Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

CASE LAW UPDATES

KENTUCKY COURT OF APPEALS 2020
KENTUCKY SUPREME COURT 2020
SIXTH CIRCUIT COURT OF APPEALS 2020
U.S. SUPREME COURT 2019-2020 TERM

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Kentucky Supreme Court (January through December 2020)

Kentucky Court of Appeals (January through December 2020)

Sixth Circuit Court of Appeals (January through September 2020)

United States Supreme Court (2020).

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KENTUCKY COURT OF APPEALS

JANUARY – DECEMBER 2020

ASSET FORFEITURE

Lee v. Commonwealth, 606 S.W.3d 95 (Ky. App. 2020)

FACTS: On August 23, 2011, Louisville Metro Police executed a search warrant for Lee's residence and seized $3,500 in cash, pills and marijuana. The same day, police also searched Lee's business and seized $2,210 in cash, pills, empty prescriptions bottles and a scale. The Jefferson County Grand Jury indicted Lee on one count of tampering with physical evidence, one count of second-degree trafficking in a controlled substance (hydrocodone), and on count of possession of an illegal substance (marijuana). On February 10, 2014, Lee entered a guilty plea to the charges under a plea agreement with the Commonwealth. On that same date, the circuit court entered an order forfeiting the $3,5000 seized from Lee's residence.

On September 16, 2019, Lee filed a motion with the circuit court for the return of the $2,210 seized from his business, arguing that he never agreed to forfeit the money seized from his business. The Commonwealth acknowledged that it was unaware that money was seized from the business location, and that the 2014 forfeiture order did not reference these funds. However, the Commonwealth asserted that Lee forfeited the $2,210 under the language of his plea agreement, even though the forfeiture order did not reference anything seized from the business. The circuit court denied Lee's motion.

Subsequently, the Commonwealth provided Lee with supplemental discovery, including a police voucher, which stated police seized $2,210, pills, an empty prescription bottle, and a scale from Lee's business. Lee filed another motion for the return of the $2,210 that was seized from the business, arguing that he was never charged with any crime stemming from the search of his business, and the plea agreement referenced only those crimes committed at Lee's residence. The circuit court denied this motion. This appeal followed:

ISSUES:

1. May a criminal defendant voluntarily agree to forfeit personal property without a hearing?
2. Must the trial court hold a forfeiture hearing concerning personal property subject to forfeiture that a criminal defendant does not explicitly agree to forfeit?

3. Is a conviction of a criminal offense a prerequisite for asset forfeiture?

HOLDINGS: 1. Yes. A criminal defendant may voluntarily agree to forfeit personal property without a hearing.[1]

2. Yes. If a criminal defendant does not voluntarily agree to forfeit personal property that is subject to forfeiture, the trial court is required to conduct a forfeiture hearing under KRS 218A.410 and KRS 218A.460, which define property subject to forfeiture, burdens of proof, and forfeiture procedures.

In this case, the record is clear that Lee was charged with crimes in connection with property seized from his residence and the forfeiture order clearly states that Lee forfeits the funds seized at the residence. Nothing in the record addresses the search of Lee's business. Because the plea agreement was silent as to the money seized from Lee's business, and there is nothing in the plea agreement indicating that Lee voluntarily forfeited that money, the circuit court is required to hold a forfeiture hearing.

3. No. Although the record indicates Lee was not charged and convicted of a crime in connection with the property seized from his business, the property may still be subject to forfeiture. Nothing in KRS 218A requires a criminal conviction, and it is sufficient to show a nexus between the property sought to be forfeited and its use to facilitate violation of the Controlled Substances Act.[2]

The Commonwealth bears the initial burden of proof and must make a prima facie case by showing "slight evidence of traceability," some evidence that the currency or some portion of it had been used or was intended to be used in a drug transaction.[3] If the Commonwealth establishes its prima facie case, the burden shifts to the defendant to rebut this presumption by clear and convincing evidence.[4]

The Court of Appeals reversed and remanded to Jefferson Circuit Court for a forfeiture hearing.

