuant to a proper search warrant?

HOLDING: Yes

DISCUSSION: First, the Court agreed that the search warrant clearly contained sufficient facts to support probable cause. The Court agreed that it was not necessary for a search warrant to provide all the elements of a specific offense, as she asserted, so long as it provided a reasonable person with enough evidence to conclude she was, in fact, DUI. The Court upheld the warrant.

Dowdy also raised a HIPAA challenges, but the Court noted that, in the case of a properly issued search warrant, the production of the records was valid under HIPAA. It is, in fact, the appropriate statutory way to obtain such evidence under Anderson v. Com.[14] She quibbled that certified records (as requested by the warrant) should not have been produced under KRS 422.305, but the Court disagreed that the statute made it improper to provide such records.

Her plea was affirmed.

Whitlow v. Com., 575 S.W.3d 663 (Ky. 2019)

[13] 560 S.W.3d 873 (Ky. App. 2018).

[14] 205 S.W. 3d 230 (Ky. App. 2006).

FACTS: On October 29, 2016, in Lexington, Whitlow, driving, left the roadway and went up onto a downtown sidewalk, striking and killing two pedestrians. She was also transported to a hospital for minor injuries and a Lexington officer asked for consent for a blood sample for alcohol testing. She refused. The officer obtained a court order for blood draw, supporting it with a detailed affidavit. It was signed at 5:30 a.m., roughly three hours after the crash, and served on the hospital staff. The blood was immediately drawn and tested, and her blood alcohol was .237 at that time. Several months later, Whitlow was charged with two counts of Manslaughter in the Second Degree and related charges. She moved to suppress the blood test, arguing that taking the blood by court order was improper, as the statute, KRS 189A.105 does not provide for a court order, but for a search warrant. The Commonwealth argued that the two were, in effect, synonymous but at any rate, the test was conducted in good faith. The trial court agreed that the best practice was to use a search warrant, but found that good faith, under U.S. v. Leon, applied, and denied the motion to suppress.[15]

Whitlow took a conditional guilty plea and appealed.

ISSUE: Is a search warrant the proper document to use to seek a blood sample in a DUI case?

HOLDING: Yes

DISCUSSION: The trial court had agreed that "while a search warrant is a type of court order, search warrants and court orders are not the same. However, the failure to obtain a document entitled 'search warrant' was not a fatal flaw because the police provided complete and accurate information that the district court judge relied on in finding probable cause for issuing the court order authorizing the testing." As such, it was proper to apply the Leon exception. Further, the Court agreed, another statute did include the language that mentions a "court order" separate from a search warrant. The Court indicated that, pursuant to the statute, a search warrant should be sought, however.

In this case, the Court noted:

> "… the court order relied upon to test Whitlow's blood was not labeled "search warrant," but in substance that is exactly what it was. Probable cause existed to justify the blood test, and the police officer completed a detailed affidavit and petition, subscribed and sworn to before a neutral magistrate, which outlined the probable cause and the specific item to be seized, *i.e.,* a sample of Whitlow's blood. Further, the court order provided particularized information regarding the search, what the blood sample was to be tested for, and what to do with the sample once taken. All requirements for a valid warrant were met. In short, even though the court order was not titled "search warrant," it had all the essential elements of a valid warrant, and consequently the trial court properly denied the motion to suppress.

The Court addressed another issue. In the affidavit, the officer mis-cited the applicable statute, but that, along with title of the court order, but bother were "hyper-technical arguments entitled to little weight." The statute itself leads to confusion between search warrants and court orders, and

[15] 468 U.S.897 (1984)

any errors could be excused in the urgency of the situation. The officer's "missteps in no way obscured the substance of what had occurred and the legitimacy of the ensuing court ordered seizure of a sample of Whitlow's blood." The Court agreed it was absolutely proper to issue a court order on the hospital, as Whitlow was already there, and the officer properly took charge of the sample after it was drawn by the hospital staff.

The Court noted, finally, that no discussion was needed on Leon because, simply put, the "affidavit and ensuing order were not deficient." The Court concluded that "despite an improper label, the court order was for all intents and purposes a valid search warrant."

The Court agreed the motion to suppress was properly denied and upheld Whitlow's plea.

Jones v. Com., 2019 WL 2563172 (Ky. App. 2019)

FACTS: Jones was stopped on August 20, 2016 in Nicholasville. Officer Cobb had spotted her vehicle weaving and once he made contact, he found Jones "smelled of alcohol, that her eyes were red and glassy, and that her speech was slurred." She performed poorly on FSTs and admitted she'd had beer. Jones was arrested and at the jail, given an Intoxilyzer, which indicated a BA of .217. Among other things, he told her she could have an independent test and estimated the cost at approximately $500. After some back and forth, she never gave a yes or no answer about the test.

At trial, she claimed she was denied her right to an independent blood test. It was noted that the cost would have been between $316 and $443, depending presumably upon the hospital. The trial court found no evidence that she could pay, no matter the cost, and found she was so intoxicated she could not rationally discuss the matter anyway. Further, the Court ruled the difference between the estimate and the actual cost was "not so substantial" so as to deny her the right.

Jones took a conditional guilty plea (this being her fourth offense) and appealed.

ISSUE: Does the cost of a DUI test (making it inaccessible) require the suppression of the officer's test results?

HOLDING: No

DISCUSSION: The Court looked to Com. v. Riker, and agreed that she was informed of her right and given the opportunity to be transported, and both declined because of the cost.[16] The Court noted the price of the test was outside the control of the officer.

The Court affirmed her plea.

Com. Ex Rel Logan County Attorney v. Williams / Ortiz, 2019 WL 4559354 (Ky. App. 2019) (DR filed 12/6/2019)

[16] 573 S.W.3d 622 (Ky. 2019)

FACTS: On September 10, 2016, Officer Eggleston (Russellville PD) responded to an erratic driver. He executed a traffic stop. Upon approach, Officer Eggleston noted the "strong odor of alcohol" on both driver (Ortiz) and car. Ortiz was unsteady on his feet and appeared highly intoxicated. He also had an open container in the vehicle. Ortiz indicated he understood the officer but was unable to do adequately complete the FSTs. Ortiz stated in English that he understood the test directions. A PBT showed the presence of alcohol. Ortiz was taken to the hospital and consented to a blood draw, which returned at .233. Ortiz was cited for DUI and having no OL. Six months later, Ortiz argued that he did not understand English or that he could refuse testing. A motion was filed to suppress the BAC and/or the failed FSTs. A coworker indicated that Ortiz "routinely nods, smiles and agrees" but that he did not actually understand English. The trial court watched the video of the stop, which showed that Ortiz occasionally responded in English and spoke to his family at the hospital in English. The trial court found that he was not fluent enough in English to give informed consent. The trial court further found that the officer spoke slowly and used a smattering of Spanish and hand signals to communicate with Ortiz, and therefore should have known Ortiz had a limited grasp of English.

The trial court suppressed the BAC but allowed the case could go forward on Eggleston's lay opinion. The Commonwealth petitioned the circuit court for a writ or prohibition to prevent the suppression of evidence. The circuit court affirmed the district court, "noting KRS 189A.105 does not merely require information be recited in English but specifically requires the person suspected of drunk driving be "informed" of the consequences of submitting to testing as well as refusing testing."

The Commonwealth appealed to the Kentucky Court of Appeals.

ISSUE: Must implied consent warnings be given in another language if the suspect does not appear to be fluent in English?

HOLDING: No.

DISCUSSION: Kentucky's implied consent law is codified in KRS 189A.103. By operating or physically controlling a vehicle in Kentucky, a person consents—upon request of an officer—to the testing of his blood, breath or urine—or any combination of the three—to determine alcohol concentration or impaired driving ability when drunk driving is reasonably suspected.[17] Prompt collection of a sample is critical because the alcohol would be constantly dissipating from the body.

The Court of Appeals held that "reading of the implied consent warning in English satisfies KRS 189A.103 and 189A.105." It looked to Com. v. Rhodes, wherein the driver's behavior indicated that she was not listening to the officer, but that he was still mandated to read it to her. [18] Although the statute says "inform" rather than "read," Ortiz insisted more was needed. The appellate court "set upon a question to find its common, ordinary meaning," as required under KRS 446.080(4). The Court of Appeals noted that a dictionary interpretation suggested that the "focus is on providing relevant facts, not the recipients ability to process the facts provided." The court noted it would

[17] Com. v. Brown, 560 S.W.3d 873 (Ky. App. 2018) (citing KRS 189A.103; Helton v. Com., 299 S.W.3d 555 (Ky. 2009))."
[18] 308 S.W.3d 720(Ky. App. 2010).

have been impossible for the officer to know if Ortiz's reactions were due to his language comprehension or his heavy intoxication, particularly when he responded to English questions both verbally and by gesture appropriately. The court held that it "will not require an officer to assume what is not communicated to him, and further indicated that "Ortiz did not act vastly different from highly intoxicated fully English-speaking persons suspected of drunk driving."

The Court of Appeals specifically stated:

> There being no statutory requirement for the suspect to understand the implied consent warning, there is no requirement it be provided to him in his native tongue.

Further, under Bedway, even if his rights were violated, suppression was not mandated. [19]

The Commonwealth also objected to the circuit court taking judicial notice that there are "electronic devices and cell phone apps to translate foreign languages." The Commonwealth noted that it was "unwilling to trust—without question—a foreign language translation just because it was found on the internet. The internet, and access to it via cell phone, is a fantastic advancement, but by no means is it perfect and unquestionably accurate such that it is a proper basis on which to take judicial notice. Unless someone with knowledge of the particular foreign language thoroughly investigates the computer program, website or cell phone app, and assures its accuracy, we cannot endorse reliance on it. Languages have various dialects, and while citizens of several different countries speak Spanish, not all speak the same version. Even trained interpreters may disagree as to the proper translation of a phrase or paragraph. At some point, reliance on a foreign language translation computer program or cell phone app may be appropriate, but we have not been cited to one in this case. Thus, the circuit court erred in taking judicial notice of the fact of computer programs and cell phone apps being available to accurately translate foreign languages."

The Court of Appeals reversed suppression and remanded the case for further proceedings.

Com. v. Morgan, 583 S.W.3d 432 (Ky. App. 2019)

FACTS: On March 27, 2017, a Campbell County police officer arrested Morgan and charged him with DUI. Morgan was taken to the jail for the Intoxilyzer. Morgan consented and the 20-minute observation period began. Just before the test, Morgan told the officer he needed to use the restroom, but he was required to wait. Eleven minutes after the test, Morgan asked to use the restroom again. The officer continued the process, printed out the citation in his cruiser and turned off his body cam. The trial court understood the Morgan was allowed to use the restroom when they went back into the jail. However, the arresting officer did not read the independent blood test warning after the Intoxilyzer was completed, indicated Morgan declined the test and that he did not sign because he needed to rush to the restroom. Morgan blew a 0.187.

During a suppression hearing, Morgan argued he was never provided the independent test warning as required by statute. Despite finding that the second warning concerning the independent test was skipped, the trial court denied the suppression motion. The trial court found that Morgan's

[19] Com. v. Bedway, 466 S.W. 468 (Ky. 2015).

need to use the restroom was made in good faith. Morgan entered a conditional guilty plea to DUI and appealed. The circuit court reversed the denial of suppression, finding that the officer's justification did not hold up because he continued some 22 minutes after the test and Morgan's requests to use the restroom.

The Commonwealth appealed.

ISSUE: Must a subject be offered an independent DUI test after they complete the officer's tests?

HOLDING: Yes.

DISCUSSION: The Court of Appeals held that the officer violated the statutory mandate of KRS 189A.105(4) with respect to the second warning. The Court of Appeals determined that no reason existed why the warning could not have been given as soon as the Intoxilyzer was given. The officer did not claim he forgot but indicated affirmatively that Morgan declined.

The Court affirmed the granting of the motion to suppress the results of the breath test.

FORFEITURE

Martin v. Com., 586 S.W.3d 252 (Ky. App. 2019)

FACTS: Martin entered a guilty plea to theft, drug-related offenses and possession of a handgun in Clark County. The Commonwealth moved for forfeiture of his truck, a trailer and a variety of tools. After forfeiture was granted, Martin appealed.

ISSUE: Is traceability needed to do a forfeiture?

HOLDING: Yes.

DISCUSSION: Under KRS 218A.410 the Commonwealth must produce some evidence that links the property at issue to the criminal drug offenses. Only when the Commonwealth produces some evidence does the burden shift to the defendant to rebut that presumption by clear and convincing evidence.[20] Here, the trial court made no written findings of fact concerning whether forfeiture of the tools was appropriate. Martin argued he inherited the tools from his father and others he purchased with legal income.

The Court of Appeals affirmed that the truck and trailer were properly traced and forfeiture was appropriate, but remanded the case for further findings with respect to whether the tools should be forfeited.

[20] Brewer v. Com., 206 S.W.3d 343 (Ky. 2006); Smith v. Com., 339 S.W.3d 485 (Ky. App. 2010).

JUVENILES

Gray v. Com., 2019 WL 643969 (Ky. App. 2019)

FACTS: On September 20, 2012, Gray was arrested in an armed robbery/shooting case in Fayette County. At the time he was taken into custody, he was identified as being 15 years of age and his mother was promptly notified. He entered a guilty plea, but two years later moved to vacate the plea, claiming inadequate counsel on various issues. The post-conviction motion was denied. Gray appealed.

ISSUE: Is it required that a parent or guardian be present before questioning a juvenile?

HOLDING: No.

DISCUSSION: Gray argued that the officers violated KRS 610.200 when he was brought in for questioning without notifying his guardian and allowing her to be present. As such, Gray argued his confession was involuntary. The Court noted that his mother was notified approximately 14 minutes after he was taken into custody and nothing requires that the parent or guardian actually be present before questioning. Gray did not allege that he was not given Miranda prior to questioning. Further, he again admitted to the offenses, under oath, during a plea colloquy.

The Court upheld the conviction.

FORFEITURE

Doebler v. Com., 2019 WL 5655283 (Ky. App. 2019) (Discretionary Review filed 1/17/2020)

FACTS: Doebler and Lankford were arrested in a Jefferson County hotel. In the room, officers found and seized almost $3,800 in cash, drugs, a cell phone, a scale, and a "loaded syringe." The money was found in a banking envelope in Doebler's purse. Photographs were part of the discovery, but were never introduced. Lankford entered a guilty plea to various drug charges. Doebler entered a guilty plea to possession of drug paraphernalia for a syringe. The parties could not reach an agreement concerning the cash, which was mostly in $100s with a few smaller bills mixed in. At a forfeiture hearing, Doebler claimed the money was from an inheritance, which additional evidence supported. Doebler testified it was not her room or her drugs. The Commonwealth countered that the money was found in close proximity to the drugs, thus supporting forfeiture of the cash.

Ultimately, the trial court ordered forfeiture of the cash. Doebler appealed.

ISSUE: Must a nexus be drawn between cash and drug trafficking for forfeiture?

HOLDING: Yes.

DISCUSSION: The Court of Appeals examined KRS 218A.410(1)(j):

> It shall be a rebuttable presumption that all moneys, coin, and currency found in close proximity to controlled substances, to drug manufacturing or distributing paraphernalia, or to records of the importation, manufacture, or distribution of controlled substances, are presumed to be forfeitable under this paragraph. The burden of proof shall be upon claimants of personal property to rebut this presumption by clear and convincing evidence.

The Court of Appeals noted that although the "burden is slight, it rest squarely on the Commonwealth's shoulders."[21] In this case, the Court of Appeals found that no evidence was presented to the trial court to support a connection between the money and drug trafficking. Doebler presented a logical and consistent story as to why she had the money and why she was present in the hotel room (to buy a telephone). The trial court even accepted Doebler's explanation.

Although both sides referenced Osborne v. Com.[22] to support their respective positions, the Court of Appeals determined that Doebler had the stronger case. The Commonwealth produced no evidence tracing the money to any drug transactions. Other cases were reviewed but the Court of Appeals noted these cases all shared "one thing that is strikingly absent in this case – some proof by the Commonwealth beyond mere proximity to illegal drug activity."

The Court of Appeals reverse the forfeiture order with respect to the cash.

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

Davis v. Com., 2019 WL 1422911 (Ky. App. 2019)

FACTS: In 2014, LMPD received an anonymous tip that provided a photo of Davis, his address, and an assertion he was trafficking cocaine from his home. On February 11, 2014, Det. Kaufling went to do a knock and talk and found Davis in the alley behind his home. Davis told Kaufling he needed to get a warrant in order to search. Kaufling explained that the tip indicated Davis had a gun, which Davis confirmed, and that Davis also stated he had marijuana and a digital scale. Kaufling knew Davis was a convicted felon. Davis offered to take Kaufling inside and give him the gun, but reiterated he could not search. The home was not searched at that time and a search warrant was obtained. The gun, drugs and paraphernalia were seized and Davis was indicted on multiple charges.

Davis moved to suppress and was denied. He entered a conditional guilty plea and appealed.

ISSUE: Is a convicted felon's admission that a gun, marijuana, and a digital scale are present in a residence sufficient probable cause to obtain a warrant to search for evidence of drug trafficking?

HOLDING: Yes.

[21] Brewer v. Com., 206 S.W.3d 343 (Ky. 2006).
[22] 839 S.W.2d 281 (Ky. 1992)

DISCUSSION: Davis argued that the warrant, based on the tip, was insufficient. However, Kaufling did not seek a warrant based on the tip, but only after Davis admitted that he possessed a gun during the knock and talk. The initial tip was possibly stale but was corroborated by "recent information showing the evidence (the gun, marijuana and digital scale) remains in the location." Davis allowed Kaufling inside to retrieve the gun, but Kaufling did not search the premises. Kaufling did not, in fact, actually seize the gun at that time but waited until he obtained a search warrant.

The Court upheld Davis's convictions.

Giles v. Com., 577 S.W.3d 118 (Ky. App. 2019)

FACTS: On February 25, 2014, Det. Kaufling (Louisville Metro PD) received a tip from a CI about cocaine and marijuana trafficking at a Louisville home. The trafficker was identified by the nickname P, and described, along with his vehicle information. The detective discovered the car was registered to Holyparadox Apollyon, who was named Giles at the time of the crime. Det. Kaufling confirmed Giles had a history of drug convictions and initiated surveillance on the home. On March 7, the detective observed a man leave the apartment and when engaged, identified himself by his "new" name. He smelled of marijuana and he agreed he had methamphetamine on his person. He was also found to have an outstanding warrant from Indiana and was arrested. They entered the apartment with a key obtained by Giles, to secure it and await a warrant, but observed crack cocaine and a small marijuana grow in plain view. A reference to the items was made in the search warrant.

Giles was charged with trafficking and moved to suppress the items found in the apartment. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Does an arrest a block away from a subject's home constitute an exigency for search incident of arrest of the home?

HOLDING: No

DISCUSSION: Giles argued there were no exigent circumstances to allow the entry into the apartment. The Court agreed nothing indicated an urgency, and the arrest was made a block away from the apartment, nothing suggested anyone else was in the apartment at the time. It was not incidental to an arrest and the court found no basis for a protective sweep

Further, the Court found insufficient evidence for the warrant with the improper information removed, and there was no other lawful reason for the officers to be in the apartment. The Court reversed and remanded his convictions for the items found in the apartment.

SEARCH & SEIZURE – EXPECTATION OF PRIVACY

Bolin v. Com., --- S.W.3d ---- (Ky. App. 2019)

FACTS: In August 2017, Trooper Hensley (KSP) pulled over a vehicle with expired tags. Bolin was driving; the owner was a passenger. Bolin was sweating profusely, shaking, and talking rapidly during the stop. He was drinking from two different bottles – tea and a soft drink, claiming to be "extremely hot and thirsty." Trooper Hensley believed Bolin might be on drugs and instructed him to perform several FSTs. Bolin successfully completed the first FST, but the trooper noted Bolin's pupils were dilated and his eyelids were droopy. Bolin completed a second FST satisfactorily, but failed the final three tests. Bolin was arrested for DUI and for outstanding warrants. Bolin admitted to having recently taken methamphetamine and that there "may be" drugs in the vehicle.

Trooper Hensley requested the Henderson PD K-9, which promptly alerted on the front driver's seat. They searched the vehicle, finding methamphetamine, paraphernalia and a loaded firearm. Bolin was charged with the drugs, being a convicted felon in possession of a firearm, and DUI. Bolin unsuccessfully moved to suppress the evidence. Trooper Hensley stated he could not recall if read Hensley his rights under Miranda. Trooper Hensley further testified that he had ARIDE training to detect drugs. The trial court suppressed Bolin's statements, finding that he was in custody at the time he made the statements, but declined to suppress the physical evidence found during the stop because the trooper possessed probable cause to believe the vehicle contained evidence related to the DUI offense and Bolin lacked standing to object to the search because the vehicle's passenger did not object to the search of the vehicle.

Bolin entered a conditional guilty plea and appealed.

ISSUE: Does a non-owner driver, with the owner in the vehicle, have an expectation of privacy in that vehicle?

HOLDING: No.

DISCUSSION: The Court of Appeals reviewed the law and first discussed whether Bolin had a legitimate expectation of privacy in the vehicle he drove but did not own. The Court of Appeals looked first to Rakas, and noted that Bolin shared the occupancy of the vehicle with the owner, and his occupancy was "never exclusive." As such, like Rakas, Bolin did not demonstrate a recognized expectation of privacy in the vehicle.[23] The analysis might be different if the vehicle's owner had not been present.

The Court of Appeals held:

> … whether the non-owner driver of a vehicle has a reasonable expectation of privacy with respect to the vehicle's compartments and interior hinges on whether the owner has relinquished both possession of and control over the vehicle to the non-owner such that the non-owner driver formed a subjective expectation of privacy that society is prepared to accept as reasonable. This is a fact intensive inquiry and one that the defendant bears the burden of proving as exemplified by U.S. v. Lochan.[24]

[23] See Com. v. Fox, 48 S.W.3d 24 (Ky. 2001) ("Peters, as a passenger, did not have standing to object to the search of the vehicle."); Lindsey v. Com., 306 S.W.3d 522 (Ky. App. 2009).
[24] 674 F.2d 960 (1st Cir. 1982).

Bolin operated the vehicle "subject to the whims of the owner/passenger." Driving is not enough to provide standing. Bolin was, however, seized during the traffic stop. During the stop, the trooper recognized Bolin was likely impaired and further discovered his outstanding warrants. Thus, Bolin was properly detained from that point forward.

The Court of Appeals affirmed the convictions.

Poe v. Com., 2019 WL 168675 (Ky. App. 2019)

FACTS: In January 2017, two officers bought drugs from an individual in the Clay City (Powell County) area. The officers obtained a search warrant for the residence of that individual, but the affidavit had some inaccuracies as to the location, particularly, the address was listed as 113 Powell Street). In fact, the officers actually searched a house some 200-300 feet away (70 Powell Street) from the address listed on the warrant – on the opposite side of the street – but the house searched matched the general description contained within the warrant.

When the team arrived, Troopers Faulkner and Crabtree (KSP) assisted. Trooper Faulkner found Poe sitting in her vehicle in the driveway of the home they were to search and learned that Poe had an outstanding arrest warrant. Drugs and other items were found, which added to Poe's charges.

Poe moved to suppress, arguing the validity of the search warrant. That motion was denied. She entered a conditional guilty plea and appealed.

ISSUE: Does a person located in a driveway that does not belong to that person have an expectation of privacy?

HOLDING: No.

DISCUSSION: Poe had to establish that she had some legitimate expectation of privacy in the residence. Nothing indicated that Poe owned the residence, or even lived there temporarily. Moreover, she was found in the driveway, which is recognized as a public place. As such, the Court held, she had no expectation of privacy there. Even if the search warrant itself was fatally flawed, that did not require overturning her arrest on a valid warrant. The Court held that someone clearly visible in a driveway has no expectation of privacy and once the officers discovered the warrant, she was lawfully arrested and searched.

The Court upheld the convictions.

SEARCH & SEIZURE – CONSENT

Taylor v. Com., 2019 WL 6973755 (Ky. 2019)

FACTS: In 2017, Probation and Parole Officer Turpin received an anonymous report of Taylor selling heroin and that a family member of the caller had died from heroin purchased from him.

Probation and Parole Officers Turpin and Copher went to the home to pay a visit. The probation and parole officers observed several people, including a woman they understood to be Taylor's wife. The woman told the officers that they could enter. Inside, the officers saw several items of suspected contraband and obtained a warrant, which led to the discovery of more contraband.

Taylor was charged with various drug charges and was convicted. An appeal followed.

ISSUE: May a third party with apparent common authority allow entry to a home?

HOLDING: Yes.

DISCUSSION: The Supreme Court noted that under U.S. v. Matlock[25] and Illinois v. Rodriguez,[26] a third party with common authority may grant consent over the premises. "The test for whether third-party consent is valid is whether a reasonable police officer faced with the prevailing facts reasonably believed that the consenting party had common authority over the premises to be searched."[27] In addition, "our Court has cited with approval U.S. v. Jenkins in which the U.S. Court of Appeals for the Sixth Circuit held "that in the absence of additional information to the contrary, it is generally considered reasonable for police officers to presume that persons answering knocks at the door of a residence have authority to consent to a search of that residence."[28]

In this case, the woman who gave consent was cleaning the front door and one of the two officers understood her to be Taylor's wife, having met her several times during home visits. As such, the Court held that it was objectively reasonable for the officers to believe she had the authority to allow them to enter. The Kentucky Supreme Court affirmed Taylor's conviction.

Miller v. Com., 2019 WL 856759 (Ky. App. 2019)

FACTS: Miller was apprehended by Princeton Police near the scene of his ex-girlfriend's home. She had called to report Miller was harassing her. Officers were familiar with Miller, and the girlfriend had earlier complained he had stolen two phones from her. Although he claimed a friend dropped him off, officers found keys on his person and found a vehicle that matched the keys in the nearby parking lot. Through the window, they could see a phone that matched the description given by the girlfriend, as it had a distinctive case. Miller finally admitted he had driven the car there, but denied consent to search the vehicle. It was impounded and towed.

The next day, a detective obtained consent from the registered owner, Miller's ex-wife. He found the second missing phone and inside a partially open backpack, a variety of ammunition and other contraband. (Only the ammunition was relevant to this case.) The owner denied owning the backpack. At the scene, officers searched the area and found a holster, and then a handgun near where Miller had been apprehended. It matched the caliber of some of the ammunition.

[25] 415 U.S. 164 (1974).
[26] 497 U.S. 177 (1990).
[27] Com. v. Nourse, 177 S.W.3d 691 (Ky. 2005).
[28] 92 F.3d 430 (6th Cir. 1996).

Miller, a convicted felon, was charged with possession of the handgun. He was indicted and moved to suppress. The trial court denied suppression, and Miller was convicted of possession of the firearm. He then appealed.

ISSUE: If a party giving consent does not limit the consent, is it permissible to search closed containers?

HOLDING: Yes.

DISCUSSION: First, Miller argued that his ex-wife's consent to search her car did not cover his backpack. The trial court had found it lawful under consent, plain view and the automobile exception. The Court took each in turn. Miller did not contest that his ex-wife could give consent for the car, but argued she could not for the backpack. The Court looked to Florida v. Jimeno and ruled that when the consenting party does not limit the search, closed containers were permitted as well.[29] Although the stolen phones were their initial object, the search consent was not limited to that. Further, the backpack was partially open, unzipped, and ownership was unclear. Even absent that, however, the Court noted that plain view combined with the automobile exception applied. The nature of the phones was readily apparent, which led to a proper search of the car. The Court upheld the denial of the motion to suppress.

Further, the Court held that testimony from a witness that the handgun found appeared to be the same one Miller routinely carried in a holster was properly admitted, although the witness did not see the gun that night. This evidence was properly admitted to prove his constructive possession of the firearm.

The Court affirmed Miller's conviction.

SEARCH & SEIZURE – TERRY

Standifer v. Com., 2019 WL 3763538 (Ky. App. 2019) (DR Filed 9/11/2019)

FACTS: On August 13, 2016, Officers Baker and Crawford (Louisville Metro) patrolled a grocery store parking lot that was known for drug trafficking. The officers focused on Standifer's legally-parked vehicle. The officers were suspicious because this vehicle sat for 15 minutes with no activity. The officers approached on foot.

Standifer was in the driver's seat smoking a cigarette with the vehicle turned off and the window partially down. Officer Baker saw scissors with marijuana flakes in Standifer's lap. Baker asked Standifer to exist the vehicle, and he refused. Baker reached inside the vehicle and grabbed Standifer's shoulder, while Officer Crawford saw Standifer place a gun in the back seat. Standifer was removed from the vehicle and handcuffed. A handgun and marijuana were found and Standifer was charged. Standifer was a convicted felon.

[29] 500 U.S. 248 (1991).

The trial court denied suppression and Standifer entered a conditional guilty plea. He appealed.

ISSUE: Is some force permitted during a Terry stop?

HOLDING: Yes.

DISCUSSION: The Court of Appeals held that no reasonable cause existed to detain or search Standifer, but that "does not mean that the officers could not engage with the parked vehicle and its occupants." "Police officers are free to approach anyone in public areas for any reason."[30] Officer Baker testified he knew that he was seeing marijuana. He testified that "(1) that the substance he saw was consistent with marijuana; (2) he was aware based on his experience and training that scissors were often used to cut up or break up marijuana before rolling it; and (3) residual marijuana often sticks to the blades because marijuana is sticky."

A warrant was not necessary "when 'the object seized is plainly visible, the officer is lawfully in a position to view the object, and the incriminating nature of the object is immediately apparent.'"[31] In this case, Officer Baker could clearly see the scissors from outside, with the only question being whether the "incriminating nature of the flakes" was so immediately apparent to warrant a detention. Standifer argued that "Officer Baker exceeded his authority in doing so and arresting him since the possession of paraphernalia is a misdemeanor, which in most instances requires the officer to issue a citation instead of making an arrest." The appellate court held that Officer Baker did not arrest him at that point, but only ordered Standifer out of the car. This was an "entirely appropriate directive" under the circumstances. When he refused, the situation "changed dramatically." As soon as the gun came into play, there was a "far more concerning issue." Once the contraband was seized, the officers knew they were dealing with several felonies. At this point, Standifer could be placed under arrest. Standifer argued that he was actually arrested when initially removed and handcuffed, but the appellate court held that the length and manner of an investigatory stop should be reasonably related to the basis for the intrusion.[32]

The Court of Appeals determined that "the right to make an arrest **or investigatory stop** necessarily carries with it the right to use some degree of physical coercion or threat thereof[.]" This is because there is a substantial interest in officer safety and preventing flight of the suspect. Thus, placing Standifer in handcuffs outside the vehicle was reasonable for officer safety and did not constitute an arrest. The arrest took place fifteen minutes later, after the officers discovered the contraband and the incriminating nature thereof.

The Court affirmed the denial of the motion to suppress and affirmed the conviction.

Com. v. Swift, 2019 WL 3381406 (Ky. App., 2019)

FACTS: On September 4, 2015, Det. Cook (Leitchfield PD), Det. Dover (Greater Hardin County Narcotics Task Force) and Deputy Beasley (Grayson County SO) went to Swift's home in Caneyville

[30] Com. v. Banks, 68 S.W.3d 347 (Ky. 2001).
[31] Kerr v. Com., 400 S.W.3d 250 (Ky. 2013).
[32] Williams v. Com., 147 S.W.3d 1 (Ky. 2004).

on a knock and talk. The officers had a tip that Swift possessed a large quantity of marijuana. Swift gave consent to enter. Immediately, the officers spotted several items they recognized as likely being connected to drug activity. The officers asked to search the garage and were refused, so they elected to obtain a search warrant. While waiting, Det. Dover put Swift in handcuffs and frisked him. Det. Dover located a plastic bag in the front pocket that he believed was methamphetamine; he was correct.

Swift was indicted for manufacturing methamphetamine and trafficking. He moved for suppression and was initially denied. In further proceedings, however, the trial court agreed to suppress.

The trial court noted:

> The testimony by Detective Robert Dover of the Greater Hardin County Task Force was he had no formal training at any police academy or continuing education classes by any accredited body to [sic] for touching and determining whether a substance in a suspect's pocket is illegal drugs. No evidence was produced [that] any such training ever existed or exists today. There is no Daubert standard upon which to verify the methodology. Further, Det. Dover's "expertise" came from his field experience over years as a county police officer in the field. There is no training which has any scientific or other validity for admission in a trial.
>
> There was no testimony this search occurred in an area where drug trafficking is well known. It occurred inside a premises based upon a warrantless "knock and talk". The four occupants inside the premises were detained by Dover for three hours without being placed under arrest. Dover was waiting for a search warrant which could have been obtained prior to the search of Swift's pockets. Dover felt no weapons in his pat[-] down of Swift. Det. Dover never placed Swift under arrest. Dover had no right to continue his search into Swift's pockets after his safety pat[-]down revealed no weapons.

The Commonwealth appealed.

ISSUE: May contraband be located on plain feel, gained through experience?

HOLDING: Yes.

DISCUSSON: The Court of Appeals noted that "when a police officer possesses reasonable suspicion of criminal activity, the officer may briefly detain the suspect and may also pat-down the suspect whenever it is reasonable to believe the suspect is armed and dangerous." During such a frisk, contraband may be seized if "immediately identifiable" by "plain feel."[33] The court emphasized that "the incriminating nature of the contraband must be immediately identifiable by the sense of touch and without the officer manipulating or moving the contraband." In this case, as soon as he touched it, Det. Dover recognized it and told his fellow officers. He was very experienced in finding

[33] Com. v. Marshall, 319 S.W.3d 352 (Ky. 2010).

such packages. The circuit court was "concerned" that his expertise came through years of service, not through training, even though no such training was even identified.

The Court of Appeals noted that under Marshall, an officer's experience could be sufficient to support a ruling. The suppression was overturned and the case was remanded for further proceedings.

Chappell v. Com., 2019 WL 4565242 (Ky. App. 2019)

FACTS: On April 16, 2016, Officer Boyd (Newport PD) stopped Chappell for a minor traffic violation. As Chappell rolled down his window, the officer detected the odor of burning marijuana. Officer Boyd called for backup. Lt. Drohan responded and also detected the odor. Chappell got out of the vehicle and Officer Boyd searched him, finding $2,300 in cash, and three cell phones. Several baggies of heroin were found in the vehicle.

Chappell was indicted on trafficking and related offenses. He moved to suppress and was denied. Chappell entered a conditional guilty plea and appealed.

ISSUE: May contraband be located on plain feel, gained through experience?

HOLDING: Yes.

DISCUSSION: Chappell argued the trial court "improperly relied upon the officers' training and experience as neither officer had any training on how to detect the odor of marijuana, and neither could demonstrate any experience in accurately detecting the odor of marijuana." Both officers, however, had testified they had years of experience in that odor, given both had been officers for some years. The Court of Appeals found this sufficient for the stop. Further, the appellate court held that the full searches (rather than frisks) were justified on probable cause for his person and the vehicle, which was supplied by the odor.[34]

The Court affirmed the convictions.

Starr v Com., 2019 WL 1422705 (Ky. App. 2019)

FACTS: On the day in question, a Campbell County restaurant called police to report that two males were in the parking lot "nodding off" and two women had been in the restroom a long time. Officers Love and Blank (Highland Heights PD) arrived, along with an unnamed officer. Officers approaching the restroom encountered Fields, who had a fresh, bleeding needle wound in her arm, and she was lethargic and impaired. She stated Starr was still in the restroom. Starr was in a stall and refused to leave when ordered to do so, stating she needed a minute. She finally exited the stall and they all went outside, as the restaurant was closing for the night.

Sgt Love testified he saw an orange syringe cap in her mouth and told her to spit it out. She was given Miranda, but continued to talk. She admitted having methamphetamine on her person. Starr

[34] Morton v. Com., 232 S.W.3d 566 (Ky. App. 2007).

was arrested for possession of the drug and the cap (as paraphernalia). She moved for suppression and was denied. Starr took a conditional guilty plea and appealed.

ISSUE: May an officer make a stop on reasonable suspicion the individual has just used drugs?

HOLDING: Yes

DISCUSSION: The Court discussed several alleged errors. Of most importance, the Court looked at how Fields' condition was described, and noted that regardless of how it was described, the officers recognized she had just used injected drugs, and there was reasonable articular suspicion to detain her briefly and talked to her. Further, once they talked to Starr, it was reasonable even though she did not appear obviously impaired. Since she did not raise the issue of being told to spit out the cap at trial, the Court refused to entertain that issue.

Starr's conviction was affirmed.

SEARCH & SEIZURE – CONSTRUCTIVE POSSESSION

Ray v. Com., 2019 WL 1430728 (Ky. App. 2019)

FACTS: Ray was a probationer. In August 2017, Det. Lamb (LMPD) obtained a search warrant for the house where Ray was staying with his girlfriend, Nash, on allegations that Ray was trafficking in narcotics. No drugs were found during the search, but a handgun was located in the master bedroom nightstand. Evidence indicated that Nash owned the firearm and she stated she normally kept it in her car, but she had brought the handgun inside as the car was going in for service. She stated Ray was unaware of the gun, and he also stated he had no idea it was there.

The Commonwealth filed a motion to revoke Ray's probation for constructive possession of the weapon. This motion was granted. Ray appealed.

ISSUE: Does the simple presence of a gun in the nightstand of a bedroom where no evidence exists that the subject has access constitute constructive possession?

HOLDING: No.

DISCUSSION: The Commonwealth argued that the presence in the nightstand was enough for constructive possession. There was no testimony that Ray shared that room with Nash or that any of his possession were in the room. His "brief residence at Nash's house was not so established as to warrant an inference that he had access to and knowledge of everything in the house." Nash "consistently claimed ownership of the gun, even before Ray was even aware that the search had taken place." Evidence corroborated that Nash's brother had bought the handgun in 2010 and given it to Nash. Further allegations in a search warrant, with no evidence found to support it, was also insufficient to revoke his probation.

The Court reversed the revocation order.

Jones v. Com., 567 S.W.3d 922 (Ky. App. 2019)

FACTS: On November 21, 2016, Trooper Begley (KSP) and several Russell County deputy sheriffs went to Grider's home to serve warrants on Jones and Morgan. Hammonds, Jones' aunt, admitted the officers into the residence. The officers found the pair sleeping, woke them up and told them of the warrants. With the lights on, Trooper Begley spotted an unlabeled pill bottle and other drug evidence, as well as tablets and capsules lying loose. Later testimony indicated the drugs found included methamphetamine, tramadol and possibly gabapentin (those pills were not tested).

Jones was charged (as was Morgan) for the drugs found in the room. Jones argued that nothing indicated who placed the drugs in the room and multiple people had access to the bedroom. He also argued there was no evidence of trafficking.

ISSUE: Does sleeping in a room convey constructive possession of items found there?

HOLDING: Yes (it may).

DISCUSSION: First, the Court agreed, that the fact the two were sleeping in the room made them subject to constructive possession. Further, the amount alone was inconsistent with personal use, and trafficking could be inferred. However, the fact that the capsules (the bulk of the pills) were not tested and that the jury should have been instructed to determine whether gabapentin is a legend drug rather than a controlled substance. Thus, the trafficking in a legend drug conviction warranted reversal with respect to the gabapentin.

Steele v. Com., 568 S.W.3d 387 (Ky. App. 2019)

FACTS: Steele was charged in 2013 with possession of materials portraying a minor in a sexual performance. Steele's wife discovered a nude photos of her daughter and photos of her daughter engaging in sexual acts with her boyfriend on Steele's password protected iPad. Steele advised his wife that he had installed a hidden webcam in the room the daughter used when she stayed at their apartment. Steele's wife kicked him out of the apartment and she called the police. Officers from the Louisville Metro Police Department searched the home, including the basement where Steele's belongings and computer equipment were stored. The basement was considered to be Steele's "man cave." The officer collected a computer and some flash or zip drives, along with Steele's iPad. During the next few weeks, Steele's wife cleaned up the basement and found a box of floppy disks. They were turned over the box to the LMPD. The floppy disks contained various images of child pornography and photos of nude adult celebrities. The iPad also contained pornography but no child pornography.

Steele admitted to voyeurism, but denied tampering with evidence and child pornography. He was convicted of voyeurism and possession of child pornography. He appealed the latter charge.

ISSUE: Are items found in a basement used by a subject enough to constitute constructive possession?

HOLDING: Yes.

DISCUSSION: Steele argued that there was no evidence that he had knowledge of what was on the disks, as he possessed no equipment on which to read them. He also noted at the time they were found, he had not been in the house for some six weeks. (The detective had only the wife's word as to where the items were found.) Steele argued that the fact that the iPad contained nude adult photos and some photos were also found on the disks was not enough. The Court noted that Steele was allegedly the only person who used the basement and the items were found with other items that did belong to him.

The Court upheld his conviction.

SEARCH & SEIZURE – SEARCH INCIDENT

Hunter v. Com., 587 S.W.3d 298 (Ky. 2019)

FACTS: When Williams and Cooper went to bed on the night of July 16, 2012, they were alone. On the morning of July 17, Cooper awoke to a loud sound and pain in her leg. She had been shot and Williams, on the floor, had been fatally shot in the chest. Shortly thereafter, Louisville Metro officers spotted Hunter, shirtless, jogging alone in the area. The officers saw Hunter had something heavy in his shorts pocket. The officers thought was a gun. The officers exited their cruiser and yelled "police" – Hunter took off running. The officers dashed after him, ordering him to stop, but Hunter continued running, occasionally reaching into his pocket. Hunter was briefly out of sight of all of the officers, but he was eventually apprehended. The pocket was empty, but he did have one live round in his possession. At the same time, the officers learned of the shooting nearby. A K-9 located the discarded firearm, right where Hunter had been briefly out of sight.

Hunter, a juvenile, was charged as an adult in the shootings. He was convicted and appealed.

ISSUE: May the search of a person be done contemporaneous with a lawful arrest?

HOLDING: Yes.

DISCUSSION: Among other procedural issues, Hunter argued that he was seized at the moment the officers tried to stop him. The Kentucky Supreme Court noted, "this, however, is counter to the United States Supreme Court's holding in California v. Hodari D."[35] Although the states had mixed results in following Hodari, Kentucky had done so in Taylor v. Com. [36] The Supreme Court noted that "Section 10 of the Kentucky Constitution provides no greater protection than does the federal

[35] 499 U.S. 621 (1991).
[36] 125 S.W.3d 216 (Ky. 2003).

Fourth Amendment."[37] Further, the Kentucky Supreme Court held "[a] seizure does not occur...if in response to a show of authority, the subject does not yield. In that event, the seizure occurs only when the police physically subdue the subject."

Hunter also argued for suppression as to what was found on his person. Hunter argued he was not under arrest at the time, while the Commonwealth argued that he was. The Supreme Court looked closely at the chronological events – as the trial court found that Hunter was under arrest but did not specify for what. The Supreme Court noted that while the group was running, there was heavy traffic in the area. There was a struggle before he was handcuffed and events unfolded quickly. The arresting officer handed him over to another officer, who did the search prior to placing him in the back of the cruiser. During the same time, the arresting officer was directing others in the search for the discarded weapon. It was unclear, the Supreme Court noted, "who knew about the shots-fired call and when they knew it, in relation to the search of Hunter's pocket." At the time Hunter was apprehended, the officers on the scene had reason to believe Hunter had committed the crime of fleeing and evading. The Supreme Court further noted that "a reasonable and prudent police officer would have reason to believe that chasing an armed individual, both on foot and by vehicle, across heavily trafficked streets, through backyards, and across railway tracks creates a substantial risk of serious physical injury." The search was contemporaneous with a lawful arrest, and thus valid.

The Supreme Court also addressed several double jeopardy arguments, but ultimately affirmed the convictions for murder, first-degree assault, tampering with physical evidence and possession of a handgun by a minor. The fleeing and evading charge was reversed because the Commonwealth failed to present any evidence at trial concerning this offense.

SEARCH & SEIZURE – TRAFFIC STOP

Mayfield v. Com., 590 S.W.3d 300 (Ky. App. 2019)

FACTS: On April 2, 2017, Officer Mascoe (Lexington PD) pulled over a vehicle for a license plate violation. He had stopped the same vehicle for a similar offense a few months earlier. That time, the driver said he had left his OL at home, but the officer "was not so forgiving a second time."

As he approached the vehicle, the officer had smelled marijuana. When he ran the information provided by the driver, he was given information that returned no results. The driver, when removed from the vehicle, admitted to having smoked marijuana in the vehicle, but the officer found no evidence of it in the car beyond the odor. On the driver, however, he found a scale, cash and marijuana. The driver volunteered he had sold "weed" earlier in the evening. Officer Mascoe read Miranda and, ultimately, the driver provided his real name – Mayfield. At the jail, more drugs were found packaged in his crotch area.

Mayfield was indicted on drug and traffic charges and moved for suppression of the fruits of the search and his statements. That motion was denied. He entered a conditional guilty plea and appealed.

[37] LaFollette v. Com., 915 S.W.2d 747 (Ky. 1996), overruled on other grounds by Rose v. Com., 322 S.W.3d 76 (Ky. 2010); see also Cobh v. Com., 509 S.W.3d 705 (Ky. 2017).

ISSUE: Does the smell of marijuana give probable cause to search a driver?

HOLDING: Yes.

DISCUSSION: First, the Court of Appeals held that the smell of marijuana gives the officer probable cause to search the person[38] because "plain smell" – as a branch of plain view, was permitted.[39] "It is a fundamental principle that a policeman may 'observe' with any of his five senses for purposes of a misdemeanor arrest."[40] The "automobile exception to the warrant requirement extends to the operator of the vehicle when the "plain smell" of marijuana results in the existence of probable cause, which justifies a search independently of an arrest."

The Court of Appeals affirmed this conviction.

Warick v. Com., 2019 WL 4072774 (Ky. 2019) (Petition for Rehearing pending 10/4/19)

FACTS: Warick and two passengers, Brian and Jessica Bertram, stopped at the Dairy Queen in Prestonsburg. While waiting for the order, he backed into a parking space. The drive thru attendant had 911 called for a possible DUI, because they spotted an open container of beer.

Multiple officers arrived, with Officer Tussey first. He walked up and saw the beer but Warick denied drinking. He passed field sobriety tests, including a PBT which registered 0. In a pat-down, Tussey found a quantity of cash. Brian was nervous and upon being searched, a marijuana cigarette and a needle were found. A K-9 called to the area found drugs (marijuana and pills) on the grassy berm behind the parked car. The bottle had a label indicating it was Warick's but contained unprescribed oxycodone. During a search pursuant to the car, they found three cell phones with incriminating texts and a drug ledger.

Warick was arrested. Ultimately other officers obtained a search warrant for Warick's Johnson County home. Upon execution of the search warrant, officers discovered drug paraphernalia, marijuana, marijuana seeds and marijuana plants. Warick moved for suppression, arguing the DUI stop was unduly prolonged. The trial court ruled that the items were found "from a natural progression of events related to the traffic stop." Warick entered a conditional guilty plea in and appealed.

The Kentucky Court of Appeals held that Warick had no standing to challenge the discovery of the items outside the vehicle or to challenge Brian Bertram's search. The Kentucky Supreme Court accepted discretionary review.