COURT PROCEEDINGS – HANDCUFFING

Mulazim v. Commonwealth, 600 S.W.3d 183 (Ky. 2020)

FACTS: After the jury verdict was read acquitting Canada of murder, Canada raised his arms while his co-defendant, Mulazim, hit the defense table three times. This conduct occurred despite the trial court's command prior to the reading of the verdicts that all present in the courtroom were to remain calm and exercise restraint. As both defendants were convicted of other offenses, the trial court ordered them remanded to the custody of the Fayette County

[1] Commonwealth v. Shirley, 140 S.W.3d 593 (Ky. App. 2004).
[2] Osborne v. Commonwealth, 839 S.W.2d 281, 283 (Ky. 1992).
[3] Gritton v. Commonwealth, 477 S.W.3d 603, 605 (Ky. App. 2015).
[4] Id.

Detention Center. The next day, the trail court refused to remove the ankle shackles on both defendants for the penalty phase of trial due to their in-court behavior. The jury did not see either defendant walk into the courtroom in shackles and it was unlikely that the jury observed the shackles while both defendants were seated.

ISSUE: Is handcuffing/shackling a defendant during a trial's penalty phase appropriate absent extraordinary circumstances?

HOLDING: No. "Shackling of a defendant in a jury trial is allowed only in the presence of extraordinary circumstances."[5] Disfavor of the practice is also reflected in RCr 8.28(5), which states that "[e]xcept for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for physical restraint." When reviewing a trial court's decision to keep a defendant in shackles in the presence of the jury, we give great deference to the trial court.[6] However, there generally must be "substantive evidence or [a] finding by the trial court that Appellant was either violent or a flight risk...."[7]

In this case, the Kentucky Supreme Court found the refusal to remove the shackles from both defendants to be harmless error. Hitting the table in celebration is not an "extraordinary circumstance" that justifies the use of restraints upon a defendant. However, no evidence of record indicated that the jury actually observed the defendants wearing ankle shackles, so there was little possibility that this substantially impacted the sentences imposed upon the defendants.

The convictions and sentences imposed upon the defendants in this case were affirmed.

EVIDENCE

Helton v. Commonwealth, 595 S.W.3d 128 (Ky. 2020)

FACTS: Kathryn Reed, an investigator with the Cyber Crimes Branch, identified an IP address suspected of searching or sharing child pornography. She identified the IP address on December 3, 2013 and began running her automated software. By December 4, 2013, her first download from that IP address was complete. Reed viewed the video file and determined that it contained child pornography. Over the next few days, Reed downloaded four more video files, each of which she determined contained child pornography. On December 13, 2013, she determined that Helton was the Internet service subscriber of that IP address. Based on this information, Reed and her team obtained a search warrant for Helton's home. A search was conducted on March 10, 2014, and seven items were seized, including a desktop computer, two laptop computers, three cell phones, and ten CDs or DVDs. Helton was subsequently arrested. Later, a forensic examination of the seized items revealed eighty-eight additional videos and

[5] Barbour v. Commonwealth, 204 S.W.3d 606, 612 (Ky. 2006) (citing Peterson v. Commonwealth, 160 S.W.3d 730, 733 (Ky. 2005)).
[6] Barbour, 204 S.W.3d at 612.
[7] Id. at 614.

three images of child pornography located on the desktop and a DVD containing three images of child pornography. Both the desktop and the DVD had been seized from a spare room located across from the master bedroom.

Despite attempts to shift blame to others who lived in the house, a Russell County jury found Helton guilty of five counts of possession of matter portraying a sexual performance by a minor and five counts of distribution of matter portraying a sexual performance by a minor. The circuit court sentenced Helton to twenty years in prison. Helton appealed to the Kentucky Supreme Court.

ISSUE: May a trial court permit the Commonwealth to introduce into evidence videos and images containing child pornography over the defendant's request for a stipulation?

HOLDING: Yes. The Commonwealth is not obligated to accept an offer to stipulation just because it has been presented because the prosecution is permitted to prove its case by competent evidence of its own choosing. A defendant is also not permitted to "stipulate away the parts of the case that he does not want the jury to see."[8]

In this case, the probative value of the five videos containing child pornography outweighed the danger of undue prejudice because the videos themselves were highly probative of the fact that they did, in fact, contain child pornography, a necessary element of the charges of possession and distribution of matter portraying a sexual performance by a minor. While there was testimony regarding the content of the videos, including vivid descriptions, the images themselves contained the actual evidence of the child pornography, and each video contained a different video file, which established a separate charge. The trial court did, however, instruct the Commonwealth to only show the briefest portion of the videos possible to establish the necessary elements because the videos were "too graphic" and would be "overwhelming" to the jury.

The convictions were affirmed.

<u>Jenkins v. Commonwealth</u>, 607 S.W. 3d 601 (Ky. 2020)

FACTS: Deandre Jenkins, seeking revenge on William Noland and Vincent Howard for allegedly robbing him, committed three separate shootings in Lexington on June 12-13, 2017. The first shooting occurred on Carneal Road where Jenkins drove by Howard and fired shots at him. The second shooting occurred at the residence of Summer Beatty, who was William Noland's girlfriend. Howard and Noland were friends. While Howard was at the residence, Jenkins drove up and opened fire on the residence with two handguns, a Glock 26 9mm and a stolen Glock 43 9 mm. Thirteen-year-old Amaya Catching was shot in the back during this incident. The third shooting occurred at a Thornton's gas station when Jenkins backed into

[8] <u>Pollini v. Commonwealth</u>, 172 S.W.3d 418, 424 (Ky. 2005).

Wardlaw's vehicle and drive off. Wardlaw started pursuing Jenkins when Stokes, a passenger in Jenkins's car, fired shots at Wardlaw.

Lexington police ultimately recovered the Glock 43 9 mm pistol during their investigation, but were unable to locate the Glock 26 9 MM. Eight spent casings from the shooting on Carneal Road matched the Glock 43. The remaining 27 shell casings were fired from the same unknown gun and were consistent with having been fired from a Glock. Ten projectiles recovered from Beatty's residence has not been fired from the recovered Glock 43. Those bullets did, however, match the hammer forged rifling of a Glock 9 mm handgun. Stokes advised police that he and Jenkins threw shell casings out the window while they fled Beatty's residence.

Three of the shell casings recovered from the shooting following the events at the gas station matched casings recovered by police on Carneal Road. The Lexington Police's Division of Property and Evidence labeled the three casings as "found property." The "found property" was not identified as evidence in this case and was later destroyed on July 9, 2018 pursuant to standard procedures for "found property." Jenkins requested a missing evidence instruction at trial. While, the trial court found that Lexington police intentionally destroyed the shell casings, the trial court found that police did not act in bad faith and that the shell casings had no obvious exculpatory value. Thus, the Fayette Circuit Court denied the request for a missing evidence instruction.

A jury found Jenkins guilty of first-degree assault, eight counts of first-degree wanton endangerment, tampering with physical evidence, and being a persistent felony offender in the second degree. The trial court imposed a life sentence and fifty years' imprisonment to run concurrently. Jenkins appealed to the Kentucky Supreme Court.

ISSUE: Is a missing evidence instruction required if the intentional destruction of evidence by law enforcement was not conducted in bad faith?

HOLDING: No. A missing evidence instruction is not required unless the evidence at issue was intentionally and in bad faith lost or destroyed.[9]

While the destruction of the three shell casings was "regrettable and not the best practice for maintaining evidence." However, the officers involved followed existing police department procedures regarding the shell casings and the destruction of the casings occurred because of the designation of the evidence as "found property." The destruction of the evidence was intentionally, but not in bad faith.

Moreover, in failure-to-preserve cases, the defendant must also be able to show both that the missing evidence possessed an exculpatory value that was apparent before the evidence was destroyed, and that the defendant was unable to obtain comparable evidence by other

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[9] University Medical Center, Inc. v. Beglin, 375 S.W.3d 783, 787 (Ky. 2011).

reasonably available means.[10] In this case, merely examining the shell casings revealed nothing beyond the caliber and type of ammunition, and nothing distinguished these three casings from any other spent shell casings recovered by police and stored in evidence.

The Kentucky Supreme Court affirmed Jenkins's convictions for first-degree assault, first-degree wanton endangerment, and tampering with physical evidence. The PFO conviction was vacated because a conviction from Michigan was improperly introduced. The Supreme Court remanded the matter to Fayette Circuit Court for resentencing.