ISSUE: When are a person's Fourth Amendment protections implicated?

[38] Dunn v. Com., 199 S.W.3d 775 (Ky. App. 2006); Hazel v. Com., 833 S.W.2d 831 (Ky. 1992).
[39] Coolidge v. New Hampshire, 403 U.S. 443 (1971).
[40] Cooper v. Com., 577 S.W.2d 34 (Ky. App. 1979), overruled on other grounds by Mash v. Com., 769 S.W.2d 42 (Ky. 1989).

HOLDING: When the person invoking protection can claim a reasonable expectation of privacy.

DISCUSSION: This case revolved around the issue of whether Warick had "standing" to challenge the search of a vehicle in which he was the driver. Warick asserted that the search of the vehicle and the subsequent search of his residence were unlawful because the purpose of the stop, to investigate a possible DUI, were completed well before the searches were executed.

Under the recently decided case of Byrd v. U.S., the United States Supreme Court noted:

> The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search; but it should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits. Because Fourth Amendment standing is subsumed under substantive Fourth Amendment doctrine, it is not a jurisdictional question and hence need not be addressed before addressing other aspects of the merits of a Fourth Amendment claim.

As a jurisdictional "standing" argument is improper under Fourth Amendment law, the Kentucky Supreme Court determined that the trial court and the Court of Appeals did not properly review Warick's complete Fourth Amendment argument. Courts are required to review the merits of an individual's Fourth Amendment claim to determine whether a reasonable expectation of privacy exists.

An operator of a private vehicle has an expectation of privacy and Warick properly asserted his Fourth Amendment rights when the officers' actions infringed upon his own Fourth Amendment rights. Warick claimed he was unlawfully detained when he was held beyond the time necessary for issuing a citation, and then the officer searched his Bertram, which led to the K-9 unit being brought to the site and the discovery of incriminating evidence. The Court of Appeals ignored this argument and instead reviewed the search of the grassy area and Bertram's search.

The Court of Appeals opinion was vacated. The trial court failed to issue sufficient factual findings concerning the suppression issue. Therefore, the Supreme Court remanded the matter to the trial court for additional findings of fact.

Dehaven v. Com, 2019 WL 1092664 (Ky. 2019)

FACTS: On January 4, 2017, Deputy Williford (McCracken County SD) was on patrol at 1:00 a.m., when he spotted a parked car, backed into the rear door of a closed convenience store. As the deputy pulled in, the car pulled away. The deputy had received prior reports of criminal activity and loitering at the store. The vehicle made no attempt to elude him or avoid him and was committing no traffic infractions. The deputy initiated a stop, and he had explained to a fellow deputy that he stopped the car to check to see if the occupants were employees. As a result, during a search, drugs and other contraband was found. Dehaven testified that the driver had pulled in to get directions and pulled back out almost immediately. He had no idea what the deputy was doing

and that Williford followed them for some distance (miles) before he made the stop. The trial court found that the stop was justified on reasonable suspicion.

Dehaven was charged with a multitude of offenses. He entered a conditional guilty plea and appealed.

ISSUE: Must a reasonable, articulable suspicion precede a Terry stop of an automobile?

HOLDING: Yes

DISCUSSION: The Court detailed each of the factors the deputy considered in making the stop. The Court noted that mere presence of a vehicle in a suspicious location was insufficient. The deputy's own statement when he made the stop that he did so to "see if there was suspicious" activity indicated he was working with the inarticulable hunch prohibited by Terry.[41] The Court note that "reasonable suspicion must preexist the stop."

The Court reversed the conviction.

SEARCH & SEIZURE – ROADBLOCK

Shelton v. Com., 2019 WL 3991065 (Ky. App. 2019) (DR pending)

FACTS: Shelton was stopped at a KSP roadblock in Muhlenberg County. KSP announced a Labor Day 2018 enforcement plan and provided a number of possible locations for traffic checkpoints. On the night in question, Sgt. Ayers and Trooper Crick met at the site of the roadblock. They started the checkpoint at 9:02 and ended at 9:46. The troopers had uniforms and cruisers with lights activated. There were no signs or traffic cones.

Shelton was the third or fourth vehicle to pass through, and every vehicle before him was stopped. Trooper Crick noted the smell of green marijuana and Shelton was asked to exit his vehicle. Upon request, Shelton removed several items, a rag, and cash from his pockets. The rag included a meth pipe. Shelton failed several FSTs. The trooper found cash, marijuana and meth in the car.

Shelton was charged and, on suppression, argued that the roadblock was unconstitutional, as not complying with Com. v. Buchanon.[42] The trial court denied the motion to suppress. Shelton entered a conditional guilty plea and appealed.

ISSUE: May a law enforcement checkpoint be conducted for only a brief period of time?

HOLDING: Yes.

[41] 392 U.S. 1 (1968).
[42] 122 S.W. 3d 565 (Ky. 2003).

DISCUSSION: The Court of Appeals reviewed traffic checkpoint law and opined that "a highway stop of motorists at a government-operated checkpoint constitutes a seizure for Fourth Amendment purposes."[43] Such checkpoints must be reasonable. It reviewed the "non-exclusive factors" in use:

> First, it is important that decisions regarding the location, time, and procedures governing a particular roadblock should be determined by those law enforcement officials in a supervisory position, rather than by the officers who are out in the field. Any lower ranking officer who wishes to establish a roadblock should seek permission from supervisory officials. Locations should be chosen so as not to affect the public's safety and should bear some reasonable relation to the conduct law enforcement is trying to curtail.
>
> Second, the law enforcement officials who work the roadblock should comply with the procedures established by their superior officers so that each motorist is dealt with in exactly the same manner. Officers in the field should not have unfettered discretion in deciding which vehicles to stop or how each stop is handled.
>
> Third, the nature of the roadblock should be readily apparent to approaching motorists. At least some of the law enforcement officers present at the scene should be in uniform and patrol cars should be marked in some manner. Signs warning of a checkpoint ahead are also advisable.
>
> Fourth, the length of a stop is an important factor in determining the intrusiveness of the roadblock. Motorists should not be detained any longer than necessary in order to perform a cursory examination of the vehicle to look for signs of intoxication or check for license and registration. If during the initial stop, an officer has a reasonable suspicion that the motorist has violated the law, the motorist should be asked to pull to the side so that other motorists can proceed.

This checkpoint was properly pre-approved and selected based upon prior history. The checkpoint was intended to run for only one hour. Even though Shelton was the last vehicle stopped, no specific vehicles were targeted. While the troopers were with Shelton, no additional vehicles were stopped. A media announcement of the checkpoint had been made in advance, and the scene was adequately marked.

The Court held Shelton was not targeted by this checkpoint and found the checkpoint to be valid. The conviction was affirmed.

SEARCH & SEIZURE – CARROLL

Com. v. Garrett, 585 S.W.3d 780 (Ky. App. 2019)

FACTS: On the evening of September 5, 2016, Officer Smith (Mt. Sterling PD) spotted a vehicle parked in an unpaved, partially graveled, area with the headlights off. The officer found this suspicious as he had never seen a vehicle parked at that location at night and because this was a high crime area. Officer Smith ran the plate and it came back negative. He and Officer Roberts

[43] Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

approached the vehicle, finding Garrett, the driver, and Hendrix, the passenger. Garrett provided his OL on request.

When Officer Smith ran Garrett, he was told Garrett might "possibly have a warrant." Garrett was removed from the car and handcuffed. At all times, Garrett was cooperative. After a few minutes, as Officer Smith was trying to talk to Garrett, he saw Hendrix trying to conceal or reach between the seats. (There was some confusion as to when Garrett was actually handcuffed.) At some point, Garrett was found to have no warrant. The detention lasted approximately 32 minutes. Suspicion centered on Hendrix based on her actions, so she was removed from the vehicle. Neither Garrett nor Hendrix were frisked, but the officers did check Hendrix's seat for a weapon. During a more thorough search of the vehicle, the officers found cannabis, scales, more marijuana, cocaine, and approximately $1200 in cash. Hendrix was later found with methamphetamine at the jail.

The trial court granted Garrett's motion to suppress evidence after finding "that when the search was conducted, neither Garrett nor Hendrix was under arrest; there was no evidence that either officer observed contraband or a weapon in plain view or plain smell; and "[t]here were no exigent circumstances." Further, the search was not consensual. The trial court also found no probable cause for a Carroll[44] search.

The Commonwealth appealed.

ISSUE: May an officer conduct a warrantless search or seizure of a vehicle in a public place without probable cause or exigent circumstances?

FACTS: No.

DISCUSSION: The Commonwealth argued that the prior decision "improperly conflated the officers' actions after removing Hendrix from the vehicle by treating the "continuum" of events as a single thorough search. The Commonwealth says the search was conducted incrementally, as follows: (1) Officer Smith asked Garrett "to step out of the vehicle, so he could check the validity of the warrant"; (2) "Officer Roberts alerted Officer Smith of the erratic movements of the passenger"; (3) "Out of concern for officer safety, Officer Smith placed [Garrett] in handcuffs and went to the passenger side of the vehicle"; (4) The officers "then searched the area where Ms. Hendrix was reaching and located cannabis and scales"; (5) "[T]he Officer's [sic] then proceeded to search the remainder of the vehicle locating cocaine." The Court of Appeals acknowledged, however, that the officer gave two different "versions" of the sequence.

The Court of Appeals determined that the Commonwealth tried to use the wrong standard, and that there "is only one standard applicable to a warrantless physical search of a vehicle – "officers may search an automobile without having obtained a warrant so long as they have *probable cause* to do so."[45] The Court of Appeals held that there was no probable cause for the search. The Court stated, "unlike most police interaction with occupants of vehicles, this incident did not begin as a traffic stop. In other words, the officers did not pull Garrett over for violating a traffic law – "[a] seizure

[44] Carroll v. U.S., 267 U.S. 132 (1925)
[45] Collins v. Virginia, 584 U.S. __, (2018) (citing California v. Carney, 471 U.S. 386 (1985))."

justified . . . by a police-observed traffic violation . . . ."[46] There was no police-observed infraction of the law. Officer Smith simply approached Garrett at 10:02 PM on Labor Day "to see what his activities were." And there is nothing wrong with that."

"Police officers are free to approach anyone in public areas for any reason[.]"[47] "No 'Terry' stop occurs when police officers engage a person . . . in conversation by asking questions."[48] In Fourth Amendment jurisprudence, such conduct is characterized as a "consensual encounter" and is not itself a search or a seizure.[49]

The appellate court held that the process remained consensual for most of the interaction. However, the court noted that the officer never actually asked Garrett why he was there, but started with asking for identification. However, the request for identification was permitted because "a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure."[50]

Officer Smith was polite and requested identification, which "would not have caused a reasonable person to suspect he was not free to leave the scene." (The court noted in a footnote that Garrett did not even have to turn over his OL, as he was not stopped for a driving offense.) The court emphasized that "circumstances changed when Officer Smith walked away from Garrett while still in possession of his driver's license." At that point, under Florida v. Royer, Garrett was seized.[51] The Court disagreed that the factors the officer identified were insufficient to satisfy reasonable suspicion and, in fact, some of the factors the circuit court got wrong. Location can be relevant, but is not dispositive. Regardless, any evidence seized was the fruit of the poisonous tree and thus had to be excluded. Under Utah v. Strieff, a warrant can be an intervening factor – but in this case "Garrett's warrant was never more than a possible civil warrant, not a criminal warrant, and turned out to be non-existent after all."[52] His detention was "was extended twenty minutes to investigate that mere possibility." Hendrix's nervous behavior was also not enough and occurred well into the prolonged stop. Further, Officer Roberts saw the movements yet did not testify.

The Court of Appeals concluded that "the fact that their investigative "hunch" was corroborated by the evidence they seized does not mean the steps preceding the seizure were not flagrant errors in their police work.[53] These errors included: taking Garrett's license to run a warrant check when he did nothing inconsistent with lawful conduct; detaining him (perhaps in handcuffs) for twenty minutes because of a "possible" civil warrant while dispatch dealt with an administrative glitch; handcuffing Garrett for officer safety with no reason to believe the officers' safety was at risk (other than Hendrix's movement after half an hour of sitting still); pulling Hendrix from the vehicle to search it for a weapon without probable cause and without patting down either Garrett or Hendrix in search of a weapon; evidence they seized does not mean the steps preceding the seizure were

[46] Rodriguez v. U.S., __ U.S. __ (2015).
[47] Strange v. Com., 269 S.W.3d 847 (Ky. 2008) (quoting Com. v. Banks, 68 S.W.3d 347 (Ky. 2001)).
[48] Id. at 850 (citing Florida v. Royer, 460 U.S. 491 (1983)).
[49] U.S. v. Campbell, 486 F.3d 949 (6th Cir. 2007).
[50] I.N.S. v. Delgado, 466 U.S. 210 (1984).
[51] 460 U.S. 491 (1983).
[52] 579 U.S. --- (2016).
[53] Nichols v. Com., 186 S.W.3d 761 (Ky. App. 2005).

not flagrant errors in their police work. At best, "Officer Smith unlawfully detained Garrett for twenty minutes while dispatch dealt with its administrative snafu."

Finally, searching the vehicle, "ostensibly for a weapon, without first conducting a "pat down" of either Hendrix or Garrett, smacks of pretext." "A protective search . . . must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby."[54] And even though we allow "the police to conduct an area search of the passenger compartment to uncover weapons," we do so only if the police "possess an articulable and objectively reasonable belief that the suspect is potentially dangerous."[55]

The Court of Appeals affirmed the suppression of the evidence.

Lewis v. Com., 2019 WL 413610 (Ky. App. 2019)

FACTS: On April 17, 2017, at about 11:30 a.m., Officer Mascoe (Lexington PD) observed a vehicle run a stop sign. He was unable to immediately execute a traffic stop due to traffic. When the intersection cleared, Mascoe saw the other vehicle accelerate at a high rate of speed. He was able to track it due to its loud muffler exhaust. The officer caught up with this vehicle, initiated a traffic stop, and found Lewis driving, and a female passenger. As he approached, he smelled marijuana. He found Lewis nervous, jittery, with shaking hands and he was "sweating profusely." Lewis admitted he did not have a license. Lewis was found to have a suspended or revoked license and an outstanding warrant.

When backup arrived, Lewis was arrested. Lewis said he did not own the vehicle and did not want it searched. Officer Mascoe searched the vehicle, finding a gun and drug evidence. Lewis admitted he was a convicted felon. No contraband was found on his person, although the passenger had marijuana on her person.

Lewis was indicted on the gun as well as the traffic related offenses. He moved to suppress, which was denied. He took a conditional plea and appealed.

ISSUE: May a case involving a search of a motor vehicle following an arrest be based on Carroll rather than Gant?

HOLDING: Yes

DISCUSSION: Lewis argued that the search of the vehicle was improper under Arizona v. Gant.[56] The Court noted that the second exception, "regarding whether the vehicle may contain evidence relevant to the arrest," is the more common situation and that will depend upon the substance of the underlying arrest. In Lewis' case, he was arresting on an outstanding warrant and there was no reason to believe any evidence would be found relevant to that warrant. However, the Court held

[54] Com. v. Whitmore, 92 S.W.3d 76 (Ky. 2002) (citing Terry).
[55] Michigan v. Long, 463 U.S. 1032 (1983); Docksteader v. Com., 802 S.W.2d 149 (Ky. App. 1991).
[56] 556 U.S. 332 (2009).

that the trial court was correct in not basing the search on Gant, but on the plain smell on the marijuana, a different exception to the warrant requirement. Under that, the search was qualified under the "automobile exception."[57]

The Court affirmed the conviction.

INTERROGATION

Decker v. Com., 2019 WL 5681456 (Ky. App. 2019)

FACTS: Decker was involved in a traffic crash on January 11, 2014. His wife was in the front seat, and her two children were in the back seat. Another driver, Kellog, saw the vehicle being driven erratically, and tried to call the police. Kellog had no cell phone signal, so he honked and flashed his lights, trying to get Decker's attention. Decker struck an oncoming vehicle head on.

Decker was ejected, while the two children and the other driver were seriously injured. All were airlifted for medical attention. While waiting at the scene for EMS, Decker was in and out of consciousness. Deputy Hammons (Grayson County SO) overheard one of the paramedics ask Decker whether he had used drugs or alcohol. (Hammons, also an EMT, knew that was a standard question.) Decker admitted to the paramedic that he consumed alcohol and marijuana. (It was some four hours, however, before his blood was tested.)

Decker was indicted on multiple counts of first-degree assault, fourth-degree assault, and related offenses. Decker moved to suppress the blood results and the statement, arguing he should have been advised of his right to remain silent. The trial court denied that motion. Decker was convicted of first-degree assault and DUI. An appeal followed.

ISSUE: Is someone having emergency medical care in custody, even if an officer is nearby?

HOLDING: No.

DISCUSSION: The Court of Appeals began:

> Miranda v. Arizona, requires police officers to advise suspects of their rights against self-incrimination and to an attorney prior to subjecting them to custodial interrogation."[58] Consequently, "only statements made during custodial interrogations are subject to suppression pursuant to Miranda."[59] Custodial interrogation is defined as questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of freedom of action in any significant way. . . . The inquiry for making a custodial determination is whether the person was under formal arrest or whether there was a restraint of his freedom or whether there was a restraint on freedom of movement to the

[57] Dunn v. Com., 199 S.W. 3d 775 (Ky. App. 2006).
[58] 384 U.S. 436 (1966), Greene v. Com., 244 S.W.3d 128 (Ky. App. 2008).
[59] Jackson v. Com., 187 S.W.3d 300 (Ky. 2006), *as amended* (Mar. 29, 2006).

> degree associated with formal arrest. Custody does not occur until police, by some form of physical force or show of authority, have restrained the liberty of an individual. The test is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave. Some of the factors that demonstrate a seizure or custody have occurred are the threatening presence of several officers, physical touching of the person, or use of a tone or language that might compel compliance with the request of the police.[60]

Decker argued he was in custody because he was not free to leave due to his injuries. On appeal, Decker claimed the paramedics were state actors, but failed to raise that issue in the trial court. The Court of Appeals chose not to review the lower court's finding due to the lack of preservation and upheld the admission of his statement.

On a separate issue, Decker argued that he could not have engaged in wanton conduct by not having the two children properly secured because "under the version of KRS 189.125 in effect at the time of the accident, the failure to use a child passenger restraint system or a child booster seat could not be considered contributory negligence nor be admissible as evidence in a civil trial. He also relied on Com. v. Mitchell, wherein the Kentucky Supreme Court held that the failure to secure an infant in the proper child restraint system is insufficient to prove recklessness, a lesser level of *mens rea* than wantonness.[61] The Mitchell court, however, did not suggest that failure to secure a child in the proper restraint system could never be used as evidence of criminal *mens rea*. It simply stated that such evidence was insufficient when standing alone without any other evidence. No evidence was introduced indicating that Decker's failure to restrain the children properly was sufficient evidence, on its own, to support a finding of wantonness. It was a piece of evidence to be considered in conjunction with all the other evidence of Decker's impairment and his erratic and dangerous driving.

The Court of Appeals affirmed Decker's convictions.

Brooks v. Com., 2019 WL 1422704 (Ky. App. 2019)

FACTS: Brooks (age 19) was under investigation for a sexual relationship with a 13-year- old girl in Hardin County. Det. Washer (KSP) went to his home to talk to him and asked him to come to the post for an interview. Brooks was willing but needed a ride; he was given a ride by Det. Washer in the back of his cruiser. Brooks was unrestrained and not questioned during the ride. Upon arrival at the post, Brooks exited the cruiser on his own. At the post, he was shown to an interview room, where Washer "kept a comfortable conversational distance" from Brooks. Det. Washer began to give him Miranda but realized the warnings were unnecessary so he did not complete them. Brooks agreed to a conversation.

Det. Washer told Brooks he just needed the truth and that he did not plan on making an arrest that day. Ultimately, Brooks confessed and Washer took him home. Washer presented the case to the

[60] Com. v. Lucas, 195 S.W.3d 403 (Ky. 2006).
[61] 41 S.W.3d 434 (Ky. 2001),

grand jury and an indictment was returned charging Brooks with rape. Brooks was convicted and appealed.

ISSUE: Is a willing interview which takes place in an interview room a custodial interview?

HOLDING: No.

DISCUSSION: Brooks argued that he was improperly interrogated. Washer agreed he did not give complete warnings, but the Court noted, Miranda is only required when the suspect is being interrogated AND is in custody.[62] In cases with no actual arrest, it is necessary to assess whether "there was a restraint on freedom of movement to the degree associated with a formal arrest."[63] Cases have fleshed out this matter over the years. In this case, the Court found no coercion in the situation. Being directed where to sit in the interview room, was to be expected as an instruction given to anyone unfamiliar with any particular room. He was not told he was free to leave, but that is "not conclusive as it is just a factor." Being told he "needed to tell the truth" was also not "inherently coercive" either. Giving partial warnings also does not convert the matter into custodial.

The Court noted that "while Brooks now regrets the words he spoke, there is no evidence they were spoken while in custody." The Court affirmed his conviction.

Galloway v. Com., 2019 WL 1313149 (Ky. App. 2019)

FACTS: Galloway lived in Bowling Green with his girlfriend, L.S., and her two children. She began a job at the same place, and the same shift, as Galloway. During that shift, he became angry, suspecting her of flirting. On the way home, he struck her in the face, then forced her to drive to a secluded area where he sodomized and raped her. On the way home, he threatened her and her children if she moved and at the apartment, raped and threatened her again with a knife. As she was injured, Galloway agreed to take L.S. for medical treatment if she would tell the police she had been injured in a robbery, and he staged events to appear to be a robbery. L.S., however, was able to give a note to admissions personnel and police were summoned.

Det. Myrick (Bowling Green PD) interviewed Galloway at the hospital and he described the robbery. Myrick excused himself and then told Galloway he knew that Galloway was lying. Galloway was arrested and given Miranda. He was charged with rape, sodomy and related charges and appealed. Ultimately one of the minor charges was overturned, but the remaining and more serious charges were upheld. He filed a collateral attack on the conviction, arguing that the statements prior to Miranda should be suppressed, and other issues. The trial court denied the collateral attack on the conviction, and Galloway appealed.

ISSUE: Does Miranda only prevent the admission of testimonial self-incrimination?

HOLDING: Yes.

[62] Thomas v Keohane, 516 U.S. 99 (1995).
[63] California v. Beheler, 463 U.S. 1121 (1983); Oregon v. Mathiason, 429 U.S. 492 (1977).

DISCUSSION: The Court declined to determine whether Galloway was in custody prior to his arrest but noted that Miranda only prevents the admission of testimonial self-incrimination. In this case, Galloway "repeatedly informed" the detective of his innocence and he made no incriminating statements during that time.

The Court also noted that the SANE nurses are recognized as a "distinct professional nursing certification" and the one involved in the case was an extremely experienced one, and was well qualified to testify without a Daubert evaluation.

Galloway's conviction was affirmed.

Merida v. Com., 2019 WL 2713050 (Ky. App. 2019)

FACTS: In 2014, Merida was incarcerated in Florida. He was interviewed by Agent Nguyen (FBI) and allegedly promised that if he confessed to multiple robberies in three states (including two in Kentucky), it would be consolidated into a single federal case. As such, he confessed in a recorded statement, although he claimed he actually did not commit the Kentucky crimes. Merida was charged in Kentucky, and he argued that the confession was involuntary. The agent was not called to testify but did later give testimony in a related proceeding. The issue of voluntariness was deferred until the morning of the trial. On that date, in 2017, Agent Nguyen testified that he was told Merida wanted to speak to investigators by jail authorities. A note was provided which detailed "robberies in three states and their locations." Merida was given Miranda[64] before he gave the statement. The agent testified there had been an earlier interrogation which was stopped when Merida asked for counsel. He stated he made no promises and there had been no discussion about bond. He became aware of the Kentucky robberies only a few days before the later interview.

The trial court concluded that it was proper for Merida to waive his previously invoked right to counsel, under Moran v. Burbine as he did so before an adversarial proceeding.[65] The question, the Court agreed, was whether Merida initiated the second interview and ruled that he had, and that nothing in what was provided suggested any deal. The trial court denied the motion and he was convicted. (He pled guilty to a second charge). He then appealed.

ISSUE: May a person waive their invocation of their right to counsel?

HOLDING: Yes

DISCUSSION: The Court agreed that by his note, Merida initiated the second interview and was properly given Miranda. He was a young man of seemingly normal intelligence and he was "voluntarily, knowingly telling his story." Although he alleged that promises were made, the trial court found that Nguyen was more credible on the issue, which was its prerogative.

Merida's convictions were affirmed.

[64] Terry v. Ohio, 392 U.S. 1 (1967).
[65] 475 U.S. 412 (1986); See also Oregon v. Bradshaw, 462 U.S. 1039 (1983).

Walker v. Com., 2019 WL 2462806 (Ky. 2019)

FACTS: George Walker lived with his brother, Chris and sister-in-law, Allison, in Adairville. On December 21, 2015, Chris called the Sheriff's Office to report Allison missing and she remained missing through the next day. During the investigation, they interviewed George at the residence and though he was told he was not under arrest, he was given Miranda. He was told several time he was under "no obligation" to continue the interview. Although he expressed uncertainly about talking to the deputies, he continued to engage in conversation and ask questions of the deputies. Ultimately, he agreed to walk down to the river and there, Allison's body was found. While still on scene, George admitted to the murder. He was arrested and again given Miranda, which he waived and he then repeated the confession. Twice more, he was given Miranda.

George Walker was indicted for Murder. At the trial, the Commonwealth played bodycam footage, during which the officer asked Walker if he would take a polygraph. It was agreed that was inadvertent and unintentional – and they had intended to redact that portion. The answer was muted so the jury did not know if he agreed to do so or not. The trial court provided an admonition, after consulting with both sides.

Walker was convicted and appealed.

ISSUE: Is Miranda only required when an adult is in custody?

HOLDING: Yes

DISCUSSION: Among other issues, Walker argued his confession should have been suppressed as a violation of Miranda.[66] In this case, the Court agreed that he was not in custody and was told multiple times he was not in custody and did not have to talk to the deputy. In fact, he wasn't the primary suspect initially, as the deputies supposed his brother. And "although he may now regret it, [Walker] made the voluntary decision to talk with police." The Court noted that giving Miranda, when not required, does not convert it to a custodial interview either as the Court did not want to punish officers for providing the rights. The Court agreed the polygraph mention was inadvertent and harmless error.

The Court upheld his conviction.

Ball v. Com., 2019 WL 5617798 (Ky. 2019)

FACTS: On October 30, 2015, Ball and Matthews committed an armed robbery at a Louisville convenience store. Ball shot an employee in the process. The police released a media release depicting the truck used. The truck belonged to Ball, who apparently reported it stolen. Both men were arrested and questioned. Both men were charged with the robbery and related offenses, with Ball having an additional charge of attempted murder. Ball's motion for suppression was denied. Both were convicted and Ball appealed.

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

ISSUE: Must a suspect be immediate advised of Miranda rights upon arrest?

HOLDING: No.

DISCUSSION: Ball argued that during his interrogation, "officers 'primed' him prior to his interrogation and impliedly threatened harm to Ball and his family." The Kentucky Supreme Court found no evidence supporting Ball's argument. Specifically, the Supreme Court noted "[t]he tone, tenor, and content of his extended and extensive statement to the police belie[d] his assertion of coercion."

The Supreme Court emphasized:

> Ball first points out that he was not immediately Mirandized upon arrest. However, the law does not require that a suspect be Mirandized prior to or immediately after arrest; it only requires that the suspect be Mirandized prior to a custodial interrogation. At Ball's suppression hearing, he testified that he was Mirandized before being transported to LMPD and was reread those rights after he arrived at LMPD. He does not argue to this Court that a custodial interrogation took place prior to either Miranda warning being given. Furthermore, the Commonwealth did not seek to introduce at trial any statements made prior to the formal interrogation at LMPD. Nevertheless, Ball argues that, prior to being formally interrogated at the police department, the detectives "primed" him for interrogation by threatening the safety of his parents.
>
> Ball discussed this allegedly coercive conversation at his suppression hearing. He testified that Detective Smith Mirandized him at some point after his arrest but prior to being transported to LMPD offices. According to Ball's testimony, he verbally acknowledged his Miranda rights and said that he wanted a lawyer and wished to remain silent, at which point Detective Smith stated his belief that Ball had hidden evidence at his parents' home in Palmyra, Indiana and SWAT might have to execute a search warrant there. Ball testified that Detective Smith told him that the SWAT team responsible for executing that warrant would be "going in blind" and did not know how many guns or people were on the property, so "if anything bad happened," it would be Ball's fault. He also testified that Detective Smith asked Ball if his father owned any weapons. According to Ball, he responded that his dad had two guns, probably for hunting varmints, and Detective Smith asked whether there would be a shootout with Ball's father. Ball claimed that he took these statements as a threat and felt compelled to sign a written waiver of his rights once he arrived at LMPD.

The detective did not recall his exact conversation, but believed it was general small talk. Although there was talk of not needing a confession, that was consist with the detectives already having linked him to the crime. Ball admitted that he thought evidence might have been hidden there, but any such references were to ensure there would not be a problem if they did have to search that property. (Most of this took place after he confessed). The Supreme Court of Kentucky opined that where there is conflict in the evidence, it is up to the finder of fact to evaluate the credibility of the evidence.

The Supreme Court further determined that some statements Ball characterized as threats were instead statements of fact, even if these statements indicated an unpleasant consequence. Indicating that Ball's parents' home might be searched was an accurate representation of what steps the detectives could take under the circumstances. The Court also agreed that despite the fact LMPD apparently had a policy of no more than two interrogators, and that three interrogators were apparently present part of the time, this fact was not enough for coercion based upon the facts of the case. The presence of the third interrogation was insufficient to constitute a violation of KRS 422.110, the anti-sweating statute.

The Court affirmed his convictions.

Vincent v. Com., 584 S.W.3d 762 (Ky. App. 2019)

FACTS: Vincent was charged with three counts of sodomy on a child under 12. The Commonwealth relied on the testimony of the child victim and Vincent's admissions. Vincent's admissions were introduced by Det. Bingham (Radcliff PD). Through a series of four interviews, which went from denials to tacit admissions, Vincent admitted to committing oral sodomy on the victim. The defense focused on portraying Vincent as intellectually disabled and argued he was duped into a false confession. (He had been on SSI most of his life and stated he could not read or write.) Vincent testified about how he "freaked out" when they told him his DNA was on items – although that was a ruse – and that he simply adopted a "theory" of the case suggested by the detective.

Vincent was convicted and appealed. The Kentucky Supreme Court affirmed on direct appeal. Vincent's post-conviction motion filed pursuant to Criminal Rule 11.42 was denied. Vincent appealed to the Court of Appeals.

ISSUE: Does some degree of intellectual disability negate a confession?

HOLDING: No.

DISCUSSION: In Bailey v. Com., the Kentucky Supreme Court held "some police tactics similar to those at issue here were sufficiently coercive to overcome the will of a mentally-handicapped person, and thus warranted the suppression of his incriminating statements."[67] Vincent's counsel decided against medical testimony concerning Vincent's status and counsel had no doubt he was competent, although he worked hard to be disabled. Counsel did not want to open the door to the Commonwealth getting its own evaluation that might show he was malingering. Later experts disagreed as to the degree of his intellectual disability and noted discrepancies on mental test results. Vincent could drive, use a complicated telephone system to call his attorney, play bingo, and had no trouble giving his personal data – all of which family members said he could not do.

Finally, the Court of Appeals differentiated Vincent from Bailey, finding that Vincent was significantly more able than the defendant in Bailey and the Radcliff officers had no reason to doubt his abilities. They were not aware of Vincent's literacy issues until the third interview and his responses did not

[67] 194 S.W.3d 296 (Ky. 2006).

suggest an intellectual disability. Vincent actively objected to some of the things officers suggested, which indicated his will was not overborne.

The Court of Appeals affirmed the denial of the post-conviction motion.

Easterling v. Com., 580 S.W. 3d 496 (Ky. 2019)

FACTS: Seventeen-year-old Tristan Cole, having sustained three gunshot wounds, was found dead at a vacant house in the Deep Creek area in Mercer County the evening of April 13, 2016. Investigators quickly determined that Cole was last seen with then sixteen-year-old Easterling.

Easterling had recently been spending time at the home of Zachary Lay, a senior at the high school Easterling attended. Lay was a known drug dealer who usually kept a handgun in a safe for protection. Interested in helping protect Lay, Easterling obtained an AR-15 rifle from Cole and took it to Lay for potential purchase but Lay decided the gun was too expensive. Easterling then had the idea to steal the gun from Cole, even though Lay did not want him to. On April 12, Easterling obtained a ride from Lay's home to a Harrodsburg park. The driver, Jerrard Smith, witnessed Easterling going over to Cole's red truck. Shortly afterward, Travis Stephens observed the red truck in his driveway on Deep Creek. Two other witnesses also saw Easterling in the passenger seat of the truck around the same time. Soon afterward, Easterling called and asked Lay to pick him up at Deep Creek Baptist Church. Lay took Smith with him to the church and they found Easterling in the cemetery area of the grounds. When Easterling got into Lay's vehicle, he handed Lay his own handgun from the safe. Easterling told Lay he had smashed a rock in Cole's face and shot him three times. Easterling's hand had blood on it and he showed Lay and Smith that he had taken Cole's wallet. He said he had killed Cole in order to protect Lay.

The Kentucky State Police, with the assistance of the Mercer County Sheriff's Department, investigated the homicide. On April 14, 2016, a detective and a deputy interviewed Easterling at the sheriff's department with his mother present. Easterling confessed he shot Cole three times, but the confession was later suppressed because the officers did not read Easterling his Miranda rights prior to questioning him. Upon hearing her son's confession, Easterling's mother terminated the interview by asking for an attorney. Easterling's grandfather then joined Easterling and his mother in the interview room and Easterling, in response to a question from his grandfather, again acknowledged that he had killed Cole.

Easterling was tried for murder and first-degree robbery. After hearing from numerous witnesses, the jury found Easterling guilty of murder but acquitted him of the robbery charge. Easterling appealed to the Kentucky Supreme Court.

ISSUE: 1. Must a juvenile be advised of Miranda prior to any custodial interview?

2. Is a videotaped statement made by a juvenile to family members in the interrogation room after the juvenile invoked the right to counsel inadmissible as eavesdropping?

3. May evidence collected by a recording made in a jail be used?

HOLDING: 1. Yes.

2. No, if no reasonable expectation of privacy exists.
3. Yes.

DISCUSSION: Easterling argued that that a videotaped statement he made to his mother and grandfather in the interrogation room after requesting counsel should have been suppressed because they did not know that the conversation was being recorded. Easterling argued that the recording violated KRS 526.020 and that the interrogation that was suppressed led to the statement in question.

KRS 526.020 creates a felony for eavesdropping. None of the parties inside the room knew they were being recorded, and there was no signage in the room that indicated such. No waivers were executed. The Commonwealth argued that, under Beach v. Com., the exclusionary rule applies to constitutional errors, not statutory violations, and that the video clip was still admissible.[68] Under Beach, "evidence obtained in violation of a state statute will not be excluded unless it involves a violation of constitutional rights or the legislature mandates exclusion." The Supreme Court noted that nothing in the statute mandated exclusion.

> The trial court's written order made findings that the defendant was in custody in a police station, charged with a crime. He was sitting in an interrogation room with officers in the area, and a camera/microphone was visible on the wall near the room's ceiling. The trial court concluded that Easterling could not have had an expectation of privacy under these circumstances and that little or no significant difference exists between his conversation with his family and a typical "jail house" conversation.

The Supreme Court further examined this situation under the Fourth Amendment. While nothing in Kentucky had addressed the issue of an expectation of privacy in such rooms, the Supreme Court looked to the line of cases under Katz v. U.S.[69] The trial court concluded there was no reasonable and objective expectation of privacy in this interrogation room. Other courts have addressed the issue and noted that "in prison, official surveillance has traditionally been the order of the day." As far back as Lanza v. State of New York,[70] the United States Supreme Court held that jail visiting-room conversations are not protected. The Kentucky Supreme Court held that "Easterling's Fourth Amendment rights were not violated when his conversation with family members in the interrogation room was videotaped and a portion of that tape was later introduced at trial."

Easterling also argued that his statement to his grandfather was the fruit of the poisonous tree and that if he had not been arrested pursuant to the suppressed confession, he would not have made the statement. The Supreme Court looked to a potential attenuated connection occurs: "when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance."[71]

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[68] 927 S.W.2d 826 (Ky. 1996).
[69] 389 U.S. 347 (1967)
[70] 370 U.S. 139 (1962)
[71] Utah v. Strieff, 136 S. Ct. 2056 (2016).

> Under the exploitation analysis, we consider whether the police exploited one event, Easterling's unlawful confession, to achieve a second event, Easterling's incriminating statement to his family. Or stated another way, we consider whether the government has established a break in the illegal action and the evidence subsequently obtained. The Commonwealth argues that the break or the intervening circumstance occurred when Easterling's mother terminated the police interview.

The Supreme Court held that there was a change of circumstances, not a "purposeful police action." Easterling was answering a family member's question when he made the statement. Thus, "the statement to the detective did not provide "a lead 'to Easterling's unanticipated and yet-to-be-made incriminating statement to his family.'" "There was attenuation between the events which dissipated the taint of the illegally obtained confession."

Easterling's conviction was affirmed.

RIGHT TO COUNSEL

Buemi v. Com., 2019 WL 4732548 (Ky. App. 2019)(DR Pending 12/3/2019)

FACTS: Buemi was under investigation by Newport police for several burglaries. Officer Gabbard interviewed Buemi, who denied any involvement in the burglaries. Buemi was indicted and his recorded interview was played at trial. Since Buemi invoked his right to an attorney during the interview, the recording was to be stopped before the invocation of counsel, but the Commonwealth was "not entirely sure where that point is in the recording." As a result, the jury heard the invocation before the recording was shut off. A few minutes later, Officer Gabbard responded to questions about what he asked Buemi during the interview and twice stated that "Buemi had asked for an attorney before he could ask that question."

The jury was allowed to listen to the recording again, during deliberations, but only in open court and the recording was stopped before Buemi's request for counsel.

Buemi was convicted and appealed.

ISSUES: 1. Is it unduly prejudicial to permit the jury to learn that a criminal defendant invoked the right to counsel?
2. Is the intent to commit an underlying crime presumed during a break-in?

HOLDING: 1. No.
2. Yes.

DISCUSSION: The Court of Appeals noted there were "only three fleeting, and apparently inadvertent, references were made to Buemi's invocation of his right to counsel. The fourth instance was cut off prior to completion of Buemi's request for an attorney and, thus, was too vague to be a true reference." The Court of Appeals held this was not enough to overturn the verdict. Buemi also argued that his conviction for one of the two burglaries was unsupported because he did not actually

commit any crime inside the premises even though he did break in. (He did, however, commit a theft at the other burglary, which was near in time and place to the first.) The appellate court determined that it was reasonable for the jury to believe that Buemi intended to commit a crime there, and for whatever reason, did not.

The Court affirmed the convictions.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – INVESTIGATIVE HEARSAY

Brewer v. Com., 2019 WL 5092606 (Ky. App. 2019)(Discretionary Review filed 11/13/2019)

FACTS: Before Brewer's trial in Perry County for the murder of Miller, the Commonwealth gave notice that it intended to introduce evidence that Brewer had previously entered Miller's home and assaulted Miller's caregiver. Dillon, the caregiver, lived with Brewer as his caregiver in the past, but had left due to Miller's abuse and moved to Ohio. Brewer eventually returned to Perry County where she moved in with Miller. Miller and Brewer lived on the same rural road and were essentially neighbors.

On the day of the murder, Brewer arrived at the Miller home and struck Dillon; Miller objected. Brewer shot Miller in the face and he subsequently died.

At trial, multiple witnesses testified. Sgt. Abner (KSP) was the lead investigator. Sgt. Abner found no evidence at the Miller home indicating that Brewer was the shooter. Later, Sgt. Abner found a bullet in the ceiling, obtained an arrest warrant for Brewer, and a search warrant for his home. Numerous guns were found at Brewer's home, but not the gun involved in the shooting. Another witness came forward to provide statements that Brewer had shared concerning the shooting.

Brewer was convicted of first-degree manslaughter and appealed.

ISSUE: Is investigative hearsay improper?

HOLDING: Yes.

DISCUSSION: Brewer objected to the introduction of the "prior bad acts" evidence committed against Dillon in the days before the shooting. The Court of Appeals held that the evidence was not introduced to show Brewer's propensity for violence, but instead to indicate why he went to Miller's house that night. In effect, this evidence provided context and showed motive.[72] Without that prior history being available to the jury, the jury would be "left to speculate as to why Brewer would randomly show up at the Victim's residence, with a gun, slap Dillon and shoot the Victim." The Court of Appeals agreed this evidence was properly introduced.

[72] Norton v. Com., 890 S.W.2d 632 (Ky. App. 1994) (quoting U.S. v. Masters, 622 F.2d 83 (4th Cir. 1980)).

The Court of Appeals also addressed the testimony of the three law enforcement officers. When each testified, the prosecutor "elicited him to repeat what his interviewee said." Brewer argued that was "both hearsay and improper bolstering" – but did not object at trial.

> KRE 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Generally, pursuant to KRE 802, hearsay is not admissible unless it falls within one of the exceptions found in KRE 803 through KRE 806. There is no exception for investigative hearsay.
>
> As the Supreme Court of Kentucky noted in Sanborn v. Com., investigative hearsay is:
>
> … a misnomer, an oxymoron. The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was information is then admissible, not to prove the facts told to the police officer, but only to prove why the police officer then acted as he did. It is admissible *only if* there is an issue about the police officer's action.[73]

The Court of Appeals held the trial court should have excluded the testimony, but since the testimony was not subject to an in-court objection or would have changed the result of the trial, the admission did not rise to the level of manifest injustice.

The Court of Appeals did caution against the future practice of allowing law enforcement officers to repeat what a testifying witness told them.[74]

Further, Brewer objected to the testimony of one officer who said "that nothing after his active investigation made him doubt his conclusion as to the suspect."[75] While this might have been reversible error, no objection was made at the time and did not lead to palpable error.

The Court affirmed Brewer's conviction.

TRIAL PROCEDURE / EVIDENCE – BOLSTERING

Smith v. Com., 2019 WL 5091996 (Ky. App. 2019)

FACTS: Smith was involved in a violent attack on his girlfriend, Kinney, who already had obtained a DVO against him. Smith was charged with second-degree assault and related offenses. At trial, after procedural issues concerning his desire to proceed *pro se*, his competency to stand trial, and the testimony of Police Chief Grogan (Hickman PD), Smith were addressed, Smith was convicted and subsequently appealed.

ISSUE: Is bolstering another witness's testimony improper?

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[73] 754 S.W.2d 534 (Ky. 1988); *see also* Burchett v. Com., 314 S.W.3d 756 (Ky. App. 2010).
[74] Bussey v. Com., 797 S.W.2d 483 (Ky. 1990).
[75] Tamme v. Com., 973 S.W.2d 13 (Ky. 1998) ("[A] witness generally cannot testify to conclusions of law.").

HOLDING: Yes.

DISCUSSION: Among other issues, Smith argued "that Chief Grogan vouched for and bolstered Kinney's testimony by attempting to testify that some of her injuries were consistent with strangulation." The Court agreed that "at most, his causation testimony indirectly supported Kinney's testimony." The trial court had "strongly admonished the jury to disregard Grogan's causation testimony" and the Commonwealth presented other substantial evidence concerning Kinney's injuries.

The Court of Appeals affirmed the conviction but did overturn the trial court's imposition of fines.

Agan v. Com., 2019 WL 5854033 (Ky. App. 2019)

FACTS: Agan was indicted of trafficking in a controlled substance for allegedly selling cocaine to a CI. During trial, Det. Wilmore testified about the reliability of the CI and stated that he used the CI before and the CI had been reliable. Agan was convicted and appealed.

ISSUE: Is bolstering another witness's testimony improper?

HOLDING: Yes.

DISCUSSION: Agan contended that Det. Wilmore's testimony improperly bolstered the testimony of the CI.[76] The Court of Appeals agreed that the testimony was improper and inadmissible under Fairrow and 404(a). Because the jury was given overwhelming evidence of Agan's guilt even without that specific testimony, the error was harmless.

The conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – EVIDENCE

Edwards v. Com., 2019 WL 2462783 (Ky. App. 2019)

FACTS: On April 20, 2016, Edwards entered a Holiday Inn in Richwood. He was surprised to find a female clerk, but told her to hand over the money. She gave him all the cash and told him she could not open the safe. He took the money and fled;she called police. A few hours later, Edwards was at the nearby Belterra Resort in Indiana and lost money at blackjack. He then left. An hour later, he returned with a roll of cash which he again lost. He left again at 5:57 a.m. From there, he went to a Waffle House in Walton, which he again robbed. (He made the servers believe he had a weapon.) This time, the store manager, Hudson, was arriving and when he learned the vehicle leaving had just committed a robbery, he followed, the same time calling police. Hudson stopped following when the police caught up with him. KSP then pursued Edwards on I-75 but due to safety concerns in the morning traffic, that ended. They were able to identify that the vehicle was owned

[76] Fairrow v. Com., 175 S.W.3d 601 (Ky. 2005).

by a couple away on their honeymoon. When they were "face-timed" and a photo shown of the robber from surveillance video, they identified the man as Edwards, with whom they had entrusted the vehicle.

Dets Dickhaus and Faulkner (Florence PD) went to Edwards' mother's home in Ohio, having already learned that Edwards was wanted on an Indiana warrant. They made arrangements to have Edwards arrested on that warrant with local law enforcement. After the arrest, they went into talk to him about the Kentucky robberies and he spoke briefly before invoking his right to silence. The detectives, however, continued speaking to him. He admitted the crimes but denied using force. He also admitted to gambling at Belterra. They recovered a shirt and cash. They also obtained video of Edwards gambling at the casino.

Edwards was indicted for two counts of Robbery and Fleeing and Evading. Following the indictment, he moved to suppress his statements, and the court agreed he was in custody and had already invoked when he made the statements. The Court suppressed his confession and the items seized after that time. At the trial, Edwards learned they intended to introduce the Belterra video, which the Commonwealth maintained was admissible under the inevitable discovery rule. In an in camera hearing, Det. Faulkner testified that they would have found it anyway, because of "good police work" and Edwards connection to gambling. He would have requested the information from the Gaming Commission and would have found it regardless of what Edwards told him. The video was played at trial.

Edwards testified that he used no threats against the women as he knew the clerks were trained to "not resist such demands" – and that he simply asked for the money.

Edwards was convicted of all charges and appealed.

ISSUE: May evidence that would have inevitably been found be admitted, even if the process in getting the information was flawed?

HOLDING: Yes

DISCUSSION: Edward argued the video should have been suppressed. The Court looked to Miranda v. Arizona and Bartley v. Com. [77], and agreed that questioning must cease after an invocation and that statements made after that must be suppressed. Further, in Dye v. Com., the Court also said that the rule "applies to evidence obtained directly from violations of Miranda as well as evidence that is tainted or fruit of the poisonous tree."[78] However, it also held that the doctrine, "is subject to the same limiting principles as its counterparts in the Fourth and Sixth Amendments – the independent-source, inevitable discovery, and dissipation-of-taint-doctrines." In the inevitable discovery rule, such evidence may be admitted if it could be shown that the "same evidence would have been inevitably discovered by lawful means.[79] In effect, it places officers in the same footing

[77] 445 S.W. 3d 1 (Ky. 2014).
[78] 411 S.W.3d 227 (Ky. 2013).
[79] Hughes v. Com., 87 S.W.3d 850 (Ky. 2002).

that they would have without the statement. The trial court agreed that the video would have been located absent the statement.

The Court agreed that given the knowledge the detectives had of Edwards prior to questioning him, it was logical to believe gambling was behind the robberies and Belterra was the logical gambling venue. As such, the Court agreed the evidence was property admitted. With respect to other arguments, the Court noted that the implication that he would use, at the least, physical force to back up his demands for money and that at the Waffle House, at least, he had announced "this is a robbery," while suggesting with his hands in his pockets that he had a gun.

The Court affirmed his convictions.

Reynolds v. Com., 2019 WL 1422702 (Ky. App. 2019) (DR Filed 5/1/2019).

FACTS: During an unrelated interaction, Reynolds was arrested by LMPD. Two baggies of narcotics were found in his "general vicinity" and he was charged with numerous offenses. Pursuant to KSP protocol, which dictated the higher weight and highest penalty bag would be tested first, only one baggie was tested and found to contain a mixture of heroin, cocaine and methamphetamine. Reynold objected to any mention of the second bag, but the Court allowed testimony by an officer who stated he believed the second bag contained methamphetamine because of its texture. He also tested the amount was inconsistent with personal use.

Reynolds was convicted of numerous offenses and appealed only his conviction for trafficking in methamphetamine.

ISSUE: Is a Daubert hearing always required for an officer to testify about drugs?

HOLDING: No.

DISCUSISON: Reynolds argued at the officer, to testify with respect to the contents of the baggie, should have been qualified as an expert after a Daubert[80] hearing. The Court looked at the issue as procedural and noted that Reynolds never specifically asked for a Daubert hearing, although the Commonwealth had indicated it would call an expert prior to the trial. The Court held that the officer's testimony was "expert" in that a juror would be unlikely to be able to identify the substance by sight. However, the officer's testimony was based on his personal observation, training, and experience rather than any scientific knowledge. The Court held that a Daubert hearing was not required and that the officer's experience as sufficient to be an expert for purposes of this case.

The Court affirmed the conviction.

[80] 509 U.S. 579 (1993).

TRIAL PROCEDURE / EVIDENCE – DOUBLE JEOPARDY

Bishop v. Com., 2019 WL 103924 (Ky. App. 2019)

FACTS: On March 26, 2016, Deputy Thomas (Fulton County SO) spotted Bishop driving with two children in the vehicle. He knew Bishop lacked a valid OL and attempted a traffic stop. Bishop sped off. Thomas clocked Bishop at 93 in a 35 MPH zone, with Bishop also driving erratically and violating other traffic laws. Deputy Thomas contacted other officers in the area, who also attempted blocking maneuvers, with no success. Bishop eluded law enforcement. Bishop ultimately turned up at a relative's house. While he denied being the driver, he was arrested. During the arrest, Bishop threatened Deputy Thomas. The vehicle was located at an apartment complex in Hickman. During a subsequent search, a wallet that contained Bishop's identification was found. The vehicle belonged to his mother.

Bishop was indicted on numerous charges, including speeding, fleeing and evading and wanton endangerment. Bishop was convicted of most of the charges and appealed.

ISSUE: Do convictions for both Speeding and Wanton Endangerment constitute Double Jeopardy?

HOLDING: Yes.

DISCUSSION: Among other issues, Bishop argued that his convictions for both speeding and wanton endangerment constituted Double Jeopardy. The Court looked to the instructions and noted that "the instructions for each offense must contain an element 'which the other does not.'"[81] In this case, everything in the speeding instruction was duplicated in the wanton endangerment instruction, with the added element of "extreme indifference to the value of human life." In effect, the wanton endangerment charge goes "one step farther." The Court held that it was improper to convict on both on charges, and vacated the lesser of the two offenses – in this case speeding.

On an unrelated note, Bishop argued that service on one of his desired witnesses was improper because the subpoena was given to his mother and no personally served on the witness. The witness was over 18 at the time. The witness had communicated to the court that he did not wish to be involved. The Court questioned the trial judge's ex parte contact with the witness's father, but agreed that the witness, Smith, was not under subpoena as he was not properly served.

The Court vacated the speeding conviction but affirmed the remaining convictions.

[81] Com. v. Burge, 947 S.W. 2d 805 (Ky. 1996); Blockburger v. U.S., 284 U.S. 299 (1932).

TRIAL PROCEDURE / EVIDENCE – CONTEMPT

Stone v. Beagle, 20198 WL 413609 (Ky. App. 2019)

FACTS: In October 2017, Stone appeared at an EPO hearing taken out by his ex-girlfriend, Beagle, in Harrison County. The Court issued the DVO and also found him in contempt of the EPO for contact he made with Beagle in the courtroom prior to the hearing. After the hearing, Officer Lane (a CSO, apparently) escorted Beagle to a car and reported that he saw Stone outside, shouting expletives and threats to Beagle. Stone was further charged. At the subsequent hearing, Beagle testified she didn't hear anything but the Court found Lane credible and found Stone in contempt, sentencing him to six months. Stone appealed.

ISSUE: Is indirect criminal contempt essentially a summary decision by the trial court?

HOLDING: Yes.

DISCUSISON: The Court noted that trial courts have "broad authority when exercising its contempt powers" and the review of such cases was limited. In this case, the Court agreed that "indirect criminal contempt is committed outside the presence of the court and requires a hearing and the presentation of evidence."[82] The Court agreed that the "trial court was in the best position to weigh the evidence, and it simply found Lane's testimony to be more credible than the testimony offered by Stone."

The Court upheld the decision.

TRIAL PROCEDURE / EVIDENCE – HEARSAY

Wilson v. Com., 2019 WL 5861905 (Ky. App. 2019)

FACTS: Wilson was arrested for drug trafficking based, in part, on information from a CI in Russell County. Audio recordings of the transaction were introduced at trial. The CI intended to buy drugs from another individual, but was directed to Williams. The CI and Williams drove to Wilson's home, where Williams made the transaction, out of the sight and hearing of the CI.

Wilson was convicted and appealed.

ISSUE: Is hearsay admissible?

HOLDING: No.

DISCUSSION: The Court of Appeals noted that:

> Review of the recordings discloses three distinct types of statements. First, the recordings contain the voice of Officer Hoover at the beginning and end of each recording. In fact,

[82] Com. v. Burge, supra.

> Officer Hoover, who had observed the transactions from afar, specifically states at the end of the first recording that the informant had gone to appellant's home to make the drug purchase. Second, the recordings contain conversations between the informant and Mr. Williams discussing the drug buys at appellant's home, drug buys in the future, the use of drugs in general, and, at times when she's alone, the informant's own commentary about what is taking place. Third, the recordings contain Mr. Williams' statements about what was occurring, plans for future drug transactions, and who they were dealing with.

The Court of Appeals noted that audio recordings are admissible when introduced for "non-hearsay purposes and is evidence of the event as it occurred." In this case, the majority of the recording was not of the crime itself and as such, was hearsay. Because of the way it was introduced, with the CI stating she did not remember what had occurred because she was high at the time. Williams testified he had no direct contact with Wilson but made the transaction through Wilson's girlfriend.

The officer's statements on the recording were consistent with his testimony and are hearsay. The CI's forgetfulness, which was not apparently hostile but was not inquired upon in detail, was also inadmissible provided that was the case. Finally, Williams' statements on the recording were inconsistent with his trial testimony, and thus could be admissible under KRE 801A(a)(1). No foundation had been laid for this evidence as required but instead.

The Court of Appeals held that the recordings were impermissibly introduced as evidence and reversed Wilson's conviction.

Shirley v. Com., 2019 WL 2713148 (Ky. App. 2019)

FACTS: Shirley was accused of sexual abuse in Barren County, the victim being his girlfriend's 8 year old daughter. At trial witnesses, the child's grandmother and two aunts, repeated statements the child had made about what had occurred, which included physical abuse Shirley had committed her mother as well, which her mother denied. (The child had testified the day before, in a closed hearing.)

Shirley was convicted and appealed.

ISSUE: Are excited utterances admissible?

HOLDING: Yes

DISCUSSION: Shirley argued that the child's statements, as repeated by the adult witnesses, constituted hearsay. The Court agreed that the statements were hearsay, the question remaining whether they were excited utterances, an exception under the rule and thus admissible under KRE 803(2). The Court looked to the spontaneity of the statements, coming close in time to the alleged abuse, tended to suggest no fabrication or coaching. The testimony indicated the child was "excited, scared and even panicked." The statements were made at the scene, and the child was not responding to a question. The criteria for assessing such statements were almost completely in favor of finding the statements to be excited utterances.

The Court affirmed the conviction.

Ford v. Com., 2019 WL 1872106 (Ky. App. 2019)

FACTS: Ford was convicted in 2012 of murdering her husband, David, in Taylor County. Among other evidence at trial, cell phone evidence was provided that indicated that Ford was in close proximity to the murder scene at the time, refuting her claim that she was not. Det. Slinker (KSP) engaged a technician to create a map of incoming and outgoing cellphone calls which further illustrated her movements that evening.

Ford was convicted and appealed. After her direct appeals failed, she brought an 11.42 motion alleging ineffective assistance of counsel.

ISSUE: Is hearsay questionable?

HOLDING: Yes

DISCUSSION: The Court noted that although her brief was improper, it would address the substantive issues. First, the Court addressed the claim whether the detective "improperly testified to expert matters without demonstrating qualifications as an expert, and used maps that had not been disclosed to the defense." The defense had not retained its own expert due to financial considerations, which was improper, but the Court agreed that did not affect the ultimate outcome of the trial. The Court noted that after the trial, Ford gave an alternative statement that she was, in fact, near the scene looking at a rental house. Any expert testimony would have been fruitless in the face of her actual confession to her mother, as well. With respect to the possible Brady violation, by failing to disclose the maps, and in particular, who actually created them, a third party, the court noted that the cell phone technician, a different person, did testify, and his testimony was generally consistent with the preliminary work that had been done by the third party, who generally gave his opinion to the detective. The Court found no reason to believe that individual's identity was material to the case. The Court also agreed that failure to object to the detective's characterization of handwriting found on the note as "disguised" was immaterial as well.

The Court upheld her conviction.

Chapman v. Com., 2019 WL 103926 (Ky. App. 2019)(DR Filed 5/15/2019)

FACTS: Chapman was tried for the stabbing assault of another individual in Jefferson County. At trial, he argued self-defense. The detective who investigated the matter testified that he did not believe, given the facts, that Chapman acted in self-defense. After several questions, the defense moved for a mistrial, arguing that the "testimony was improper because it went to the ultimate issue" in the case. The Court denied the request. Chapman was convicted and appealed.

ISSUE: Should a witness refrain from offering opinions on the stand?

HOLDING: Yes.

DISCUSSION: The Court noted that the trial court "immediately and thoroughly admonished the jury that [the detective] was not defining the law for them." In fact, given that Chapman had been charged, the detective "merely stated the obvious" that he believed self-defense was not a factor. The jury by their verdict, suggested they accepted that it was "imperfect self-defense" situation by not convicting him of attempted murder.

After resolving other trial related issues, the Court affirmed the judgement.

TRIAL PROCEDURE / EVIDENCE – CELL PHONE

Rivera-Rodrigues v. Com. 2019 WL 2462783 (Ky. 2019)

FACTS: Rivera-Rodrigues became the target in a Fayette County drug investigation. Mayberry, a CI, was working with KSP and made four buys from Rivera-Rodrigues. During the third buy, he talked to Mayberry about committing a murder for hire, related to drug trafficking, and even offered from a selection of firearms. Mayberry told his handler, who shared the information with Lexington, the FBI and the DEA and a fourth buy was planned.

On that same day, Lexington police responded to a 911 call where they found a blood-covered woman in a vehicle, sitting by the side of the road. A man, also bloody, Dominguez was in the vehicle, deceased. He had been shot several times. During the fourth buy, Rivera-Rodrigues told Mayberry about the murder also he said the victim was left in a truck, rather than the sedan in which the victims were found. He stated he "came up to the car shooting." Physical evidence in the vehicle included cocaine and a time-stamped receipt for scissors. Det. Buzzard (Lexington PD) found a bullet hole and shell casings.

Det. Upchurch (Lexington) interviewed Rivera-Rodrigues and he admitted having been at the store with his father-in-law, and making the purchase of the scissors. He was indicted for Murder and four counts of Trafficking 1st. At the trial, historical cell phone data was introduced through a technician, with testimony about the cell phone number used in the transaction. Maps were shows as well.

Rivera-Rodrigues was convicted of complicity to murder and trafficking. He appealed.

ISSUE: May cell phone location evidence be admitted in which the technician witness carefully explains the process?

HOLDING: Yes

DISCUSSION First, Rivera-Rodrigues argued that the technician should not have been allowed to testify as to the cell phone issues, as the report he produced pursuant to RCr 7.24 prior to trial did not contain the information to which he testified. The Commonwealth responded that the testimony was not opinion testimony. Further, during pre-trial proceedings, the defense had attempted to preclude some of the evidence, which suggested that they did, in fact, have much of

the information and anticipated what would be discussed at trial. The Court looked to Holbrook v. Com., in which the court had allowed similar testimony, in which the witness had carefully described the limits of the technology used to place the location of cell phone calls.[83] And like in Holbrook, the testimony in this case was "relevant and probative" and allowed the jury to place Rivera-Rodrigues near the scene of the murder.

He also objected to being required by police to provide his cell phone number before he was advised of Miranda. The trial court had found that "asking someone his cell phone number is a routine question."[84] The number he provided was not the number from which the cell phone testimony was provided, but his old number and a girlfriend's number. As such, whether it was a routine booking question is immaterial, but simply didn't relate to the evidence he wanted to suppress.

The Court affirmed his conviction.

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Abplanalp-Bryant v. Com., 2019 WL 328675 (Ky. App. 2019)

FACTS: Bryant and A.T., his sister, lived with their parents, 3 more sisters and 2 brothers. The Cabinet removed A.T. and two sisters from the home due to neglect. A.T. in particular, was "specifically targeted for mistreatment." While in the custody of her aunt, and during therapy, A.T. said that she had not been sexually abused. However, when moved to a residential treatment facility, A.T. disclosed she had been sexually abused by Bryant. That abuse included rape. Bryant was indicted on charges of Rape, Incest and Sexual Abuse. The Commonwealth filed notice under KRE 404 (c) that it intended to introduce "uncharged acts" of sexual abuse on A.T. and another sister. The Court allowed this evidence with respect to A.T. because "there were few cases in which an alleged pattern of abuse against the same victim was not presented to the jury." The evidence deemed admissible about the other sister was limited by the trial court, however. A local detective also testified as to his involvement with the family and Bryant's "access" to his sisters.

Ultimately, Bryant was only convicted of sexual abuse. He appealed.

ISSUE: May evidence of prior bad acts be admitted with limitations?

HOLDING: Yes.

DISCUSSION: Bryant argued he was unfairly prejudiced by the evidence of prior bad acts against both sisters. The Court held that with A.T., the evidence of uncharged crimes was admissible to show why she feared reporting the abuse, and that Bryant, despite his claims, was around her unsupervised. With respect to the other sister, the detective's testimony about situations in which she was the victim was relevant to impeach the testimony of their mother, who claimed she would always supervise and that the parents were not concerned with the well-being of their daughters. The Court agreed that the jury was properly instructed as to how to use the testimony provided.

[83] 525 S.W.3d 73 (Ky. 2017),
[84] Dixon v. Com., 149 S.W.3d 426 (Ky. 2004).

The Court agreed that the conviction was proper and affirmed the trial court's decision.

TRIAL PROCEDURE/EVIDENCE – RECORDINGS

Grimes v. Com., 2019 WL 3059969 (Ky. App. 2019)

FACTS: In 2016, Doreen Grimes ran a daycare out of her Hardin County residence. Her husband, Ronnie, was often present. On August 1, 2016, Grimes had one of the children, Jane, age 6, on his lap – he slid his hand into her panties and touched her vagina. Jane told her parents, who contacted Det. Priddy (Hardin County SO.) Det. Priddy interviewed Ronnie, who "closed off" with her. She elected to enlist the aid of a male officer, Det. Schoonover (KSP). Det. Schoonover invited Ronnie to submit to a polygraph examination. During the polygraph, Grimes first denied touching the child, but finally admitted that he "pinched" her there and "she liked it." Det. Priddy observed by video monitor.

Grimes was indicted for first-degree sexual abuse. At trial, the Commonwealth was permitted to introduce his admissions elicited after the polygraph. The child also testified, but Det. Schoonover did not. Grimes was convicted and appealed.

ISSUES:
1. Is an eight-year-old sexual abuse victim competent to testify as a witness?
2. May a recording of an interview with a suspect be used to provide context?

HOLDING:
1. Yes.
2. Yes.

DISCUSSION: Grimes argued it was improper to allow the child to testify (nearly 8 at the time of the trial) to testify as she was not "competent" due to her age. Under KRE 601(a) "age is not determinative of competency and there is no minimum age for testimonial capacity." The Court of Appeals held that the trial court had the discretion to determine if a child could testify. Grimes also argued it was improper to show the video of Det. Schoonover when he, himself, did not testify. Crawford v. Washington only applies to testimonial hearsay, not when material is introduced for other reasons.[85] In Turner v. Com., similar statements were declared to not be hearsay as the statements were not offered for truth, but to put the admissions into context.[86]

Finally, Grimes argued the admissions made after the polygraph were improper because his "will was overborne" when confronted about his failure on the polygraph. The Court of Appeals held that "incriminating statements made in circumstances surrounding a polygraph are nonetheless admissible.[87] Further, no evidence existed of any coercion.

The conviction was affirmed.

[85] 541 U.S. 36 (2004).
[86] 248 S.W.3d 543 (Ky. 2008).
[87] Com. v. Hall, 14 S.W.3d 30 (Ky. App. 1999); Powell v. Com., 994 S.W.2d 1 (Ky. App. 1997).

Roberts v. Com., 2019 WL 2067115 (Ky 2019)

FACTS: Roberts stood trial in Jefferson County, and ultimately was convicted of reckless homicide. He appealed based upon matters that occurred during the trial, unrelated to the facts of the case, relating to jury interactions with the bailiff (a deputy sheriff). Following the close of proof on December 18, 2017, and before sending jurors to deliberate, pursuant to RCr 9.68, the deputy sheriff bailiffing the court was sworn in. That evening, the juror asked to see the weapon used, and a written interchange occurred with the judge. Another note was sent out a few hours later suggesting they were deadlocked. Those notes were part of the court file. At some point, a verbal interchange occurred, concerning a desire to replay testimony, and the bailiff was told that jurors were to be reminded to put all requests in writing. It was unclear if they were ever allowed to do so, or if they were ever told to do so, as they has resolved the matter in question before the bailiff could do so.

At some point, defense counsel asked for a mistrial as the bailiff had revealed that the jury believed they were "hung." The matter went on the record and the bailiff testified.

ISSUE: Should requests from the jury be written down?

HOLDING: Yes

DISCUSSION: Roberts argued that jury "requests that were either never reduced to writing or if written, cannot be located. He takes the bailiff to task for not delivering to the trial court an unspecified number of written jury requests and argues all requests must be given to the trial court."[88] During a motion for a new trial hearing, The Court had said they were missing notes, but she had "read into the record each note received. There was apparently some discussion of a request for a TV, to replay testimony, but never reduced to writing.

The Court noted:

> Curiously, the bailiff was not called to testify during the new trial hearing. Thus, we do not know whether he received a written request for a television or to re-watch testimony. We do not know how he communicated with the jury, how many notes he received, nor how he handled them. We do not know whether he—of his own volition—told an individual juror or the jury as a whole no television would be brought to the jury room, but the entire panel could return to the courtroom and review Roberts' complete testimony as a group with everyone. Testimony from the bailiff would have avoided the speculation on which Roberts now relies. We will not assume the bailiff breached his sworn duty.

With respect to a mandate to write down all requests, the Court noted that "While creating a paper trail is wise, we are cited no authority mandating it. If a judge chooses to require all jury inquiries to be written, such a policy should be conveyed to the jury before it retires to deliberate. Roberts' jury was advised of such between being sworn and hearing opening statements." With respect to

[88] Young v. State Farm Mut. Auto. Ins. Co., 975 S.W.2d 98 (Ky. 1998) (jury requests should be "immediately conveyed to the trial judge. . . . Bailiffs are cautioned to follow the law and bring any question to the attention of the court.").

"Whether any testimony, or how much testimony, would be replayed was to be decided by the trial court, not the jury."

Further, the court had no issue with an allegation that a random juror, not the foreperson, communicated with the bailiff, finding nothing to so mandate in RCr 9.74. The Court found "no clear showing the bailiff influenced deliberations or failed to convey jury communications to the court."

The Court also addressed procedural issues but ultimately, affirmed Roberts' conviction.

WORKERS COMPENSATION

Kenton County Sheriff's Department v. Rodriguez, 2019 WL 2713075 (Ky. App. 2019) (Appeal to Kentucky Supreme Court filed August 2, 2019)

FACTS: Rodriguez was a deputy with the Kenton County Sheriff's Department (KCSD). In 2016, he suffered a physical injury and claimed workers' compensation. In the same claim, Rodriquez claimed he was diagnosed with PTSD and described various symptoms, including night terrors and insomnia, linked to "numerous incidents which occurred in the course of his employment as a SWAT first responder."[89]

The immediate injuries were stipulated and the parties agreed that Rodriguez stopped working due to a psychological claim and that he was earning less that his average weekly wage. After a hearing, the ALJ ruled in Rodriguez's favor considering the specific physical injuries, and found that Rodriguez had a disabling, work-related PTSD. The ALJ, however, concluded that Rodriguez did not suffer a psychological injury under Kentucky's worker's compensation law. On appeal to the Workers' Compensation Board, the Board held that PTSD might be compensable separately, vacated that part of the ruling, and remanded for further findings.[90] The KCSD appealed.

ISSUE: May PTSD be considered a work-related injury?

HOLDING: Yes.

DISCUSSION: On appeal, the Court of Appeals had to determine whether a compensable injury existed. In West, a "physical injury" in the "context of an alleged work-related psychological injury" is:

> An event that involves physical trauma may be viewed as a "physical injury" without regard to whether the harmful change that directly and proximately results is physical, psychological, psychiatric, or stress-related. But in instances where the harmful change is psychological, psychiatric, or stress-related, it must directly result from the physically traumatic event. We view an incident that is described as a "full-fledged fight" in which a

[89] These includes three shootings, a fatal car crash in which he was unable to rescue the driver, fire entries, burned children, his own serious car accidents, his K-9 being stabbed and exposure to infectious diseases.
[90] Lexington-Fayette Urban County Government v. West, 52 S.W. 3d 564 (Ky. 2001).

police officer and suspect are scuffling and rolling on the ground as an event that involves physical trauma, in other words, as a physically traumatic event.

KRS 342.0011(1) has no requirement that "each traumatic event in a series of such events must involve physical rather than mental trauma in order to authorize compensation for a resulting psychological psychiatric, or stress-related change, only that the harmful change must be 'the direct result of a physical injury.'" The statute permits the viability of a PTSD claim.

The Court of Appeals held that reconsideration of this issue before the ALJ is appropriate and provided specific guidance to the ALJ in making a determination if the PTSD is a compensable claim.

Benningfield v. Fields, 584 S.W.3d 731 (Ky. 2019)

FACTS: Fields suffered a work related injury while working for the Taylor County Jailer in 2009. He had two surgeries and was eventually declared permanently restricted in his work activities. Since no light duty work was available, Fields never returned to work. During his time off, he kept his employer up to date on his progress. During one conversation with the Jailer, Fields was told of the hardship his injury was causing to the agency and he was demoted from Sergeant to Deputy. When his medical excuse expired in 2010, Field's employment was terminated. Fields did not appeal it this action to the county.

Following his workers' compensation settlement in 2011, Fields filed suit in federal court. The district court granted summary judgment for the Jailer and for Taylor County on the alleged wrongful dismissal, but refused to rule on the state court issues. Fields filed suit in Taylor Circuit Court, alleging that Taylor County violated Kentucky law by "harassing, coercing, or discriminating against him for pursuing a workers' compensation claim" in violation of KRS 342.197. The Court of Appeals ruled against Fields and he further appealed.

ISSUE: 1. Does KRS 342.197 waive governmental immunity for governmental employers in their official capacities?

2. Can a governmental employer, in the individual capacity, assert qualified immunity in defense of a retaliation claim made pursuant to KRS 342.197?

HOLDING: 1. Yes.

2. Yes.

DISCUSSION: The only issue on appeal was Field's allegation that his employment was unlawfully terminated in retaliation for filing a workers' compensation under KRS 342.197.

The Supreme Court held that KRS 342.197 waived immunity for governmental entities, such as the Taylor County Fiscal Court. Through a complicated legal analysis, the Supreme Court concluded that it was not intended that government employees would be left without a recourse should they be wrongfully terminated for filing a workers' compensation claim. However, the waiver only applies to the actual employer, not others – which means, in Fields' case, only the Taylor County Fiscal Court and the Taylor County Jailer in office at the time of Field's termination in official capacities only.

The court held that Fields had at least shown that he met his initial burden in the case, which meant summary judgment was not appropriate for the Taylor County Fiscal Court and Benningfield in official capacities. The other individual defendants were, however, properly dismissed as they were not employers for purposes of the statute or were shielded by governmental immunity.

Calloway County Sheriff's Dept v. Woodall (Estate of Spillman), 2019 WL 2067115 (Ky. App. 2019)

FACTS: In March, 2007, Spillman was a deputy sheriff with the Calloway County when he was seriously injured in an automobile wreck. He received a permanent partial disability assessment and received weekly payments. He reopened his claim in 2013 due to a worsening of his medical condition and received a settlement which increased his benefits; that expired in July, 2016. He underwent back surgery in 2017 and died of a pulmonary embolism during surgery. . "It was uncontested that the surgery was attributable to Spillman's 2007 injuries."

Woodall (Spillman's spouse) filed for death benefits and to reopen the claim; the ALJ denied the claim. The Board affirmed that was time barred from lump sum benefits (with a four year limit) but reversed the denial of surviving spouse benefits and sent it back to the ALJ for recalculation.

CCSD then moved for reviewing, asking a reversal of the surviving spousal benefits, while Woodall cross-petitioned to find the four year limitation unconstitutional.

ISSUE: Do workers' compensation benefits differentiate between individual and spousal benefits?

HOLDING: Yes

DISCUSSION: The Court looked to KRS 342.750, which covered both types of benefits. The Court looked to Family Dollar v. Baytos, in which the injured employee had settled his claim a year before his death from the same work-related injuries.[91] In that case, the court noted that the correct way to approach such a situation is for the survivor to open a claim in their own right, not try to reopen the decedent's claim, which Woodall did. As such, the issue of the four year limitation was irrelevant. Further, there is no limit on Woodall's claim for periodic death benefits and the Board correctly awarded Woodall benefits.

The CCSD argued that Woodall could not receiving survivor benefits because the lump sum settlement had ended his regular payments. The Court noted that since the General Assembly had not yet amended the statute, after Baytos, it must be the legislature's intent to continue allowing such benefits.

With respect to the issue of the lump sum benefits specifically, the Court found she had not met the heavy burden of overturning a statute as unconstitutional. The Court agreed the four year limitation is intended to prevent stale claims, to provide stability to the system. It was rationally related to that intent and the limitations apply to all.

[91] 525 S.W.3d 65 (Ky. 2017).

The Court affirmed the decision of the Board.

OPEN RECORDS

Lexington – Fayette County Urban County Government v. Maharrey, 2019 WL 2712967 (Ky. App. 2019)

FACTS: On July 17, 2017, Maharrey, a freelance journalist, made a detailed request concerning eleven surveillance technologies in use by the Lexington Police Department. The Lexington Police Department provided information of body worn cameras, but denied that it possessed most of the other technologies. For one technology it did own, video and audio monitoring and/or recording technology, it denied the open records request pursuant to KRS 17.150(2)(b) and KRS 61.878(1)(m). Maharrey appealed to the Attorney General and the LFUCG stated that all nonexempt documents would be released. Eventually Lexington Police produced 467 pages, but redacted specifics on 29 cameras. It also withheld training manuals as a safety issue. LFUCG filed an appeal in Fayette Circuit Court of the OAG's decision.

The Fayette Circuit Court held that the LFUCG relied improperly on the exemptions and that "no exemption … would warrant nondisclosure of information under the ORA." The LFUCG appealed.

ISSUE: May information be withheld in open records if the information is not usable as a safety or similar issue?

HOLDING: No, but the circuit court must conduct an in camera review to address the safety concerns.

DISCUSSION: The LFUCG argued that releasing the information would jeopardize officers and informants and provide too much information to criminal targets. The Court of Appeals, however, found it hard to believe that any criminal target could readily make use of information when they would not even know what camera was being used. The Court of Appeals reversed and remanded the matter to the circuit court for further evidentiary proceedings.

Com. (KSP) v. Teague, 2019 WL 856756 (Ky. App. 2019)

FACTS: In 1995, Teague was abducted from a Henderson beach. Her body has never been found and no arrests have been made since that time. Starting in 2004, Teague's mother began making open records requests to KSP concerning its investigation into the crime. Over the years, those requests have been consistently denied. In 2016, Teague made the most recent request, seeing a variety of specific records, including 911 calls from the time of the abduction. KSP denied the request under KRS 17.150(2)(d), which exempts disclosure which would harm the investigation. KSP claimed the investigation was "still open, active and ongoing." Teague appealed the denial to the Attorney General, which upheld the denial. She appealed the case to the Henderson Circuit Court and it was transferred to the Franklin Circuit Court.

Franklin Circuit Court granted her leave to supplement her request, which was again denied by KSP. Ultimately all of the requested records were submitted to the court for in-camera review. The circuit court concluded that KSP failed to sustain its burden and required KSP to release the records. Teague amended her request, also demanding that KSP pay attorneys' fees and a fine for its willful withholding of the records. In 2018, the Court agreed and awarded Teague over $20,000 in related costs and fines. KSP appealed. The penalty was reduced but KSP further appealed.

ISSUE: Must a denial of a records request be based on some factual basis?

HOLDING: Yes.

DISCUSSION: The primary issue is whether KSP willfully withheld the records, which would justify fines and penalties. KSP focused on the exemptions set forth in KRS 17.150 and KRS 61.878 (1)(h), which to some extent mirror each other. The Court noted that KSP's relied on the fact that the 22 year old case had not been solved or closed and release could taint the jury pool or tip off those involved. This was the same argument it had consistently raised in each request. The circuit court determined the rational was "vague, speculative" … and "constituted extremely remote *possibilities*." The Court emphasized that "a mere parroting of the statutory language does not satisfy the requirement of a *factual* basis for denial of an open records request." In fact, the KSP had previously shared some of the evidence with Teague, although they did not provide copies. Its "pattern of vague denials over the course of so many years is more than sufficient to support the imposition of penalties." The court had adjusted the penalty for the initial failure to bring the case in the correct venue (Franklin), leaving the award to be appropriate.

The Court affirmed the Franklin Circuit Court's decision.

CIVIL LITIGATION

Fox v. Brumback, 2019 WL 6817315 (Ky. App. 2019)

FACTS: On July 5, 2015, Deputy Fox (Franklin County SO) responded to a 911 call. The caller, Paige, reported that her neighbor was waving a pistol. Deputy Fox ultimately arrested Brumback and charged him with several offenses. He was indicted but reached an agreement that resulted in the dismissal of the case.

Brumback filed a civil case against a witness, Paige, and the deputy. Fox moved for dismissal, arguing sovereign immunity. Deputy Fox was then named individually. She moved again for dismissal. The motion to dismiss was denied and the case proceeded. After discovery, she moved for summary judgment on the malicious prosecution claim, asserting immunity. The circuit court denied the motion for summary judgment and she appealed.

ISSUE: Is the Sheriff immune for actions against his deputy?

DISCUSSON: No.

HOLDING: The Court noted:

> Sovereign immunity is a common law principle "that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity."[92] Governmental immunity is derived from sovereign immunity and applies to the tort liability of governmental agencies.[93] The immunity of our county governments extends to public officials sued in their official capacity.

The Court of Appeals examined KRS 70.040, which waives "immunity as applied to the office of the sheriff for acts committed by its deputies." The statute provides that: "[t]he sheriff shall be liable for the acts or omissions of his deputies; except that, the office of sheriff, and not the individual holder thereof, shall be liable under this section."[94] The Supreme Court of Kentucky has held that this statute waives immunity for the office of the sheriff for acts committed by its deputies.

The Court of Appeals held that KRS 70.040 does not bar the claim of malicious prosecution. The Court of Appeals affirmed the denial of summary judgment.

Barlow v. Evans, Ky. App. 2019

FACTS: On May 28, 2012, Evans was involved in a collision between his motorcycle and a Monroe County sheriff's vehicle, driven by Pickerell. Pickerell had backed into Evans' motorcycle. Evans sought treatment the next day. Pickerell served as a dispatcher and did vehicle maintenance for the Sheriff but was not a paid employee. Pickerell was performing maintenance work at the time of the collision, notably testing the brakes of the vehicle, when he inadvertently backed into the motorcycle.

Evans sued Sheriff Barlow and Pickerell for his injuries. Sheriff Barlow moved for summary judgment, arguing official immunity. The circuit court reasoned that vehicle maintenance was a ministerial act and as such, official immunity was not warranted. Sheriff Barlow appealed.

ISSUE: Is the Sheriff entitled to official immunity for a ministerial act?

HOLDING: No.

DISCUSSION: The Court of Appeals reviewed official immunity under state law.

> "'Official immunity' is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or employee, but on the function performed."[95] When an officer is sued in his representative capacity, the officer's "actions are afforded the same immunity, if any,

[92] Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).
[93] Jones v. Cross, 260 S.W.3d 343 (Ky. 2008).
[94] KRS 70.040.
[95] Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).

to which the agency, itself, would be entitled[.]" However, when sued in his individual capacity, "public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment."

A public official sued in his individual capacity is entitled to qualified immunity for his negligent acts when he performs: "(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 [his] authority." Id. (citations omitted). However, "an officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act, i.e., one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts."

The Court of Appeals examined several cases to determine if a matter is discretionary or ministerial. Qualified immunity might apply in discretionary matters but does not apply in ministerial tasks. Arranging for Pickerell to perform the maintenance of patrol vehicles was discretionary. As such, Sheriff Barlow had official immunity. However, whether Pickerell had qualified immunity from suit in his individual capacity is a separate determination. The Court of Appeals noted Sheriff Barlow "would be entitled to qualified immunity if he performed: (1) a discretionary act, (2) in good faith, and (3) within the scope of his authority."[96] Since the trial court had ruled the Sheriff's act was ministerial, it did not do an evaluation under the correct standard.

The Court of Appeals remanded to the trial court to "determine whether he acted in good faith and in the scope of his authority. If the trial court finds these elements are satisfied, then Sheriff Barlow, in his individual capacity, is entitled to qualified immunity."

The Court of Appeals further noted that "official immunity is absolute when an official's or an employee's actions are subject to suit in his official capacity" unless immunity has been waived.[97] Generally, a sheriff "has absolute official immunity at common law for torts . . . when sued in his official capacity." The main exception to this general rule is that KRS 70.040 waives a "sheriff's official immunity . . . for the tortious acts or omissions of his deputies." Here, there is no dispute that Pickerell was not a deputy. On remand, the trial court was ordered to determine whether there was any waiver of absolute official immunity for Sheriff Barlow, in his official capacity. If there was no waiver, Sheriff Barlow is entitled to official immunity in his official capacity."

Wilson v. Clem, 2019 WL 5090397 (Ky. App. 2019)

FACTS: In 2014, Wilson filed suit against Deputy Clem (Boyle County SO) claiming malicious prosecution, defamation, false light and trespass. Wilson claimed he was falsely arrested on allegations he had committed a felony. (Wilson was acquitted at trial.) The trespass and defamation

[96] Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).
[97] Jones v. Cross, 260 S.W.3d 343 (Ky. 2008).

claims were dismissed in 2016, but the malicious prosecution claim was allowed to continue. Deputy Clem reasserted his motion for summary judgment on that claim and it was dismissed in 2017. The circuit court found that since probable cause existed for the arrest, Deputy Clem was protected by qualified immunity for performing a "discretionary action in good faith" by executing an arrest warrant. Wilson appealed.

ISSUE: Does probable cause for an arrest negate a malicious prosecution claim?

HOLDING: Yes.

DISCUSSION: The Court of Appeals examined Martin v. O'Daniel and held that "acting with malice and acting in good faith are mutually exclusive."[98] The Court of Appeals noted that "the issue of qualified official immunity is superfluous" as it is negated by a finding of the malice necessary for a malicious prosecution claim.

To prove malicious prosecution, the following elements are required:

1) the defendant initiated, continued, or procured a criminal or civil judicial proceeding, or an administrative disciplinary proceeding against the plaintiff;
2) the defendant acted without probable cause;
3) the defendant acted with malice, which, in the criminal context, means seeking to achieve a purpose other than bringing an offender to justice; and in the civil context, means seeking to achieve a purpose other than the proper adjudication of the claim upon which the underlying proceeding was based;
4) the proceeding, except in *ex parte* civil actions, terminated in favor of the person against whom it was brought; and
5) the plaintiff suffered damages as a result of the proceeding.[99]

Specifically, the Court of Appeals addressed the probable cause element. Wilson argued Clem's grand jury testimony was "exaggerated and misleading," but failed to offer any elaboration on these claims. As such, the Court affirmed the circuit court's decision.

Pape v. White, 2019 WL 6998650 (Ky. App. 2019)

FACTS: While working as a photographer for UK, White was struck by a utility ATV operated by Commander Pape (Lexington PD). Commander Pape was assisting with traffic at a UK football game at the time. White filed suit against Pape and the Lexington-Fayette Urban County Government on a variety of negligence claims. Pape and LFUCG moved for sovereign immunity (LFUCG) and qualified immunity (Pape). The motion were denied and appeals followed.

ISSUE: Is driving a non-emergency vehicle generally a ministerial task?

HOLDING: Yes.

[98] 507 S.W.3d 1 (Ky. 2016).
[99] Martin v. O'Daniel, 507 S.W.3d 1 (Ky. 2016).

DISCUSSION: First, with respect to LFUCG and its police department, the Court of Appeals held they were county agencies and entitled to sovereign immunity. That, by extension, provided immunity to Pape in his official capacity. With respect to Pape in his individual capacity, the Court of Appeals examined qualified immunity.

The defense of qualified immunity "applies to the negligent performance 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.'"[100] Further, it requires an analysis of the "particular acts or functions" and whether they are discretionary or ministerial. Qualified immunity only applies to discretionary acts. Driving is generally considered ministerial, and in this case, Pape was driving on the sidewalk en route to his assignment, not "involved in a police pursuit, crowd control, or an emergency response." Accordingly, qualified official immunity does not apply.

The Court of Appeals reversed with respect to LFUCG, but affirmed with respect to Pape in his individual capacity.

Collins v. Carroll County Sheriff's Department, 2019 WL 413614 (Ky. App. 2019)

FACTS: In February 2013, Collins was arrested for child abuse in Carroll County. His charge was dismissed prior to trial. He moved to expunge all records related to his arrest, including but not limited to the entry on the Sheriff's Office website concerning the arrest. The Sheriff's Office did not comply initially with the order, but did remove the article after it was served with the lawsuit. The CCSD moved for summary judgment, which was granted, and found the CCSD not to have painted him in a false light as the article was truthful and that the statements were privileged under KRS 411.060. Further, it found no private right of action under KRS 431.076. The trial court dismissed the case and Collins appealed.

ISSUE: Is the sheriff's office usually immune from suit?

HOLDING: Yes.

DISCUSSION: The Court first looked at CCSD's claim on immunity. Collins argued that KRS 70.040 served as a limited waiver of the sheriff's official immunity, but since that only applied to the deputies, which Collins did not name, the Court disagreed. As such, the Court agreed the sheriff's immunity prevailed.

Further, the Court found no cause of action for emotional distress either.

The Court upheld the decision in favor of the Sheriff's Office.

[100] Ritchie v. Turner, 559 S.W.3d 822 (Ky. 2018) (quoting Yanero, 65 S.W.3d at 522).

Mabrey v. Simpson, 2019 WL 1422645 (Ky. App. 2019)

FACTS: In 2012, Simpson's mother called 911 to report her son (Maverick Simpson) had stolen his grandmother's vehicle. She reported he was 14 and suffered from depression and might be under the influence of drugs, but did not have a weapon. His father separately reported the theft as well. Officer Mabrey met with the father to take the report, and as he did so, Simpson drove by in the stolen vehicle. Mabrey could not pursue immediately. He learned that Simpson might be at a certain Louisville address and found the vehicle in the driveway there. Mabrey approached on foot. Simpson drove around the officer and fled, with Mabrey in pursuit, but not closely. Simpson lost control and hit a guardrail, suffering serious but not fatal injuries.

Simpson filed suit, claiming Mabrey was negligent in not terminating the pursuit. He alleged his actions were in violation of the LMPD SOP. Mabrey's request for qualified immunity was denied, with the trial court finding that the SOPs are ministerial and as such, squalified immunity did not apply. Mabrey appealed.

ISSUE: Could an SOP be considered ministerial based upon the language used in the SOP?

HOLDING: Yes.

DISCUSSION: The Court looked to Yanero v. Davis.[101] Under state law, qualified official immunity applies to negligence when the government employee is in performance of a discretionary act or function, acted in good faith, and within the scope of their authority. However, an act that is ministerial does not enjoy the same protection. In this case, the trial court looked to Mattingly v. Mitchell[102] and concluded Mabrey's actions were ministerial because the SOPs "provide specific directives to its officers when initiating or engaging in a pursuit." The use of the word "shall" for example, is mandatory language and indicates a ministerial duty. Mabrey argued that he did not violate the SOPs, but the Court agreed that decision must be made by a jury.

Mabrey also argued that the Court should consider whether he owed Simpson a legal duty and whether the pursuit was the proximate cause of Simpson's collision. Again the Court agreed it did not have the jurisdiction to determine the issue of proximate causation.

SIXTH CIRCUIT

FEDERAL LAW

FEDERAL LAW – SENTENCE ENHANCEMENT

U.S. v. Pineda-Duarte, 933 F.3d 519 (6th Cir. 2019)

[101] 65 S.W.3d 510 (Ky. 2001).
[102] 425 S.W.3d 85 (Ky. App. 2013).

FACTS: Pineda-Duarte, a Mexican citizen, had twice been subject to removal. On his third return, he ended up in Clark County, Kentucky, working on a farm growing marijuana. KSP discovered this plot and after a brief "operation," set up an arrest. Pineda-Duarte did not go to the ground when ordered to do so. Instead, he swung a shovel at the officers, missed the officers while swinging the shovel, then dropped the shovel and tried to flee. He was apprehended. He was charged with manufacturing under federal law.

Pineda took a guilty plea. During the sentencing process, it was recommended that his sentence be enhanced for his violent act against the trooper. Pineda argued he did not intend violence (as was required by the enhancement) but acted purely on reflex. The District Court disagreed and Pineda appealed.

ISSUE: Is swinging a shovel reflexively or with the intent to injure an officer a "credible threat to use violence" under the Federal Sentencing Guidelines imposing a sentencing enhancement for making a treat of violence in the course of committing a drug-related offense absence of some credible evidence of verbal or physical intent?

HOLDING: Probably not, unless the defendant's intent to use violence is proven.

DISCUSSION: The Sixth Circuit noted that the issue was whether there was a "credible threat" posed by Pineda's action, warranting the enhancement. Pineda-Durate argued it was, at most, attempted violence. The Sixth Circuit reviewed the language of the sentencing guideline and held that just because the shovel "missed the mark" and did not hit anyone, did not change its characterization of "violence." Further findings with respect to Pineda-Durate's intent to use violence and whether that intent was articulated for the purpose of a sentencing enhancement is required, so the matter was remanded for further findings of fact.

FEDERAL LAW - 18 U.S.C. §241 – 242

U.S. v. Dukes, 2019 WL 2714470 (6th Cir. 2019)

FACTS: Late one evening, Littlepage went out for a drive. That same night, Officer Dukes (Providence PD) on patrol, got a call of a reckless driver. Thinking Littlepage was the driver, he made a traffic stop. When Littlepage didn't move fast enough, he was subjected to frisk, but not an "ordinary" one. Instead he was struck in the back and genitals. He released Littlepage with a warning, but not a usual one – with Dukes telling Littlepage to stay off that particular road and if he did not, he would "answer" to Dukes. Littlepage, unfortunately, needed to use that road the next day. But "he was confused and traumatized"… and … "did not know what would happen if he ended up on that road again." So he tried to register a concern. First, he called Providence PD, and was told he could contact the chief the next day – but he needed to drive down that road the next morning. He was given the opportunity to talk to the officer on duty – which was, of course, Dukes, and that only made it worse. He was told he could come in and file a complaint and hung up on him. He called back and Dukes threatened to arrest him for harassing communications. Littlepage then called the Webster County Sheriff' Office, and getting no satisfaction, called KSP. After that call, KSP called Providence and told them about the call.

Dukes soon got wind of Littlepage's calls. He instructed the dispatcher to contact Littlepage and tell him he could come down to the station to talk to a supervisor that night, but no supervisor was present. Littlepage asked instead that the supervisor come to his house, but the dispatcher said no, but did ask for Littlepage's address. Littlepage provided it after being assured no one would arrest or bother him. Littlepage went to bed. A short time later, Dukes showed up, banged on the door until he answered and then told him he was under arrest. Littlepage backed into the house, followed by Dukes. What ensued was recorded, and resulted in Dukes tasing him twice, spraying him with OC, breaking his nose with a punch and hitting him multiple times with the baton. Dukes told the responding EMT that "he hadn't been in a good fight like this in a long while." Littlepage was transported to the hospital and cited for harassing communications, resisting arrest, assaulting a police officer and criminal mischief – the last "for allowing his broken nose – courtesy of Dukes – to bleed on Dukes' uniform."

The county dismissed all charges and referred the matter to the Kentucky Attorney General, who referred it to the U.S. Attorney. Dukes was charged under 18 U.S.C. §242 for a variety of criminal charges relating to the use of force and related issues. Dukes was convicted for the unlawful arrest and appealed.

ISSUE: If probable cause is an issue in a case, is the decision up to the jury to find it?

HOLDING: Yes

DISCUSSION: The Court noted that:

> It is usually not a good thing to see the flashing lights of law enforcement behind you. Sometimes you get lucky, and the officer just gives you a warning; other times you are not so lucky, and you get a ticket. But the string of horrors Officer William Dukes Jr. paraded on Jeffrey Littlepage after a simple traffic stop has no place in our society.