Torrence v. Commonwealth, 603 S.W.3d 214 (Ky. 2020)

FACTS: On May 17, 2016, Torrence shot Thomas on 26th Street in Louisville. The shooting left Thomas paralyzed below the waist. During police questioning, Torrence claimed that he was picking up his daughter in the Blue Lick area of Louisville, approximately 11 air miles from 26th Street. To verify, Louisville Police Detective Snider served a search warrant on AT&T requesting historical cell phone tower date for Torrence's cell phone for May 17, 2016. Based upon the information contained in the 500-page report from AT&T, Detective Snider was able to determine which cell phone towers were communicating with Torrence's cell phone, recorded the latitude and longitude coordinates of those towers, the directional degree reading of the cell phone in relation to the towers, and marked those coordinates on a Google map. The Google map graph overlay showed the Torrence's cell phone was in contact with towers close to the shooting location and not in contact with towers near the Blue Lick area when Thomas was shot. Detective Snider testified about his findings as a lay witness and not as an expert witness. No expert testimony was presented concerning the AT&T report or the data contained therein.

Torrence was ultimately convicted of first-degree assault, possession of a handgun by a convicted felon, and being a persistent felony offender. The trial court sentenced Torrence to a total sentence of twenty-five years in prison. Torrence appealed to the Kentucky Supreme Court.

ISSUE: May lay testimony be used to present historical cell-tower data so long as the testimony does not go beyond simply marking coordinates on a map?

HOLDING: Yes. In a case of first impression, the Kentucky Supreme Court held that Detective Snider's testimony presenting his findings from his investigation of this historical cell-tower data from Torrence's cell phone. Detective Snider used the cell-phone data to plot geographical points on a map, which was entered into evidence, to cast doubt on Torrence's claimed alibi. Detective Snider did not attempt to offer an opinion about any inferences that may be drawn from that information. If the witness does attempt to offer an opinion about inferences that may be drawn from data, i.e., an opinion as to the actual location of the cell phone during the relevant time based on the plotted coordinates, the witness must be qualified as an expert witness under KRE 702.

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[10] McPherson v. Commonwealth, 360 S.W.3d 207, 217 (Ky. 2012).

The convictions were affirmed.

GOVERNMENTAL IMMUNITY

Ruplinger v. Louisville/Jefferson County Metro Government, 607 S.W. 3d 583 (Ky. 2020)

FACTS: Ruplinger, a Muslim woman, was wearing a hijab during her arrest. At the jail, she removed her hijab around female officers during the booking process, but refused to remove the hijab for her booking photograph because it was taken by a male officer. Ruplinger stated that her religion prevented her from removing her headscarf in the presence of non-family males. After being ordered to remove the hijab, Ruplinger ultimately complied. Ruplinger filed a civil suit, removed to federal court, under KRS 446.350, the Kentucky Religious Freedom Restoration Act (KRFRA). Louisville/Jefferson County moved to dismiss, arguing that sovereign immunity was not waived by KRS 446.350.

The Western District of Kentucky requested certification of the law from the Kentucky Supreme Court concerning whether KRS 446.350, the KRFRA, waived sovereign immunity.

ISSUE: Does KRS 446.350, the KRFRA, waive sovereign immunity as to monetary damages?

HOLDING: No. Sovereign immunity for the state itself has long been the rule in Kentucky.[11] This absolute immunity extends to county governments, including consolidated city-county government schemes like Louisville Metro.[12] Sovereign immunity can only be waived by the General Assembly.[13] "[A]bsent an explicit statutory waiver, Metro [ ] is entitled to sovereign immunity."[14]

The KHRFA as contained in KRS 446.350, states:

> Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

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[11] Comair, Inc. v. Lexington-Fayette Urban Cty. Airport Corp., 295 S.W.3d 91, 94 (Ky. 2009).
[12] Bryant v. Louisville Metro Housing Auth., 568 S.W.3d 839, 845 (Ky. 2019).
[13] Dep't of Corrs. v. Furr, 23 S.W.3d 615, 616 (Ky. 2000) (citation omitted).
[14] Jewish Hosp. Healthcare Servs., Inc. v. Louisville/Jefferson Cty. Metro Gov't, 270 S.W.3d 904, 907 (Ky. App. 2008).