The Court reviewed the standards for the charge and agreed that when probable cause was an issue in a criminal case, it was for the jury to provide. Looking at the charges placed against Littlepage, the Court agreed that there was no probable cause for harassing communications. His calls were absolutely for a "legitimate purpose" even if they bothered Dukes.

One of the witnesses testified as to Dukes' training which indicated that he had been specifically taught the elements of the crime. Although the testimony was close to the line with respect to admissibility, as the witness came close to invading the province of the jury in making the ultimate determination – the Court agreed that the error, if any, was harmless.

The Court affirmed his conviction.

FEDERAL LAW - RETALIATION AGAINST A WITNESS

U.S. v. Edwards, 783 Fed.Appx. 540 (6th Cir. 2019)

FACTS: In 2015, D.B. was working as a CI in a case against two brothers, the McShans, in Steubenville, Ohio. Their trial was held in Columbus (150 miles away). D.B. and others testified. Family members and friends of the McShans had to be removed from the courtroom for photographing witnesses. Both men were convicted. A few months later, Edwards (the McShans' sister) and others began posting and reposting photos of D.B. on social media and making very derogatory and threatening comments about him. She did not take any of the photos or create images, but mostly reposted others with her own captions. Her Facebook page was set on public and broadcast the CI's name, nickname, location, family members and his cooperation with law enforcement.

Edwards was charged with retaliating against a witness, 18 U.S.C. §1513(e). Edwards claimed the statute was unconstitutional based upon the First Amendment and moved to dismiss. The trial court denied the motion to dismiss, finding the statute constitutional. Edwards was convicted and appealed.

ISSUE: May Facebook postings be considered retaliation?

HOLDING: Yes.

DISCUSSION: Edwards conceded she knowingly posted the messages on Facebook, but there was no indication that she intended to retaliate against D.B., or that she caused D.B. any real harm. The Sixth Circuit opined that the use of the word "snitch" increased a risk of harm, and that such inflammatory comments could foreseeably lead to negative consequences. Edwards argued that others posted similar statements, so she could not be held to blame for his overall harm. There was "close temporal proximity" between her statements and his harm, and D.B. felt intimidated at in fear of his safety in Steubenville. His little sister received threats as well, as a result. He chose to not visit his family as much or live at home. The Sixth Circuit held that Edwards' action constituted harm. The Sixth Circuit further noted that Edwards was not selectively prosecuted because she made posts, but rather that "*her Facebook posts were the crime*." It was "hardly remarkable that she was singled out for enforcement."

Edwards' conviction was affirmed.

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Asgari, 918 F.3d 509 (6th Cir. 2019)

FACTS: Asgari, an Iranian national who earned a doctorate at Drexel University, began teaching in Iran. He returned to the U.S. several times, on business and pleasure, collaborating on a scientific research project at Case Western University in Cleveland, Ohio. (That university worked on a number of defense-related projects, although nothing there was specifically classified.) In

August 2012, he came to the U.S. on a mixed business/pleasure trip, based in New York where his son lived. He applied for a university position at Case Western Reserve while in the U.S. At some point, the FBI received a tip that he was working at the university on an improper visa and the university was questioned about it.

Agent Boggs obtained a search warrant for Asgari's personal email account, to determine if he violated any federal law and ultimately, he was indicted on multiple counts of "stealing trade secrets" by allegedly transmitting information to Iran in violation of American sanction laws. Asgari moved to suppress any evidence from the 2013 warrant, arguing it was improper, and that information used from the execution of that warrant was used to find information for a 2015 warrant, which resulted in the charges. The trial court agreed with Asgari and suppressed all of the evidence and the Government appealed.

ISSUE: May Leon[103] save a deficient warrant affidavit?

HOLDING: Yes.

DISCUSSION: The case turns on the evidence uncovered by the execution of the 2013 warrant. The Court agreed that even if probable cause was questionable, the good faith rule under Leon applies. Leon provides a "safe harbor for reasonable slipups." The Court held that a reasonable officer could rely on the lengthy affidavit in the 2013 warrant affidavit, which included that although he never indicated Cleveland (where Case Western is located) as a destination on the visa, he travelled there and exchanged numerous emails with parties there, and he worked on the project there in 2012. None of these actions were permitted under the visa he obtained, and Asgari, in effect, misled the State Department about his true intent. The evidence suggested that Asgari "may have exploited his position to transmit information back to Iran." Iran, it noted was under broad sanctions. The Court held that in putting it all of this information together, the investigators operated in good faith. His omission to list Cleveland on either trip clearly appeared to be part of an effort to deceive. Asgari argued he was on sabbatical and that he was corresponding mostly with students, but he was communicating with students of a university (his home institution) with close ties to the sanctioned government.

Although the affidavit had some errors, they were more minor omissions as opposed to deliberate falsehoods designed to mislead the judge.

The Court held the warrant met the good faith threshold and reversed the lower court's ruling.

U.S. v. Crawford, 943 F.3d 297 (6th Cir. 2019)

FACTS: Officer Nelson (Blue Ash, Ohio, PD) learned through a CI by the name of Heard that Crawford was dealing cocaine. Nelson had not worked with the before, so he proceeded to talk to other officers who had. Other officers deemed him reliable. Heard also identified Crawford from a photo and provided the officer with Crawford's cell phone number. Heard told Nelson that Crawford was looking to sell a large quantity of cocaine. Nelson also learned Crawford had multiple drug-

[103] 468 U.S. 897 (1984).

trafficking convictions. Heard continued his work and showed text messages to Nelson in which a sale was being organized.

Using that information, Nelson obtained a warrant to track Crawford's cell phone. He cited Heard's information but did not name him. Heard provided more information concerning Crawford's car. The vehicle was registered in Ohio and was located at an apartment near Florence, Kentucky, where Crawford's wife lived. Nelson saw Crawford at that location. With the help of Detective Boyd,[104] Nelson obtained a second warrant, which allowed the placement of a tracking device on the vehicle. Heard's information was contained within the second warrant. Finally, Heard completed a controlled buy, and Crawford was surveilled when he left the apartment in Kentucky to go to the location. Heard was searched and given cash for the buy, but the listening device he wore did not operate. Heard returned with the drugs, and GPS data indicated Crawford returned to the apartment. With that information, the officers sought a third search warrant, for the apartment. Cash and cocaine were found. "Crawford incriminated himself, admitting that he sold on consignment an ounce of cocaine to "Jerry," and that he had placed cocaine under his sink.

Crawford was charged with three counts related to drug trafficking. He moved to suppress, arguing against the search warrant. Specifically, he claimed that Boyd "made a materially false statement regarding the content of the phone conversation during which the gym meeting was arranged." The magistrate ruled against his motion and demand for a Franks hearing. He was convicted at trial and appealed.

ISSUE: May officers rely on a CI attested to by other officers?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit began:

> Confidential informants play an important role in combatting drug trafficking. Reflecting as much, our cases reveal numerous examples of confidential informants providing critical information to support search warrants targeting drug crimes.

To determine probable cause, a reviewing court "is limited to examining only "the information presented in the four-corners of the affidavit."[105] But as to the conclusions to be drawn from the information within those four corners, a reviewing court must accord "great deference" to the decision of the issuing court.[106]

When CI's are an important part of a search warrant application, courts are required to "examine the messenger more than the message," with a focus on the informant's reliability. Different circumstances require different means for verifying an informant's reliability. Courts begin by examining the known facts and circumstances regarding the informant.[107] An easier case for

[104] The decision stated Boyd was with the Norfolk PD, in fact, he was with Newport.
[105] U.S. v. Frazier, 423 F.3d 526, 531 (6th Cir. 2005); see also Christian, 925 F.3d at 314 .
[106] U.S. v. Allen, 211 F.3d 970, 973 (6th Cir. 2000).
[107] See U.S. v. Jackson, 470 F.3d 299 (6th Cir. 2006).

verification is one in which an officer uses a confidential informant known to that officer. In that setting, courts typically do not require the officer to verify independently any of the information provided by the informant. Allen is one example. There, the Sixth Circuit did not require independent corroboration of information received from a confidential informant because the informant, for "over a five-year period," was "personally known to the detective who swore the affidavit.

When other officers know the informant, the assessment is a bit different. "If the affiant officer avers that another officer has vouched for the informant's reliability, that too will typically satisfy our reliability inquiry."[108]

Finally, in cases in which "an officer relies upon information from an informant the officer is using for the first time, and whose credibility the officer cannot verify through other officers. In that instance, there is no track record of credibility to fall back on. We thus require the officer to take steps to test the informant's veracity.[109] In such cases, officers might verify key information received from the informant, where plausible to do so. Or the officer could identify multiple sources providing the same information, increasing the likelihood that the tip is reliable.

In this case, neither Nelson nor Boyd knew Heard. Nelson adequately supported Heard's information, however, by talking to other officers who had worked with Heard. "That confirmation alone can be compelling evidence of an informant's reliability. Nelson also stated that Heard identified Crawford from his driver's license photo. And, Nelson added, Heard provided him with Crawford's telephone number, reaffirmed that number a second time, and then a third time, showing Nelson text messages between Heard and Crawford. Nelson, for his part, independently examined Crawford's background, discovering Crawford's criminal past, which included drug trafficking." The Court held that passed muster.

With respect to the third warrant, Crawford argued there "was no nexus between his home and his then-known criminal conduct, meaning that affidavit too did not sufficiently establish probable cause justifying the ensuing search." He had not raised that issue before, however, which limited the court to reviewing it under the plain error standard, a "tall order."

The Sixth Circuit held that:

> That general rule is refined when the place is a home and the evidence drugs. "[I]n the case of drug dealers," we have observed, "evidence is likely to be found where the dealers live."[110] And so a court issuing a search warrant "may infer that drug traffickers use their homes to store drugs and otherwise further their drug trafficking."[111]

Boyd had used the information in the first two warrants, obtained by Nelson, to obtain the third. "Heard was demonstrably a reliable source of information, as reflected in the first two warrants.

[108] See U.S. v. Brown, 732 F.3d 569 (6th Cir. 2013)
[109] See U.S. v. Hammond, 351 F.3d 765 (6th Cir. 2003).
[110] U.S. v. Jones, 159 F.3d 969 (6th Cir. 1998).
[111] U.S. v. Williams, 544 F.3d 683 (6th Cir. 2008).

And the third warrant, it bears adding, was also supported by Heard's first-hand account of purchasing cocaine directly from Crawford."

Finally, Crawford argued the third warrant was "premised upon a knowingly and intentionally false statement in the underlying affidavit. Crawford singles out the statement in the affidavit asserting that Heard and Crawford arranged to meet for a drug transaction. Because there was no express mention of drugs in the monitored phone call in which Crawford and Heard discussed meeting at the gym, Crawford says the corresponding statement in the affidavit is untruthful. Accordingly, Crawford requests a hearing to test how that false statement impacted the evidence-gathering process.[112]

Addressing this argument, the Sixth Circuit stated:

> The type of hearing Crawford seeks has come to be known as a "Franks hearing," following the Supreme Court's holding in a case by that name. In a Franks hearing, a court determines whether to suppress the fruits of an executed search warrant, where the warrant was the result of a false statement. To demonstrate entitlement to the hearing, a defendant must make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." "The allegedly false statement," moreover, must be "necessary to the finding of probable cause."
>
> A Franks analysis turns on two questions of fact, and one of law. The two questions of fact: One, is there a false statement included in an affidavit? If so, then two, how culpable is the affiant officer in including that statement in the affidavit? Where the affidavit does include a false statement, and where the officer making the statement was culpable in doing so, then the court turns to a question of law: After excising the false statement, is there sufficient information in the affidavit to constitute probable cause to issue a warrant?

Even if, for arguments' sake, Crawford can meet his burden on the factual issues, he cannot meet his burden on the legal one. After all, even if the statements at issue were false, and even if Boyd had some culpability in including them in his affidavit, the affidavit contained an ample amount of other evidence to support a finding of probable cause to search Crawford's home. It explained that Heard and Crawford had discussed the price at which Crawford would sell cocaine to Heard as well as the organization from which Crawford would buy that cocaine. And it explained the details of the controlled buy in which Heard claimed to have purchased cocaine from Crawford.

> The truthful evidence in the affidavit thus outweighs any concern over the inclusion of arguably false content. It follows that, after excising any mention of the phone call, the district court still had sufficient evidence upon which to find probable cause. Accordingly, we reject Crawford's claim that he should be afforded a Franks hearing."

Crawford also argued that his "incriminating statements made to police officers while in custody." He contended he was not giving his Miranda rights prior to the interrogation. Both officers testified,

[112] See Franks v. Delaware, 438 U.S. 154 (1978).

however, that they did so. The Court agreed the trial court's assessment of credibility would hold. His only evidence was "a recording made while he was being questioned in a police car. In that recording, Deputy Canfield mentions that he did not know whether Crawford had been Mirandized. But weigh that equivocal statement against the unequivocal testimony from two other officers, each of whom testified that Crawford had been Mirandized. The best Crawford can say, then, is that the district court was presented with conflicting testimony." Further, the magistrate had ruled that Crawford had waived his rights, voluntarily and knowingly.

Finally, the Court addressed a complaint of improper witness bolstering by the prosecution, but the Court agreed that Nelson's testimony as to how he validated the CI's credibility was appropriate.

Crawford's conviction was affirmed.

U.S. v. Christian,925 F.3d 305 (6th Cir. 2019)

FACTS: On September 3, 2015, Officer Bush (Grand Rapids, MI, PD) obtained a search warrant for Christian's home. The affidavit provided a number of details. Once heroin and other items, including a gun, were found, Christian was charged under federal law with drug trafficking and possession of the firearm. He moved to suppress and was denied.

Christian was convicted and appealed.

ISSUE: Is a search warrant rife with factual assertions "bare bones?"

HOLDING: No

DISCUSSION: Christian argued that the warrant was insufficient, that it "did not establish probable cause and that the Leon good-faith exception to the exclusionary rule should not apply."[113] He also challenged the admission of a jail call between two other parties that suggested where Christian had hidden evidence later located by the police.

The Court agreed that the affidavit was more than adequate, and "really not even close." The Court reviewed the "totality of the circumstances" "through the 'lens of common sense'" and agreed that the "conclusion is inescapable" – that a search of the indicated property would "uncover evidence of drug trafficking." In fact, "Most readers of the affidavit would have been surprised if it did not." In fact, with an avalanche of details, one stood out, that the target was seen entering and leaving the suspect property – despite Christian denying it. The agreed the affidavit could have been more precise, as there was a suggestion of a question about the target location, but "probable cause is not the same thing as proof." All of the evidence was connected to the address which was the subject of the warrant. The Court noted in U.S. v. Hines that ""not all search warrant affidavits include the same ingredients," we said before recognizing that "[i]t is the mix that courts review to decide whether evidence generated from the search may be used or must be suppressed."[114] The

[113] 468 U.S. 897 (1984).
[114] 885 F.3d 919 (6th Cir. 2018).

Court also agreed that even if there was an issue, the good faith exception of U.S. v. Leon, applied. The affidavit contained a vast number of factual allegations and was far above "bare bones."

Finally, the Court agreed that any error, although it disagreed there was even error, in admitting the telephone call, did not sway the decision. As such, the Court affirmed Christian's conviction.

U.S. v. Chaney (James/Lisa) and Ace Clinique of Medicine, LLC, 921 F.3d 572 (6th Cir. 2019) (CERT PENDING)

FACTS: By 2010, the Chaneys were operating a medical clinic in Hazard. Dr. James Chaney, known as "Ace," was licensed as a physician in Kentucky and his wife, Lesa, operated the business as president and CEO. In 2010, the Cabinet for Health and Family Services received a tip, directed to an investigator, Johnson, that Chaney was pre-signing prescriptions for the clinic to be used when he wasn't there. Johnson opened an investigation and confirmed that prescriptions were being used during times when Chaney was out of town; employees confirmed the process. A search warrant of the clinic, the Chaney home and an airplane hangar led to federal charges of distribution of controlled substances, fraud and money laundering.

The Chaneys sought suppression, to only partial success, with the airplane hangar evidence been suppressed along with old evidence from the clinic. At trial, both were convicted of some of the charges and appealed.

ISSUE: Should a warrant for medical records be carefully circumscribed?

HOLDING: Yes

DISCUSSION: The defendants argued that the "patient files" demanded as part of the search warrant was overbroad and allowed seizure of patient records that were legitimate. The Court noted that the preamble to the list "acted as a limit on the list" – as they could only seize what was part of the criminal enterprise. The FBI agent involved admitted in testimony that they essentially took everything, and the Court agreed that was reasonable as "there was no way agents in the field could have determined which files were potentially relevant evidence."

The search warrant itself was proper as well.

The Court noted that

> Two sorts of infirmities can lead to an insufficiently particular, and therefore unconstitutional, warrant.[115] The first is when a warrant provides information insufficient "to guide and control the agent's judgment in selecting what to take."[116] The second is when the category of things specified "is too broad in the sense that it includes items that should

[115] U.S. v. Richards, 659 F.3d 527 (6th Cir. 2011).
[116] *Id.* (quoting U.S. v. Upham, 168 F.3d 532 (1st Cir. 1999)).

not be seized." This is often referred to as "overbreadth." "The degree of specificity required depends on the crime involved and the types of items sought."[117]

The Government argued that the business was **"**so permeated with fraud that there was probable cause to seize all patient files." The Court disagreed that was a sufficient reason as there was dispute as to how much of the clinic business was "pain management." As such, the evidence did not support that the entire business was a fraud, however, it would be difficult to readily separate the fraudulent from the legitimate. The Court also noted that the central purpose of the business had to be considered. In this case, at the least, a substantial number of the patients were involved in "pain management," and thus potentially fraudulent, but they had at least a "non-negligible amount of legitimate patients" as well. The evidence was close, but not quite enough to suggested permeation.

However, the Court agreed that the preamble clause did serve as an adequate limitation on the breadth of the warrant. Although there is no formula to follow, the court agreed that the preamble and the statutes that were referenced in the affidavit, provided "specific guidance as to what sorts of patient files were authorized to be seized—namely, those that were evidence of drug distribution." Such papers and records, while not contraband, do contain valuable evidence of the crime. The warrant authorized seizure of files related to the scheme and "This category surely contains numerous documents, but it is nevertheless tailored: the scheme was large, and so too the quantity of files seized."

The Court agreed "in sum, the warrant, as written, was constitutional."

The Court also reviewed, at length, each of the charges and agreed that the Chaneys were properly convicted, in that they operated to provide prescriptions for opioids for patients with no actual legitimate medical need for them, as indicated by an independent medical review of the files and testimony from former patients as to their medical care. That led to the health care fraud charges as well.

The Court upheld their convictions.

U.S. v. McElrath, 2019 WL 4447582 (6th Cir. 2019)

FACTS: In February 2018, Kalamazoo (MI) PD officers obtained a search warrant for a home, and evidence indicated that McElrath, a crack cocaine drug dealer, was working from that residence. There was also evidence guns were located in the house. That night, multiple officers converged on the home. A driveway was between the target home (637) and the neighbor (635). The driveway belonged to 635 but was physically closer to 637. There was a car and two men in the driveway. As the officers arrived, the two men walked away and the car accelerated out of the driveway, struck a police car and fled along the sidewalk. The two men were apprehended. Smith, went to the ground

[117] U.S. v. Abboud, 438 F.3d 554 (6th Cir. 2006) (quoting U.S. v. Blakeney, 942 F.2d 1001 (6th Cir. 1991)) (for example, "[i]n a business fraud case, the authorization to search for general business records is not overbroad").

immediately while McElrath was slower to follow commands, but eventually complied. McElrath gave his name and admitted to having "something illegal" on his person. He reeked of marijuana and admitted to smoking it. He denied consent to search unless he was under arrest. Officer Cake told him that they had a warrant for 637, including the occupants, and McElrath gave consent for a search. An empty magazine and drug foil was found. Officer Cake was reminded that McElrath had been mentioned in the pre-raid briefing. McElrath was arrested and a further search found a quantity of cocaine.

McElrath was charged with drugs and a firearm charge because a gun was found in his proximity when he was seized. McElrath argued that the search warrant did not give authority to search him, and that the officers had no reasonable suspicion to seize and hold him. The district court granted suppression, finding that he was not on the property at the time and that there was nothing else to raise sufficient suspicion. The Government appealed.

ISSUE: May officers detain a suspect with reasonable suspicion?

HOLDING: Yes.

DISCUSSION: An officer may detain a suspect if the officer has an objective reasonable suspicion. In this case, it turned on whether the officers had a "particularized and objective basis" for doing so. The Sixth Circuit reviewed what the officers knew and while each fact, in isolation, was not enough, the details had to be considered in combination with each other. It is immaterial what the officers thought, only what they perceived at the time. Nothing suggested which house "owned" the driveway, and both officers indicated being closer to 637, the target house. Further, the appellate court held that the officers had enough to warrant handcuffing McElrath, especially given the vehicle's actions had just placed them in danger.

The suppression order was reversed.

U.S. v. Harney, 934 F.3d 502 (6th Cir. 2019)

FACTS: In 2015, the FBI gained control of Playpen, a large child pornography website. The FBI continued operating the site in a controlled manner to capture users. The FBI obtained a warrant to find the users behind the usernames, as they were shielded by another router. With that warrant, the FBI identified several users, including Harney. While executing a search warrant for Harney's home, he admitted he had downloaded child pornography. A forensic examination confirmed 3,640 child pornography images and 1,199 child pornography videos were downloaded onto Harney's computer.

Harney was charged with possessing child pornography and moved to suppress, arguing that the warrant was improper. His motion was denied.

Harney entered a conditional guilty plea to receiving child pornography and appealed.

ISSUE: May officers rely on a search warrant obtained in good faith?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit held that the investigators relied in good faith on the detailed warrant. Harney argued the FBI failed to describe where the government would search, as they did not know where the computers were actually located. The Sixth Circuit noted "that frequent reality of web-based searches" is simply a reality of the digital age and did not convert it to a general warrant.

Further, under a change in Federal Criminal Rule 41, it was proper for a judge one district to issue warrants that extended outside of their normal jurisdiction, for exactly this reason. The agent conveyed firsthand knowledge in the warrant.

Finally, Harney argued that the warrant, in effect, authorized illegal or outrageous conduct – the continued operation of the website. The Sixth Circuit noted that although this was a defense, it had never actually been applied by the court, making it "the kind of rare bird that is much talked about but never seen." The Court left "some sliver of hope that one day, some day, the defense might apply. But not in this case."

The Court affirmed the conviction.

SEARCH & SEIZURE - SEARCH INCIDENT

U.S. v. Ruffin, 783 Fed.Appx. 478 (6th Cir. 2019)(Certiorari Pending 12/22/2019)

FACTS: In October 2015, a Postal Service drug dog alerted on a package, which contained four pounds of methamphetamine. Someone else was "interested" in the package as well, as evidence indicated it was closely tracked on its journey; that someone was Ruffin. The package was seized. The next month, two more packages were found going to two different addresses in the same area. Officers set a trap, substituted a counterfeit for the drugs in one package and a small quantity of the drugs with a tracker in another. Both packages were released for delivery and were tracked. The postal carrier, however, confiscated the packages, scanned them as delivered, and placed them into her personal vehicle. On the way home, she drove the packages to a local drug house. The postal carrier was arrested before she could deliver these packages. Ruffin was inside that house. The occupants saw the arrest of the postal carrier and fled. Ruffin was stopped almost immediately. At the time of his seizure, he had $1,400 in cash, marijuana and two cell phones on his person.

When agents searched the cell phones, "Ruffin's prospects went from bad to worse." A phone included photos of the package on its trip, and showed he was in communication with Harris and Tucker concerning this trafficking. Ruffin also talked about the trafficking in a group message on Facebook. The agents mapped his movements before the delivery as well.

Ruffin was charged with conspiracy and moved to suppress. He was convicted and appealed.

ISSUE: Does probable cause for an arrest also justify a search?

HOLDING: Yes.

DISCUSSION: Ruffin argued the officers lacked probable cause to arrest him. The Sixth Circuit believed that Maryland v. Pringle[118] provided probable cause to arrest and search. Further, headlong flight is also the "consummate act of evasion" and added to the probable cause.[119]

With respect to his cell phone, it was noted that the officers took their action before Carpenter[120] was decided. This search comported with the Stored Communications Act, 18 U.S.C. 2703(d) as it existed at the time

The Sixth Circuit affirmed the conviction.

SEARCH & SEIZURE – CIVIL LEVY

Watson v. Pearson, 928 F.3d 507 (6th Cir. 2019)

FACTS: In December, 2013, Deputies Pearson and Mendez (Blount County, TN Sheriff's Office) went to serve a civil levy on Watson. They knocked on the front door of his presumed residence for some time, jointed by Deputy Talbott. Watson finally emerged. They stated their purpose and he claimed not to live at the residence, but his girlfriend did. (In fact, he rented it with her.) He claimed he had locked himself out. Having only change in his pocket, to satisfy the levy, Watson was told he could free to leave.

Deputies checked and determined that the door was locked, so they walked around the house, looking for items on which to levy. They smelled marijuana coming from the crawl space and saw hand rolled alleged joints outside, but they were never tested. They obtained a search warrant, amassing what they observed, Watson's record and a CI tip. Inside they found a large quantity of marijuana and other items.

Watson was charged under state law and demanded suppression, which he received. He then filed suit against the deputies under 42 U.S.C. §1983. Following several proceedings, only Deputies Mendez and Talbott remained as defendants. They received qualified immunity and Watson appealed.

ISSUE: May deputies walk into the curtilage when searching for items upon which to levy?

HOLDING: No

DISCUSSION: The Court looked to the search of the curtilage without a warrant, and without a valid exigent circumstance. The Court noted that Watson had indicated, at the least, that he was "an

[118] 540 U.S. 366 (2003).
[119] Illinois v. Wardlow, 528 U.S. 119 (2000).
[120] U.S. v. Carpenter, 926 F.3d 313 (6th Cir. 2019).

overnight or social guest with a legitimate expectation of privacy at the residence."[121] There was no indication that the residence was abandoned, although apparently unoccupied at the time. Watson had established rights that he had not given up. Case law had protected the curtilage for many years prior to 2013 and in Florida v. Jardines, the rights under a knock and talk were also clearly established as early as 2006.[122] Despite some conflicting subsequent case law, the Court disagreed, and emphasized Jardines had settled the point. They were walking around not to locate someone to talk to, but to find items upon which to levy.

The Court reversed the summary judgement and remanded the case.

SEARCH & SEIZURE – CELL SITE DATA

U.S. v. Carpenter, 926 F.3d 313 (6th Cir. 2019)

NOTE: This case was remanded back from the U.S. Supreme Court for further proceedings.

FACTS: In the underlying factual case, Carpenter was convicted with the use of cell site historical location data. At the U.S. Supreme Court, the Court agreed using such data requires a warrant. It was then remanded back to the Sixth Circuit for further proceedings.

ISSUE: Is it now improper to use historical CSLI without a warrant now?

HOLDING: Yes

DISCUSSION: The Court addressed the issue of Cell Site Location Information (CSLI) as it was used in the prosecution of Carpenter in multiple robberies. The Court noted that in "this new era of connected devices," it had to address the Stored Communication Act – upon which the FBI depending in obtaining the data without a warrant under certain circumstances.

The Court addressed the case in the context of the "intersection of two lines" under the Fourth Amendment. First addresses a person's privacy in their location, the second their abandonment of information voluntarily turned over to a third party. In the first issue, the Court noted that in tracking cell phones now, it was almost as good as attaching an ankle monitor to the subject, as the phone, in effect, follows the user everywhere. As such, Carpenter had an expectation of privacy in his physical movements. The Court also agreed that the third-party doctrine did not matter as it would never have been imagined that a phone could travel with the owner in that way.

In this case, however, "what matters is whether it was objectively reasonable for the officers to rely on the statute at the time of the search." The Court agreed it was reasonable for them to believe that they did not need a warrant, and two magistrate judges had also issued orders to compel the production of the data.

[121] Minnesota v. Olson, 495 U.S. 91 (1990).
[122] 569 U.S. 1 (2013).

The Court concluded that the decision in Carpenter at the highest level taught that the lower courts must "carefully and incrementally adapt their Fourth Amendment jurisprudence to advances in the digital era." However, it also agreed that it was reasonable for the FBI at the time to rely on the SCA to get the data needed for Carpenter.

SEARCH & SEIZURE – CONSENT
U.S. v. West, 789 Fed. Appx. 520 (6th Cir. 2019)

FACTS: During a traffic stop following a tip that she was transporting drugs Tennessee, West admitted that she was concealing drugs on her person and handed them over. She gave consent to search the car but nothing incriminating was found. The dash video showed West "walking around, engaging in discussion with officers, and also laughing with officers." She claimed, later, that "she did not do so voluntarily because the police had, by that point, created an "inherently coercive environment" in violation of the Fourth Amendment.

West was indicated for possession with intent to distribute. The trial court denied her motion to suppress, finding that the video showed no intimidation. A private conversation, with the lead detective, was out of the camera's line of sight, was initiated by West, and she later conceded she had done so to talk about the drugs.

West entered a conditional guilty plea and appealed.

ISSUE: May a suspect's conduct indicate that consent to search was not coerced?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit began:

> We assume, for purposes of this decision, that Shockley's request for West to turn over the drugs qualifies as a "search" under the Fourth Amendment, which avoids any need to opine on that preliminary issue.[123] The search was nevertheless reasonable under the Fourth Amendment. A search is reasonable when it is supported by a warrant or an exception to the warrant requirement.[124] The usual exceptions apply in this verbal-search context.[125] And here, the magistrate judge found as a fact that West voluntarily produced the drugs without police coercion.

The Sixth Circuit held that it was proper to find no coercion when the dash-cam footage that showed that West was "cooperative and nonchalant in her actions."

The conviction was affirmed.

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[123] Cf. U.S. v. Street, 614 F.3d 228 (6th Cir. 2010).
[124] Kentucky v. King, 563 U.S. 452 (2011).
[125] U.S. v. Pope, 686 F.3d 1078 (9th Cir. 2012), and those exceptions include voluntary consent, see Schneckloth, 412 U.S. at 219.

U.S. v. Harris, 2019 WL 4447543 (6th Cir. 2019)

FACTS: On February 13, 2017, McNairy County (TN) deputy sheriffs went to Harris's home with an arrest warrant. They knocked and Harris answered. Harris was advised of the warrant for his arrest and he was immediately handcuffed on his front porch. Harris expressed concern that the front door was open and asked that it be locked. Deputy Gilbert swept the home, finding Bailey, Harris's girlfriend. Bailey collected her belongings and left. Deputy Gilbert made sure no one else was in the residence and turned off a fan. On his way out, Deputy Gilbert spotted a plastic bag and could see marijuana inside the bag. He opened the bag, confirming the presence of marijuana. Deputy Gilbert also found methamphetamine. Deputy Gilbert called another deputy to obtain a search warrant for the home. Harris stated he did not give consent for the entry, instead claiming that he asked if he could go inside. Harris stated he was going to see if Bailey was planning to stay and if she had a key. Harris was told he could not go back inside. He told the officers they could not go in without a search warrant, but they entered anyway.

The trial court denied the motion to suppress, finding Harris gave the officers consent to enter the home. Harris was convicted of the underlying crime and appealed.

ISSUE: May officers enter with consent to secure a property?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit determined that there were inconsistencies in the officers' testimony but that ultimately, there was good reason to believe that Harris wanted his house to be locked up, and that the officers were given permission to enter.

The Sixth Circuit affirmed the conviction.

SEARCH & SEIZURE – TRAFFIC STOP

U.S. v. Murray (Born / Elstarheem), 926 F.3d 313 (6th Cir. 2019) (CERT PENDING)

FACTS: In November, 2016, the Murrays (brothers) were stopped by Trooper Weeks (Ohio State Police). Trooper Weeks initiated traffic stops when asked to do so by undercover officers in the area. Agents followed the brothers when they left a local hotel, and they watched until Elstarheem, driving, made an illegal lane change. The agent asked Weeks via radio to make the stop.

At the stop, Elstarheem admitted he lacked a valid license, and both brothers had prior convictions. Born, who had a license, agreed to drive and they were released to go to the nearest hospital, as they claimed to be seeking medical aid for Born. They returned to the hotel instead, where they

were found to load luggage into a different car. Born, driving, committed another traffic violation, and Weeks made a second stop, about 90 minutes later.

This time, he again checked the records and told Elstarheem to sit with his hands on the dashboard, instead he "bolted" and only stopped when he was told he would be tased. With both brothers in the cruiser, secured, Weeks' drug dog did a pass around the vehicle and alerted on the trunk. No drugs were found, but instead, two envelopes holding 150 stolen commercial checks. They were charged with a variety of offenses related to the checks and moved for suppression. When that was denied, they took a conditional guilty plea and appealed.

ISSUE: Is a pretextual stop proper?

HOLDING: Yes

DISCUSSION: The Murrays focused on the short time (less than one minute) between the second traffic stop and Elstarheem's flight. They argued that the detention was unlawful because Weeks had "abandoned his traffic violation investigation" and instead had Born get out to investigate drug trafficking instead, without any reasonable cause. Although the stop was arguably a "pretext to fish," it was still lawfully based on a traffic violation.[126] The Court noted that while "reasonable may become unreasonable" there simply wasn't enough time for Weeks to have done anything at all with the traffic citation, and he had "barely started" the process. He had not asked for Born's license because he had checked it just a short time before, and it was appropriate to get him out of the vehicle.[127] He had already caught the two men in a lie and it was proper to remove the driver from the vehicle to figure out what was going on.

The Court upheld the pleas.

U.S. v. Lambert, 770 Fed.Appx. 737 (6th Cir. 2019)

FACTS: On November 19, 2012, Officer McMullen (Jackson, TN PD) was dispatched to a call about a man with a gun at a local shopping mall. On the way, the officer received another dispatch that the man was leaving and provided a vehicle description. The officer spotted the car and followed it. Upon confirming the plate, Officer McMullen executed a traffic stop. The officer had the driver, Lambert, exit the vehicle and the door was left open. Officer McMullen explained the purpose of the stop, and Lambert denied having a gun. Officer McMullen frisked Lambert. While McMullen was conducting the frisk, another officer looked through the window of the vehicle and spotted a toddler in a car seat. The other officer searched the vehicle and ultimately found a pistol tucked between the console and the driver's seat.

[126] Whren v. U.S., 517 U.S. 806 (1996).
[127] U.S. v. Lash, 665 F.App'x 428 (6th Cir. 2016).

Lambert, a convicted felon, was indicted for possession of the gun. He moved to suppress, but the trial court found that the officer had performed a "legal protective sweep of the area within reach of the driver." McMullen pled guilty and appealed.

ISSUE: May a vehicle be searched under Gant if the subject has the ability to access the car?

HOLDING: Yes, but this is a fact-specific and case-specific analysis.

DISCUSSION: Lambert asserted that no sufficient reason existed to search his car. Further, Lambert argued that the search was improper. The Sixth Circuit held that Officer McMullen had reasonable suspicion to make the stop. The appellate court also noted that while carrying a weapon is not illegal, the initial call suggested a disturbance, and even a lawful carrier – which Lambert was not – may not engage in criminal action with the firearm. With respect to the search, Gant, and Michigan v. Long were examined. A vehicle search is valid even if the subject is under the officer's control because the subject could break away and access the vehicle. Until a full custodial arrest is executed, the officer is vulnerable. In this situation, Lambert remained standing next to the open driver's door. Thus, this situation "falls squarely" under Long. "Gant specifically recognized the continuing validity of Michigan v. Long as an established exception to the Fourth Amendment warrant requirement."[128] The possibility legality of the weapon was not a factor.

The conviction was affirmed.

U.S. v. Coleman, 923 F.3d 450 (6th Cir. 2019)

FACTS: In March 2017, law enforcement officers began to investigate Powell, a local drug dealer. After a CI identified one of the sources as Coleman, the investigation turned to him. A few days later, Coleman was observed associating with Powell. After further investigation, officers obtained a search warrant to attach a tracking device on Coleman's vehicles, which were parked in an open apartment parking lot. One vehicle was in his shared driveway and the other vehicle was in a parking space open to residents and guests. After Coleman made some sales to Powell, he was tracked back and forth to his home.

Agents obtained a search warrant for Coleman's home, locating a number of items. Coleman admitted possession of the cocaine found and a firearm (he was a convicted felon). Coleman's motion to suppress the fruits of the search warrants was denied. Coleman entered a conditional guilty plea and appealed.

ISSUE: Is a public parking lot curtilage?

HOLDING: No.

DISCUSSION: The appellate court first held that the tracking device warrant was property supported and obtained as the supporting affidavit listed the facts known to the issuing magistrate. The Sixth Circuit then examined the installation of the tracker, which Coleman argued was within

[128] Arizona v. Gant, 556 U.S. 332 (2009); Michigan v. Long, 463 U.S. 1032 (1983).

the curtilage. Coleman's driveway was open, shared with another resident of the apartment complex, and was not enclosed in any way, abutted a sidewalk, and was the point of entry to the residence.[129] The court held that the entry was proper.

Additionally, sufficient evidence existed to support a warrant for the residence, as it was a fair inference that drug dealers have evidence at their residence. Coleman regularly drove between his home and transactions.

The district court was affirmed.

42 U.S.C. §1983

The following cases (specifically under this heading) may involve ongoing litigation. The summaries below reflect the most recent published decision in the case in the Sixth Circuit Court of Appeals. In cases involving the reversal of a summary judgment granted by the District Court (that is a ruling against the agency or officer), the agency may continue the litigation or it may be settled out of court. The following may not be the final determination in the case.

42 U.S.C. §1983 – DETENTION

Vanderhoef v. Dixon, 938 F.3d 271 (6th Cir. 2019)

FACTS: Vanderhoef was involved in an automobile accident in Tennessee with Dixon, an off-duty reserve police officer, who was driving home in his personal vehicle. Vanderhoef was driving at a high rate of speed, lost control of his vehicle in a curve, struck Dixon's vehicle, and ultimately stuck a telephone pole. After the accident, Dixon held Vanderhoef and his passengers (teenagers) at gunpoint for several minutes. Vanderhoef filed suit and the matter went to trial. The jury found in Vanderhoef's favor and awarded a nominal judgment in the amount of $500. (The trial court determined that Dixon was acting under color of law in his actions.) After trial, Dixon renewed his motion for qualified immunity, which the trial court granted and dismissed the judgment. Vanderhoef appealed.

ISSUE: May an off-duty officer be held liable for actions taken under color of law?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit held that it was unreasonable for Dixon to hold the occupants of the other vehicle at gunpoint under the circumstances. He did not identify himself as a police officer until the end of the interaction but continued to issue orders for several minutes. The Sixth Circuit examined Graham v. Connor's factors and found them all to fall to Vanderhoef's favor.

The trial court's decision to award qualified immunity to Dixon was reversed and the judgment was reinstated.

[129] Collins v. Virginia, 584 U.S. --- (2018).

Parnell v. City of Detroit, 786 Fed.Appx. 43 (6th Cir. 2019)

FACTS: On January 14, 2016, Parnell was celebrating his birthday in Detroit with his fiancée, Cann. Cann wanted to practice firing her legal firearm – so she went outside and fired several shots at the abandoned house next door. Cann did this twice. Parnell never went outside or fired a weapon.

A neighbor called 911 and officers Billingslea and Patterson responded. As they passed, Billingslea later stated he saw a male dressed in a brown shirt (as Parnell was) shoot at the cruiser from Cann's porch. They called for backup. When the officers knocked, both Cann and Parnell came outside, with Cann yelling she had been the person firing the gun. The officers ignored Cann and focused on Parnell. Parnell complied with commands to walk backwards toward them and he alleged that he was then beaten. (Parnell could identify Billingslea from prior interactions, but no one else.) Patterson helped take Parnell into custody.

Cann had given permission for a residence search and the gun was found. Cann continued to insist she had been the person shooting and even reported such to 911. Captain Thompson wrote a report but indicated he could not confirm the officer's claim as there were no marks on the cruiser. There was, however, significant evidence to support Cann, as there were several marks on the empty house. Sgt. Mack submitted the reports, except for the one that concerned what was found on the house, to the prosecutor Yang. Yang filed charges against Parnell.

Right before the trial, Sgt. Diaz, an evidence technician who examined the house and found evidence supporting Cann's account of this incident, spoke to the trial prosecutor, Lanning. Lanning was surprised and realized that there was conflicting evidence. Ultimately, the case against Parnell was dismissed without prejudice and ultimately was completely dropped.

Parnell filed suit under state law, and the case was removed to federal court. The officers' motion for summary judgment was denied. This appeal followed.

ISSUE: To support a false arrest claim, is lack of probable cause a prerequisite?

HOLDING: Yes.

DISCUSSION: To succeed on a false arrest claim, Parnell must prove there was no probable cause for the arrest.[130] That same element was one of four needed for a malicious prosecution claim. Under the available facts, a reasonable jury could find that both officers made knowing or reckless material false statements that resulted in Parnell's arrest and prosecution.

Further, in this case, a jury might note the "eyebrow-raising nature of Billingslea's claim" – that he could see so much in the rear-view mirror, in the dark, while moving and quite some distance away and while "under fire." The Sixth Circuit found the story to stretch credulity.

[130] Voyticky v. Village of Timerblake, 412 F.3d 669 (6th Cir. 2005); Wallace v. Kato, 549 U.S. 384 (2007).

With respect to Sgt. Mack, also a defendant, the Sixth Circuit found that he passed on the information to the prosecutor with at "least reckless disregard for the truth." "Significant physical evidence unambiguously indicated that the shooter fired not toward the officers, but in the opposite direction." Without Billingslea's claim, there was simply no evidence Parnell fired at the officers.

With respect to the remainder of the malicious prosecution elements, the Sixth Circuit held that the false information certainly influenced Yang's decision to prosecute Parnell. Further, the prompt dismissal of the charges against Parnell upon the prosecutors learning the facts suggested that there was a "formal abandonment" of the charges.

The Sixth Circuit held that qualified immunity was not appropriate and affirmed the district court.

42 U.S.C. §1983 – SEARCH WARRANT

Butler v. City of Detroit, Michigan, 936 F.3d 410 (6th Cir. 2019)

FACTS: In December 2015, Officer Benitez (Detroit PD) swore out a warrant to search a specific address, naming as his source an experienced and reliable CI. Officer Benitez provided details to support that reliability. He noted that the CI indicated in October that he saw drugs in the listed house (and two others) within the prior 24 hours. The officer further indicates he conducted surveillance on one of the other addresses and the target address – but the addresses were 8 miles apart. In December, he supposedly did the same thing – suggesting he was observing the same two locations, including the one for which he wanted the warrant, at the same time. The CI also conducted a controlled buy at the other address. However, despite the inconsistencies in the affidavit, Benitez received the warrant.

Butler, the owner of the target home returned home from an errand after receiving break in alert. He identified himself to the officers present, who seized his lawful weapon and his wallet. Butler was handcuffed, taken inside and "slammed" into a wall by Detective Meadows, exacerbating a previous injury. Butler remained cooperative. A number of items, including almost $5,000 and cash were seized, but no charges were ever filed as nothing illegal was seized.

Butler filed suit under 42 U.S.C. §1983 on a variety of claims. The trial court ruled in favor of the defendants except for a claim against Benitez for the search and against Meadows for the force. Butler appealed.

ISSUE: Is there a high standard for a claim that a search warrant is fatally flawed?

HOLDING: Yes.

DISCUSSION: Butler argued first that Benitez's errors were material falsehoods that led to the warrant being wrongfully issued. Courts "have never required that police officers be infallible to avoid liability under 42 U.S.C. § 1983. Instead, the doctrine of qualified immunity 'provides ample protection to all but the plainly incompetent or those who knowingly violate the law.'[131] In the

[131] Malley v. Briggs, 475 U.S. 335 (1986).

context of a Fourth Amendment claim that a police officer lied in a search warrant, we have distilled a specific inquiry. 'To overcome an officer's entitlement to qualified immunity, a § 1983 plaintiff must make 'a substantial showing that the defendant stated a deliberate falsehood or showed reckless disregard for the truth.'"[132] In addition, the plaintiff must then show "that the allegedly false or omitted information was material to the finding of probable cause."

> This court derived the Vakilian standard from the Supreme Court's decision in Franks v. Delaware.[133] In Franks, a criminal defendant moved to suppress evidence seized during a search of his apartment. He requested an evidentiary hearing to prove his allegations that officers had made false statements in their search warrant affidavits. The Supreme Court determined that the Fourth Amendment's exclusionary rule allowed a defendant, in narrow circumstances, to attack the veracity of a search warrant affidavit. Id. at 164–65. The Court, however, carefully circumscribed the opportunity to do so, recognizing the need to give respectful deference to a magistrate's probable cause determination. Id. at 166–67. The bottom line was that an evidentiary hearing on the affidavit's truthfulness was required only if the defendant alleged "deliberate falsehood or . . . reckless disregard for the truth.". "Allegations of negligence or innocent mistake," the Court emphasized, would be "insufficient." Id. And the allegations of deliberate or reckless falsehood "must be accompanied by an offer of proof." Id. Even having satisfied these steps, a defendant must still show that "when material that is the subject of the alleged falsity or reckless disregard is set to one side," the affidavit's remainder no longer demonstrates probable cause. Only then is a defendant entitled to a Franks hearing to prove his allegations. Franks thus drew an evidentiary line with reference to the well-known common-law scienter standards: negligence, recklessness, and willfulness. See Restatement (Second) of Torts §§ 8A, 282, 500 (1965). Only "substantial" evidence tending to show one of the two more culpable mental states, Franks said, would do.

The Court acknowledged that officers do make mistakes, only a deliberate falsehood should lead to the officer being ineligible for qualified immunity, to give them "breathing room" to do the job. To overcome immunity, there must be substantial evidence of a "culpable mental state." In this case, Butler made no such showing. Benitez admitted his error, but that did not equate to any "calculated or reckless deception." Even "spotting Butler everything in the affidavit that he claims is deliberately or recklessly false, the remaining affidavit material still establishes probable cause to search Butler's house." The informant's tip alone would have been enough.

With respect to the force claim, Meadows argued that he was shoved against the wall only once. The Sixth Circuit, however, noted that "the Constitution says nothing about free passes for just '*one* shove against the wall,' even during drug raids."

The Sixth Circuit held that Meadows was properly denied qualified immunity. The district court's decision to deny qualified immunity to Benitez was reversed and the matter was remanded to the district court for further proceedings.

NOTE: There was a strong dissent in this case, noting the inconsistencies and especially, that the CI only indicated he had been to Butler's address, but not what he saw there or the purpose of the visit.

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[132] Vakilian v. Shaw, 335 F.3d 509 (6th Cir. 2003).

[133] 438 U.S. 154 (1973).

42 U.S.C. §1983 – HOT PURSUIT

Coffey v. Carroll, 933 F.3d 577 (6th Cir. 2019)

FACTS: Officers Carroll, Pranger and Pilchak (Taylor, Michigan, PD) were dispatched to the scene of a car break in (with the occupant inside). "The 911 caller gave the officers a lead in tracking the purported burglars. Mother Nature did the rest. Because the attempted break in took place with fresh snow on the ground, the officers could track prints in the snow revealing the men's escape. The incriminating trail of snowprints led the officers to the home of Nicholas Coffey." They found David (Nicholas' father) outside the home. David claims he did not give consent to entry, the officers said he did. What happened when they entered is "at the crux of this dispute." Coffey claims he was violently arrested after been awakened from sleep, while the officers claimed he violently resisted. Coffey suffered facial injuries. Coffey was charged with assaulting the officers but acquitted.

Invoking 42 U.S.C. §1983, Coffey filed his own action against the officers and the City of Taylor. Coffey alleged that the officers, under the supervision of the City, violated his constitutional rights by engaging in conduct amounting to unlawful entry, excessive force, and malicious prosecution. By stipulation, the suit against the City was dismissed and the claims against the officers proceeded through discovery.

The officers claimed summary judgment and the Court returned a mixed decision, finding in favor of summary judgment part and against in part. Cross-appeals were filed.

ISSUE: May a hot pursuit start inside a house?

HOLDING: No.

DISCUSSION: It was a matter of dispute as to whether the officers lawfully entered David's home to seize Coffey. "For Fourth Amendment purposes, the search here occurred on sacred ground. "[T]he Fourth Amendment has drawn a firm line at the entrance to the house."[134] A government official may knock on a person's front door and try to initiate a consensual entry.[135] But absent consent, and in the absence of a warrant or exigent circumstances, the Fourth Amendment prohibits the official from entering the home."[136]

The Court then looked to whether this was a hot pursuit. Coffey was inside with the door closed, and not in the public view. Coffey was inside the home, asleep on a loveseat. Further, the officers were not in hot pursuit, which is a recognized exception to search and seizure. "The justification has been invoked in instances where an officer without a warrant justifiably chases a suspect into a private home when the criminal has fled arrest in a public place.[137] "The 'pursuit' begins when police

[134] Payton v. New York, 445 U.S. 573 (1980).
[135] See U.S. v. Thomas, 430 F.3d 274 (6th Cir. 2005).
[136] Cummings v. City of Akron, 418 F.3d 676 (6th Cir. 2005)."
[137] Warden v. Hayden, 387 U.S. 294 (1967).

start to arrest a suspect in a public place, the suspect flees and the officers give chase."[138] "[T]he emergency nature of the situation," turns an ordinary pursuit into a "hot" one, creating the need for "immediate police action," justifying what might otherwise be an illegal search and seizure."

Further, the officers were neither "hot" nor in "pursuit," in any fair sense of those words. The sequence of events lacked an emergency. At most, Coffey had attempted (and failed) to commit a non-violent property crime earlier in the day, meaning that when the officers arrived at his house sometime later, their pursuit was lukewarm at best. Nor were the officers truly in pursuit of Coffey, as that term is understood in the case law. Pursuit is defined as an effort to catch and detain an individual following an attempted arrest and subsequent escape. But here, the officers encountered Coffey for the first time *after* they entered the home; it was only then that they began to arrest him. In other words, this was not pursuit following a failed arrest. The district court thus correctly concluded that the search was not justified by an exigent emergency."

The Court correctly denied summary judgment on this issue.

The Court also looked at the excessive force claim. Although the officers argued that Coffey claimed to have no memory of what happened, he did testify as did his father, who was present but did not see everything. The Court noted that "our bottom-line inquiry is whether the totality of the circumstances justifies a particular level of force.[139]. Factors to consider in making this inquiry include (but are not limited to) 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" Upon assessment of these factors, the Sixth Circuit determined that "the Graham factors on balance support the conclusion that the officers arguably acted in an objectively unreasonable manner." Thus, summary judgment was not appropriate.

Lastly, two of the officers allegedly offered false testimony at the preliminary examination and as such, without further proof, summary judgment was not appropriate for the officers on the malicious prosecution claim.

42 U.S.C. §1983 – MALICIOUS PROSECUTION

Thames v. City of Westland, 2019 WL 6650561 (6th Cir. 2019)

FACTS: On August 27, 2016, Thames, joined by three other pro-life activists and a Roman Catholic, was on the public sidewalk in front of an abortion clinic in Westland. They held large signs. The clinic staff were familiar with Thames but the security guard, Parsley, was not. Thames and Parsley conversed, and although there was conflict in who mentioned bombs first, bombs were discussed. Thames left the area to go to the restroom, and Parsely reported the conversation to a clinic staff member, who called police. Four Westland officers arrived. Thames returned. Officer Gatti had already interviewed Parsley and Guibernat, the staff member. Parsley claimed she fled when he tried to take her photo. Officer Soulliere spoke to Thames and asked her if she made a

[138] Smith v Stoneburner, 716 F.3d 926 (6th Cir. 2013) (citing Cummings v. City of Akron, 418 F.3d 676 (6th Cir. 2005)).
[139] Mitchell v. Schlabach, 864 F.3d 416 (6th Cir. 2017).

bomb threat, but she "talked around" his questions, but repeated she had not made any threat. Eventually, Sgt. Brooks order Thames arrested for "making a terrorist threat" under Michigan law.

During the process, a microphone worn by one of the officers caught a comment from Sgt. Brooks stating that "[a]nybody who has anything to do with this whole thing, they're fanatics." He later stated he meant the comment for both sides of the debate. When she was handcuffed, one of the other protestors, a nun, stated she had not heard any bomb threats and that Parsley was lying. She harangued Officer Gatti, who eventually responded, "You shouldn't be in the position you are. You're a disgrace."

At some point, Thames was moved to Officer Soulliere's cruiser from that of Officer Halaas. Officer Halaas had been summoned to another call. He was aggravated by her questions and expressed it verbally. During the process, the Court noted, her car was searched and nothing was found. It noted, later, that "officers did not evacuate the Clinic or the surrounding area, nor did they conduct a search of the Clinic, the adjacent parking lot, or a nearby dumpster. They did not contact the Michigan State Police to request bomb sniffing dogs. They did not impound Thames's car."

She was processed and held over the weekend, and declined to eat for the duration. She was not given an opportunity for religious devotions. Det. Farrar, to which the case was assigned, had been summoned to a homicide and did not address her case until Monday. He determined that in fact, no threat was made and released her. The PD conducted an internal investigation and concluded the arrest was "reasonable and justified" although it criticized several of the officers for some of their comments.

Thames filed suit against the four on-scene officers and the City of Westland, claiming false arrest and related situations. Notably, for procedural reasons, and essential in this case, "Thames has deliberately pressed her claims, and her arguments in this appeal, as if she made the statements as Parsley represented, effectively admitting Parsley's accusation of what she said—or conceding any dispute about it—and arguing only that those statements, considered in context, would not be sufficiently threatening to establish probable cause for her arrest. She has therefore insisted that there are no material facts in dispute and the only question here is whether, as a matter of law, her statements as reported by Parsley and the events in the recordings establish probable cause." The district court denied summary judgment from both sides for most of the issues, but did grant it to the Westland Police Chief and the City, finding that finding that Thames had not asserted, nor could she prove, a pattern, policy, or specific action necessary for Monell-based liability claims.[140]

The officers filed an interlocutory appeal, challenging the denial of summary judgment. Thames cross appealed, on the denial of her motions as well.

ISSUE: Does probable cause negate a retaliatory arrest claim?

HOLDING: Yes.

[140] Monell v. Department of Social Services, 436 U.S. 658 (1978).

DISCUSSION: First, the Sixth Circuit addressed the officer's appeal from their denial of qualified immunity. Since Thames conceded, for the purposes of argument, that Parsley's recitation was true, it made the case "purely legal."

The Sixth Circuit examined Michigan state law and the interpretation of a "true threat." Thames argued that even if she said precisely what Parsley stated, it was not a threat. While a subjective fear response is not enough, it still had to take the statements in context. Specifically:

> Four other facts bear mention. One, Thames said 'bombs.' She did not threaten brimstone, or God's fiery wrath, or something that might be considered overzealous proselytizing—she said "bomb." Two, she approached and said it, discreetly, to the security guard—she did not say it to staff passing by, or patients, or bystanders—and she did not say it where anyone else could hear her. Three, following this conversation, Thames refused to let Parsley photograph her and, without explanation to Parsley, immediately got into her car and drove off. She did return, but not until after the police had arrived. And, finally, when questioned, Thames emphatically denied making any bomb threat, but she was actively evasive and unwilling to tell Officer Soulliere what she had said to Parsley, even though Soulliere asked multiple times and stressed to her the importance of her answer.

Based upon this, the Court agreed that the officers were entitled to qualified immunity on the false arrest claim.

With respect to claims based upon a First Amendment-based retaliatory arrest claim, the Court looked to Lozman v. City of Riviera Beach (2018).[141] The Sixth Circuit "identified two potentially applicable tests: the Hartman test, which requires that "a plaintiff alleging a retaliatory prosecution must show the absence of probable cause for the underlying criminal charge . . . [or else] the case ends,"[142] and the Mt. Healthy test, which allows a plaintiff to prevail by showing that the retaliation was the "but-for cause" of the governmental action (i.e., the arrest), regardless of the existence of probable cause."[143]

Under Hartman, "beginning with the officers' reasonable belief that they had probable cause (as established above) for this run-of-the-mine arrest, Thames's failure to disprove probable cause necessarily defeats her claims that the officers are liable for wrongfully arresting her as retaliation for exercising her First Amendment rights to free speech and religion by protesting at the Clinic. Even using the Mt. Healthy test, Thames's claim fails because she has no evidence to show that the alleged retaliation was the "but-for cause" of her arrest. Given that none of the other protesters were arrested, particularly the far more effectively antagonistic nun, the officers' comments at the scene (i.e., Officer Halaas's hostile shout of "I don't give a shit," Sgt. Brooks's expression of his opinion that "anybody who has anything to do with this thing is a fanatic," and Officer Gatti's insult to the nun, calling her a "disgrace") do not demonstrate that they would not have arrested Thames "but for" her anti-abortion protesting. Rather, they arrested her for making what they reasonably

[141] 585 U.S. --, 138 S. Ct. 1945 (2018).
[142] Id. at 1952 (discussing Hartman v. Moore, 547 U.S. 250 (2006));
[143] See id. at 1952 (discussing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

accepted as being a bomb threat and for behaving in an evasive manner during the investigation of it."

The Sixth Circuit agreed it was incorrect to say she was arrested for her First Amendment speech, but in fact, the officers arrested her for her believed bomb threat. No matter, they would have removed her from the public sidewalk, no matter the charges. The Court noted that the details of her detention were outside the realm of the officers named in the lawsuit. The Court upheld qualified immunity on those claims as well. Finally, the Court agreed summary judgment for the Chief and the City was proper.

The decision of the district court that denied qualified immunity to the officers was reversed.

Evans (Joe/Linda) v. Kirk, 772 Fed.Appx. 317 (Mem) (6th Cir. 2019)

FACTS: The Evans (Joe and Linda) owned a pawn shop in Inez, Martin County, Kentucky. In February, 2016, Sheriff Kirk spotted Dials enter the shop and though he had an outstanding warrant. He went inside and asked him to come outside – Dials did so but "began to sweat and look nervous." He finally handed over oxycodone and suboxone. Deputy Witten arrived and placed Dials under arrest for public intoxication. Evans identified the source of the drugs, an employee of the pawn shop, and the transaction had taken place there.

Witten obtained a search warrant and found more pills, $20,000 in cash and a stolen gun. The Evans were arrested for trafficking, but the charges were dismissed. Both filed suit under 42 U.S.C. §1983, under the Fourth Amendment and malicious prosecution. The deputies were granted qualified immunity and summary judgement – the Evans' appealed.

ISSUE: Is a defense to malicious prosecution that the officers provided factual information to the decisionmaker?

HOLDING: Yes

DISCUSSION: The Evans focused on the malicious prosecution claim. The Court noted there was no proof that any of the officers engaged in conduct that would constitute malicious prosecution. They made no false claims and nothing indicated the evidence was not properly found pursuant to a valid warrant. At most, the court noted, he did not note that the informant, Dials, was impaired at the time and not necessarily a reliable informant. His statements, in fact, bore nothing to do with their prosecution.

The Court affirmed the decision.

Liogghio v. Township of Salem (Michigan), 766 Fed.Appx. 323 (6th Cir. 2019)

FACTS: Liogghio was the administrative assistant to the Township Supervisor. When that individual ran for re-election, she ran for Clerk as his running mate. They lost the race. The new Supervisor told a witness that he would not fire her but would "force her to quit." Over the ensuing

months, he made changes to her position. It culminated with Liogghio engaging in an argument with the new Supervisor. She then stopped going to work, for health reasons, accusing the Supervisor of making her working conditions so intolerable that she was forced to resign. She never returned but instead, filed suit under 42 U.S.C. §1983, claiming a violation of her First Amendment right to run for the office. The Town Supervisor moved for summary judgment, which was denied. He appealed.

ISSUE: May constructive dismissal for exercising First Amendment rights lead to litigation?

HOLDING: Yes.

DISCUSSION: Liogghio argued she was constructively discharged by the Township's actions. The Township Supervisor argued his actions, which reduced her duties and responsibilities, were not sufficient to constitute retaliation, and that in fact, she never actually quit.

The Court held that the factual issues Liogghio presented barred summary judgment. The case was allowed to move forward.

Rayfield v. City of Grand Rapids (Michigan), 768 Fed.Appx. 495 (6th Cir. 2019)

FACTS: Rayfield, a Grand Rapids artist, became involved with Smith, who allowed him to live in one of her rental properties. In 2014, the relationship "soured" and Smith sought to evict Rayfield. Sawinski, the other tenant in the duplex, to assist Smith, obtained a protective order against Rayfield which prohibited him from entering Sawinski's property. The two units, however, shared a garage, and he noted that would make it difficult to enforce. Rayfield alleged that the PD documented that Sawinski obtained the order to allow Smith to circumvent the usual evicition process. At the same time, Smith filed for eviction. The day before the eviction hearing, Sawinski called police claiming a violation of the order (a PPO in Michigan) and Rayfield was arrested. Rayfield claimed he had a video showing Sawinski was the aggressor but the officers declined to look at it.

Due to his arrest, and being held for three days, Rayfield missed the eviction hearing and was subsequently evicted.

Rayfield filed suit under 42 U.S.C. §1983 for his arrest and detention against the officers, the city and the county; all claims were dismissed. Rayfield appealed.

ISSUE: Is probable cause a defense to a false arrest claim?

HOLDING: Yes

DISCUSSION: In some of the claims, Rayfield initially filed against John Doe city defendants, and later amended his claim to include county defendants (reflective of the county jail). The Court agreed that because of procedural issues, his county claims could not relate back and were time-barred.

As for the city defendants, the Court noted that "Section 1983 does not create any substantive rights; rather, it is a statutory vehicle through which plaintiffs may seek redress for violations of a right secured by the Constitution or federal laws." Further, a claim "requires proof that: (1) the defendant was a person acting under the color of state law, and (2) the defendant deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States."[144] In addition, "the constitutional right must be "clearly established" at the time of the violation so that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[145]

The Court then assessed the individual claims. The Court agreed that the original arresting officers had probable cause for the arrest, given the nature of the allegations and the PPO still being valid. Even though they understood the impracticality of enforcement given the shared garage space, "the mere fact that an order is difficult to enforce does not suggest that it cannot therefore be violated." The fact that one of the officers later supported the lifting of the PPO, given Sawinski's own aggressive actions, that did not negate the "clear language of the still-effective PPO." With respect to the video, the Court agreed that if the arrest been solely for the violation, they should have reviewed it, as it potentially contained "exculpatory—and corroborative—evidence showing that Rayfield had not violated the PPO." The Court agreed that "Although officers are not required to conduct further investigations to disprove possible affirmative defenses or to corroborate a suspect's proclaimed innocence, when a suspect presents allegedly exculpatory, and quickly ascertainable, evidence showing that the officers' basis for probable cause is inaccurate, those officers may not turn a "blind eye" to that evidence in favor of the inculpatory evidence."[146]

However, in this case, the court noted that the video was not, in fact, exculpatory given that even if it showed what he alleged, he still violated by staying in Sawinski's presence. The Court affirmed the dismissal of that claim.

With respect to his detention in jail, the Court found since there was probable cause, the arrest was valid. With respect to the length of time for his detention, during which time he was transferred from a holding cell in Grand Rapids to the County jail, and the officers should have alerted the jail as to how long he had been held pending a required hearing, 48 hours, he was still lawfully held for that 48 hours, which would have covered the time for the eviction hearing. In this case, it was not clearly established that the officers failure to apprise the jail of the time frame, their "failure to communicate regarding Rayfield's detention would [not] necessarily violate Rayfield's constitutional rights …." The Court also upheld dismissal of the claims against the city for failure to train the officers how to properly protect hearing rights under the state's 48 hour rule. Although the Court indicated some concern at how the process apparently worked in the jurisdiction, and that there was a "likelihood of miscommunication or administrative delays when more than one governmental entity is involved [that] may well extend a person's detention beyond the time frame established in County of Riverside, the Court affirmed the dismissal of those claims due to procedural issues with his claim.[147]

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[144] Fridley v. Horrighs, 291 F.3d 867 (6th Cir. 2002), *cert. denied*, 537 U.S. 1191 (2003).
[145] Klein v. Long, 275 F.3d 544 (6th Cir. 2001)
[146] Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999).
[147] County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

Campbell v. Mack, 2019 WL 2359419 (6th Cir. 2019)

FACTS: On June 7, 2016, in the early evening, Campbell, African-American, was driving his wife's recently purchased minivan, which bore a obscured temporary license plate (which someone outside could not readily see) in the back window. He passed Mack, an Allen Park officer, who was with Clyde, his K9. Campbell provided his state ID and the vehicle's paperwork, he did not have a license. He stepped out upon command. When Campbell exited the minivan, Mack "jostled" Campbell, handcuffed him "very tightly," conducted a patdown search of Campbell's person, and placed Campbell in the backseat of his cruiser. Campbell complained that the handcuffs hurt his wrists and asked Mack to loosen them. Mack tightened the handcuffs and replied, "[t]hat's the loosest they're going to get."

Mack accused Campbell of stealing the van, which he denied, and stated he was on the way to a friend's house. Clyde searched the minivan, which was eventually towed in. Campbell was taken to the station to be booked for driving on a suspended OL. The handcuffs were removed, although Campbell continued to complain about them. Mack did a strip search, ordered Campbell to "get naked" and drop his pants. Mack did an extensive search, examining his buttocks and genitals, and told him the "dog indicated." Mack pulled up the pants, and then pulled down Campbell's pants and underwear, insisting to a second officer that Campbell had drugs hidden, but found nothing. He also ordered Campbell to remove his wedding ring and tossed it outside the cage. Mack finally resorted to a body cavity search but still found nothing.

Campbell filed suit under §1983 and Mack moved for summary judgement. The Trial court denied the motion, finding that "a genuine dispute of material fact existed regarding whether the traffic stop violated the Fourth Amendment and that Campbell's Fourth Amendment rights were clearly established. The District Court further found that, because Mack was not entitled to qualified immunity on Campbell's Fourth Amendment claim arising from the traffic stop, he was also not entitled to summary judgment on Campbell's Fourth Amendment claims concerning conduct that occurred after the stop, *i.e.*, the search of the minivan, the two strip searches, and the body cavity search."

Mack appealed.

ISSUE: Must the defendant accept the plaintiff's version of the "facts" in a motion for summary judgement?

HOLDING: Yes

DISCUSSION: The Court attempted to "disentangle Mack's impermissible arguments involving disputed material facts from the purely legal issues to determine whether, viewing the facts in the light most favorable to Campbell, the district court properly denied Mack qualified immunity on Campbell's constitutional claims."

The Court listed all of the places where the:

> … parties had presented conflicting evidence on the following disputed factual issues: (1) "[w]hether the temporary license plate affixed to the back of Campbell's minivan was visible;" (2) "[w]hether Campbell told Mack where his 'home' was and whether Campbell said specifically what city he was coming from and what city he was driving to;" (3) "[w]hether Campbell's pants were unzipped when he stepped out of the minivan and whether and how his pants became unzipped during the encounter;" (4) "[h]ow much physical force Mack used to patdown and handcuff Campbell, and whether Mack tightened Campbell's cuffs after Campbell complained they were too tight;" (5) whether Mack walked Clyde, the police dog, around Campbell's minivan and whether Clyde indicated the presence of narcotic odor, or whether, alternatively, Mack placed Clyde directly inside the minivan; (6) whether Campbell moved around or otherwise acted suspiciously while he was handcuffed in the backseat of Mack's cruiser; (7) "[w]hether Mack told Campbell that Mack would need to perform a strip and/or body cavity search of Campbell at the Allen Park police station;" (8) "[w]hether Mack placed his hands inside of Campbell's underwear during the strip search;" and (9) "[w]hether Mack placed his finger(s) inside Campbell's anus during the strip and/or body cavity search.

In his motion, Mack relied on "his preferred version" of the disputed facts, rather than conceding Campbell's version, as required at this state of the proceeding. The Court noted it could simply dismiss the motion for that reason, but elected to discuss the substantive matters as well.

First the Court agreed that Mack lacked any objective reason for the stop, as the temporary tag was properly placed pursuant to Michigan law and clearly visible. As such, Mack was not entitled to qualified immunity on the claim. Campbell argued that his tight handcuffs and the searches were in retaliation for his complaints and were adverse actions under the law.

In Thaddeus-X v. Blatter, this Court articulated a three-part test for First Amendment retaliation claims:

> (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.[148]

Mack conceded below that Campbell engaged in protected conduct when he complained about Mack's actions during the traffic stop and the strip and/or body cavity searches. Accordingly, to determine whether Campbell established a constitutional violation for purposes of summary judgment, we need only evaluate whether he satisfied the second and third prongs of his First Amendment retaliation claim; that is, whether Mack took an adverse action against Campbell and, if so, whether a causal connection existed between Campbell's complaints and Mack's adverse action.

[148] Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999).

Regarding the second element—whether the officer took an adverse action that would deter a person of ordinary firmness from engaging in the protected conduct—we have "emphasize[d] that while certain threats or deprivations are so *de minimis* that they do not rise to the level of being constitutional violations, this threshold is intended to weed out only inconsequential actions, and is not a means whereby solely egregious retaliatory acts are allowed to proceed past summary judgment." Further, "[w]hether a retaliatory action is sufficiently severe to deter a person of ordinary firmness from exercising his or her rights is a question of fact."[149] "Thus, unless the claimed retaliatory action is truly 'inconsequential,' the plaintiff's claim should go to the jury."

Regarding the third element—whether a causal connection existed between the protected conduct and the adverse action—we evaluate "the totality of the circumstances to determine whether an inference of retaliatory motive [may] be drawn."[150] To establish causation, the plaintiff need only demonstrate "that his protected conduct was a motivating factor" for the retaliatory acts.[151] "[T]he motivating factor prong of a First Amendment retaliation case can be supported by circumstantial evidence, with temporal proximity aiding in the analysis."[152] Because "[p]roof of an official's retaliatory intent rarely will be supported by direct evidence of such intent[,] . . . claims involving proof of a [defendant's] intent seldom lend themselves to summary disposition."

The Court agreed that the alleged actions did rise to the level of the adverse action and met the elements and further, that " "[I]t is well-established that a public official's retaliation against an individual exercising his or her First Amendment rights is a violation of § 1983."[153] Further, "the courts that have considered qualified immunity in the context of a retaliation claim have focused on the retaliatory intent of the defendant" rather than on the retaliatory action the defendant allegedly undertook.[154] This is because "[t]he unlawful intent inherent in such a retaliatory action places it beyond the scope of a police officer's qualified immunity if the right retaliated against was clearly established."

The Court stated:

> Based on Sixth Circuit precedent that existed before 2016, a reasonable officer would have known that retaliating against Campbell for complaining about Mack's conduct by tightening his handcuffs to the point of injury, subjecting him to strip and/or body cavity searches, and conducting these searches in an overly aggressive manner would violate the First Amendment.

The Court affirmed the denial of the motion for summary judgement.

42 U.S.C. §1983 – TRAFFIC STOP

[149] Bell v. Johnson, 308 F.3d 594 (6th Cir. 2002).
[150] Holzemer v. City of Memphis, 621 F.3d 512 (6th Cir. 2010) (citing Vereecke v. Huron Valley Sch. Dist., 609 F.3d 392 (6th Cir. 2010)).
[151] Maben v. Thelen, 887 F.3d 252 (6th Cir. 2018) (quoting Thaddeus–X, 175 F.3d at 399).
[152] Spencer v. City of Catlettsburg, 506 F. App'x 392 (6th Cir. 2012) (citing Gaspers v. Ohio Dep't of Youth Servs., 648 F.3d 400 (6th Cir. 2011)).
[153] Barrett v. Harrington, 130 F.3d 246 (6th Cir. 1997).
[154] Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998).

Bey v. Falk / Canton, Ohio, 946 F.3d 304 (6th Cir. 2019)

FACTS: On March 16, 2013, Bey and two friends were out in Bey's minivan. The van bore a temporary tag. They went shopping, finally ending up finding the item they sought at the third store. Unbeknownst to them, at their first stop, when they left empty-handed, their activity had been noted by undercover police officers working crime prevention. When leaving the third store, they were stopped by Canton officers, who had been asked to make the stop. As later described, their actions fit the possibility that they were engaged in retail theft, including a quick turnaround on the highway perceived as an effort to "shake" any tails. Inside the third store, the three men separated, looking a different things. However, the officer following them saw nothing indicating they were attempting to steal. As protocol indicated that plainclothes officers not make stops, Officer Falk (Canton PD) was dispatched to assist and he was briefed by the plainclothes officers. Bey was stopped shortly after leaving the store. Bey was armed, and promptly notified Falk – he had a concealed weapons license. Unfortunately, it was expired. He showed the receipts for the items they bought but he was arrested for the weapon.

Bey moved for suppression. For some reason, only Falk testified, and he did so truthfully, stating he "personally had seen no suspicious activity." The state court suppressed the evidence and ultimately, the case was dismissed. Bey filed suit under 42 USC §1983 against all of the involved officers. The officers sought summary judgment on qualified immunity and were denied. The officers appealed.

ISSUE: Does a demand that another agency make a traffic stop, with insufficient cause, possibly lead to liability for the officer who makes the request?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit addressed the claims against each officer.

McAteer and Eisenbeis, members of the team that observed the group, did not participate in any action that violated Bey's rights. As such, the Court agreed, both were entitled to summary judgment.

McKinley, who ordered the stop, was a different matter. He directed the stop without at a minimum, reasonable suspicion. None of the officers had observed any criminal or even overtly suspicious, actions. Even allowing for McKinley's arguments, they were simply "meager observations." The most damning information was that Bey's temporary tag came back with no record, but it was known that it often took some time after a sale for such tags to appear in the official database. (There was also an assertion that the tag was unreadable, but that was contradicted by the testimony of others.) The Sixth Circuit permitted the case against McKinley could proceed.

With respect to Falk, he made the stop at the behest of other officers, after a briefing of just a few minutes. Under the collective knowledge doctrine, officers may conduct a stop based on

information from other officers.[155] It would not be expected that he would cross-examine his fellow officers. The doctrine holds even when the officer is "wholly unaware of the specific facts that established reasonable suspicion for the stop."[156] Often such information is "quite skimpy." In this case, the underlying information was not enough for reasonable suspicion, but the officer acted in good faith." Falk's role was merely to make the stop when ordered to do so by McKinley. It was reasonable for him to believe the other, more experienced officers had far more information than he did at the time.

The Sixth Circuit held "an officer is not subjected to liability if he, through no improper action or inaction on his part, conducts a stop that is unconstitutional due to the error of a generally trustworthy source."[157] It was noted that officers might have additional information about the situation, but nothing suggested an improper action or inaction on Falk's part. Simply put, nothing would have suggested to Falk that McKinley's action was improper. As such, Falk was also entitled to qualified immunity.

McKinley's appeal was dismissed, with the case allowed to move forward against him, while the claims against the other three officers were dismissed.

42 U.S.C. §1983 – FIRST AMENDMENT

Novak v. City of Parma, 932 F.3d 421 (6th Cir. 2019)

FACTS: "Apple pie, baseball, and the right to ridicule the government." The events that follow occurred in Parma, Ohio.

Novak "created a 'farcical Facebook account' designed to look like the Parma Police Department's official page." The page was up for twelve hours and published several posts. Among the posts was a recruitment advertisement that "strongly encourag[ed] minorities to not apply." Novak also posted an apology from the department for "neglecting to inform the public about an armed white male who robbed a Subway sandwich shop," while promising to bring to justice an 'African American woman' who was loitering outside the Subway during the robbery. The page polarized the community, with some finding it hilarious, other angered, and some confused, believing it to be a real page. The Parma Police Department was not amused.

> A Facebook battle ensued. First, the department posted a warning on its official Facebook page. The warning alerted the public to the fake page and assured them that the matter was "currently being investigated." Then Novak reposted the exact same warning on his own page. He claims he did this to "deepen his satire." For the same reason, Novak deleted "pedantic comments" on his page explaining that the page was fake, as these "clumsy explication[s]" only "belabored the joke."

[155] Brown v. Lewis, 779 F.3d 401 (6th Cir. 2015).
[156] U.S. v. Lyons, 687 F.3d 754 (quoting U.S. v. Hensley, 469 U.S. 221 (1985)). U.S. v. Kaplansky, 42 F.3d 320 (6th Cir. 1994).
[157] Hardesty v. Hamburg Township, 461 F.3d 646 (6th Cir. 2006)

After that, the conflict moved from social media into the real world. Officer Riley assigned Officer Connor to the task of tracking down who created the page. Connor requested Facebook delete the page, by letter and email. A local news outlet opened an investigation. Novak elected to delete the page, concerned about consequences.

"Though Novak was done posting, the police department was not done investigating. They still wanted to find the person behind the laptop." Connor obtained a search warrant in which Novak claimed that Connor made "material misrepresentations and omissions." Facebook provided Novak's identity. With that, Connor obtained a search warrant for Novak's residence and an arrest warrant for Novak, claiming his actions impaired the department's ability to function in violation of Ohio law. Novak argued other than tying up the telephone lines for some 12 minutes with citizen's calls, nothing else directly affected the department. Novak was acquitted at trial.

Novak filed suit against the City of Parma, Officer Riley and Officer Connor. The officers moved to dismiss the 30-plus claims, claiming qualified immunity. The trial court granted the motion in part, but denied the motion in part, leaving 26 claims pending. The officers appealed.

ISSUE: Is parody a protected right under the First Amendment?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit began:

> Apple pie, baseball, and the right to ridicule the government. Each holds an important place in American history and tradition. So thought Anthony Novak when he created a Facebook page to mock the Parma Police Department. He styled his page to look like the department's official Facebook page. But the similarities ended there. Novak shared posts like an advertisement for a "Pedophile Reform event," at which pedophiles would receive honorary police commissions.
>
> Novak's page delighted, disgusted, and confused. Not everyone understood it. But when it comes to parody, the law requires a reasonable reader standard, not a "most gullible person on Facebook" standard. The First Amendment does not depend on whether everyone is in on the joke. Neither is it bothered by public disapproval, whether tepid or red-hot.
>
> Novak's Facebook page was either a protected parody in the great American tradition of ridiculing the government or a disruptive violation of state law. Maybe both. At this stage, we decide only whether the officers are entitled to qualified immunity. For some of Novak's claims they are, but for others they are not.

The Sixth Circuit further noted:

> For a right to be "clearly established," the "constitutionality of the officer's conduct" must have been "beyond debate" in the "particular circumstances before him."[158] The Supreme

[158] Id. at 589–90 (quoting Ashcroft v. al–Kidd, 563 U.S. 731 (2011)).

> Court has cautioned that "clearly established" must not be defined "at a high level of generality." Instead, we must be sensitive to the fact that police officers work in the real world, which is often messier than law books would have us believe.[159] So when it comes to holding police officers liable for heat-of-the-moment decisions they make in the line of duty, abstract legal principles will not do the trick.

The Sixth Circuit then broke down the issues. First was an examination of whether the officers committed retaliation based on Novak's protected speech. **"**The retaliation claim turns on two issues: (1) whether Novak's Facebook page was a parody and (2) whether the Parma police had probable cause to arrest Novak for his page. Because resolving both issues involves questions of fact, the claim survives.[160]

> Was Novak's speech protected? The Supreme Court has repeatedly reminded us that almost all speech is protected other than "in a few limited areas."[161] These "limited areas" include speech expressed as part of a crime, obscene expression, incitement, and fraud.[162] It is clearly established, though, that parody does not fall in one of these "limited areas."[163] It is protected speech.
>
> The question, then, is whether Novak's page was a parody. The officers claim that his Facebook page was false and meant to mislead the public, not a parody. But they are wrong to think that we just look to a few confused people to determine if the page is protected parody.
>
> Our nation's long-held First Amendment protection for parody does not rise and fall with whether a few people are confused. Instead, we must apply a "reasonable reader" test. Speech that "could not reasonably have been interpreted as stating actual facts" is a parody, even if "patently offensive." The test is not whether one person, or even ten people, or even one hundred people were confused by Novak's page. Indeed, the genius of parody is that it comes close enough to reality to spark a moment of doubt in the reader's mind before she realizes the joke. "The germ of parody lies in the definition of the Greek *parodeia* . . . as a song sung alongside another."[164] And masterful parody may skirt that line even closer. Benjamin Franklin's 1784 satirical essay in the *Journal de Paris* came so close to the truth that it anticipated reality before it happened. Franklin spoke of the benefits of daylight and joked that the French should consider waking up earlier to save money on candles. In his tongue-in-cheek proposal, Franklin recommended several measures for the implementation of his plan. He suggested that: "Every morning, as soon as the sun rises, let all the bells in every church be set ringing; and if that is not sufficient?, let cannon be fired in every street, to wake the sluggards effectually, and make them open their eyes to see their true

[159] Nieves v. Bartlett, 139 S. Ct. 1715 (2019)
[160] Greene v. Barber, 310 F.3d 889 (6th Cir. 2002).
[161] U.S. v. Stevens, 559 U.S. 460 (2010) (internal quotation marks omitted).
[162] See U.S. v. Alvarez, 567 U.S. 709 (2012).
[163] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).
[164] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (internal quotation marks omitted).

interest."[165] Through his satire, Franklin predicted the reality of daylight saving time, which would come a century and a half later.

And a parody need not spoil its own punchline by declaring itself a parody. "Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived)."[166] Imagine if *The Onion* were required to disclaim that parodical headlines like the following are, in reality, false: *Presidential Debate Sidetracked By Booker, De Blasio Arguing About Best Place In Lower Manhattan To Get Tapas*, or, *John Bolton Urges War Against the Sun After Uncovering Evidence It Has Nuclear Capabilities*. *News in Brief*.[167] The law of parody does not require us to strain credulity so far. And that is not because everyone always understands the joke.[168]

Instead, the test for parody is whether a reasonable reader would have seen Novak's Facebook page and concluded that the posts stated "actual facts." Our nation boasts a long history of protecting parody and satire. "[F]rom the early cartoon portraying George Washington as an ass down to the present day, . . . satirical cartoons have played a prominent role in public and political debate." And parody, like all protected speech, need not be high-minded or respectful to find safe haven under the First Amendment. "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."[169] "The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided." We uphold this right, even where parody shocks us, because "[o]ur trust in the good sense of the people on deliberate reflection goes deep."

The Sixth Circuit determined that it could not establish at this stage whether Novak's page was protected parody. Instead, that remains a jury decision.

The next question concerned whether the officers had probable cause to arrest Novak. "To answer this question," the Sixth Circuit noted that it needed "more facts." Without probable cause, Novak was arrested based upon a "'forbidden retaliatory motive."

"A plaintiff alleging retaliatory arrest must disentangle these "wholly legitimate" considerations of speech from any wholly illegitimate retaliatory motives." The Sixth Circuit questioned whether Novak would have been arrested even had he not criticized the department, and that would, of course, depend upon facts, and whether the officers truly believed they had probable cause for a non-retaliatory arrest.

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[165] Benjamin Franklin, An Economical Project, Letter to the Editor of the Journal of Paris (1784), http://www.webexhibits.org/daylightsaving/franklin3.html.
[166] Campbell, 510 U.S. at 583 n.17.
[167] The Onion (June 26, 2019), https://politics.theonion.com/presidential-debate-sidetracked-by-booker-de-blasio-ar-1835870332; News in Brief, The Onion (June 10, 2019), https://politics.theonion.com/john-bolton-urges-war-against-the-sun-after-uncovering-1835805360.
[168] Susanna Kim, All the Times People Were Fooled by The Onion, ABC News (June 1, 2015), https://abcnews.go.com/International/times-people-fooled-onion/story?id=31444478.
[169] Baumgartner v. U.S., 322 U.S. 665 (1944) (Frankfurter, J.).

In summary:

> … to resolve the retaliation claim, the factfinder below will have to decide: (1) whether Novak's Facebook page was a parody, and thus protected speech, and; (2) whether the officers had probable cause to arrest Novak under the Ohio statute. If the officers did not have probable cause, they are not entitled to qualified immunity, and Novak can attempt to show the arrest was retaliatory. If the officers did have probable cause, they are entitled to qualified immunity even if Novak's page was protected speech because the law at the time did not clearly establish that charging Novak under the statute would violate his constitutional rights.

Potential issues were identified by the appellate court, which noted that a "thorny causation issue" arises "in cases with both protected speech and unprotected conduct." In such cases, the factfinder might be unable to "disentangle whether the officer arrested him because of what he did or because of what he said." In this case, without the speech, there would be no case at all. The Sixth Circuit also noted that the statute itself was vague and overbroad.

The appellate court examined whether the deletion of comments on the official department Facebook page "censored speech in a public forum and violated [Novak's] right to receive information." The Sixth Circuit stated:

> The First Amendment no doubt applies to the wild and "vast democratic forums of the Internet."[170] But when it comes to online speech, the law lags behind the times. And rightly so. "The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow."

"Courts have not reached consensus on how First Amendment protections will apply to comments on social media platforms." Even though the right to speak anonymously is deeply rooted in American political tradition and in First Amendment doctrine, there was no clearly established law on the issue of social media posting. Novak argued that the discovery of his identity during the investigation was improper but again, there is "no law clearly establishing that investigative actions by police can violate the right to speak anonymously." On that issue, the officers were entitled to qualified immunity. The Sixth Circuit held that allegations of improper search and seizure and malicious prosecution could continue as well.

Novak also alleges a violation of the Privacy Protection Act. This claim also depends on whether the officers lacked probable cause to search Novak's apartment and seize his property. Because he has alleged facts that make it plausible that the officers lacked probable cause, the claim survives for now.

The Court noted:

> The Privacy Protection Act makes it unlawful for a government officer to "search for or seize any work product materials possessed by a person reasonably believed to have a purpose to

[170] Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

> disseminate" information to the public.[171] But the statute has a "suspect exception."[172] The Act does not apply if the officers have "probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate." Novak has alleged that the officers lacked probable cause to search and seize the contents of his apartment, so the "suspect exception" does not apply at this stage. The claim goes forward.

Finally, the Sixth Circuit looked to conspiracy. Although the intracorprate conspiracy doctrine has been applied in the sixth Circuit – it did not apply because at least one member of the law enforcement team, an unidentified task force member, was not part of the same agency.[173]

In conclusion:

> Though Novak's Facebook page mocking the Parma Police Department has since left the cyber world, several of his legal claims will live on. Others will end here. We REVERSE the district court's decision to deny the motion to dismiss on Novak's claims related to anonymous speech, censorship in a public forum, and the right to receive speech.

Brindley v. City of Memphis, 934 F.3d 461 (6th Cir. 2019)

FACTS: In 2017, a Planned Parenthood clinic opened next to the Virginia Run Cove, a collection of commercial properties in Memphis. The Cove exists as a two lane street that provides access to the businesses, with no sidewalks but manicured berms lining the street. It is directly off a major public thoroughfare. On May 1, 2017, Brindley arrived at the clinic to promote a pro-life message. A Planned Parenthood employee told him that the street was private and he had to leave. Eventually, Memphis police arrived and Lt. Barham confirmed that the street was private. He ordered Brindley to relocate to the main street, several hundred feet away. Brindley left.

Brindley then filed suit against the City of Memphis and Lt. Barham, for violations of the First Amendment, namely excluding him from a traditional public forum. Brindley demanded access to the Cove and requested and injunction. The district court denied the injunction and this appeal followed.

ISSUE: May a private road still be considered public for First Amendment purposes?

HOLDING: Yes.

DISCUSSION: All parties agreed that Brindley was engaging in protected speech, so the issue turned on "the Cove's forum classification." Public streets had long been considered the "archetype of a traditional public forum."[174] If a privately owned street is physically

[171] 42 U.S.C. § 2000aa(a).
[172] S.H.A.R.K. v. Metro Parks Serving Summit Cty., 499 F.3d 553 (6th Cir. 2007).
[173] Jackson v. City of Cleveland, 925 F.3d 793 (6th Cir. 2019).
[174] Frisby v. Schultz, 487 U.S. 474 (1988).

indistinguishable from a public street and functions like a public street, then it is a traditional public forum.[175] Here, the Cove is physically unable to be separated from a public street, this street provides free access to businesses, and nothing would suggest a private ownership. Further, documents suggested it had been dedicated to public use.

Since the street was a public place, any restriction must be narrowly drawn to serve a compelling state interest. The Sixth Circuit found no reason to believe any restriction was necessary and reversed the denial of the injunction. The case was remanded.

Cruise-Gulyas v. Minard, 918 F.3d 494 (6th Cir. 2019) (Cert filed 5/15/2019).

FACTS: In June 2017, Officer Minard (Taylor, MI) stopped Cruise-Gulyas for speeding but elected to cite her for a lesser violation. She was "apparently ungrateful for the reduction," and she "made an all-too-familiar gesture at Minard with her hand and without four of her fingers showing." Minard, unhappy, pulled her over within 100 yards and changed the ticket to a speeding offense.

Cruise-Gulyas filed suit under 42 U.S.C. §1983, claiming retaliation because of protected speech. Minard moved for summary judgment based on qualified immunity. The trial court denied the motion, ruling that she "could not be stopped a second time in the absence of a new violation of the law." Minard filed an interlocutory appeal.

ISSUE: Does rudeness constitute a basis for a traffic stop?

HOLDING: No.

DISCUSSION: The Court began by noting "fits of rudeness or lack of gratitude may violate the Golden Rule." However, "that does make them illegal…." The Court agreed that for the second stop, he needed a new driving infraction, which he did not have. Her crude gesture provided "no legal basis" to make the second traffic stop.

"Qualified immunity protects police from personal liability unless they violate a person's clearly established constitutional or statutory rights. The rights asserted by Cruise-Gulyas meet that standard."[176] To have pulled her over the second time, he needed probable cause of a traffic infraction or reasonable suspicion of a crime, but he had neither. In Wilson v. Martin, the court had ruled that the "gesture was crude, not criminal."[177] As such, "Minard should have known better here." The second stop was "distinct" from the first, and was "*not* a continuation of it." Any reasonable officer should know that such a gesture is free speech that is protected under the First Amendment."[178] "No matter how he slices it, Cruise-Gulyas's crude gesture could not provide that new justification" for a stop." Minard, in short, clearly ha[d] no proper basis for seizing Cruise-Gulyas a second time."

[175] Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996).
[176] Kisela v. Hughes, 138 S.Ct. 1148 (2018).
[177] 549 F.App'x 309 (6th Cr. 2013).
[178] Sandul v. Larion, 119 F.3d 1250 (6th Cir. 1997); Cohen v. California, 403 U.S. 15 (1971).

The Court affirmed the denial of summary judgment and permitted this matter to proceed.

Hartman v. Thompson, 931 F.3d 471 (6th Cir. 2019)

FACTS: On August 27, 2015, the Kentucky Farm Bureau (KFB) sponsored an annual event at the Kentucky State Fair known as the Ham Breakfast. To attend the Ham Breakfast, a person had to have a separate ticket for the breakfast and purchase admission to the state fair. The day before the breakfast, the Fairness Campaign, the American Civil Liberties Union of Kentucky, and the Jefferson County Teachers Association (and some other organizations) issued a press release announcing they would protest the event against discriminatory policies on the part of the KFB. Trooper Thompson (KSP), who was overseeing fair security, received a call from Fairgrounds CEO Rippetoe, which precipitated a meeting of fair personnel to discuss how this protest would be handled. Kentucky Administrative Regulations required a 72-hour notice to the Executive Director of the Kentucky Exposition Center of any protest activities and a permit was required to be obtained. Ultimately, it was decided that this protest could go forward despite the lack of notice.

Thompson met with the group and suggested an area in the parking lot some 50 feet from the sidewalk. "The suggestion was based on handicap-accessible parking because Thompson remembered from previous dealings with The Fairness Campaign, when they had protested the event in prior years, that 'there were a few members that were with the group that were handicapped, or if not handicapped they used assistance with canes, wheelchairs and so on.'" The group agreed with Thompson's recommendations and flagged off the area …." He also met the group the next morning and told them they could use signs, megaphones and "the whole nine yards" during their demonstration.

However, anticipating that some of the protestors would have tickets for the event, Thompson warned the group that they could not disrupt the event from inside the facility. Hartman, one of the protestors, stated "I'm going to do what I have to do." Trooper Thompson was aware of what had occurred the previous year which involved several attendees disrupting the event. No arrests were made in 2014.

Based on Thompson's warning, the Fairness Campaign decided to "rethink its plan." Instead of moving to the front of the speakers' dais as they had done the previous year, they "decided they would stand silently at their assigned table for 60 seconds." As soon as the first speaker started, the group did as they planned and three tables of protestors stood up silently.

At this point, accounts differed. The protestors claimed that "immediately after they stood up, police officers approached them, placed Hartman under arrest, and escorted him from the building." They alleged no one was warned to sit down or leave. Trooper Thompson, however, "testified he approached Hartman and asked him to sit down, but Hartman refused to answer and did not sit down." Trooper Drane testified that "after Hartman was placed into handcuffs, he picked his feet up and had to be "pack[ed] out" of the venue by the troopers." Hartman stated that in protest to being handcuffed, he did a "dead drop" in response to being jerked forwarded when he delayed cooperating. Trooper Drane arrested Hartman for failure to disperse and disorderly conduct. Thompson returned and found others still standing. He told them they had to leave and all but two

did so, leaving only DeVries and Wallace. DeVries claimed that Trooper Hill told her to leave and she replied she was waiting for her friends. Hill, however, stated that she was already handcuffed when he was told to take charge of her and remove her, and she too was charged with failure to disperse. Wallace claimed she was told she had to leave, but before she could comply, she was removed and arrested on the same charges.

Ultimately, the Jefferson County Attorney dismissed all charges. At that time, they filed a lawsuit in state court, which was ultimately removed to federal court under 42 U.S.C. §1983. The three asserted claims of "false arrest and malicious prosecution in violation of the Fourth Amendment, and free speech and retaliatory arrest claims in violation of the First Amendment" under federal law and "wrongful arrest, malicious prosecution, and battery under Kentucky law."