Unlike the Kentucky Civil Rights Act as codified in KRS 344.450, the KHRFA does not contain an express waiver of sovereign immunity. The KHRFA does not express or implied what relief is available. Accordingly, the Supreme Court held that sovereign immunity as to monetary damages is not waived under the KRFRA or for a claim filed in conjunction with a petition for a declaratory judgment.

INTERVIEWS AND INTERROGATIONS

Goff v. Commonwealth, ---- S.W.3d ----, 2020 WL 449977 (Ky. App. 2020) – (DR filed 10/9/2020)

FACTS: In June 2016, Wilson entered a GameStop store in Louisville and briefly spoke with an employee about selling old video games. When Wilson left, two armed men wearing hoods entered and robbed the store. During this robbery, a second employee entered the store and was shoved to the floor. The men pistol whipped both employees and left the store with money from the safe and registered. Mixed with the money was a GPS tracking device. Within minutes after the robbery, law enforcement tracked the GPS device to Goff's apartment. Goff, Wilson and another man were transported to police headquarters for questioning. Police executed a search warrant for Goff's residence and found clothing matching that which the robbers wore during the robbery hidden in an air vent, a pistol with five rounds in the magazine, and a backpack matching the description of the one used in the robbery.

At police headquarters, Goff admitted to participating in the robbery, but denied being the mastermind, possessing a gun, or pistol whipping either employee. Goff also denied having any knowledge of where the cash taken from the store was located. However, during a monitored telephone call from the jail, Goff directed his mother to the cash and police recovered it. Goff was charged with complicity to first-degree robbery.

On the morning of trial, Goff moved to suppress his videotaped statement made to police, alleging that invocation of his right to counsel had been violated. The video indicates that prior to his interrogation, Detective Crouch advised Goff of his Miranda rights and presented him with a form listing those rights, which Goff initialed indicating that he understood his rights and that he waived them. Although Goff initially indicated that he wanted to contact his attorney, he ultimately spoke with Detective Crouch and Detective Mason. The detectives then advised Goff of his right to have counsel present and Goff stated that he wished to proceed without counsel present. Detective Crouch emphasized to Goff that if he wished to stop the interrogation and contact counsel, he was free to do so. Detective Crouch confirmed Goff reinitiated communication and waived his right to have counsel present. The trial court denied the motion to suppress after finding that Goff waived his right to counsel after initially invoking it.

The jury ultimately convicted Goff of complicity to first-degree robbery. This appeal followed.

ISSUES: 1. May a suspect who has previously invoked the right to have counsel present during an interrogation waive the right to counsel by reinitiating communication with law enforcement?

2. Does complicity require the intent that a crime is completed.

HOLDINGS: 1. Yes. A suspect who has previously invoked the right to have counsel present during an interrogation may subsequently waive that right by voluntarily reinitiating communication with law enforcement.[15] In this case, the Court of Appeals held that Goff's waiver of his right to counsel was voluntary and that the detectives did not intimidate or coerce him into waive his right to counsel.

2. Under KRS 502.020, a person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he solicits, commands, or engaged in a conspiracy with such other person to commit the offense; or aids, counsels, or attempts to aid such person in planning or committing the offense. Under KRS 506.080, a person is guilty of facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engaged in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime. Thus, for complicity, the defendant must intend that the crime be committed while facilitation does not require intent.[16] Facilitation contemplates a defendant who has no intent to promote or commit the crime himself, but merely provides the means or opportunity for another to do so.

In this case, the Court of Appeals held that Goff's conduct constituted complicity, not facilitation. The mere division of labor between robbers in the commission of a crime does not preclude conviction of each as a principal.[17] Goff was present at the robbery, actively participated in the crime and directed others to the stolen cash. Accordingly, this evidence constituted complicity rather than facilitation.

The Court of Appeals affirmed Goff's conviction.

Taylor/Kaballah v. Commonwealth, --- S.W. 3d ----, 2020 WL 5104312 (Ky. 2020)

FACTS: Taylor and Kabballah were housed in the same dormitory as Cedric Weaver at the Louisville Metro Detention Center. On November 13, 2014, Weaver asked Taylor and another inmate if they could move their chess game, so he could watch the television. When they refused, Weaver picked up all their chess pieces. That night, a group of inmates in Weaver's dorm room dragged him out his bed and violently assaulted him for an extended period of time. At some point, Taylor anally sodomized Weaver with the handle of a toilet brush found in the dorm room.