The district court granted summary judgment to the troopers and the protestors appealed.

ISSUES: 1. Is law enforcement's actions in moving protestors to a "protest zone" reasonable when law enforcement was not involved with the creation or enforcement of the protest zone?

2. Is a law enforcement's officer's recommendation of the location for the "protest zone" outside of a quasi-public event a violation of free speech?

3. Is requiring protestors to protest within a designated "protest zone" viewpoint discrimination in violation of the First Amendment?

4. Does passive disruption of a lawful meeting provide probable cause to arrest for disorderly conduct, disrupting a meeting and/or failure to disperse?

5. Is a police officer liable for malicious prosecution for simply forwarding a police report to a prosecutor's office?

HOLDING: 1. No.

2. No.

3. No.

4. Yes.

5. No.

DISCUSSION: With respect to the protest zone, the Sixth Circuit noted that since neither Drane or Hill was involved in the establishment of the zone, they were entitled to summary judgment on that claim. As for Thompson, "§1983 requires that the defendant 'subjects, or causes to be subjected' a United States citizen to the deprivation of a constitutional right." Thompson recommended the placement of the zone at a request from the Kentucky Exposition Center. Only the director of the Kentucky State Fair could authorize this protest and establish the parameters of the protest. Thus, Thompson could not be subject to lawsuit on that claim.

With respect to the protected speech issue, the Sixth Circuit noted that "there are four types of speech fora: nonpublic, public, designated public, and limited public."[179] Although the protestors argued they were on sidewalks outside of the Kentucky Exposition Center, they were clearly in a parking lot property owned and maintained by the Exposition Center. The protestors also had to

[179] Pleasant Grove City v. Summum, 555 U.S. 460 (2009); Miller v. City of Cincinnati, 622 F.3d 524 (6th Cir. 2010).

pay admission to be located where they were. Accordingly, this was a "limited public forum." In a "limited public forum," the government "is not required to and does not allow persons to engage in every type of speech."[180] The government may restrict speech so long as the restrictions are viewpoint neutral and "reasonable in light of the purpose served by the forum." Viewpoint discrimination is a more "egregious" form of content discrimination."[181] It occurs when speech is restricted because of the speaker's viewpoint on the topic—i.e., but for the perspective of the speaker, the speech would normally be permissible.[182]

The Sixth Circuit held that "the Fairgrounds had a legitimate, viewpoint-neutral reason for designating a protest zone for a large group of people. The Fairgrounds regulations allow demonstrations unless a demonstration unreasonably and substantially interferes with (1) patron safety; (2) '[t]he orderly movement of vehicle and pedestrian traffic'; or (3) the 'normal functions' of the Fairgrounds." Some 2,000 attendees were expected for the breakfast and State Fair personnel were concerned about this group interfering with that traffic. The location was not designated because of any particular viewpoint, and any other protestor would have been placed in a similar "protest zone." Although the protestors alleged others were permitted to be in the sidewalk, closer, with signs, they did not provide any specifics. As such, there was a "viewpoint-neutral rationale for the protest zone."

With respect to the argument that it was improper to force protestors to "indicate their intent to protest" and make a "distinction between those registering to protest and those who simply show up and do so arbitrarily favors those who do not register," The Sixth Circuit held that Thompson's actions were reasonable under the circumstances.

With respect to what occurred inside the venue, the Sixth Circuit determined that this event was a private forum, so the rules of engagement between law enforcement and the public are different. Arrest requires probable cause and "[t]o determine whether probable cause exists, we consider only 'the facts known to the arresting officer at the time of the arrest.'"[183] The offense establishing probable cause need not be "closely related to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest." Nor does an officer's subjective motivation invalidate an otherwise lawful arrest based on probable cause.[184]

The district court ruled that the troopers had probable cause to arrest each of the protestors and found no reason to disagree with that ruling. However, the district court had pointed to a different Kentucky statute – Disrupting a lawful meeting – KRS 525.150 instead. Indeed, they admitted the intent was to "draw attention away from the speaker." Even if the protestors did not actually obstruct the meeting, they engaged in an action "tending" to do so. Trooper Thompson was aware of the events that occurred the prior year, and that Hartman had intended to "ramp up" in 2015. "Considering these facts, Thompson had reason to believe that The Fairness Campaign was going to do something more than forming a wall in front of the speaker for 60 seconds. That action would

[180] Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).
[181] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).
[182] See, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993)
[183] Devenpeck v. Alford, 543 U.S. 146 (2004).
[184] Arkansas v. Sullivan, 532 U.S. 769 (2001).

certainly tend to obstruct or interfere physically with the Ham Breakfast in violation of Ky. Rev. Stat. § 525.150."

Finally, although a silent standing demonstration is an "age old form of political speech at public meetings," this was not, in fact, a public event. Once probable cause is established, the Sixth Circuit noted, the "remaining claims fall like a house of cards."

Under 42 U.S.C. §1983, if the officer has probable cause, a false arrest claim cannot be maintained. Since probable cause existed, the false arrest claims failed. With respect to First Amendment retaliation, the court noted that "a claim of First Amendment retaliation requires proof that: "(1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between" the first two elements, i.e. "the adverse action was motivated at least in part by the plaintiff's protected conduct."[185]

The district court ruled that probable cause defeated the claim for retaliatory arrest, relying on Hartman v. Moore[186] and Marcilis v. Township of Redford.[187] Hartman established that a plaintiff claiming retaliatory prosecution must plead and prove a lack of probable cause to prosecute. Because the officers had probable cause to arrest, the First Amendments claim also failed.

The Sixth Circuit also elected to mention the most recent decision, Nieves v. Barlett.[188] "As Nieves makes clear, if there is a showing of probable cause, a retaliatory arrest claim fails."

With respect to malicious prosecution, the Court noted:

> A claim for malicious prosecution under § 1983 requires: (1) that the defendant "ma[d]e, influence[d], or participate[d] in the decision to prosecute" the plaintiff; (2) a lack of probable cause for the criminal prosecution; (3) the plaintiff suffered a deprivation of liberty as a consequence of the legal proceeding; and (4) the criminal proceedings were resolved in the plaintiff's favor.[189]

The protestors did not show the first element, as there is no indication the troopers took any action in the prosecution after the initial arrest.

Under Kentucky law, these elements are slightly different. In Kentucky:

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[185] Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999) (en banc).
[186] 547 U.S. 250 (2006).
[187] 693 F.3d 589 (6th. Cir. 2012).
[188] 139 S. Ct. 1715 (2019) held that "probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment." The Court noted that in First Amendment retaliation cases, "it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct," and thus, "[b]ecause of the 'close relationship' between the two claims, their related causal challenge should lead to the same solution: The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest."
[189] Sykes v. Anderson, 625 F.3d 294 (6th. Cir. 2010).

This … requires a plaintiff to prove that

1) the defendant initiated, continued, or procured a criminal . . . proceeding. . . against the plaintiff;
2) the defendant acted without probable cause;
3) the defendant acted with malice, which, in the criminal context, means seeking to achieve a purpose other than bringing an offender to justice . . . ;
4) the proceeding . . . terminated in favor of the person against whom it was brought; and
5) the plaintiff suffered damages as a result of the proceeding.[190]

Here, the troopers had probable cause to arrest and acted without malice. In fact, following the arrests, Trooper Thompson met with the remaining protestors, told them they could still protest outside, and even offered to put the flags back up that protected the zone which had been knocked down.

With respect to Hartman's battery claim, the court held that appropriate force was used because Hartman refused to walk.

The district court was affirmed.

42 U.S.C. §1983 – BRADY

Jackson / Ajamu / Bridgeman v. City of Cleveland, 6th Cir. 2019

FACTS: This case involves several men who served long sentences for crimes they did not commit and each spent at least several years on death row. They were eventually exonerated of the crimes through the Innocence Project and are generally acknowledged to truly be innocent of the crimes. Each filed suit against the City of Cleveland arguing that detectives in each of their cases did not properly share exculpatory evidence with the defense. The District Court gave, among other decisions, summary judgement to the claims under arising from violations of Brady v. Maryland, fabrication of evidence, and malicious prosecution.[191] The City and the affected officers appealed.

ISSUE: Do officers of the same agency working together to commit a misdeed constitute conspiracy?

HOLDING: No

DISCUSSION: The Court noted that "Brady claims have three elements: "[1] the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued."[192]

[190] Martin v. O'Daniel, 507 S.W.3d 1 (Ky. 2016), as corrected (Sept. 22, 2016), reh'g denied (Feb. 16, 2017).

[191] 373 U.S. 83 (1963).
[192] Strickler v. Greene, 527 U.S. 263 (1999).

The Court agreed that in one case, although a jury might ultimately disagree and find that the officer "did not suppress evidence, it would not be unreasonable in finding that he had."

With respect to allegations of conspiracy, given that multiple officers were involved in the cases, a reasonable jury could find that the detectives were working together to prevent the evidence from reaching the prosecutors. However, under the intracorporate conspiracy doctrine, individual officers within the government entity could not be considered to be in a conspiracy as they all worked for the same entity. Following an extensive discussion, the Court agreed that Brady was clearly established at the time the cases originated. The officers should have been aware of a requirement that they disclose exculpatory evidence, and that the evidence involved was potentially exculpatory. The Court emphasized "Brady is concerned only with cases in which the government possesses information which the defendant does not."[193] The Court linked this with the concept that an officer would not know that coercing a perjured statement was unlawful as well, as was alleged.

More concretely, as far back as 1935, the Supreme Court recognized that the introduction of fabricated evidence violates "the fundamental conceptions of justice which lie at the base of our civil and political institutions."[194] And in 1942, the Supreme Court held that when a witness perjures himself because of threats from police officers, the defendant suffers "a deprivation of rights guaranteed by the Federal Constitution."[195] The Court also agreed he would have been on notice that his actions might be considered malicious prosecution.

The Court reversed the summary judgement decisions with respect to the primary detective, and remanded the case.

42 U.S.C. §1983 – ARREST

Jackson v. Lawson, 760 Fed.Appx. 394 (6th Cir. 2019)(Cert. filed 5/9/2019)

FACTS: On December 16, 2016, Officer Lawson (Louisville Metro PD) responded to a suspicious person call. He found Jackson preparing to inject heroin. Lawson found multiple hits under Jackson's name for active warrants, and placed Lawson under arrest. After booking, Lawson again ran Jackson through the system and found several outstanding warrants, in particular, one for flagrant non-support out of Grant County. The subject in that warrant had the same birth year and last four numbers of the Social Security number, but few other identifiers were in the warrant. When told, Jackson said he "didn't think it was him." Jackson indicated he was aware of it and had, two years before, written a letter to "some lawyer" and said they had the wrong person, but "did nothing else." (Jackson denied that he was told about the warrant at that time.) Lawson went through some steps and ultimately served it, but realized Jackson was a little taller than indicated by the warrant and gave a different street address.

[193] U.S. v. Graham, 484 F.3d 413 (6th Cir. 2007).
[194] Mooney v. Holohan, 294 U.S. 103 (1935) (citing Hebert v. Louisiana, 272 U.S. 312 (1926)).
[195] Pyle v. Kansas, 317 U.S. 213 (1942).

After his matters in Jefferson County were resolved, he was to be transferred to Grant. (This was the point at which Jackson stated he learned of the warrant for the first time.) He protested to his attorney but was transferred and remained in custody for another two months, until he could post bond. Within another month, with a DNA test, he was excluded as the father of the child and the case was dismissed.

Jackson filed suit against Lawson and other parties, arguing false arrest and related claims, under 42 U.S.C. §1983. After discovery, Lawson was dismissed under summary judgment. Jackson appealed.

ISSUE: Should officers attempt to verify identity (to the extent they can) when an arrested subject states they are not the right person?

HOLDING: Yes.

DISCUSSION: The Court noted that "the general rule is that when an individual is arrested pursuant to a facially valid warrant and detained despite protestations of mistaken identity, the individual's imprisonment is not constitutionally repugnant."[196] The standard would be deliberate indifference and a failure to take some action to verify the identity of the party involved. The Court noted factors to be considered are the length of time of the detention, the extent to which he protested his innocence and the availability of exculpatory evidence to the officer at the time. In this case, his detention was lengthy (two months) but his attempts to protest were minimal, at least to Lawson. Lawson verified as much as he could, based upon available information. The height and address differences were negligible.

The Court affirmed the dismissal.

Watson v. City of Burton, 764 Fed. Appx. 539 (6th Cir. 2019)

FACTS: On August 4, 2015, Hubarth contacted the Burton, Michigan PD alleging Watson had sent her threatening text messages and she believed he was armed. On August 12, officers went to Watson's apartment and asked him to come outside, but then reached in and led him outside. He admitted to sending the messages to Meissner, Hubarth's friend, not to Hubarth. Watson was charged with a local violation and those were later charged.

Watson filed suit under 42 USC §1983 against the department and the officers involved, claiming improper arrest. Watson argued he was inside the house when grabbed and pulled outside. The officers argued that Watson was on the threshold and thus in a public place. The trial court denied summary judgment and the officers and city appealed.

ISSUE: May a home be entered to make a warrantless arrest, absent an exigency?

HOLDING: No.

[196] Baker v. McCollan, 443 U.S. 137 (1979).

DISCUSSION: The Court equated this to the situation in U.S. v. Saari, calling this a constructive in-home arrest."[197] In both, the subject was seized by intimidation and a command or action while inside their homes. "Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."[198]

In this case, the Court found "no compelling law enforcement need to enter the home at the moment they did." As such, the Court affirmed the denial of summary judgment and permitted the case to move forward.

Rayfield v. City of Grand Rapids (Michigan), 768 Fed.Appx. 495 (6th Cir. 2019)

FACTS: Rayfield, a Grand Rapids artist, became involved with Smith, who allowed him to live in one of her rental properties. In 2014, the relationship "soured" and Smith sought to evict Rayfield. Sawinski, the other tenant in the duplex, to assist Smith, obtained a protective order against Rayfield which prohibited him from entering Sawinski's property. The two units, however, shared a garage, and he noted that would make it difficult to enforce. Rayfield alleged that the PD documented that Sawinski obtained the order to allow Smith to circumvent the usual evicition process. At the same time, Smith filed for eviction. The day before the eviction hearing, Sawinski called police claiming a violation of the order (a PPO in Michigan) and Rayfield was arrested. Rayfield claimed he had a video showing Sawinski was the aggressor but the officers declined to look at it.

Due to his arrest, and being held for three days, Rayfield missed the eviction hearing and was subsequently evicted.

Rayfield filed suit under 42 U.S.C. §1983 for his arrest and detention against the officers, the city and the county; all claims were dismissed. Rayfield appealed.

ISSUE: Is probable cause a defense to a false arrest claim?

HOLDING: Yes

DISCUSSION: In some of the claims, Rayfield initially filed against John Doe city defendants, and later amended his claim to include county defendants (reflective of the county jail). The Court agreed that because of procedural issues, his county claims could not relate back and were time-barred.

As for the city defendants, the Court noted that "Section 1983 does not create any substantive rights; rather, it is a statutory vehicle through which plaintiffs may seek redress for violations of a right secured by the Constitution or federal laws." Further, a claim "requires proof that: (1) the defendant was a person acting under the color of state law, and (2) the defendant deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States."[199] In addition, "the constitutional right must be "clearly established" at the time of the

[197] 272 F.3d 804 (6th Cir. 2001).
[198] Payton v. New York, 445 U.S. 573 (1980).
[199] Fridley v. Horrighs, 291 F.3d 867 (6th Cir. 2002), *cert. denied*, 537 U.S. 1191 (2003).

violation so that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[200]

The Court then assessed the individual claims. The Court agreed that the original arresting officers had probable cause for the arrest, given the nature of the allegations and the PPO still being valid. Even though they understood the impracticality of enforcement given the shared garage space, "the mere fact that an order is difficult to enforce does not suggest that it cannot therefore be violated." The fact that one of the officers later supported the lifting of the PPO, given Sawinski's own aggressive actions, that did not negate the "clear language of the still-effective PPO." With respect to the video, the Court agreed that if the arrest been solely for the violation, they should have reviewed it, as it potentially contained "exculpatory—and corroborative—evidence showing that Rayfield had not violated the PPO." The Court agreed that "Although officers are not required to conduct further investigations to disprove possible affirmative defenses or to corroborate a suspect's proclaimed innocence, when a suspect presents allegedly exculpatory, and quickly ascertainable, evidence showing that the officers' basis for probable cause is inaccurate, those officers may not turn a "blind eye" to that evidence in favor of the inculpatory evidence."[201]

However, in this case, the court noted that the video was not, in fact, exculpatory given that even if it showed what he alleged, he still violated by staying in Sawinski's presence. The Court affirmed the dismissal of that claim.

With respect to his detention in jail, the Court found since there was probable cause, the arrest was valid. With respect to the length of time for his detention, during which time he was transferred from a holding cell in Grand Rapids to the County jail, and the officers should have alerted the jail as to how long he had been held pending a required hearing, 48 hours, he was still lawfully held for that 48 hours, which would have covered the time for the eviction hearing. In this case, it was not clearly established that the officers failure to apprise the jail of the time frame, their "failure to communicate regarding Rayfield's detention would [not] necessarily violate Rayfield's constitutional rights …." The Court also upheld dismissal of the claims against the city for failure to train the officers how to properly protect hearing rights under the state's 48 hour rule. Although the Court indicated some concern at how the process apparently worked in the jurisdiction, and that there was a "likelihood of miscommunication or administrative delays when more than one governmental entity is involved [that] may well extend a person's detention beyond the time frame established in County of Riverside, the Court affirmed the dismissal of those claims due to procedural issues with his claim.[202]

42 U.S.C. §1983 – OFF DUTY

Kalvitz v. City of Cleveland, 763 Fed.Appx. 490 (6th Cir. 2019)

FACTS: "Almost every important fact in this case is in dispute." In May 2014, Kalvitz, a retired police officer was attending an annual police event. He got into a fight with an officer from another

[200] Klein v. Long, 275 F.3d 544 (6th Cir. 2001)
[201] Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999).
[202] County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

jurisdiction and he was carried out in handcuffs. During the fight, Officers Kinas and Randolph, both Cleveland officers, intervened, but "not to calm things down." Instead, Kalvitz alleged Kinas and Randolph beat him while he was on the floor, and then arrested him. As Kalvitz was carried outside, he was banged into the walls and ultimately thrown into a concrete wall. He suffered a number of injuries. The Cleveland officers, however, claimed they were off duty and bystanders but by the time they saw Kalvitz, he was already cuffed and outside. They also claimed they were off-duty and private citizens at the time.

The trial court cited the factual disputes and ruled against summary judgment. The Cleveland officers appealed.

ISSUE: May officers be sued for official acts taken while off-duty?

HOLDING: Yes.

DISCUSSON: The Court noted that there would be no debate should Kalvitz's claims turned out to the true. The officers claimed, in an alternative argument, they had been told that Kalvitz had brandished a knife, but they only heard that after the fact. As such, it was immaterial. Kalvitz claimed he did not resist arrest; the Cleveland officers claimed he did. Further, Kalvitz specifically identified which officers took which action.

Finally, the Cleveland officers argued that they were acting off-duty, and thus a §1983 action was not appropriate. The Court noted whether it was state action did not depend on their duty status but how they presented. All of the officers announced they were officers, wore weapons and two wore badges. This suggests that they were acting in an official capacity. If they used their handcuffs, that would also implicate state action. But that will be "for the jury to sort out."

The Court affirmed the denial of summary judgment and allowed the case to go forward.

Jacobs v. Alam / Weinman / Kimbrough, 915 F.3d 1028 (6th Cir. 2019)

FACTS: On January 3, 2014, a Michigan law enforcement task force, with local officers serving as Special Deputy U.S. Marshals, including those subject to the lawsuit, arrived at the home of Vargas, the brother of a fugitive they were seeking. They searched but did not find the fugitive. They also searched the basement apartment of the residence, occupied by Jacobs. During the search, Jacobs had arrived through a back entrance and did not notice the officers – although they saw him. Jacobs found his space ransacked and "bounded" up the interior stairs into the house proper. Jacobs found people he did not expect (the officers) and spun around to run, but fell down the stairs. Jacobs was armed but did not get a chance to draw his weapon. He was shot as he fell. Jacobs retreated and only then learned it was law enforcement officers who had shot him. (One recovered bullet came from Kimbrough's gun.) The version given by Kimbrough and Alam, who both fired, indicated that when Jacobs emerged from the basement, he had a pistol pointed at Kimbrough. Kimbrough identified himself as police. Kimbrough stated that Jacobs fired his weapon (although forensic evidence indicated he did not) and Kimbrough retreated. He claimed Jacobs surrendered after exchanging shots. Alam indicated he heard shots but did not know who fired. The other men saw

nothing. The Sergeant who was present stated that Jacobs said he "had the drop" on the men but Jacobs denied saying he had pointed a gun at anyone.

Jacobs was indicted but acquitted of all charges related to the incident. He then filed suit against the officers under Bivens, as they were serving as federal officers at the time.[203] The officers moved for summary judgement and were denied. They then appealed.

ISSUE: May local officers be sued under Bivens?

HOLDING: Yes.

DISCUSSION: The Court looked at whether a Bivens remedy is available under Zigler[204] and Hernandez[205]. Under Ziglar, the Court noted that each action must be considered as to whether factors warranted extending it to a Bivens action. The Court, however, noted this was in face a run of the mill challenge to a standard law enforcement activity and presented no novel idea.

The Court agreed that this action involved a simple allegation of excessive force, and because of the dispute in what actually occurred, it could not be resolved in an interlocutory ruling.

42 U.S.C. §1983 – FORCE
Studdard v. Shelby County, 934 F.3d 478 (6th Cir. 2019)(Certiorari Pending 11/14/2019)

FACTS: On a hot day in July 2016, Deputy Lane (Shelby County, TN) responded to a situation involving Studdard. Deputy Lane responded to a hit and run and bystanders directed him to Studdard, who was walking away. Deputy Lane was advised that the man had cut his own wrists, causing Deputy Lane to follow him. Next, Deputy Lane pulled up next to Studdard and tried to talk to him. Studdard turned toward Lane and displayed a knife and bloody wrists. Lane continued to follow, calling for backup. Deputies Pair, Shepherd and Reed arrived and positioned their vehicles to intercept Studdard. All three pulled out their firearms. Studdard was, in effect, sandwiched between two sets of responders. Studdard was ordered to drop the knife. He raised the knife to his throat and began to sway while moving forward. Deputies Reed and Shepherd fired, hitting Studdard several times. Studdard died several weeks later.

Studdard's wife filed suit under 42 U.S.C. §1983, claiming excessive force. The officers moved for summary judgment and were denied. The officers appealed.

ISSUE: May officers use potentially deadly force against an individual who is only a threat to themselves?

[203] 403 U.S. 388 (1971).
[204] 137 S.Ct. 1843 (2017).
[205] 137 S.Ct. 2003 (2017).

HOLDING: No.

DISCUSSION: When confronting Studdard initially, the officers had good reason to believe Studdard was dangerous and uncooperative. He did not comply with commands, but did not pose a serious risk to anyone, with the closest officers more than 30 feet away. Studdard threatened only himself. The Sixth Circuit compared this case to Sova v. City of Mt. Pleasant and held that, if anything, that case was closer, but in Sova, they also concluded that the use of deadly force against a man in a similar situation was excessive.[206]

The Court affirmed the denial of summary judgment.

Hodge v. Blount County, TN, 783 Fed.Appx. 584 (6th Cir. 2019)

FACTS: On June 10, 2015, Hodge left the scene of a minor wreck. (He suffered from vascular dementia.) The other driver followed him while calling police. Eventually, Deputy Vaughn (Blount County SO) stopped Hodge. Before Vaughn could get out of his vehicle, Hodge's truck lurched forward. Vaughn approached Hodge's vehicle with his pistol drawn and ordered Hodge out multiple times. Hodge did not respond but instead asked what he had done. Vaughn then pulled Hodge out of the vehicle, causing him to fall to the ground. Hodge, who was already in poor health, died shortly after this incident.

Hodge's wife and estate representative filed suit, arguing excessive force. The district court refused to give summary judgment to Deputy Vaughn and he appealed**.**

ISSUE: Is a violent jerk enough for an excessive force claim?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit assessed the case in segments, noting that "the officer's conduct must be reasonable at every stage.[207] The appellate court determined that there appeared to be no actual risk to the office because Hodge was "obviously confused." Hodge's hands were always in plain sight. And even if some force was permitted, a violent jerk – as described by a witness – was "clearly over the line."

The Court affirmed the district court's denial of immunity.

Phillips v. Blair (and others), 2019 WL 4164727 (6th Cir. 2019)

FACTS: On a summer night in 2014, a caller reported a commercial structure burglary to 911. "In a classic case of finding oneself in the wrong place at the wrong time," Phillips had stopped his truck at that same building. Officer Blair, responding to the 911 call, found Phillips there and questioned him, even though his vehicle did not match the caller's description. Phillips resisted the

[206] 142 F.3d 898 (6th Cir. 1998).
[207] Dickerson v. McClellan, 101 F.3d 1151 (6th Cir. 1996).

questioning and avoided handing over his license, until Blair explained about the burglary. As more officers arrived, matters became disputed and heated. Eventually Officer Groves "pulled on his arm and repeatedly commanded him to stop resisting before a group of officers—despite his attempts to comply—violently took him to the ground, cuffed him, and sprayed mace directly into his eyes." Phillips was treated and questioned, and arrested for obstructing official business. Phillips was convicted of that charge, successfully appealed, and was eventually acquitted.

Phillips filed suit under 42 U.S.C. §1983 against a number of officers and the City of Columbus, Ohio, for the arrest, the force and for a First Amendment claim. The officers were denied summary judgment and appealed.

ISSUE: Is a forcible seizure permitted when a violent crime is reasonably suspected?

HOLDING: Yes.

DISCUSSION: View this matter in the light most favorable to Phillips, there was sufficient reasonable suspicion for the officers to detain him. He was, after all, the only vehicle present at the scene within moments of the 911 call. Phillips' evasion only exacerbated the situation. Further, as the situation evolved, it was appropriate to continue the stop, and the other officers, who arrived in moments, "reacted to a swiftly developing situation and nothing about Blair's brief, initial interaction with Phillips definitively ruled out his involvement in the suspected burglary." Further, once Groves arrived, the officers acted reasonably in asking Phillips to exit his truck for safety reasons and to dispel suspicions.[208]

The district court's denial of summary judgment with respect to the detention was reversed.

With respect to the arrest, the Sixth Circuit noted:

> A probable cause determination depends on whether, at the moment of arrest, "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."[209]

Reviewing the specific Ohio state law for which Phillips was arrested, the Court noted that "Phillips knew that the officers wanted him out of the truck, yet he did not exit voluntarily." Although reasonable minds could differ, the appellate court determined there was enough to support the arrest.

Finally, with respect to the force claim:

> "[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[210] Determining the

[208] *See* U.S. v. Noble, 762 F.3d 509 (6th Cir. 2014).
[209] Beck v. Ohio, 379 U.S. 89 (1964).
[210] Graham v. Connor, 490 U.S. 386 (1989).

> reasonableness of the physical coercion "requires careful attention to the facts and circumstances of each particular case, including [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." Id. As with probable cause, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation," as officers "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." The reasonability analysis includes some "built-in measure of deference to the officer's on-the-spot judgment."[211]

In Phillips case, Officer Groves extracted him from the truck and had taken him to the ground, and officers "piled on top" – injuring Phillips in the process. At the time, however, the officers believed Phillips might have been involved in the burglary, a serious crime. Phillips' conduct suggested he might be a risk to the officers, which again tipped the Graham factors in favor of the officers. The Sixth Circuit reversed the district court's denial of immunity on the excessive force claims.

A final claim involving mace was permitted to proceed.

McGrew v. Duncan, 937 F.3d 664 (6th Cir. 2019)

FACTS: On Thanksgiving Eve, 2014, McGrew was cooking at her home when the Detroit PD arrived with a search warrant. While McGrew was stirring macaroni in the kitchen, she heard a bang at the front door. When she went to investigate, she found a group of Detroit Police officers, wearing all black and masked, standing in her living room. She was thrown to the ground by the officers and handcuffed. When she complained that the handcuffs were too tight, one of the officers responded that she "shouldn't be so fat." He also threatened to "blow [her] head off" if she didn't "shut her f--ing mouth." The officered seized a gun and marijuana, which was documented on the search warrant return, but also allegedly seized another gun, diamond earrings, a computer and a phone – which were not documented. McGrew went to the hospital and was treated for some injuries sustained during the raid.

McGrew filed suit against various officers under 42 U.S.C. §1983, claiming excessive force and related claims. The officers all moved for summary judgment; it was denied. The officers appealed.

ISSUE: Is bruising enough for a handcuff claim?

HOLDING: Yes.

DISCUSSION: With respect to the handcuffing claim, the officers did "not dispute that McGrew complained and that they did not loosen the handcuffs." The officers contended, however, that "bruising is not enough" for a claim. In Morrison v. Bd. Of Trs., the Sixth Circuit held that bruising and marks do create a "genuine issue of material fact" sufficient to overcome summary judgment.[212] As such, summary judgment is not warranted on the bruising claim.

[211] Burchett v. Kiefer, 310 F.3d 937 (6th Cir. 2002).
[212] 583 F.3d 394 (6th Cir. 2009).

The agency's claim that qualified immunity was warranted because McGrew could not identify who handcuffed her was also addressed by the court. McGrew was only able to give a general description. "If officers actively conceal their identities by wearing masks, and if that concealment prevents a plaintiff from identifying which officer violated her rights, she may get to a jury if she can create genuine factual issues regarding the officers' presence at the scene.[213] And on this record, the trier of fact may decide liability because the officers actively concealed their identities by wearing masks and none disputes his presence at the scene."

The Sixth Circuit affirmed the district court's denial of qualified immunity and remanded the case for further proceedings.

Baker (Estate) v. City of Trenton, 936 F.3d 523 (6th Cir. 2019)

FACTS: Baker decided to try LSD on "Senior Skip Day" – right before he graduated from high school. On May 28, 2015, a week later, he began acting oddly, likely after-effects of the LSD. He was sent to the principal's office. Suspecting drugs, the principal called the police. Officer Davis visited the school, observed Baker and believed that he was under the influence of something. Officer Davis and the principal left to discuss the matter. When they returned, Baker had left. The principal called Baker's parents, who were divorced, and a friend of Baker's, independently, texted Baker's mother. Baker's father finally reached him, and he told Baker to go home. Baker's mother also reached Baker, but Baker did not tell her where he was. When he did not answer additional calls, Mrs. Baker texted the friend that she was concerned.

The friend, Collin, went looking for Baker and found him alone in his father's basement. Collin used his own phone to call Baker's mother so they could talk, but Baker refused to return the phone to his friend, showing a knife instead. Collin, now without a phone, went directly to the police department and told a dispatcher what had happened. Although Collin later disputed exactly what he said, the dispatcher dispatched police officers and attested later to the validity of what she said. Officers Driscoll, Arnocski, Lyons and Biniarz responded to the house. The dispatcher added more details that indicated that Baker was armed with a knife or shotgun, or both, and was holding his mother hostage.

The officers found an unlocked door, entered, and called out. Baker responded with obscenities and demanded they leave. The officers swept the upstairs, finding nothing of interest. They went to the basement steps and tried to talk to Baker, who was at the bottom of the stairs. They could see Baker holding a lawnmower blade and when asked, he said he did not know where his mother was. Baker refused to come upstairs, but after a standoff of several minutes, he took a couple of steps up, where he was tased. Driscoll went down to subdue him, but Baker stood up still with the blade. The other officers drew back, but Driscoll, who had fallen into a seated position, was pinned, facing Baker who was swinging the blade erratically. He managed to strike Driscoll, cutting him, and Driscoll shot him. Forensic evidence indicated Driscoll fired downward, although he said he fired upward, with

[213] See Burley v. Gagacki, 729 F.3d 610 (6th Cir. 2013); see also Greer v. City of Highland Park, 884 F.3d 310 (6th Cir. 2018).

Baker above him. Baker died from his injuries. The officers cleared the house, finding a shotgun under the bed.

An investigation indicated that the shooting was in self-defense. The Estate Representative filed suit under §1983, but the district court granted summary judgment for Driscoll and the other officers. The Estate appealed.

ISSUE: Is a reasonable, although mistaken, use of deadly force permitted?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit examined the "three Fourth Amendment claims: 1) that the officers violated Kyle's constitutional rights when they entered the home without a warrant, 2) that Driscoll violated Kyle's constitutional rights when he shot Kyle, and 3) that the City of Trenton violated Kyle's constitutional rights by failing to properly train and discipline its police officers." The Sixth Circuit held that that exigent circumstances, those that "are situations where real[,] immediate[,] and serious consequences will certainly occur if the police officer postpones action to obtain a warrant" can permit entry under the right circumstances. The appellate court noted that the only match in the list of exigent circumstances was that his actions posed a risk of danger.

> Under the exigent circumstances exception concerning the threat of violence to officers or others, police officers "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[214] We use an objective test to analyze the circumstances that gave rise to a warrantless entry: "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'"[215] As applied to the danger-to-police-or-others exception, a lawful warrantless entry requires "an objectively reasonable basis for believing . . . that a person within the house is in need of immediate aid."[216] More specifically, this standard requires us to determine whether "a reasonable person [would] believe that the entry was necessary to prevent physical harm to the officers or other persons."[217]

In this case, the Sixth Circuit opined that the offices reasonably believed that they needed to enter the residence to prevent physical harm. Using what they knew, and nothing more, and without the ability to communicate with anyone inside, entering the residence was reasonable. Upon encountering Baker, the officers had to take some action. The officers had no way of knowing whether Mrs. Baker was in the house, and had they retreated, far worse consequences could have ensued. The court upheld the warrantless entry to this residence.

With respect to a force claim, the Sixth Circuit noted that under Graham's objective reasonableness test, no reasonable jury could find in favor of Baker's estate. Although the other officers had

[214] Goodwin v. City of Painesville, 781 F.3d 314 (6th Cir. 2015) (quoting Schreiber v. Moe, 596 F.3d 323 (6th Cir. 2010)).
[215] Brigham City v. Stuart, 547 U.S. 398 (2006) (quoting Scott v. U.S., 436 U.S. 128 (1978)).
[216] Goodwin, 781 F.3d at 332 (quoting Michigan v. Fisher, 558 U.S. 45, 47 (2009)).
[217] Brigham City, 547 U.S. at 402 (citation omitted) (alteration in original).

retreated and were momentarily safe, Driscoll was unable to do safely retreat and was in a "vulnerable position." Driscoll acted in self-defense.

The district court's grant of summary judgment for the defendants was affirmed.

Saunders v. Cuyahoga Metropolitan Housing Authority, 769 Fed.Appx. 214 (6th Cir. 2019)

FACTS: On January 20, 2014, Officer Ali (Cuyahoga Metropolitan House Authority Police Department) was dispatched to a noise complaint. When he arrived, Saunders, a maintenance man, was inside delivering a drink to the tenant's sister. Officer Ali asked about the leaseholder and was told she was not present. Officer Ali asked to enter and requested ID. The sister, Williams, had no ID but gave her identity and relationship to the leaseholder. Officer Ali then turned to Saunders, made "intimidating" actions, including cracking his knuckles and started rolling his shoulders. Officer Ali said he was calling a supervisor. When Saunders put his hands in his pockets, Officer Ali told Saunders to remove his hands from his pockets and to approach Ali. Saunders pulled out his hands and held them up, but refused to get closer to Ali. Ali called dispatch and said he had a male "claiming to be maintenance" inside and refusing to show ID.

Saunders looked up to see Officer Ali holding a Taser. When Saunders went to open the door, turning his back to Ali, he was Tased. The tasing had no effect because of Saunders' heavy jacket. As Saunders walked down the hallway, Officer Ali never commanded him to stop. Ali then used OC spray, while Saunders called for help and ended up in another apartment. That tenant refused to allow the officer to enter. When two other officers arrived, all three officers entered the apartment. The two newly arrived officers handcuffed Saunders, and Ali drive-stunned him. Officer Reynolds told Ali to stop, but Ali stunned Saunders again after he was pulled out to the hallway and laid down. Video taken late in the encounter was not dispositive. Ali's Taser log indicated he fired it with a series of 8 the first time and 5 the second time.

Saunders was charged with assault, burglary and obstructing official business. The burglary was dismissed and he was acquitted of assault. He was convicted of obstructing official business, but the conviction was overturned on unrelated issues. Ultimately, he entered a plea to disorderly conduct. Saunders filed suit against Officer Ali and the CMHA, alleging excessive force. Ali requested summary judgment, but was denied. Ali appealed.

ISSUE: Should force be used against a non-resisting subject?

HOLDING: No.

DISCUSSION: Ali argued that the undisputed evidence indicated that Saunders was engaged in criminal conduct and presented a danger by refusing to show ID and comply with commands, and that Ali resisted and attempted to evade arrest by fleeing. Ali stated he had a report before about the location (but perhaps not that apartment) being used in drug activity. The Sixth Circuit examined Graham v. Connor factors and noted that the first factor leaned against Ali – as the "crime" in question was a noise complaint, and even what Saunders pled to, disorderly conduct, was not a

serious crime. For the second factor, the Court found no indication that he posed any immediate threat, as Saunders stood quietly against the wall most of the time. He identified himself as a custodian, which argued against the need to arrest him immediately or "risk losing him forever." In fact, Saunders was never told he was under arrest, a predicate to a resisting arrest charge. Saunders simply walked out of the apartment.

Ali's actions were deemed unreasonable, so the judgment of the district court was affirmed.

Naselroad v. Mabry / Craycraft, 763 Fed.Appx. 452 (6th Cir. 2019)

FACTS: On October 8, 2013, Detectives Mabry and Craycraft (KSP) went to Naselroad's home in Clark County, Kentucky to conduct a knock and talk. They were investigating a tip that marijuana was being grown behind the residence. While Mabry was talking to Naselroad's mother, Craycraft spotted Naselroad going out the back door and yelled at Naselroad. The detectives saw that Naselroad had a rifle. They called at him to drop it, but he did not do so, and he was shot once in the chest. Both detectives were in plainclothes and, according to Naselroad, did not specifically identify themselves as police. Naselroad survived. It was later explained that Naselroad was investigating an individual spotted on surveillance video on his property – almost certainly the individual who provided the tip to the police. He did not know who the men were that were yelling at him and was confused. Following the shooting, officers obtained a search warrant and found marijuana and drug paraphernalia. He was convicted of possession of marijuana and drug paraphernalia, but not of other charges on which he was indicted, including wanton endangerment and cultivation.

Naselroad sued Craycraft and Mabry, among others, under 42 U.S.C. §1983. The district court ruled in favor of the police defendants under qualified immunity and Naselroad appealed the decision with respect to Mabry and Craycraft.

ISSUE: Is there a right to be free from deadly force if someone does not pose a deadly threat?

HOLDING: Yes

DISCUSSION: First, the Court agreed the Heck v. Humphrey[218] did not bar the claims. Naselroad was convicted of charges related to marijuana, found as evidence obtained as a result of a search warrant obtained after the shooting. (The defendants were in the odd position of arguing that the search warrant, obtained by another officer, was facially invalid and fell outside the Leon good faith doctrine, but the Court disagreed. The warrant did accurately reflect that Naselroad was pursued and seized while on his own property.)

With respect to the issue of summary judgment, the Court first looked to the initial entry onto the property. The Court agreed that entry into the curtilage is only justified under specific circumstances and that they did arrive, apparently, in a marked unit, with a uniformed trooper in the group, and they identified themselves to Naselroad's mother. Further, "evasive activity after contact with law

[218] 512 U.S. 477 (1994).

enforcement conducting a 'knock and talk' to investigate drugs can support a reasonable inference that evidence is about to be destroyed."[219] As such, the decision to pursue Naselroad was proper.

With respect to the use of force, however, the Court agreed that "Naselroad enjoyed a clearly established right not to be shot if he did not present a threat sufficient to justify the use of deadly force."[220]. The Court found summary judgement on the issue inappropriate at this stage, as there was a dispute as to any threat presented by Naselroad. The officers were at the scene to investigate a non-violent, low-level crime and had no additional information to suggest that Naselroad was threatening. He had put on the record that he held the gun, apparently a rifle, at "low ready" and pointed down.

The Court affirmed the Fourth Amendment decision, but reversed the judgment with respect to the force claim. The Court also remanded the claims under Kentucky state law for malicious prosecution, assault and battery.

42 U.S.C. §1983 – PRIVATE CITIZENS

Harcz, et al v. Boucher, et. al., 763 Fed. Appx. 536 (6th Cir. 2019)

FACTS: In 2014, several groups in Michigan planned an event to celebrate the 25th anniversary of the ADA. Harcz, among others, mostly physically disabled, knew about and planned to attend the event and Harcz was directly involved in the planning. Due to some controversy, there were concerns about a protest and possible disruption of the event. Organizers notified the Michigan State Police about the concerns. Allegedly two organizers, Grivetti and Weaver met with the police and it was agreed that protesters would be excluded from the Capitol where the event was to be held.

The morning of the event, Boucher, and others, assembled near the Capitol to stage their protest and were prevented from entering the Capitol environs. The group, numbering 15-20, were blocked by police and then barricaded from approaching the stage set up for the event. Harcz, who was blind, attempted to circumvent the barricades and was ultimately arrested; he was detained for the duration of the event. He was charged but most charges were dismissed, although a judge did find probable cause for obstruction.

Harcz and others filed suit under 42 U.S.C. §1983, under the First and Fourteenth Amendment. The District Court dismissed part of the claim, as it was against private entities not showed to be in a civil conspiracy with law enforcement. It dismissed Harcz's individual claims as probable cause was found for his underlying arrest. The plaintiffs' appealed.

ISSUE: May private citizens be sued under §1983 if involved in a conspiracy with law enforcement?

[219] U.S. v. Hogan, 539 F. 3d 916 (8th Cir. 2008).
[220] King v. Taylor, 694 F.3d 650 (6th Cir. 2012).

HOLDING: Yes.

DISCUSSION: First, the Court looked at the claims against the private defendants, which could only move forward if they were shown to be acting in conspiracy with the law enforcement defendants. Although group members did meet individually with police, there was no indication of a "shared objective" and more indication that the law enforcement defendants acted independently in developing an operation plan to handle protesters without input from the event organizers, who had simply expressed concerns. The Court noted that it did not want to "deter private citizens from reaching out to the police with concerns" and did not want to "impose liability here without sending a clear message to think twice before notifying the police about a concern." The court upheld the dismissal involved the private defendants.

With respect to the law enforcement defendants, the Court however, agreed that further development of the facts was critical to evaluable the actions of the MSP. The complaint plausibly alleged a First Amendment violation.

In such as assessment, three considerations must be made:

1) "whether the plaintiff's conduct is protected speech";
2) "the nature of the forum"; and
3) Whether the justification for exclusion from the relevant forum satisfy the requisite standard.

In this case the speech was protected and the forum public. Even in a "traditional public forum, the government may impose reasonable time, place, and manner restrictions on speech as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

The protesters argued that they "posed no threat of disruption before the police excluded them from the event" and the police countered they imposed the restrictions with the aim of "crowd control, safety, and prevent a heckler's veto." The Court noted that video evidence only showed conduct well after they were denied access and as such, the facts clearly support a First Amendment violation, a right that was clearly established.

The Court reversed the dismissal of those claims.

With respect to Harcz's individual claims, available video, although not definitive, suggested more than one interpretation of what occurred and the Court agreed dismissal of Harcz's claims was to be reversed.

42 U.S.C. §1983 – CIVIL PROCESS

Burgess (William / Grace) v. Bowers, 773 Fed.Appx. 238 (6th Cir. 2019)

FACTS: Officer Bowers (Knox County SO) had been attempting to serve civil process on William Burgess, who he believed was actively evading and hiding from him. He attempted service at Burgess's mother's home, which William used as a business address. He learned from an employee that William was on the property and summoned assistance. Officer Jenkins and others were dispatched. Jenkins verified with Captain Norris that they could enter if they had probable cause to make an arrest for evasion or obstruction of justice. Jenkins found her fellow officers talking to Grace, William's mother, at the back of the house, and Grace was pleading with William to come outside. That confirmed William was inside, so Jenkins entered over Grace's objection. Burgess was found hiding in the basement crawlspace. Officer Ballard ultimately sent in his canine. As Burgess fought the dog, he was tased multiple times and the tasing made it impossible for him to resist the dog. In the process, William was seriously injured.

William was indicted for two misdemeanors, and he and his mother filed suit against the officers under 42 U.S.C. §1983, making several claims. William was convicted, but his conviction was overturned in state court. During the pendency of those proceedings, the federal civil case continued. Ultimately, the officers were granted qualified immunity on the false arrest claim, but were denied qualified immunity on the unreasonable search and seizure claims.

Cross-appeals followed.

ISSUE: 1. Should officers enter a third-party's home without an arrest or search warrant to make an arrest for evasion of civil process?

2. Does a suspect have the right to be free from a warrantless arrest in somebody else's home?

HOLDING: 1. No.

2. No.

DISCUSSION: The first claim examined was Grace's claim of an unreasonable search when the officers entered her home without any type of warrant. Grace's home was arguably both a public business and a residence. As there was no evidence concerning the usage of that particular structure, which the Burgesses claim was purely a residence with the business operating from another building, the appellate court held it was a factual determination that required a denial of qualified immunity. Under Steagald v. U.S.,[221] it is improper to enter a third party's residence to effect an arrest without a search warrant, let alone enter without an arrest warrant. Further, the Sixth Circuit rejected the contention that acting under legal advice (an attorney apparently advised Jenkins' supervisor that it was alright) immunized the officers absent extraordinary circumstances. Accordingly, the Sixth Circuit affirmed the decision to deny qualified immunity.

William's unreasonable search claim could go forward even though he was not arrested in his own home, but his mother's home. In Buckner, the appellate court held that a party does not have a reasonable expectation of privacy in someone else's home simply because they are there at the time. Nothing suggested that William was an overnight guest even though he was "certainly more than a casual visitor" and maintained a basement workshop there. The Sixth Circuit determined

[221] 451 U.S. 204 (1981).

that the right, if it existed, was certainly not clearly established. Therefore, the officers were entitled to qualified immunity with respect to William's unreasonable seizure claim.

With respect to William's force claim, specifically the use of the dog and the use of the Taser, this situation was factually similar to Robinette v. Barnes.[222] In Robinette, the officers were forced to deal with a suspect who was hiding in a dark crawlspace and they could not be sure of whether the suspect was armed. The space was only 18 inches or so in height, which would put an officer who entered the space at a dangerous disadvantage. The suspect was told several times the dog would be deployed. Granted that his crime was a misdemeanor, he also never rebutted that he was tased because he was fighting the dog, and when he was subdued, the dog was called off. A delay in calling off a dog might be actionable under Greco v Livinston County. With respect to William, even under his version of the facts, it is arguable whether the force was excessive.[223] Accordingly, Ballard, the K-9 handler, was entitled to qualified immunity.