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[15] See Cummings v. Commonwealth, 262 S.W.3d 62 (Ky. 2007).
[16] Thompkins v. Commonwealth, 54 S.W.3d 147, 150-151 (Ky. 2001).
[17] Commonwealth v. Smith, 5 S.W.3d 126, 129 (Ky. 1999).

Immediately following the attack, prison officials entered the dorm, threw percussion grenades and verbally ordered the inmates to get on the floor. Officials handcuffed Taylor and Kaballah and took them to a separate room that was set up like a typical office for an interview by two Public Integrity Unit Officers. Neither defendant was Mirandized before the interview. The door was closed, and neither was told they were free to leave. Taylor admitted that he was not "roughed up" or physically coerced, but that he was only cooperating in order to "eat chow." The officers asked Taylor repeatedly whether he was giving the statement of his own free will, and he repeatedly answered no.

Louisville Metro Department of Corrections Sergeant Melinda Zapata was the first to see Weaver after he was assaulted. She testified that he was sitting on his bunk, bleeding from his head which was "as big as a basketball," and that "his ear was hanging off his head." Weaver suffered a traumatic brain injury. He had to undergo months of physical therapy, speech therapy, and occupational therapy. It took seven months of physical therapy before Weaver learned to walk again.

Ten defendants were indicted for the incident; nine defendants remained the week before trial. Just prior to trial, seven of these defendants pled guilty to various charges arising out of the assault. This left Taylor and Kaballah as the only remaining defendants at trial. Both men were convicted of multiple counts and sentenced to an enhanced term of life in prison. This appeal followed.

ISSUE: Must inmates be advised of their Miranda rights if subjected to a custodial interrogation?

HOLDING: Miranda warnings are required as procedural safeguards before the start of custodial interrogation to dispel the inherent compulsion of these settings and ensure that the defendant is aware of and able to assert his/her Fifth Amendment right against self-incrimination. Miranda warnings are required when a person is interrogated and in custody.[18] If a defendant is interrogated while in prison, a separate set of factors is used to determine whether he was in custody for purposes of Miranda.[19] A defendant in physical custody in a prison, without more, does not necessarily mean that he/she is in custody for the purposes of Miranda.[20] Taylor and Kaballah pass this first prong because they were physically in custody in prison, so their freedom of movement was restrained.

The "something more" required to move from physically in custody under a term of imprisonment, to in custody for purposes of Miranda, has not been explicitly defined, but the next step is to determine "whether the relevant environment presents the same inherently

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[18] Miranda v. Arizona, 384 U.S. 436 (1966)
[19] Howes v. Fields, 565 U.S. 499, 508, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012).
[20] Id. at 512, 132 S.Ct. 1181.

coercive pressures as the type of station-house questioning at issue in Miranda."[21] A court must consider the objective totality of the circumstances.[22] This includes 1) the location of questioning; 2) the duration of the questioning; 3) statements made during the interview; 4) whether physical restraints were used; and 5) whether the defendant was released at the end of questioning.[23]

In Howes, the defendant, Fields, was interrogated in prison without Miranda warnings about a crime unrelated to his incarceration. He was taken from his cell to a private room, was unrestrained, and questioned for five to seven hours, with the door open during part of the interrogation. He was repeatedly told throughout the interrogation that he was free to leave and return to his cell. Fields was not in custody for Miranda purposes, so warnings were not required. Although the questioning of Fields lasted five to seven hours, was conducted without Fields' consent, and with the presence of armed guards, this was outweighed by the fact that he was told repeatedly he could leave whenever he wanted, he was not physically restrained, or threatened, and the door remained open in a well-lit and normalized room.[24]

Here, with respect to the location of questioning, Taylor and Kaballah were interrogated in separate rooms away from other inmates. An isolated interrogation like this does not necessarily add to the coerciveness of an interview for Miranda purposes, but rather is often used as a safety measure for prisoners.[25] A door remaining open in an isolated interrogation room can support a conclusion that a defendant was not in custody.[26] Thus, a closed door supports Defendants' argument that they were in custody.