With respect to the Taser, William never disputed the argument that he was Tased because he was stomping the dog's head, nor did he argue that the officers tased him more than was necessary to subdue him. The use of the dog was to stop him from resisting arrest, and was therefore appropriate.

The officers were entitled to qualified immunity with respect to William's claims, but not with respect to Grace's claims.

42 U.S.C. §1983 – HECK CLAIM

Phillips v. Curtis, 765 Fed.Appx 130 (6th Cir. 2019)

FACTS: In May 2012, Phillips was physically abused by her boyfriend. When the police arrived, however, Phillips tried to leave in a vehicle and struck a police cruiser. Officers ordered her to stop, and even broke the car windows trying to get her to turn off the car. Her car continued to move slowly while officers were in close proximity. Curtis shot her through the rear window.

Phillips was indicted for multiple counts of wanton endangerment. While the criminal case was pending, Phillips filed a civil lawsuit alleging excessive force. . The civil case had been held in abeyance until the criminal case was resolved. In 2018, she pled guilty in the criminal case. Upon conviction, the civil lawsuit was dismissed under Heck v. Humphrey.[224] Phillips appealed.

ISSUE: May a person be guilty and still have a civil claim under Heck?

HOLDING: Yes.

DISCUSSION: To determine whether a civil judgment and a criminal conviction conflict, a court must "look to many considerations." In this case, Phillips argued there were "two separate incidents,

[222] 854 F.2d 909 (6th Cir. 1998).
[223] 774 F.3d 1061 (6th Cir. 2014).
[224] 512 U.S. 477 (1994).

one when she endangered Curtis, the other when he opened fire." If they occur together, Heck will apply. Phillips, however, argued that "she placed Curtis's life in jeopardy at point one, she ceased to be a threat at point two, and only after that did Curtis shoot her." Under her version, given the gap between the two events, she could escape the Heck bar.

The Sixth Circuit remanded for further discovery concerning the nature of Phillip's plea and the timing of her conduct and the shooting.

42 U.S.C. §1983 – INVESTIGATION

Manolios (Estate) v. Macomb County, 785 Fed.Appx. 304 (6th Cir. 2019)

FACTS: In May 2015, five teenage boys were involved in a major crash in a Michigan park. Four were ejected, one stayed in the vehicle. Of the four ejected, only one survived. All five were intoxicated. It was not immediately clear who was driving. The one boy remaining in the vehicle was the only one who could not have been driving because he was in a seatbelt in the passenger seat. Eventually, the Macomb County Sheriff's Department concluded Manolios had been the driver but mistakenly reported his blood alcohol was 0.086. Manolios' BAC was actually 0.024. The Manolios family contended that Narra, the ejected survivor, had been driving and that the sheriff's office intended to shield Narra from prosecution. The Manolios family also claimed the insurance company did not initially pay a claim because of that alleged error, but eventually did so.

The Manolios family filed suit under 42 U.S.C. §1983, claiming several violations of their constitutional rights.

ISSUE: Is an alleged error in a police investigation actionable?

HOLDING: No (as a rule).

DISCUSSION: There was no indication the family was subjected to any unequal treatment as a member of a protected class, and even such protection existed, there was a rational basis for the agency's identification of Manolios as the driver – the surviving passenger told them Manolios was driving. The "clear establishment" of a constitutional right is a very high bar and the "public misidentification of Manolios as the driver falls well below that standard."

The district court was affirmed.

42 U.S.C. §1983 – MENTAL HEALTH SEIZURE

Dolbin v. Miller, 786 Fed.Appx. 52 (6th Cir. 2019)

FACTS: On February 2, 2015, M.K., a minor, called to report her father, Dolbin, was barricaded in a closet threatening suicide with a gun. Officers Miller and Whelan (Strongsville OH PD) responded to the dispatch. Dolbin realized 911 had been called and went to the door to wait for police with his hands against the glass door. Officer Whelan drew his firearm and told Dolbin about

the call. Dolbin explained that he was unarmed and obviously not in the closet. Realizing Doblin was calm, Officer Whalen reholstered his weapon. Officer Whalen told Dolbin they still needed to investigate. Dolbin asked to speak to a supervisor, and Sgt. O'Deens responded. O'Deens and Whalen entered the residence to speak with Dolbin, who explained he made a general threat to his wife earlier in the day. Doblin agreed to go for a mental evaluation with the officers. Doblin was handcuffed and placed in the cruiser. At some point, the officers were told that Dolbin's wife and daughter were at the police department to take out a domestic assault charge on him. Eventually, his daughter recanted her allegations and Doblin was acquitted of criminal charges.

Dolbin filed suit against the officers, alleging unreasonable search and seizure, false imprisonment, and malicious prosecution. The district court granted summary judgment to the officers on all but the search and seizure claims after finding that a genuine issue of material facts existed concerning whether the officers had no authority to seize Doblin to transport him for a mental health evaluation.

ISSUE: May officers seize an individual and transport that person for a mental health evaluation based upon a credible threat of suicide?

HOLDING: Yes.

DISCUSSION: Even though the information may have been incorrect, the officers were relying on a credible report from Doblin's daughter that Dolbin was "actively suicidal." The daughter provided "concrete allegations of specific and particularized suicidal and dangerous behavior. The Sixth Circuit held that the officers were entitled to qualified immunity.

Rudolph v. Babinec, 939 F.3d 742 (6th Cir. 2019)

FACTS: On the night in question, Leticia Rudolph's ex-husband, Kyle, received a text from their son stating that his mother had her handgun "out" and asking his father to check on her. Kyle did so, and he spoke with Leticia for an extended period of time. With Leticia's consent, Kyle took the gun with him. Later that night, Kyle was stopped by a Michigan police officer and advised that he was in possession of a firearm. Kyle explained why he possessed the weapon and even showed the officer the text. Kyle was released, but the officers "felt obligated to do a wellness check on Rudolph."

Officer Babinec and Officer Atkinson went to the home and banged on the doors and windows to no avail. They advised Officer Hodges, who had made the traffic stop. Officer Hodges told Kyle to call Leticia – she answered and explained she was sleeping. Leticia got up and opened the door to the officers outside. They asked if she was suicidal, which she denied, stating she "felt fine." "Rudolph generally cooperated with the officers, but the officers, without much further inquiry, gave her the option of going voluntarily to the hospital or being taken into custody involuntarily for a mental-health check."

> Then, according to Rudolph, things took a turn. Rudolph says that Officer Babinec grabbed her by the arm without warning, slammed her body and face into the wall, and handcuffed

her. She told the officers that the handcuffs were "really tight," and that the officers were hurting her. They responded that she was suicidal. The officers then "manhandled" her out of the house, without giving her a chance to put shoes on, and dragged her across her forty-foot driveway. Rudolph could not keep up with the officers and asked them to slow down. They did not. Rudolph stumbled and hurt her right ankle—so badly that she would later need two surgeries to treat that injury. She complained repeatedly to Officers Babinec and Atkinson that the handcuffs were too tight, but they did not respond.

At the hospital, Leticia was determined to be intoxicated so a mental evaluation could not be done immediately. In a few hours, she was evaluated and determined to be at low risk of self-harm, and released.

Leticia filed suit against Officer Babinec and Atkinson, and their employer, Fruitport Township, under 42 U.S.C. §1983. The officers were denied summary judgment.

ISSUE: Must officers have probable cause of a threat of harm to make a mental health seizure?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit began:

> There are two sides to every story. Here, the two sides read like they come from different books.

With respect to Leticia's Fourth Amendment argument, the Sixth Circuit noted that although the officers had a reason to show up at her door, a jury could find they had no probable cause for the mental-health seizure.

In Fisher v. Harden, the Sixth Circuit held "that in the context of a mental health seizure an officer must have probable cause to believe that the person seized poses a danger to [her]self or others."[225] "A showing of probable cause in the mental health seizure context requires only a 'probability or substantial chance' of dangerous behavior, not an actual showing of such behavior."[226] If probable cause exists, a person's denial that they are at risk of suicide does not by itself eliminate that probable cause.[227] Further discussion of Fisher revealed another significant point in the analysis for mental-health seizures: whether a reasonable officer would question the veracity of a suicide report based on the facts at the scene of the wellness check that is done in response to the suicide report.

In Fisher, no probable cause existed for the seizure, while in Monday v. Oullette, there was a much clearer indication of a mental health emergency. Leticia's case "falls more on the Fisher side of the

[225] Fisher v. Harden, 398 F.3d 837 (6th Cir. 2005).
[226] Id. at 843 (quoting Monday v. Oullette, 118 F.3d 1099 (6th Cir. 1997)).
[227] See Ziegler v. Auckerman, 512 F.3d 777 (6th Cir. 2008) (granting qualified immunity even though plaintiff denied making any suicidal comments, and "plaintiff allegedly suffer[ed] from a mental illness that prevent[ed] her from realizing her own need for treatment.").

line." Nothing Kyle reportedly said indicated Leticia was suicidal, and no evidence existed that he asked the officers to check on her. (Kyle's concern about the firearm may have centered Leticia's intoxication – she tested at .153 at the hospital.) While the officers believed that Leticia was intoxicated, there is no indication they thought she was so drunk as to die, or that she had overdosed on pills. "[O]nce the danger—i.e., the gun—was removed from the equation, there was no longer an unacceptable risk of Rudolph harming herself." The officers may have been right to be initially concerned, but it became "less reasonable" as they investigated. As such, qualified immunity was unavailable.

Leticia also put forward a handcuffing claim because she consistently complained that the handcuffs were too tight. "[W]hat matters in an excessive force claim is whether the Miller requirements—complaint, ignoring of complaint, and injury—are met, and whether the officers acted reasonably in the circumstances."[228] Although the officers stated Leticia was only handcuffed ten minutes, Leticia argued she was handcuffed for much longer. At this stage of litigation, the district court must accept her version absent evidence to the contrary. While subjective pain may not be enough, "Rudolph provided photos she took one day after the incident, showing the injuries on her hands, wrists, and arms. And a picture is often worth a thousand words." Summary judgment was not available on the handcuffing claim as well.

Leticia also claimed excessive force during the seizure. Leticia claimed that despite complying with the officers' orders, the officers "slammed her face and body into a wall, pulled her out of her house, and dragged her down a long driveway so roughly that she needed multiple surgeries.

After addressing some Michigan state issues, the Court affirmed the denial of the district court's denial of summary judgment.

42 U.S.C. §1983 – RELIANCE

Fineout v. Kostanko, 780 Fed.Appx. 317 (6th Cir. 2019)

FACTS: On the day in question, Tyler, Fineout and Wright all shared a home with 4 children between them. Under Michigan law, occupying a "red-tagged" property - one deemed uninhabitable by code inspectors, was a misdemeanor. It was common for officers interacting with a resident to check to see if the property was, in fact, red-tagged. On that day, Lansing (Michigan) officers arrived in response to a 911 call about child abuse and the officers were told by 911 that the house was red-tagged. The officers forced entry and arrested the adults. In this case, pursuant to procedure, Dispatch Supervisor Harris confirmed the red-tag status using a computer database maintained. Unfortunately, the house was not red-tagged at this point, although it may have been at some point in the past. Officers did learn that one of the adults had a separate arrest warrant, but that was not discovered until after they entered. The occupants initially denied entry, telling officers they needed a warrant. Instead, relying on the red-tag status, officers forced entry. Upon entry, officers found 21 marijuana plants, which were claimed eventually by Tyler, who was not present when the officers entered. Tyler stated, and later proved, he had a medical exemption or the marijuana.

[228] Miller v. Sanilac County, 606 F.3d 240 (6th Cir. 2010).

All charges were dismissed when it was shown the property was not red-tagged.

A lawsuit was filed against the officers and the dispatcher, claiming unlawful search, arrest and related claims. Qualified immunity was granted, and this appeal followed.

ISSUE: May officers rely on information from dispatch?

HOLDING: Yes.

DISCUSSION: To sustain an "unlawful search" claim, plaintiffs must demonstrate that the officers' entry was not reasonable. Although police are generally required to "obtain a warrant based upon a judicial determination of probable cause prior to entering a home[,] . . . there are a few well-defined and carefully circumscribed circumstances in which a warrant will not be required."[229] One of those exceptions is the existence of "exigent circumstances"—"situations where real immediate and serious consequences will certainly occur if the police officer postpones action to obtain a warrant."[230] One such exigent circumstance is a "risk of danger to the police or others." "Thus, law enforcement officers 'may enter a home . . . to protect an occupant from imminent injury.'"[231].

Further, under Payton v. New York, an arrest warrant justified entry if there is reason to believe the suspect lives there and is present.[232] With respect to the officers, the Sixth Circuit held that it was reasonable for the officers to believe entry was lawful.

> Police officers have the "right to rely on dispatch information" and courts therefore consider an officer's reasonable reliance on such information when determining whether the officer is protected by qualified immunity.[233] Here, dispatch twice informed the police defendants that the residence had been red-tagged, and the officers had no reason to doubt this information. It was therefore reasonable for them to believe that the residence was, in fact, red-tagged.
>
> Citing multiple cases supporting the warrant requirement, plaintiffs contend that even with the red-tag information, defendants lacked authority to forcibly enter the residence without a warrant. But the record establishes that it was a common practice for Lansing police officers to enter red-tagged properties, without a warrant, where there was reason to believe that someone was illegally occupying the structure. Officers testified that it was part of their training to do so. Indeed, plaintiffs argued below that the officers entered the residence pursuant to a policy and custom of the City of Lansing. We note that Lansing's

[229] Thacker v. City of Columbus, 328 F.3d 244 (6th Cir. 2003) (citing Mincey v. Arizona, 437 U.S. 385 (1978)).
[230] Id. at 253 (internal quotation marks omitted) (quoting Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2002)).
[231] Michigan v. Fisher, 558 U.S. 45 (2009) (quoting Brigham City v. Stuart, 547 U.S. 398 (2006)); Schreiber v. Moe, 596 F.3d 323 (6th Cir. 2010) ("Preventing imminent or ongoing physical abuse within a home qualifies as an exigent circumstance[.]").
[232] 445 U.S. 573 (1980).
[233] Dorsey v. Barber, 517 F.3d 389 (6th Cir. 2008); see also Feathers v. Aey, 319 F.3d 843, (6th Cir. 2003) (finding that officers were protected by qualified immunity where "[i]f the dispatcher's information were accurate and reliable, as the police presumed, the totality of circumstances would justify" the officers' actions).

practice of conducting warrantless entries into occupied, red-tagged homes is troubling. However, in this case, plaintiffs have identified no case supporting that it was clearly established that police cannot lawfully enter an illegally occupied structure without a warrant."

With respect to Harris, the Sixth Circuit held that it was not possible to know what Harris saw on her computer on the date in question, but that it was undisputed the property was not red-tagged on that date. Even had the house not been red-tagged, the officers could enter on the claim of active child abuse. Although they were found not to be violating the law with respect to the house, when the plaintiffs refused to allow the officers to see the children, it was sufficient for other charges also placed against Fineout and Wright. Further, when Tyler admitted possession of the plants and could not immediately produce documentation as to the legal status, his arrest was also warranted – although later dismissed as well.

The District Court decision was affirmed.

42 U.S.C. §1983 – ENTRY

Richards v. City of Jackson, Michigan, 2019 WL 4447390 (6th Cir. 2019)

FACTS: In 2014, Richards, Harris and their dog, Kane, lived together in a duplex at Jackson, Michigan. The couple shared responsibility for the dog. On November 28, officers arrived at their address on a matter unrelated to the couple, they were looking for a different person but their address was one that had been provided. Upon arriving at 511/513, the officers found two units in one building. "Each unit had a separate door on the exterior of the house, and each door was conspicuously labeled with a single, distinct address identifying the residence inside. Each door was also accompanied by its own mailbox, and the door marked "513" (their address) had its own doorbell as well." One officer went to 511 and knocked, but Officer Peters, at 513, just opened the door and walked inside. (He claimed he thought it led to a common entryway for multiple units.) Harris claimed that Peters opened the inner, solid door upon entry. The stairs there opened into the upstairs living room. Harris and Caddell (Richards' younger brother) were there playing video games. Peters apparently knocked on the wall and Harris yelled down, asking who it was, to which Peters responded "police." Kane went running down the stairs. After some dialogue, over a few seconds, caught on Peters' bodycam, the officer shot Kane.

At that point, stories differed, with Officer Costley claiming that Kane was growling and barking and had Peters backed into corner. Peters told Harris he shot the dog because he was bitten. It was later proven than Kane had not bitten Peters.

Richards and Harris brought suit, arguing an unlawful entry and related claims. Summary judgment was denied for Peters. Peters appealed.

ISSUE: Should officers take care when entering a multi-unit building to ensure they are not actually entering an actual dwelling unit?

HOLDING: Yes.

DISCUSSION: "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[234] The Sixth Circuit noted that it had "taken this threshold seriously, making clear that "any physical invasion of the structure of the home, 'by even a fraction of an inch,' [is] too much," and that "there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the non-intimate rug on the vestibule floor."[235] "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."

Peters does not argue that he had a warrant, consent, or exigent circumstances to enter the home. Instead, his argument turns on whether he had entered the plaintiffs' home at all. Peters claims that he reasonably believed the front door led to a common entryway shared by multiple residences, and he argues that individuals have no "objectively reasonable expectation of privacy in the unlocked and open common hallway and stairway of [their] duplex."[236] The Sixth Circuit rejected this argument, holding that this was not a common area, even though it was a foyer with steps leading to a single upstairs unit.

With respect to the dog, "there is a constitutional right under the Fourth Amendment to not have one's dog unreasonably seized."[237] Unreasonably using deadly force against a household pet was improper. "[When Peters announced his presence from inside the home, Kane ran down the stairs and growled but never advanced past the foot of the stairwell; that Kane did not lunge or bite at Peters; and that Harris was on his way down the stairs to get Kane at the time that Peters shot Kane." Growing, barking, and approaching by a dog is to be expected when a stranger enters the dog's home, a "common dog behavior" as it were. This was not a serious enough display of aggression to warrant deadly force. And most importantly, there was nothing to justify Officer Peters' entry at all.

The District Court was affirmed.

Taylor v. City of Saginaw, 922 F.3d 328 (6th Cir. 2019)

FACTS: Taylor was a frequent recipient of parking violations in Saginaw. Parking enforcement used chalk to mark vehicle tires to ensure that a vehicle had not been moved in the requisite time frame. Taylor brought an action under 42 U.S.C. arguing that the chalking violated her rights against illegal search. The District Court ruled that while it may have been a search, the search reasonable. Taylor appealed.

ISSUE: Is chalking vehicle tires a search?

HOLDING: Yes.

[234] U.S. v. U.S. District Court (Keith), 407 U.S. 297, 313 (1972);
[235] Kyllo v. U.S., 533 U.S. 27 (2001) (quoting Silverman v. U.S., 365 U.S. 505, (1961)).
[236] U.S. v. Dillard, 438 F.3d 675 (6th Cir. 2006).
[237] Brown v. Battle Creek Police Dep't, 844 F.3d 556 (6th Cir. 2016)."

DISCUSSION: The Sixth Circuit held that the chalking was a search because it constitutes a slight physical intrusion onto private property. Under U.S. v. Jones, it becomes a search when the government trespasses upon private property to obtain information.[238] Both existed in this case. Although vehicles have a lessened degree of privacy, at the time the vehicle was chalked, the city simply did not know if it was parked illegally.

The community caretaking doctrine does not save the case, as exceeding the permitted time for parking was not sufficient to allow the warrantless search.

The District Court's decision was reversed.

Bullman v. City of Detroit, 2019 WL 4691416 (6th Cir. 2019)

FACTS: In 2016, Detroit officers conducted a drug raid at Castro's home. The officers were acting on a tip that marijuana was being sold at Castro's home. The target actually possessed a medical marijuana license and had two "patients." Castro refused to sell to a CI. Officer Fox obtained a search warrant and the executed the raid.

At the time of the raid, three pit bulls, Castro and Chris Bullman were in the residence. Castro had several signs warning that dogs were inside. The officers knocked, but according to Castro, entered within second. Castro grabbed one dog and secured it in another room, while the remaining two were cowering in the kitchen which was open partially to the living space. Castro tried to keep the officers from killing the dogs, but Officer Bray shot the two dogs several times. Officers testified that the dogs were behaving in a threatening way, trying to jump a barricade between the two rooms.

Officers cleared the house, seizing plants and money. Castro claimed they damaged his interior cameras as there was no video. Castro was permitted to secure the remaining dog before the search was conducted. Castro was charged but upon proving he had the license, the charges were dismissed.

At the same time, Alonzo Bullman was stopped outside, as he was lingering in the vicinity. Nothing was found in his vehicle, which was searched.

Alonzo Bullman filed suit concerning the search, and Castro (and another man) filed suit relating to the death of the dogs. Officers Bray and Hurd were denied summary judgment, and appealed.

ISSUE: Must dogs present an imminent threat in order to be shot?

HOLDING: Yes.

[238] 565 U.S. 400 (2012).

DISCUSSION: With respect to the stop, the Sixth Circuit held there was enough to warrant a Terry stop of Bullman's vehicle, given the concerns that Bullman might be planning to interfere with the raid. The search, however, was not unsupported because it was based on the alleged odor of marijuana they claimed was emanating from the car.

With respect to the shooting of the dogs, the Court found no indicated that either dog presented any imminent threat to the officers. The Sixth Circuit examined Brown v. Battle Creek Police Dep't and held that the officers were physically separated by a barricade and were allegedly cowering in fear.[239] Even though one of the dogs was unlicensed, a violation under state law, such violation was insufficient to justify the shooting. The Sixth Circuit affirmed the district court's decision to deny qualified immunity with respect to the shooting of the dogs.

42 U.S.C. §1983 – INTERROGATION

Peterson v. Heymes, 931 F.3d 546 (6th Cir. 2019)

FACTS: In the mid-1990s, Montgomery was raped and murdered in her Michigan home. Twenty-two months later, inmates identified Peterson as the perpetrator. Peterson was in custody on an unrelated matter, claiming he had made an incriminating statement about the earlier crime. Peterson claimed that he was mentally ill and had suffered cognitive issues due to brain damage.

Det. Somers opened an investigation. Peterson denied any involvement, but after nine interrogations and several polygraphs, conducted by Somers, Heymes and Uribe, all with Kalaska County, Peterson confessed. A week later, DNA results indicated Peterson was not the source of the rape DNA. A shirt also bore source but could not be tested at the time. Charges were brought on a multiple assailant theory.

> Peterson alleges that the officers took advantage of his mental state, fed him information to provide in his statements, and induced his confession with false promises, including that he would be sent to a psychiatric hospital instead of prison. He also claims that the officers continued to mislead him about the consequences of his confession in order to pressure him into maintaining his statement even after he attempted to recant it.

Suppression was denied as the district court found his confession voluntary and admissible. Peterson was convicted. In 2013, the shirt sample was tested using new technology and Peterson was found not to have been the source. Peterson's conviction was vacated and all charges were dismissed. In 2015, Peterson brought suit under 42 U.S.C. §1983 against the officers and the city. The district court denied qualified immunity for the officers. This appeal followed.

ISSUE: If an interrogation rises to the level of a coercion, may the confession obtained be suppressed?

HOLDING: Yes.

[239] 844 F.3d 556 (6th Cir. 2016).

DISCUSSION: The Sixth Circuit examined the voluntariness of Peteron's confession.

> The Fifth Amendment, which protects against self-incrimination, requires confessions to be given freely and voluntarily.[240] This right is applicable to the states through the Fourteenth Amendment. A Fifth Amendment violation occurs only if the coerced confession is used against the defendant at trial.[241] In determining whether a confession is compelled, the constitutional inquiry is whether "a defendant's will was overborne in a particular case," considering "the totality of all the surrounding circumstances."[242] Thus, the Supreme Court has acknowledged that "coercion can be mental as well as physical."[243] For Fourteenth Amendment Due Process claims, the Sixth Circuit considers whether the defendant's conduct "shocks the conscience." This is a higher standard for "deprivations of liberty caused by the most egregious conduct."
>
> Peterson maintains that Defendants Somers and Uribe knew but ignored the fact that Peterson was brain-damaged, emotionally unstable, depressed, and suicidal at the time of his interrogation. In addition, Peterson, who was twenty-two years old at the time, contends that Somers and Uribe fed him information to provide in his statements, and promised he would be sent to a psychiatric hospital instead of prison if he confessed. Although the right against self-incrimination "does not mandate that the police forgo all questioning," considering the totality of the circumstances and taking Peterson's allegations as true at this stage, Peterson's assertions are enough to show that Somers and Uribe's conduct could have amounted to a violation of the Fifth and Fourteenth Amendments. Thus, Peterson has met the requirements to overcome Somers and Uribe's qualified immunity defense with respect to his claim under the Fifth and Fourteenth Amendments (Count I).

The Sixth Circuit held that the actions of Somers and Uribe, working together, constituted conspiracy, making qualified immunity unavailable. However, another officer who was involved in a tangential manner and operated in good faith in his actions was entitled to qualified immunity.

Mitchell v. MacLaren, 933 F.3d 526 (6th Cir. 2019)

FACTS: On June 21, 2008, Mitchell allegedly killed Jorden. (There was dispute as to who actually committed the homicide, as another man was also involved in the dispute.) Mitchell was arrested a few months later. The morning after the arrest, "Detective Collins took Mitchell out of his cell, interrogated him for thirty minutes without reading him his Miranda rights, and then returned him to his cell. In the afternoon, Collins again removed Mitchell from his cell and again questioned him without Miranda warnings. During this second interrogation, Mitchell told Collins that there had been 'an incident about a gun *before* June 21,'" prompting Collins to ask Mitchell

[240] Malloy v. Hogan, 378 U.S. 1 (1964) (citing Bram v. U.S., 168 U.S. 532 (1897)).
[241] Chavez v. Martinez, 538 U.S. 760 (2003).
[242] Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (noting that the U.S. Supreme Court has taken into account the age, education, and intelligence of the accused, length of detention, repeated or prolonged nature of questioning, physical punishment, and psychological impact on the accused); U.S. v. Alsante, 812 F.3d 544 (6th Cir. 2016).
[243] Blackburn v. Alabama, 361 U.S. 199 (1960); see also Culombe v. Connecticut, 367 U.S. 568, (1961) (finding a cognitively impaired man's confession was coerced and improperly admitted at trial where officers pressured his wife and children to coax him into confessing).

about the night of June 21, when the shooting happened. Mitchell responded that "there was a lot of us who were just hanging around getting ready to go out." When Collins pressed for further details, Mitchell told Collins that he "would tell him what happened," but that Mitchell would need "to start from the beginning so he would understand." "As soon as I said this," according to Mitchell's affidavit, "Detective Collins stopped me." Collins then took Mitchell upstairs to an interrogation room to be Mirandized and video-recorded.

Collins, however, stated he spoke only briefly with Mitchell and he knew Mitchell was involved in a homicide from another witness. Once upstairs, he provided Mitchell a document explaining his Miranda rights. At that pointed, Mitchell asked a few questions about his rights and then made several admission, but claimed the other man actually shot Jorden. Mitchell's motion to suppress his statements was denied, he was convicted of Murder (and felony murder) and appealed.

ISSUE: Does an inadvertent failure to give Miranda require suppression?

HOLDING: No, as a rule.

DISCUSSON: Mitchell argued that the detective's statement as to when he was entitled to an attorney (during questioning versus in court) was misleading. The Court looked to Duckworth v. Eagan which upheld a warning that included the statement ""we have no way of giving you a lawyer, but one will be appointed for you, if you wish, *if and when you go to court*."[244] The Court had stated "Miranda does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one." The Court agreed that the warnings were sufficient.

The Court also looked at Mitchell's argument that he was "only advised … of his Miranda rights 'mid-stream.'" The Court noted

> To understand the applicable Supreme Court case law, we must first consider Oregon v. Elstad.[245] In Elstad, the police went to the suspect's house to take him into custody on a charge of burglary. Before the arrest, one officer spoke with the suspect's mother while the other officer joined the suspect in the living room, where the officer said he "felt" the suspect was involved in a burglary. The suspect said, "Yes, I was there." Later, at the station house, the suspect was given Miranda warnings, and he made a full confession.
>
> The Elstad Court reasoned that "a simple failure to administer the [Miranda] warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," does not automatically "taint[] the investigatory process." "[T]here is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of Miranda, was voluntary. The relevant inquiry is whether, in fact, the second [i.e., the Mirandized] statement was also voluntarily made.". "[A] suspect who has once responded to unwarned [i.e., un-Mirandized]

[244] 492 U.S. 195 (1989).
[245] 470 U.S. 298 (1985).

yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." Id.

After Elstad came Seibert, upon which Mitchell relies. There, police questioning led to the defendant's confession to a crime, after which she was given a 20-minute break.). Following the break, the officer turned on the tape recorder and only then gave the defendant her Miranda warnings. When the defendant resisted making a statement, the officer reminded her that she had already admitted involvement in the crime; the defendant then confessed post-warning. In a fractured decision, the Supreme Court held that the post-warning confession was inadmissible.

Elstad was distinguished based on the following factors: "[1] the completeness and detail of the questions and answers in the first round of interrogation, [2] the overlapping content of the two statements, [3] the timing and setting of the first and the second, [4] the continuity of police personnel, and [5] the degree to which the interrogator's questions treated the second round as continuous with the first." On the facts of Seibert, the Court determined, these factors dictated reversal "[b]ecause the question-first tactic effectively threatens to thwart Miranda's purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose."

The Sixth Circuit held that Mitchell did not admit any wrongdoing during the earliest questioning.

The conviction was affirmed.

SUSPECT IDENTIFICATION

U.S. v. Lett, 782 Fed. App. 429 (6th Cir. 2019)

FACTS: In 2006, Lett and two friends attended a gun show in Berea, Ohio. Lett was a convicted felon and could not purchase a firearm "so he stole one instead." Fortunately, the vendor quickly realized a handgun was missing from his table. While he was making a report, Lett approached and stole a different gun—picking it up off the table and walking away. Fortunately, the vendor's son, who was at a neighboring table, saw Lett, confronted him, and recovered the gun. Lett and a "partner in crime" stole a third gun later that day, using the same method, with one distracting the vendor while the other stole the gun. That vendor also reported the theft and "that report made its way to an off-duty officer who was working security." The officer spotted Lett and knew he was involved in the prior situations.

Armed with this knowledge, the officer tried to stop Lett. But Lett refused to stop; he said he had not done anything wrong and kept on walking. So the officer physically restrained him. Then three or four more vendors arrived and identified Lett as one of the thieves. Lett later provided his identification and as the officer verified its accuracy, he learned that Lett had several active arrest warrants. At that point, federal agents who were also at the show stepped in and took Lett to a private area for questioning.

At the same time, one of his accomplices had left the show and went into a nearby hospital. Since the accomplice was believed to be armed, the hospital went into lockdown. "One agent took Lett's picture with a cellphone, showed the picture to two vendors, and asked them if the picture depicted one of the men they had witnessed stealing guns. The agent did the same with drivers-license photographs of whom he believed were the other suspects—including the one who had entered the hospital. The vendors confirmed that Lett and the others were the ones who had stolen multiple guns."

Lett was arrested and charged with being a convicted felon in possession and with possessing a stolen firearm. Lett moved for suppression, arguing initially a lack of reasonable suspicion to stop, and that showing the photos violated due process by suggesting he was the suspect. Suppression was denied and he was convicted. He then appealed.

ISSUE: Is a cell phone identification proper?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit wrote:

> If bringing a knife to a gun fight is a supremely bad idea, stealing a gun from a gun show is not far behind it. When defendant Anthony Lett tested his luck by attempting the latter, it left him with two federal charges and—after a jury trial—two federal convictions.

With respect to the stop, several eyewitnesses identified Lett as one of the men who had stolen guns. That alone was enough to justify a stop based on reasonable suspicion.

With respect to the photo identification process, Lett claimed it was "highly suggestive," but "never explains *why* that was so." Even though the "agent never used a blind administrator (someone who does not know the suspect's identity) and never circled back with a lineup of multiple photographs or actual people," that does not make it improper. The Sixth Circuit noted that "everything about the identifications suggests that the vendors were correct. As the government points out, both venders interacted with Lett that day, speaking with him as he stood just a few feet away. He stole a gun in front of one of them, and he was speaking with the other as his accomplice stole a different gun—events that were sure to stick out from the run-of-the-mill interactions the vendors had that day. And they identified his photograph the day of the crimes, not weeks or months later."

Lett's convictions were affirmed.

U.S. v. Clayton, 937 F.3d 630 (6th Cir. 2019)

FACTS: Clayton became involved with J.P., a drug addicted juvenile female. Clayton gave J.P. drugs in exchange for sex, recorded the sex and shared it on Snapchat. He introduced J.P. to other men and began serving as her pimp, still in exchange for drugs. Eventually, J.P. texted her father and said she feared for her life. J.P.'s father called the Battle Creek (Michigan) PD, and

officers raced to the house. The officers found J.P. inside, along with drug evidence and guns. Clayton and Robbins, another man in the house, were arrested. Hernandez was arrested later.

Before questioning, Clayton was advised of his Miranda rights. However, the officer misread one of the warnings, omitting the clause that said he could have an attorney with him during questioning. Clayton refused to sign the form, but indicated verbally he understood his rights. In two separate questionings, Clayton provided no material information.

The next day, he was questioned again, and was asked by Agent Williams (Homeland Security) if he wanted to talk. Williams indicated he understood Clayton had already been advised of his Miranda rights. Clayton agreed to talk and admitted to the sex, stating he thought J.P. was 17. Clayton provided his cellphone password. J.P. was also interviewed at length.

Williams obtained search warrants for Clayton's phone, Facebook and Snapchat accounts. Williams found video of three different victims, although with photos of drugs and guns, along with text messages discussing trafficking J.P.

Clayton was charged with numerous offenses under federal law. His motion to suppress was denied. At trial, evidence was presented primarily about the sex trafficking, involving several victims. Clayton was convicted and appealed.

ISSUE: May a faulty Miranda still be sufficient?

HOLDING: Yes.

DISCUSSION: In reviewing the Miranda issue, the Sixth Circuit acknowledged that the phrase concerning having an attorney present during questioning was omitted, but the full warning was on the written form provided to Clayton. It was unclear, however, whether Clayton, who refused to sign the form, actually read it. The Sixth Circuit held that the verbal warning, although deficient, was sufficient to convey Miranda to him. All that was necessary is that the warning "touch all the bases" to convey the rights. Florida v. Powell had a similar deficiency and the Supreme Court agreed the provided warning was enough to properly convey the rights.[246] Both warnings "made clear the seminal right at stake – 'the right to talk to a lawyer.'" The warning given to Clayton was enough "to communicate 'the same essential message'" as in Powell and, in fact, was more comprehensive.

The Sixth Circuit reiterated that "officers are expected to take the necessary steps to properly Mirandize a suspect." In this case, the officer did not read from the form in his hand, "opting instead to recite the warnings from memory." In this case, "his memory failed him," which left him open to a Fifth Amendment challenge, albeit unsuccessful. "[I]n the world of Miranda, substance controls form. And here, the substance passes constitutional muster."

[246] 559 U.S. 50 (2010).

Clayton's statements were voluntary. He was of normal intelligence and he "had the opportunity to respond freely" to the questioning, a process he had been through before. There was no evidence of coercion. Clayton argued he was "freaking out" and grabbed at the "lifeline" extended to him by Agent Williams. That offer was nothing more than a suggestion of possible leniency for cooperation, "a practice that is generally permissible." This "freaking out" was nothing more than what would be expected in the face of serious charges.

The convictions were affirmed.

INTERROGATION

U.S. v. Collado-Rivera, 759 Fed.Appx. 455 (6th Cir. 2019)

FACTS: In July 30, 2015, Ohio authorities stopped a car hauler and found 40 kilos of cocaine. They linked Collado-Rivera and others to the conspiracy. Following a search warrant he was arrested and taken in for an interview. After being read his Miranda rights, he admitted that he was involved in the scheme. He was indicated and sought suppression.

ISSUE: If sufficient time passes, will an interrogation be considered coercive if the initial arrest was violent?

HOLDING: No.

DISCUSSION: Collado-Rivera claimed that he was given suggestions that if he confessed, he might get leniency for his cooperation. He also claimed they promised that no one would know but his interview was revealed in the presence of his co-defendants. The Court ruled that mistreatment, if any, during the search warrant execution did not make the resulting interview coercive. (The raid itself was violent.) Some time had passed between the warrant service and his interview and he expressed no fear of reprisals.

The Court found no evidence that the actions at the scene overbore his will or was the motivating factor for his confession. The court denied his suppression.

42 U.S.C. 1983 – CONSPIRACY

Jackson / Ajamu / Bridgeman v. City of Cleveland, 6th Cir. 2019

FACTS: This case involves several men who served long sentences for crimes they did not commit and each spent at least several years on death row. They were eventually exonerated of the crimes through the Innocence Project and are generally acknowledged to truly be innocent of the crimes. Each filed suit against the City of Cleveland arguing that detectives in each of their cases did not properly share exculpatory evidence with the defense. The District Court gave, among other

decisions, summary judgement to the claims under arising from violations of Brady v. Maryland, fabrication of evidence, and malicious prosecution.[247] The City and the affected officers appealed.

ISSUE: Do officers of the same agency working together to commit a misdeed constitute conspiracy?

HOLDING: No

DISCUSSION: The Court noted that "Brady claims have three elements: "[1] the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued."[248]

The Court agreed that in one case, although a jury might ultimately disagree and find that the officer "did not suppress evidence, it would not be unreasonable in finding that he had."

With respect to allegations of conspiracy, given that multiple officers were involved in the cases, a reasonable jury could find that the detectives were working together to prevent the evidence from reaching the prosecutors. However, under the intracorporate conspiracy doctrine, individual officers within the government entity could not be considered to be in a conspiracy as they all worked for the same entity.

Following an extensive discussion, the Court agreed that Brady was clearly established at the time the cases originated. The officers should have been aware of a requirement that they disclose exculpatory evidence, and that the evidence involved was potentially exculpatory. The Court emphasized "Brady is concerned only with cases in which the government possesses information which the defendant does not."[249] The Court linked this with the concept that an officer would not know that coercing a perjured statement was unlawful as well, as was alleged.

More concretely, as far back as 1935, the Supreme Court recognized that the introduction of fabricated evidence violates "the fundamental conceptions of justice which lie at the base of our civil and political institutions."[250] And in 1942, the Supreme Court held that when a witness perjures himself because of threats from police officers, the defendant suffers "a deprivation of rights guaranteed by the Federal Constitution."[251] The Court also agreed he would have been on notice that his actions might be considered malicious prosecution.

The Court reversed the summary judgement decisions with respect to the primary detective, and remanded the case.

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[247] 373 U.S. 83 (1963).
[248] Strickler v. Greene, 527 U.S. 263 (1999).
[249] U.S. v. Graham, 484 F.3d 413 (6th Cir. 2007).
[250] Mooney v. Holohan, 294 U.S. 103 (1935) (citing Hebert v. Louisiana, 272 U.S. 312 (1926)).
[251] Pyle v. Kansas, 317 U.S. 213 (1942).

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

U.S. v. Isaac, 763 Fed.Appx. 478 (6th Cir. 2019)

FACTS: Osborne and his wife served as CIs to aid in a Pikeville investigation into drug trafficking against Isaac. They were wired. During Isaac's subsequent trial, Officer Hamilton (Pikeville PD) narrated two separate videos and confirmed at various points the meaning of certain terms and phrases. Parts of his testimony drew objections. Det. Adkins testified as to other recorded transactions, doing the same thing. Adkins was also qualified as an expert in drug trafficking behaviors

Ultimately, Isaac was convicted and appealed.

ISSUE: Should an officer narrate and interpret the video of a transaction they did not directly witness?

HOLDING: No (as a rule).

DISCUSSION: Issac only challenged the portions of Hamilton's testimony in which he narrated and interpreted the videos. The Court held that an officer witness (not an expert) may testify when either the "officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred."[252] This derives from FRE Rule 701. Although the court believed that error may have occurred, in this case, the error was harmless because the "evidence against Isaac was overwhelming." Further, Osborne testified about the videos as well and covered the same ground as Officer Hamilton.

The Court affirmed Osborne's conviction.

TRIAL PROCEDURE / EVIDENCE – EVIDENCE

U.S. v. Moran, 771 Fed.Appx. 594 (6th Cir. 2019)

FACTS: In 2016, the Internet Crimes Against Children Task Force (Kentucky) was in search of child pornography being distributed on peer-to-peer networks. They located a user and Det. Cooper (KSP) confirmed files that were illegal – and that led to Moran, who lived with family near Maysville. After eliminating other occupants, Moran was left. He admitted he had been using BitTorrent on his laptop. He was advised of his rights and admitted to having child pornography on his laptop. He denied having actively searched for "baby porn" but did express an interest in Japanese animated pornography (which was legal). He admitted to using several peer-to-peer programs and that sometimes he ended up with things he didn't want and tried to delete. In the interview, they discussed file sharing, and despite denying knowing how it worked, he made statements "that

[252] U.S. v. Kilpatrick, 798 F. 3d 365 (6th Cir. 2015).

suggested he understood well enough." He admitted others could have gotten images from his "share folder."

At trial, Det. Viergutz testified that he found 106 videos and 91 images that were child pornography. Although the ones picked up originally were not there, evidence remained that they had been at one time. He was convicted of distributing and possession of child pornography and appealed.

ISSUE: Must prosecution expert testimony be disclosed to the defense?

HOLDING: Yes

DISCUSSION: Among other issues, Moran argued that it was improper to allow Viergutz to testify to certain evidence because it had not been specifically disclosed to the defense prior to trial as required under the Federal Rules. The government disclosed that Viergutz was an expert and would testify to the contents of the forensics report he had prepared and was also disclosed, including a spreadsheet he had made. The Court agreed the disclosure was sufficient.

The Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – CONFIDENTIAL INFORMANT

U.S. v. Shanklin, 924 F.3d 905 (6th Cir. 2019)

FACTS: In fall, 2013, Louisville police began an investigation of marijuana cultivation at Shanklin's home, based on a tip from a reliable CI. Officer initiated surveillance and observed Shanklin leave the home. They made a traffic stop and with the help of a K9, found marijuana in his vehicle. They had maintained surveillance on the home and when officers approached, detected the strong smell of marijuana inside, as well as observed marijuana plants outside. Officers obtained a search warrant and found over 50 plants and other paraphernalia. A number of items indicated Shanklin lived at the home. They also found a pistol.

Shanklin was charged with cultivating marijuana and for possession of the firearm, as he was a convicted felon. While those charges were severed, the marijuana charge was enhanced by the presence of the firearm. He was convicted but the jury did not find on the firearm issue. He was convicted of the firearms charge in federal court and appealed.

ISSUE: May the identity of a CI be withheld?

HOLDING: Yes (depending upon circumstances)

DISCUSSION: Shanklin argued that the government should have been compelled to share the identity of the CI, as it was possible the CI, who had reportedly been in the residence days before the search warrant, might have left the gun and other items. The Court looked to Roviaro v. U.S. and agreed that in such cases, the "police have an important interest in maintaining the CI"s

identity" to allow them to continue to use the CI.[253] Each case requires a careful, individualized consideration to determine if the informant's identity would assist in the defense. In this case, the CI did not testify and none of the CI's statements were introduced for the truth of the matter asserted (hearsay), but instead were only used as background for the search warrant. And nothing involving the CI had anything to do with the firearm, but only the drugs. The detective was thoroughly questioned about the matter as well, including any possible motivation for the CI to have provided false information.

The Court agreed that Shanklin had not met the bar to force the disclosure of the CI's identity. In this case, the CI was merely a "tipster" – and his tip was well corroborated by the police.

The Court upheld his conviction and sentence.

CIVIL LITIGATION

Hall v. City of Williamsburg, 768 Fed.Appx. 366 (6th Cir. 2019)

FACTS: On January 10, 2013, an anonymous posting on Topix offered a reward for a murder of Jones, and the concealment of her body. Jones reported the post to KSP and Trooper Sowders investigated. He obtained, with a warrant, the originating IP address and linked it to Hall, in Whitley County. Given that, the investigation was transferred to the post for that county and assigned to Trooper Baxter. Trimble, the Commonwealth Attorney for Whitley and McCreary instructed Baxter to get a search warrant, and he did so. Hall was arrested and the matter was covered on the news.

At the preliminary hearing, Trooper Baxter testified that Jones considered it a serious threat, although he had not actually spoken to hear. Hall was bound over and then indicted for solicitation to murder. Ultimately, though, in 2016, all charges were dismissed. In the interim, however, Hall, who had been admitted to law school before the arrest, had his offer rescinded. (Trimble had notified the school of his arrest.) Also during that time, Reeves, Hall's girlfriend, made numerous contacts with Trimble making threats, and Trimble placed intimidation charges against both. He then recused himself and handed the case over to a special prosecutor. That charge was dismissed for lack of prosecution. A later charge was placed for retaliation but that too was dismissed ultimately. Other charges were placed, some of which ended with guilty pleas.

Hall filed suit, alleging malicious prosecution, under 42 U.S.C. §1983 against a number of defendants. The defendants moved for summary judgement but also engaged in settlement negotiations (Bird – the primary officer - and the City of Williamsburg) and settled for a nominal amount. Trimble and Baxter also received dismissal. However, Hall failed to follow the Court's direction to sign the paperwork on the settlement and those claims were dismissed. Hall appealed.

ISSUE: Are grand jury witnesses immune from lawsuit?

HOLDING: Yes

[253] 353 U.S. 53 (1957).

DICUSSION: The Court agreed that Trimble, as a prosecutor, was entitled to absolute immunity for his actions in that role, but not for investigative functions. However, the Court agreed that all of Trimble's actions, including assisting in search and arrest warrants, fell under his role as a prosecutor. Any claims related to the situation in which Trimble was the victim failed because of the statute of limitations.

With respect to Trooper Baxter, the Court noted:

> To state a federal § 1983 claim for malicious prosecution, a plaintiff must allege facts meeting four elements:
>
> (1) a criminal prosecution was initiated against the plaintiff and the defendant made, influenced, or participated in the decision to prosecute; (2) there was no probable cause for the criminal prosecution; (3) as a consequence of the legal proceeding, the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor.[254]

Further, "In Kentucky, a malicious prosecution plaintiff must also allege that the defendant acted with malice."[255]

In this case, the Court agreed there was probable cause supporting the solicitation charge, but Hall argued he wasn't in the position to access the account at the time the posting was made. (He suggested his girlfriend, however, did.) His claims were based, in part, on Baxter's testimony before the grand jury and such witnesses also enjoy absolute immunity. Since there was no indication he provided Trimble with false information, he was also immune for his involvement with making the decision to prosecute, which fell to Trimble. Hall argued that Baxter made false statements but the totality of the information available to Baxter was properly shared with Trimble. (In particular, Hall challenged whether Baxter's testimony that Davis was actually frightened by the threat was correct, but the Court agreed that it was.)

Finally, the Court agreed that his agreement to settle, although never formalized, was valid. The Court affirmed the dismissals.

EMPLOYMENT

Sensabaugh v. Halliburton, 937 F.3d 621 (6th Cir. 2019)(Certiorari pending 12/16/2019)

FACTS: Sensabaugh was the head football coach at David Crockett High School in Tennessee. He paid a visit to a local elementary school in the same district, a visit unrelated to his job, and posted photos on his Facebook page of a classroom and students, decrying the condition of the school. The principal of that school contacted the district, concerned about the

[254] Robertson v. Lucas, 753 F.3d 606 (6th Cir. 2014).
[255] Prewitt v. Sexton, 777 S.W.2d 891 (Ky. 1989).

photos showing the children. Halliburton, the Director of Schools, believed it might violate FERPA and unsuccessfully tried to contact Sensabaugh. She communicated with him via text to remove the photos, but he did not do so. Two days later Sensabaugh posted again, discussing concerns about prisoners working in the school. Halliburton texted him, and he called her, talking to both Halliburton and Principal Wright. The phone call became contentious and Sensabaugh refused to remove the post, yelling at the two administrators. Sensabaugh characterized it differently, claiming that his employment was threatened. Halliburton sought legal counsel on firing Sensabaugh, and Sensabaugh was given a Letter of Guidance. When this document was given to him, Sensabaugh became belligerent and brought up allegations that a student had brought a gun to school and that another coach was "high." Sensabaugh later denied these allegations.

Wright contacted the county attorney and reported that she believed Sensabaugh was a threat to the school. Wright wanted to fire him, but instead, a Letter of Reprimand was issued, along with a suspension pending possible termination. Following a lengthy investigation, many of the allegations were sustained. During that time, Sensabaugh filed suit against Halliburton and Wright. Termination was recommended and he was fired in May 2018. He amended his lawsuit to include the termination. The district court awarded summary judgment to Halliburton. Sensabaugh appealed.

ISSUE: I**s** a suspension with pay a disciplinary action for protected speech?

HOLDING: No.

DISCUSSION: Sensabaugh argued that Halliburton retaliated against him for his protected speech, the initial Facebook post. The Sixth Circuit determined that the two letters were not adverse actions and there was no causal connection between the posts and his ultimate termination months later. The first letter had no effect on his job as head football coach, and the second letter and suspension with pay was also not an adverse action. While the termination certainly was an adverse action, the termination was not connected to the Facebook posts. (In fact, although Halliburton expressed concern on the posts, she did not ask him to remove them.)

The district court was affirmed.

Harper v. City of Cleveland, 2019 WL 2574980 (6th Cir. 2019)

FACTS: Harper began his career as a Cleveland police officer in 1989, and moved to an airport assignment two years later. In 2007, the city was considering moving to private law enforcement at the airport and Harper worked with colleagues to campaign against the effort – in effect, he "organized" them. The City ultimately chose not to privatize. In 2009, he claimed, he began to have unpleasant interactions with Sgt. Reese. In 2013, the City received complaints about Harper's sleeping and "disappearing" while on duty and he was found to be "regularly abandoning his post." Through an investigation, they discovered he was napping on regular intervals while on duty.

In 2014, a charge was prepared and ultimately, he was giving a disciplinary hearing. He pled "no contest," was suspended and transferred. He claims he was constructively forced into retirement. His benefits and salary were, it was noted, unchanged by the transfer.

In 2016, Harper sued the city on claims of race and First Amendment retaliation. The District Court gave summary judgement to the City and Harper appealed.

ISSUE: Must First Amendment retaliation occur close in time to the protected speech?

HOLDING: Yes

DISCUSSION: In the case of an alleged constructive discharge, the Court noted, the Court had to look at a variety of factors including:

> (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement or continued employment on terms less favorable than the employee's former status.

Harper argued he would have reduced opportunities for overtime and lost the "status" of going from a specialized unit to a patrol unit. He claimed "personal physical jeopardy" as he was given no retraining for street assignment, but had declined an offered training. He had been an officer for 26 years total. Looking to his suspension and transfer, specifically, Harper provided no comparable officers who had received different discipline for similar situations. Some of those examined had isolated incidents of misconduct, not "an ongoing, month's long dereliction of duty." Further, even had he shown it, the Court found that there was a legitimate and nondiscriminatory reason for the action, neglect and subsequent lies.

With respect to his claim that it was as result of his earlier "speech," the Court noted that he needed to prove that

> (1) he engaged in constitutionally protected speech; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; [and] (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by his protected conduct.[256]

The Court noted that there was a long time span between the speech and the alleged adverse action, with the speech occurring, at the latest, in 2009, although he claimed random adverse actions in the ensuing years. However, there must also be a very close causal connection between the speech and the alleged retaliation, as well, and nothing indicated that to be the case.

The Court affirmed the dismissal.

[256] Gillis v. Miller,845 F.3d 677(6th Cir. 2017) (quoting Dye v. Office of Racing Comm'n, 702 F.3d 286 (6th Cir. 2012)).

Holt / Erskine v. City of Battle Creek,
925 F.3d 905 (6th Cir. 2019)

FACTS: Holt and Erskine both served as battalion chiefs for the City of Battle Creek Fire Department. Both were the second in command, and in overall command of the department during their respective shifts, and were the chief's "senior staff." They rotated on standby duty, with the fire chief, a week at a time, which required them to respond to scenes if necessary during their normal off time. During their week, they received 1. 5 hours of pay for each day on standby and overtime pay should they actually need to respond. They had a pager, radio and were also expected to field phone calls. During those weeks, they were restricted in that they could not drink alcohol or leave town, and of course, they were awakened when the pager went off for large fire calls. Both Holt and Erskine argued the restrictions were onerous, the fire chief, Hausman at the time of the lawsuit, disagreed.

Both Holt and Erskine filed suit under FLSA, arguing they should receiver overtime for standby duty. The trial court ruled that they were exempt under both executive and administrative exemptions. And even if not, their standby duties were no so onerous as to prevent them from engaging in most activities.

Erskine and Holt appealed.

ISSUE: Are executive level staff exempt from overtime?

HOLDING: Yes

DISCUSSION: First the Court looked at the FLSA executive exemption elements. Only the second and fourth were at issues – whether the employee's primary duty was management and whether they had hiring/firing authority. The Court agreed that both men performed both functions for the department and played a significant role in personnel decisions, despite the fact the chief did not always follow their recommendations.

The Court agreed both were not entitled to overtime.

Barrow / Cook v. City of Hillview, 775 Fed.Appx. 801 (6th Cir. 2019)

FACTS: On January 4, 2012, Barrow, Cook, Caple and Straughn, all members of the Hillview Police Department, went to Mayor Eadens home in response to a call. While searching for suspicious activity, the purpose of the call, they found a backpack in the yard that contained evidence of methamphetamine manufacturing. Allen Eadens, the mayor's son, denied any knowledge of it. He was handcuffed. Barrow stayed with him while the others continued to search. Cook and Straughn found white garbage bags that smelled of chemicals they also recognized as connected to manufacturing. Chief Caple ordered that the backpack be placed with the bags, which were off the mayor's property behind a fence to take the "heat" off the mayor. Cook moved the bags, as he was familiar with drug processing materials because of the chief's order, although he knew it was a violation of SOP.

When the others joined him, Barrow asked about the backpack and was told it was in the woods outside the property. Barrow, suspecting they had done something illegal, told Cook he was "done" with the scene and Cook released him. He was ordered by Straughn not to talk to anyone and Barrow gave a "sarcastic salute." At the mayor's request, his son was removed and the drug task force "cleaned up" the scene.

Barrow reported the situation to the Bullitt County Sheriff's Office which referred it to the FBI. Barrow gave a statement, later corroborated by Cook. Both cooperated with the FBI and Barrow recorded conversations. By the next year, the investigation became common knowledge and ultimately, Barrow admitted he'd talked to the FBI. Beginning about that time, both he and Cook became the subject of disciplinary actions, including reprimands and suspensions. Cook eventually took a demotion to patrolman to obtain dismissals of the pending discipline. Both Barrow and Cook filed suit, arguing retaliation for their cooperation with the FBI. In the interim, Caple was indicted for lying to the FBI and was eventually convicted of same.

Barrow (joined by Cook later) filed suit against Hillview, Caple and Straughn. He complained of violations of the Kentucky Whistleblower Act and conspiracy to prevent him from reporting the alleged crime. Ultimately he abandoned the first claim. With respect to the second claim, the trial court agreed that the intracorporate-conspiracy doctrine prevented a conspiracy claim, as all three were under the umbrella of Hillview, and thus a single "person" for purposes of conspiracy. The Court also dismissed under claims. Barrow and Cook appealed.

ISSUE: Are officers reporting misconduct to a third party protected by the First Amendment?

HOLDING: Yes

DISCUSSION: The Court noted an exception to the intracorporate-conspiracy doctrine when the employees act outside the scope of their employment, but in this case, they did not find sufficient evidence that what the two were doing was outside the purview of their own Hillview employment. The Court upheld the dismissal on that claim. The Court addressed whether a personal motive allowed the doctrine to be avoided but in this case, the Court did not agree that it did.

With respect to employment reprisal, the court looked at is a public policy wrongful discharge, even though they were not actually terminated, but only disciplined. As the Kentucky Supreme Court had not provided guidance on the application of the statute, whether "wrongful discharge really means wrongful discipline."

The Court also looked at allegations of First Amendment retaliation. The District Court found no precedent to rule that reporting misconduct or participating in a FBI investigation was protected speech, the first element of such a claim. The Sixth Circuit disagreed and noted that while it might be their professional responsibility to make the report – as Barrow noted – it was still protected speech.

In such assessment, the ccourt had to make a three step inquiry.

> First, we ascertain whether the relevant speech addressed a matter of public concern.[257] Second, we determine whether the employee spoke as a private citizen or as an employee pursuant to the employee's official duties.[258] Third, we balance the interests of the parties and determine if the employee's speech interest outweighs "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[259]

In the first, the Court agreed the matter was one of strong public concern, exposing government misconduct. The Court noted that "there is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For government employees are often in the best position to know what ails the agencies for which they work. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." Their statements were not within their "ordinary job responsibilities." While certainly general law enforcement was within their duties, taking an allegation of public corruption to outside authorities was not. They did not utilize their own chain of command for obvious reasons, as well, having already been warned off the matter.

Finally, the court engaged in the Pickering balancing test, the Court noted that there was no evidence that anything said by Barrow or Cook was incorrect.

The Court agreed that the statements were, in fact, protected speech and reversed the summary judgement to the defendants on that claim. The Court also reversed the dismissal of the claim against Hillview itself, based on the disciplinary decisions made by the two command officers on behalf of Hillview.

The Court reversed and remanded on two of the claims.

Barrow v. City of Cleveland, 775 Fed.Appx. 801 (6th Cir. 2019)

FACTS: Barrow served as a City of Cleveland police officer for many years, and by all accounts, was a good officer, having risen through the ranks up to Lieutenant by 2011. In that year, he tested for Captain, but failed. Of the ten who took the test, two, including Barrow, failed. Barrow was African American, and only one of the eight who passed was African American. In 2012, Barrow filed a complaint with the EEOC, alleging racial discrimination.

Following that charge, Barrow experienced several employment actions that he alleged were in retaliation for his complaint. One involved changes to his vehicle assignment, with Barrow losing the newer vehicle until he left the unit to which he was assigned, and the vehicle was then assigned to his successor. He was also removed from duties in his unit, assigned to administrative duties and removed from active street duty, and not allowed to have "contact with the public." He remained in that status for approximately two years. He was also denied the ability to overtime work security details by that "no contact" order. Those changes led to a second EEOC claim. He filed suit, and within months retired in 2016.

[257] Connick v. Myers, 461 U.S. 138 (1983).
[258] Id. (citing Garcetti v. Ceballos, 547 U.S. 410 (2006).
[259] Id. (quoting Pickering v. Bd. of Educ. , 391 U.S. 563 (1968)).

The Court denied many of the claims as being time-barred, but allowed retaliation claims to move forward. At trial, he was awarded substantial compensatory damages along with attorney's fees. The City appealed.

ISSUE: Is timing of alleged retaliatory actions critical in making a claim?

HOLDING: Yes

DISCUSSION: The Court noted that "an employee alleging discrimination or retaliation in violation of Title VII must first file an administrative charge with the EEOC within a certain time after the alleged wrongful act." The Court agreed that his claim related to being assigned to administrative duty was "reasonably related" to his first allegation and thus it was properly handled, even though he did not specify it in the first claim. With respect to his Title VII retaliation claim, it was necessary to introduce "direct evidence of retaliation or by proffering circumstantial evidence that would support an inference of retaliation."[260] Under circumstantial, it must be assessed under "the same McDonnell Douglas evidentiary framework that is used to assess claims of discrimination."

In such:

> A plaintiff establishes a prima facie by showing that: (1) he engaged in a protected activity; (2) his exercise of the protected activity was known by the defendant; (3) thereafter, the defendant took an action that was materially adverse to the plaintiff; and (4) a causal connection existed between the protected activity and the adverse action.[261] Finally, it must be proved that "the plaintiff must furnish evidence that "the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."[262]

The City argued that the decision maker didn't know about the EEOC claim, in previous cases the court had "inferred knowledge of protected activity in situations where the decision-maker 'took an action with respect to the plaintiff, other than the challenged action, from which it could be inferred that the [decision-maker] was aware of the plaintiff's grievance.'"[263] The Court noted that within weeks of his filing, a memorandum was sent out that required claims to go to the director of public safety, rather than directly to human resources, which meant, according to Barrow that "oftentimes you had to forward your complaint directly to the person you were complaining about." That would serve to discourage action. The Court agreed that although the policy applied broadly to city employees, it was reasonable for a jury to find that the "timing and circumstances" were in response to Barrows complained. Further, there was notification that the EEOC had notified the city of the claim.

[260] Laster v. City of Kalamazoo, 746 F.3d 714 (6th Cir. 2014) (quoting Imwalle v. Reliance Medical Products, Inc., 515 F.3d 531 (6th Cir. 2008)).
[261] Rogers v. Henry Ford Health Sys. , 897 F.3d 763 (6th Cir. 2018).
[262] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).
[263] Mulhall v. Ashcroft, 287 F.3d 543 (6th Cir. 2002).

In such cases, the protection was not against all retaliation, but against materially adverse actions – those that affect the "terms, conditions or status of employment."[264] The Court agreed that the reassignment was materially adverse, given that it constrained Barrow from performing the tasks inherent in the job. With respect to causation, while temporal proximity alone is not enough, it is a strong factor, but in this case, the first adverse action occurred some 5 ½ months after he filed the claim. Initially, in fact, he suffered no direct reaction but even his immediate supervisors did not know why Barrow was put on administrative duty and the "no public contact" order – which they testified usually occurred when there was a criminal investigation. It was lifted when he was transferred, which was also illogical if being done for a public safety reason. The Court agreed it was reasonable for the jury to find causation.

As for his emotional distress, Barrow was able to point to "specific manifestations" such as being isolated from his unit, and feeling insecure in his position, and seeking medical treatment. The Court agreed that the jury verdict was "neither unreasonable nor against the weight of the evidence." Further, the Court agreed the fees demanded, in a case that was partially successful, were appropriate and reasonable. (In fact, the fees were essentially double Barrow's award.)

The Court affirmed the decision.

SUPREME COURT OF THE UNITED STATES, 2018-2019 TERM

EMPLOYMENT

Mount Lemmon Fire District v. Guido, --- U.S. --- (2018), Decided November 6, 2018

FACTS: When the Mount Lemmon Fire District (Arizona) found itself in a budget crisis, it laid off two of its oldest firefighters, Guido and Rankin. They sued the fire district, which is a political subdivision of the state under Arizona law, under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §621. The fire district argued that it was too small under federal law to qualify as an employer as it did not have twenty employees.

The issue centered on the following definition:

> "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State . . . ." [265]

The Ninth Circuit ruled that the definition indicated that a State, or a political subdivision of a State, did not require the numerosity limitation to be met for the ADEA to apply. The Fire District requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Does the ADEA apply to government entities with fewer than 20 employees?

[264] Hawkins v. Anheuser–Busch, Inc., 517 F.3d 321 (6th Cir. 2008).
[265] 29 U.S.C. §630(b).

HOLDING: Yes

DISCUSSION: The Court reviewed the evolution of the law, which in 1974 was amended to "reach state and local employers." The Court agreed that the phrase, "also means," should be read to indicate that the two parts of the definition should be read independently. The Court agreed that in the same amendment, the Fair Labor Standards Act (FLSA) was amended to "reach all government employers regardless of their size." The Court looked to the dozens of other instances in which the phrase is used in federal law and noted it "typically carr[ies] an additive meaning."

The Court discounted the concern that applying the ADEA to "small public entities risks curtailment of vital public services." The Court noted that in the years since many states have enacted similar laws on age discrimination, no "untoward service shrinkages have been documented."

The Court affirmed the decision of the Ninth Circuit Court of Appeals.

NOTE: Although this case involved a fire district, the same interpretation can be placed on small city governments in Kentucky as well, some of which may have fewer than 20 employees total.

ACCA

U.S. v. Stitt/ U.S. v. Sims, --- U.S. --- (2018), Decided December 10, 2018

FACTS: In two separate cases, Stitt and Sims were each convicted of unlawful possession of a firearm (18 U.S.C. 922(g)(1)). Because each had prior state burglary convictions, they both were also potentially subject to enhanced sentencing under the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(1). The ACCA "requires an enhanced sentence for offenders who have at least three previous convictions for certain 'violent' or drug-related felonies." The federal statute provides some description of the state laws that might qualify for the provisions of the ACCA and include, among other crimes, burglary.

Stitt was convicted for aggravated burglary under Tennessee law, which included a burglary of a structure "designed or adapted for the overnight accommodation of persons," Sims was convicted under Arkansas law for the burglary of a "residential occupiable structure." For both, the federal District Courts agreed that their crimes fell within the scope of burglary for purposes of the ACCA, and imposed the enhanced sentences. In both, however, their respective federal Circuit Courts of Appeal disagreed, vacated their sentences and remanded the cases for resentencing. The Government, in both, requested certiorari for reconsideration of those decisions, and the U.S. Supreme Court granted review.

ISSUE: Is burglary a violent crime under the Armed Career Criminal Act?

HOLDING: Yes (most of the time).

DISCUSSION: The Court began by noting that the "word 'burglary,' like the word 'crime' itself, is ambiguous." The Court determined that the ACCA requires a trial court to "evaluate a state

conviction 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'"[266] The Court noted that in Taylor v. U.S., it had concluded that Congress intended a "uniform definition of burglary" to be used in ACCA cases.[267] That would include the "classic" common law definition – breaking and entering into a dwelling at night – but that had been extended over time by most states to include other types of structures as well. The Court agreed, however, that it appeared to limit the scope to "serious" burglaries, those that might lead to a "serious risk of physical harm." In Taylor, the Court had defined the elements for a generic burglary as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intend to commit a crime." The Court agreed that the state law in Tennessee and Arkansas fell within that generic definition. By the time the ACCA was passed, in the mid-1980s, most state burglary laws included vehicles used for lodging, such as a recreational vehicle, so the inclusion of such did not remove convictions under those laws from consideration under the ACCA. Further, burglary is an "inherently dangerous crime" that "creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate."

With respect to vehicles used as mobile lodgings, the Court noted that the same risk is present, if not even greater given the smaller size of such lodgings, because both occupants and burglars would find it difficult to escape to avoid confrontation. The Court also found no need to consider the part-time aspects of the use of a recreational vehicle, as it is "no less a burglary" in such circumstances. The Court also discounted the argument that the Tennessee law included atypical structures and vehicles, such as those being used for housing that are not typical RVs, as not an issue it needed to consider for the purposes of deciding the case.

The Court reversed the decision of the Sixth Circuit (for Stitt) and vacated and remanded the decision of the Eighth Circuit (for Sims.)

NOTE: This case may affect individuals convicted under Kentucky's burglary statutes (KRS Chapter 511).

42 U.S.C. §1983 - FORCE

City of Escondido (CA) v. Emmons, --- U.S. --- (2019), Decided January 7, 2019

FACTS: In April 2013, Escondido Police received a 911 call from Maggie Emmons, concerning domestic violence. Officer Houchin responded and the domestic call escalated, resulting in the arrest of Maggie's husband, for injuries he inflicted on Maggie. He was soon released. On May 27, police received another 911 call, this time conveyed by Douglas' mother – Douglas being a roommate of the Emmons. She had received a call from her daughter, screaming for help, and the daughter appeared to be fighting with Maggie Emmons. Officer Houchin again responded, along with Officer Craig. Dispatch told the officers there might be two children in the apartment and that call-backs to the apartment were going unanswered.

[266] Begay v. U.S., 553 U.S. 137 (2008).
[267] Taylor v. U.S., 495 U.S. 575 (1990).

Officers knocked but got no answer. They were able to speak to Maggie Emmons through an open window and they tried to get her to open the door for a welfare check. A man inside told Emmons to "back away from the window," but officers could not identify him. Additional officers arrived as backup. A man emerged and tried to brush past Officer Craig, leaving the apartment. Officer Craig told him to leave the door open, but he did not, shutting it behind him. Officer Craig seized the man, took him to the ground and handcuffed him. The body worn camera did not indicate the man to be in any discomfort as a result. The man was brought to his feet and arrested for a misdemeanor offense. The man turned out to be Marty Emmons, Maggie's father. He ultimately sued Officer Craig and Sgt. Toth under 42 U.S.C. §1983, claiming excessive force. The District Court upheld the arrest and the force used to effect it, finding the officers had probable cause, and further that the "video shows that the officers acted professionally and respectfully" in their interaction with Emmons. The Ninth Circuit reversed that decision and remanded the matter to trial.

The officers requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Is an officer immune from suit if it is even debatable whether the force used was excessive under clearly established law?

HOLDING: Yes.

DISCUSSION: The Court first reversed the decision concerning Sgt. Toth, which the U.S. Supreme Court found puzzling as only Officer Craig was involved in the use of force claim.

With respect to Officer Craig, the Court noted:

> As we have explained many times: "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[268]

Under existing precedent, and particularly with respect to excessive force cases, the Court continued:

> Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue. . . . "[I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right's contours were

[268] Kisela v. Hughes, 584 U. S. ___, ___ (2018) (per curiam) (slip op.), see District of Columbia v. Wesby, 583 U. S. ___, ___–___ (2018); White v. Pauly, 580 U. S. ___, ___–___ (2017) (per curiam); Mullenix v. Luna, 577 U. S. ___, ___–___ (2015) (per curiam).

sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it."[269]

With Emmons' arrest, the Court agreed that the Ninth Circuit "should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances." The Court found the Ninth's Circuit evaluation to be "far too general" in applying a force case that involved passive resistance to the situation, and the Ninth Circuit "made no effort to explain how that case law prohibited Officer Craig's actions in this case." The Court agreed that the proper analysis was "whether clearly established law barred Officer Craig from stopping and taking down Marty Emmons in this manner as Emmons exited the apartment." The Court vacated the decision with respect to Sgt. Toth, and remanded the case back to the Ninth Circuit to analyze the case against Officer Emmons using the correct process.

ACCA

Stokeling v. U.S., --- U.S. --- (2019), Decided January 15, 2019

FACTS: On July 27, 2015, two men burglarized a Miami Beach restaurant. Stokeling was an employee and quickly became a suspect. After a background check, he was found to have already been convicted of three felonies, including a robbery. He was armed when arrested.

Stokeling pled guilty to being a felon in possession, and was also sentenced under the Armed Career Criminal Act (ACCA), 18 U.S.C. §922(g)(1). The ACCA applies when an individual has three prior convictions for a violent felony. At issue was his prior conviction for robbery, which he argued was not a "predicate offense" for the ACCA. The District Court denied the enhancement, but the Eleventh Circuit reversed that decision, ruling that the ACCA applied.

Stokeling petitioned for certiorari, and the U.S. Supreme Court granted review.

ISSUE: Is a robbery under the common law elements a predicate offense for the ACCA?

HOLDING: Yes.

DISCUSSION: For a determination under the ACCA, the court must find that the underlying offense has, as an element, some degree of necessary violence. Stokeling argued that under robbery, Florida requires a use of force, defined in that state as including "resistance of the victim that is overcome by the physical force of the offender." The District Court had looked at the actual facts of the underlying robbery and found that his specific actions in that case did not justify the enhancement.

The Court noted that the Florida statute "mirrored the elements of the common-law crime of robbery, which has long required force of violence." Those two terms, in fact, are often used interchangeably. The law made no distinction between "gradations" of violence, and the overcoming of even slight resistance is enough to constitute violence for a robbery offense. When

[269] Id., at ___ (slip op., at 5) (quotation altered).

it enacted the ACCA, Congress defined robbery as having an element of force or violence, which clearly indicated a desire to legislate against a background of the common law. When the ACCA was amended in 1986, the enumerated crimes, including robbery, were eliminated, but instead an "element clause" was substituted, and that was defined as any crime that included the "use, attempted use, or threatened use of physical force." Clearly, the Court agreed, Congress intended that force retain the same definition as it had under the common law. Most states require a degree of force to overcome resistance in even the lowest degree of robbery, but that is more than mere touching. It is on the nature of a "physical contest" between victim and criminal, but need not result in physical pain or injury, just be capable of causing it.

The Court held that any crime that includes an element of physical force – force that is "capable of causing physical pain or injury" is sufficient to serve as a predicate offense under the ACCA. As such, the Florida crime of robbery does so. The Eleventh Circuit's decision was affirmed.

NOTE: Under this decision, a conviction under either degree of Robbery under KRS Chapter 515 may serve as a predicate offense for the ACCA.

ASSET FORFEITURE

Timbs v. Indiana, --- U.S. --- (2019). Decided February 20, 2019

FACTS: Timbs pleaded guilty in an Indiana state court to dealing in a controlled substance (heroin) and conspiracy to commit theft. At the time he was arrested, the police also seized a Land Rover SUV, valued at $42,000, that he purchased with money he received as a result of his father's death. Indiana sought forfeiture of the SUV under civil law, claiming the vehicle had been used to transport the heroin. The trial court agreed that the vehicle had been used to transport heroin, but denied forfeiture because state law limited the fine for such an offense to $10,000. The trial court found forfeiture unconstitutional under the Eighth Amendment's Excessive Fines Clause as grossly disproportionate to the severity of his actual crime. However, the Indiana Supreme Court disagreed, finding that clause applies only to federal actions.

Timbs requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Is the Eighth Amendment's Excessive Fines Clause applicable to the states under the Fourteenth Amendment's Due Process Clause?

HOLDING: Yes

DISCUSSION: The Court noted that initially, the Bill of Rights applied only to the Federal Government. However, over time, as cases came before the Court, it accepted (with only one exception) the specific protections in each of the Bill of Rights to the States under the Fourteenth Amendment (the Due Process Clause). Each of the fifty states have, in their respective constitutions, a provision prohibiting the imposition of excessive fines. An excessive fine violates the "penal goals of retribution and deterrence."

The Supreme Court disagreed with Indiana's argument that the Excessive Fines Clause does not apply in "civil in rem forfeitures." The Court vacated the forfeiture of the vehicle and remanded the case.

42 U.S.C. §1983 - ARREST

Nieves v. Bartlett, --- U.S. --- (2019), Decided May 28, 2019

FACTS: This matter arose from an Alaska event called the Arctic Man – an "extreme ski event" in the mountains near Paxson, Alaska. The event drew large crowds and includes "high levels of alcohol use." Troopers Nieves and Weight (Alaska State Police) were sent to the parking lot to investigate complaints of underage drinking.

During the investigation, Trooper Nieves tapped on Bartlett's shoulder and asked him if "they could talk." Bartlett refused to do so and asked if he was free to go, and the trooper allowed him to walk away. A little later, about 1:30 a.m., Bartlett saw a minor he'd accompanied to the party talking to Trooper Weight. He approached the pair and told the trooper that he didn't "have the authority to talk to him without a parent or guardian present." (It was suggested that he spoke loudly due to the music playing.) The trooper said "No" and pushed Bartlett, who later claimed his hands came up in reaction to the shove. Trooper Nieves grabbed Bartlett's arm and ordered him to back up, while Trooper Weight grabbed the other, and they tried to force Bartlett to the ground. Bartlett "hesitated," as he later said he did not want to aggravate an existing back injury. They threatened him with a Taser and he then voluntarily went prone to the ground and put his hands behind his back. Bartlett was placed into a cruiser and told he was under arrest for "harassing" the trooper. They loosened his cuffs when he complained. At some point, Bartlett claimed Trooper Nieves stated that "bet you wish you would have talked to me now," a statement that would prove critical in later proceedings. He was charged with disorderly conduct and "resisting or interfering with arrest." The troopers drafted a report, which Bartlett later claimed was "fabricated in that it contain[ed] many false statements." Ultimately, the state dismissed the charges against Bartlett.

Bartlett filed suit under 42 U.S.C. §1983, claiming that he should be "free from unlawful assault by a police officer, to be free from a malicious criminal prosecution, to not be falsely incarcerated, unreasonable search and seizure, freedom of speech, equal protection of the law and his right to due process." In particular, he noted that he did not attempt to head-butt the troopers, as the report indicated, nor did he throw punches. He also claimed he did not yell back into his RV, which was nearby, that the occupants did not have to talk to the troopers. Several videos were submitted, from different angles, and some were subject to more than one interpretation. (In fact, a news crew was with Trooper Nieves.) The troopers claim they were entitled to qualified immunity in the arrest.

The District Court reviewed the various allegations. With respect to the false arrest claim, the Court agreed that "it is well established that an arrest without probable cause violates the Fourth Amendment." Further, it noted the "the ultimate touchstone ... is 'reasonableness.'" "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'" If "it was reasonable for an officer to suspect that the defendant's conduct was illegal,"

then "there was no violation of the Fourth Amendment." The standard is objective, and so "[w]e do not examine the subjective understanding of the particular officer involved." Even if it was arguable, and reasonable officers might disagree on the legality of an arrest, they might still be entitled to qualified immunity. Bartlett was told that he was being arrested for harassment – which under Alaska law was when "with intent to harass or annoy another person, that person ... insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response." Looking at the undisputed facts, the Court agreed that his conduct spurred the "violent response," even if that was not his intent, given his loud voice and hand movements. The District Court agreed that the troopers had probable cause for the arrest.

With respect to his malicious prosecution claims, the District Court found no indication that they had exercised any influence over the prosecuting attorney that would have swayed his decision, and in fact, helped him locate video of the event that was not in the possession of the ASP.

With respect to Bartlett's excessive force claim, the Court looked to Graham v. Connor[270] and its "objective reasonableness" standard. It noted that "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." The troopers noted that no case law suggested that their actions were inappropriate or excessive, and that they did, in fact, a "controlled takedown." Looking at the Graham factors, the Court noted that in hindsight, his offense was minor, but that the circumstances did suggest a possible threat to the troopers and the public. Trooper Weight's shove, which did not even knock Bartlett down, served only to put distance between them. When he complained about the handcuffs, they were immediately loosened and he suffered no injury as a result. The Court agreed that the troopers were entitled to qualified immunity on the claim.

With respect to the First Amendment, the District Court noted "criticism of the police is not a crime, and even obscene gestures and words directed towards police officers, without more, will not support probable cause to arrest." The Court agreed, however, that there had not yet been a case recognizing a "First Amendment right to be free from a retaliatory arrest that is supported by probable cause." Bartlett believe his arrest was "motivated purely by a desire to retaliate against a verbal challenge to an officer's authority." The Court agreed, however, that since the troopers had adequately shown that they had probable cause to support the arrest, he could not maintain a First Amendment claim.

Finally, the District Court agreed that there was no evidence that the media footage was improperly withheld or that it was ever even in the possession of the prosecutor or the police. It agreed that without individual claims, there could be no conspiracy claim, either. The District Court ruled in favor of the troopers.

Bartlett then appealed to the Ninth Circuit Court of Appeals. It affirmed the decision on the issue of the false arrest and force claims, as well as the malicious prosecution claim. The Court, however, reversed the trial court's decision on the retaliatory arrest claim, noting in it had held, in the past, that a "plaintiff can prevail on a retaliatory arrest claim even if the officers had probable cause to

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

arrest,' despite the decision in Reichle v. Howards.[271] The Court agreed that the threat of an arrest would "chill a person of ordinary firmness from future First Amendment activity."

The Troopers requested certiorari on the retaliatory arrest claim, and the U.S. Supreme Court granted review.

ISSUE: Does probable cause defeat a First Amendment retaliatory-arrest claim under 42 U.S.C. §1983?

HOLDING: Yes, in most instances.

DISCUSSION: The Court noted that the issue it was "asked to resolve" is "whether probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment." Although the issue had been brought in twice in recent court terms, it had been left essentially unanswered. The Court found the facts of this matter, however, appropriate to directly address the issue. The Court agreed that "[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" when they are "engaging in protected speech." If the official does something based on a retaliatory motive, and there is insufficient grounds to have provoked the consequences (such as an arrest) absent that motive, the injured party may seek relief. To prevail, the plaintiff must be able to show a "'causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury.'" The motive and the injury must be linked together, and that "but-for" the motive, the action would not have occurred.

Often, the Court agreed, the connection was straightforward and obvious. In Hartman, however, the Court required plaintiffs to further and "prove as a threshold matter that the decision to press charges was objectively unreasonable because it was not supported by probable cause." The officers in the instant case "argue that the same no-probable-cause requirement should apply to First Amendment retaliatory arrest claims." The Court agreed that such claims often "give rise to complex causal inquiries." But, in short, the Court agreed that the "plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." Further, the Court agreed, it had "almost uniformly rejected invitation to probe subjective intent" – preferring to depend instead on the "application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.[272] "The Court noted that although, as a rule, "probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." It emphasized that when §1983 was first adopted, officers in most of the country were much more limited in their ability to make warrantless arrests for misdemeanors. That has changed, however, and such arrests are now permitted "in a much wider range of situations." It left intact the possible argument that a plaintiff could raise, that the subject

[271] 566 U.S. 658 (2012); See also Hartman v. Moore, 547 U.S. 250 (2006).

[272] Crawford-El v. Britton, 523 U.S. 574 (1998); Mt. Healthy City Bd. Of Ed. v. Doyle, 429 U.S. 274 (1977).

"was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."

However, in Bartlett's situation, the Court agreed that despite the statement made by Nieves, that Trooper Weight, who made the arrest, had no knowledge of the prior interaction. The Court agreed that the troopers had probable cause for the arrest and that his "retaliatory arrest claim fail[ed] as a matter of law."

The Court reversed the decision of the Ninth Circuit Court of Appeals and the case was remanded.

DUAL SOVEREIGNITY

Gamble v. U.S., --- U.S. --- 2019. Decided June 17, 2019

FACTS: In 2015, Gamble, a convicted felon, was arrested in Alabama with a handgun. He pled guilty under state law for possession of the firearm, and was then indicted under federal law for possession of the same gun. He moved to dismiss, arguing that the federal indictment was the "same offence" under the Fifth Amendment as the one at issue in the state conviction. However, the Court had long held that such situations were not, in fact the same offense, under Double Jeopardy, if prosecuted by "different sovereigns." He then entered a conditional guilty plea.

Gamble appealed to the Eleventh Circuit, and his conviction was affirmed. He petitioned the U.S. Supreme Court for review, and it granted certiorari.

ISSUE: May an individual be prosecuted for the same essential offense under both state and federal law?

HOLDING: Yes.

DISCUSSION: The Court reviewed the history of the Fifth Amendment and the Double Jeopardy clause, in particular, at length. The Court held that eliminating the "dual sovereignty rule" would not reduce the reach of the federal government in criminal law, and would have little effect on state law prosecutions.

The Court upheld the prosecution under both Alabama state law and federal law, and upheld Gamble's conviction.

42 U.S.C. §1983 – MALICIOUS PROSECUTION

McDonough v. Smith, --- U.S. --- (2019), Decided June 20, 2019

FACTS: McDonough was a commissioner in the Rensselaer County, New York, board of elections. Smith was appointed as a special district attorney to prosecute possibly forged absentee ballots. Allegedly, Smith scapegoated McDonough (in which there was a personal vendetta) and fabricated evidence, and leaked to the press that McDonough was the primary target. McDonough refused to confess and "Smith allegedly fabricated evidence in order to inculpate him." Smith was accused of falsifying affidavits, coaching witnesses to lie and orchestrating "a suspect DNA analysis to link McDonough to relevant ballot envelopes."

Using this evidence in part, Smith obtained an indictment of McDonough. He was arrested, arraigned and released with restrictions. At trial a year later, the trial ended in a mistrial. Ultimately, during a second trial in 2012, in which fabricated testimony was used, McDonough was acquitted. Just under three years later, in 2015, McDonough sued Smith and others under 42 U.S.C. §1983 for fabrication evidence and malicious prosecution. The District Court dismissed the latter under immunity and dismissed the former as untimely.

McDonough appealed to the U.S. Court of Appeals for the Second Circuit, which affirmed, agreeing with disposition of the malicious prosecution claim. It also explored when the limitations period for the evidence claim accrued and concluded that it started when McDonough was arrested, as that was the point at which he knew the evidence was false and being used against him, and he suffered some loss of liberty (the restrictions of his release). As such, the case was brought untimely, as the matter had a three year statute of limitations in New York. (Such claims follow the statute of limitations for personal injury in the state in which it occurred.)

McDonough requested review, and the U.S. Supreme Court granted certiorari.

ISSUE: When does the statute of limitations for a malicious prosecution claim under 42 U.S.C. §1983 accrue?

HOLDING: At the favorable termination of the defendant's underlying criminal case.

DISCUSSION: The Court held that the statute of limitations for such a claim did not begin until the criminal proceedings terminated in the subject's favor. When the claim accrues and is a matter for federal law to decide, it begins only when the plaintiff has a "complete and present cause of action." In such cases, it was first necessary to identify "'the specific constitutional right' alleged to have been infringed."[273] The Second Circuit treated the claim as falling under the Due Process Clause, and the Court found that to be sound, as it normally decided such accrual questions by looking to analogous claims. Looking to Heck v. Humphrey, the Court agreed that malicious prosecution is the most analogous common-law tort, and that required a showing that a "defendant instigated a criminal proceeding with improper purposes and without probable cause."[274] In such a claim, he could not bring up the case until the favorable termination of his prosecution, which was designed to avoid conflicting and parallel civil and criminal prosecutions. The Court held "[o]nly once the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of Heck, will the statute of limitations begin to run."

[273] Manuel v. Joliet, 580 U.S. – (2017).
[274] 512 U.S. 477 (1994).

The Court noted that it would "impose a ticking limitations clock" which would force defendants to take action quickly after they become aware of the fabrication, which would create "practical problems" where criminal proceedings might extend into years. Such defendants might have to choose between letting the case expire or filing a lawsuit against the very person prosecuting them, and the latter would cause defense strategy issues as well. The Court agreed that McDonough "had a complete and present cause of action for the loss of his library only once the criminal proceedings against him terminated in his favor."

The Court concluded that the statute of limitations began at McDonough's acquittal. As such, his lawsuit was brought in a timely manner. The Court reversed the decision of the Second Circuit and remanded the case for further proceeding consistent with the decision.

FEDERAL LAW – FIREARMS

Rehaif v. U.S., --- U.S. --- (2019), Decided June 21, 2019

FACTS: Rehaif entered the U.S. on a student visa. When he received failing grades, he was told he needed to transfer to another university or leave the country. He did neither. Sometime after that, he visited a range and fired two weapons. Learning of this, he was prosecuted for possessing the firearms illegally (as a "alien unlawfully in the" U.S.). At trial, the judge instructed the jury that Rehaif did not need to have been proven to have known he was in the U.S. unlawfully.

Rehaif was convicted and appealed, arguing that the jury should not have received that instruction. The Eleventh Circuit Court of Appeals affirmed the decision, finding that a defendant need not to have been shown to have known his status, and that a similar lack of a requirement would be found in the "felon-in-possession" statutes.

Rehaif requested review and the U.S. Supreme Court granted certiorari.

ISSUE: Must a subject know that it is illegal for them to possess a firearm as a criminal alien and that they are, in fact, a criminal alien?

HOLDING: Yes.

DISCUSSION: The Court noted that in looking at the intent of Congress in this statute, it had long held that "Congress intends to require a defendant to possess a culpable mental state regarding "each of the statutory elements that criminalize otherwise innocent conduct." In other words, there is a presumption of scienter – knowledge – inherent in each. In this case, Rehaif's status was what made his actions criminal. The Court did not believe that Congress would have expected all possible defendants to understand their own status, and normally presumed that "Congress did not intend to impose criminal liability on persons who, due to lack of knowledge, did not have a wrongful mental state." Further, the maxim of "ignorance of the law is no excuse" did not apply when the defendant "has a mistaken impression concerning the legal effect of some collateral matter and that

mistake results in his misunderstanding the full significance of his conduct" – which negated the mental state required.

The Court concluded that to prosecute Rehaif, the Government "must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm. The Court reversed Rehaif's conviction and remanded the case.

DUI

Mitchell v. Wisconsin, --- U.S. --- (2019), Decided June 27, 2019

FACTS: Officer Jaeger (Sheboygan, Wisconsin, PD) was dispatched to a call of a possibly impaired subject. The officer located Mitchell, who was apparently extremely intoxicated. Mitchell's instability made a field sobriety test "hopeless, if not dangerous," so the officer gave Mitchell a PBT instead. It registered 0.24%. He was arrested and taken to the police station. On the way, his condition deteriorated and upon arrival, Officer Jaeger drove Mitchell to the hospital instead. Jaeger read Mitchell the standard warning, and Mitchell was unresponsive. The blood draw, taken while he was unconscious, taken some 90 minutes after his arrest, was 0.222%.

Mitchell was charged and moved to suppress the results, as it was taken without a warrant and under Wisconsin's implied-consent statute. Under that law, the blood test was considered consensual, "curing any Fourth Amendment problem." The Wisconsin Supreme Court affirmed Mitchell's convictions.

Mitchell requested review from the U.S. Supreme Court, which granted certiorari.

ISSUE: Does a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement?

HOLDING: No, but it can be justified under another principle.

DISCUSSION: The Supreme Court noted that its prior decisions on the topic have been based on "the precedent regarding the specific constitutional claims in each case, while keeping in mind the wider regulatory scheme developed over the years to combat drunk driving. The scheme is centered on legally specified BAC limits for drivers – limits enforced by the BAC tests promoted by implied-consent laws." Over the years, the Court had ruled on a number of DUI-related decisions, and for the most part, the court has approved of the methods in use.

In some cases, drivers had raised challenged under the Fourth Amendment, as such BAC tests are searches. By default, a search requires a warrant, but "there are well-defined exceptions to the rule." In the most recently decided case, Birchfield v. North Dakota, the Court had concluded that a DUI arrest may justify a warrantless breath test, but not a blood tests, "since breath tests are less intrusive, just as informant, and (in the case of conscious suspects) readily available.[275] BAC tests

[275] 579 U. S. ___ (2016).

had also been address as being taken under "exigent circumstances" in Missouri v. McNeeley.[276] In the much older case of Schmerber v. California, the Court had agreed that while the "fleeting qualify" of BAC evidence is not alone enough for a warrantless search, that it could justify excusing the need for a warrant because it was done in the context of a of a wreck, whether the officers were attending to "other pressing duties."[277]

In this fact pattern, the Court noted:

> Like Schmerber, this case sits much higher than McNeely on the exigency spectrum. McNeely was about the minimum degree of urgency common to all drunk-driving cases. In Schmerber, a car accident heightened that urgency. And here Mitchell's medical condition did just the same.

The Court emphasized that "Mitchell's stupor and eventual unconsciousness also deprived officials of a reasonable opportunity to administer a breath test." Although a PBT was obtained at the scene, the officer had no chance to use an "evidence-grade" instrument.

The Court continued:

The importance of the needs served by BAC testing is hard to overstate. The bottom line is that BAC tests are needed for enforcing laws that save lives. The specifics, in short, are these: Highway safety is critical; it is served by laws that criminalize driving with a certain BAC level: and enforcing these legal BAC limits requires efficient testing to obtain BAC evidence, which naturally dissipates. So BAC tests are crucial links in a chain on which vital interests hang. And when a breath test is unavailable to advance those aims, a blood test becomes essential. The Court reiterated, strongly, that highway safety is a legally "compelling interest," and had, in two much earlier cases called "the effects of irresponsible driving … 'slaughter' comparable to the ravages of war."[278]

> It agreed that established BAC limits helped to eliminate that tragedy. Such tough measures had corresponded with a "dramatic drop in highway deaths and injuries." To enforce the law requires an accurate and reliable testing process that is effected promptly on the subject. Evidence, in such cases, it agreed "is literally disappearing by the minute."

The Court noted that drivers who are so impaired as to pass out are an even greater risk and "it would be perverse if the more wanton behavior were rewarded – if the more harrowing threat were harder to punish." And in such drivers, unconsciousness is, in itself, a medical emergency requiring a trip to the hospital where of course, blood would be drawn and where the treatment would delay testing and might even distort the results of later testing.

Further:

[276] 569 U.S. 141 (2013).
[277] 384 U. S. 757 (1966).
[278] Breithaupt v. Abram, 352 U. S. 432 (1957); Perez v. Campbell, 402 U. S. 637 (1971).

> Indeed, in many unconscious-driver cases, the exigency will be more acute, as elaborated in the briefing and argument in this case. A driver so drunk as to lose consciousness is quite likely to crash, especially if he passes out before managing to park. And then the accident might give officers a slew of urgent tasks beyond that of securing (and working around) medical care for the suspect. Police may have to ensure that others who are injured receive prompt medical attention; they may have to provide first aid themselves until medical personnel arrive at the scene. In some cases, they may have to deal with fatalities. They may have to preserve evidence at the scene and block or redirect traffic to prevent further accidents. These pressing matters, too, would require responsible officers to put off applying for a warrant, and that would only exacerbate the delay—and imprecision—of any subsequent BAC test.
>
> In sum, all these rival priorities would put officers, who must often engage in a form of triage, to a dilemma. It would force them to choose between prioritizing a warrant application, to the detriment of critical health and safety needs, and delaying the warrant application, and thus the BAC test, to the detriment of its evidentiary value and all the compelling interests served by BAC limits. This is just the kind of scenario for which the exigency rule was born—just the kind of grim dilemma it lives to dissolve.

The Court looked at Mitchell's argument, that in modern times, warrants are easier, because of technology, to obtain, but noted that they still take time. And "In the emergency scenarios created by unconscious drivers, forcing police to put off other tasks for even a relatively short period of time may have terrible collateral costs. That is just what it means for these situations to be emergencies."

Although the Court vacated the Wisconsin Supreme Court's decision, the Court noted that was done because Mitchell did not "have a chance to attempt to make" the argument that "his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." The Court concluded that "[w]hen police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment. We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." However, clearly, the Court intimated that such cases would like be few and far between, and that in most cases, a driver's unconscious or stupor state constituted sufficient exigent circumstances to justify a warrantless blood draw.

NOTE: In essence, although the Court effectively negated Wisconsin's statutory implied-consent doctrine, similar to Kentucky's KRS 189A.103, it upheld the principle of allowing a warrantless blood draw in cases where the subject is physically unable to give consent. Instead of basing such a test on the statute, however, it must be based on a more general "exigency" justification.

TABLE OF CASES