The length of questioning initially appears to imply that neither defendant was in custody; however, one factor is not dispositive in a totality of circumstances analysis. Although Kaballah's interrogation was significantly shorter than in Howes (one hour and nine minutes as compared to five to seven hours) it could still be more coercive. A lengthy interrogation is but one factor that adds to coerciveness. Kaballah was only interrogated for a little over an hour, however, he was isolated in an attorney booth for six and a half hours prior. Additionally, although Taylor's interview was also relatively short in length (though the exact time is not mentioned), Taylor was denied food during the interrogation. Further, Taylor did not give consent or willingly participate. On the contrary, he explicitly stated that he was being coerced. The presence of other coercive factors likely outweighs the shorter length of interrogation. Regarding the nature of Taylor's and Kaballah's statements made during the interrogation, Miranda warnings are given to protect the Fifth Amendment privilege against self-incrimination. Taylor's and Kaballah's statements were not full confessions but were used in the Commonwealth's case-in-chief which supports the conclusion that the defendants were in custody.

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[21] Id. at 509, 132 S.Ct. 1181.
[22] Stansbury v. California, 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994).
[23] Howes, 565 U.S. at 511, 132 S.Ct. 1181.
[24] Id. at 503-515, 132 S.Ct. 1181.
[25] People v. Cortez, 299 Mich.App. 679, 832 N.W.2d 1, 9 (2013).
[26] Howes, 565 U.S. at 515, 132 S.Ct. 1181.

The physical restraint factor also supports the conclusion that Taylor and Kaballah were in custody. Both defendants were restrained in handcuffs during the entire interrogation. The use of physical restraints only adds to the coercive nature of an interrogation. The use of restraints is not a neutral action in a custody analysis, but rather explicitly demonstrates that someone is being controlled. Restraints not only limit one's physical freedom of movement but create a more coercive environment—the main concern that Miranda warnings aim to remedy.[27] Although not dispositive, this factor weighs in favor of the conclusion that the defendants were in custody.

Taylor and Kaballah were released back to their cells immediately after questioning which we have previously held supports a lack of custody.[28] However, in the present case, this factor likely cuts the other way. Both defendants were interrogated by Public Integrity officials who are a part of the Louisville Metro Police Department. These are not the prison guards that the defendants see every day and may be comfortable with, but rather strangers who were brought in immediately following a crime, searching for the perpetrator. As Howes mentioned, the same level of shock does not exist when one is taken from a cell to an interrogation room in prison as when someone is pulled from their house into a police station.[29] However, an additional shock exists when outside officers are brought in. Rather than being questioned about an incident in the distant past by someone familiar and then released back to their cells, both defendants here were interrogated by LMPD officials about a just-committed crime. They likely showed urgency and commitment to find the perpetrator. Taylor and Kaballah were released back to their cells; however, the present facts are distinguishable from a typical release due to the pressure and urgency of being interrogated by LMPD officials following a serious crime.

The Court in Howes emphasized that the most important factor that led to its decision that Fields was not in custody was because Fields was told multiple times he was free to leave, contrary to our present facts.[30] Additionally, Fields was never placed in restraints while being interrogated, while both defendants here were handcuffed throughout the interrogation. Fields was not subject to physical force, while both defendants here had previously been ordered to lay down after a close-range blast of a percussion grenade in an enclosed room. This likely ads to the overall coercive atmosphere surrounding an interrogation that the Miranda court was concerned with.

The Commonwealth has the burden to establish that no custodial interrogation took place, or that the defendant knowingly and voluntarily waived his rights. The record does not clearly establish this. The central purpose of Miranda warnings is to dispel coercion in a custodial interrogation by ensuring that individuals know what rights they can assert.[31] Although the

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[27] Miranda, 384 U.S. at 467, 86 S.Ct. 1602.
[28] See Smith v. Commonwealth, 520 S.W.3d 340, 348 (Ky. 2017) (noting that a return to a cell after an interrogation in prison is conceptually indistinguishable from an un-jailed suspect going home after an interrogation).
[29] Howes, 565 U.S. at 511, 132 S.Ct. 1181.
[30] Id., 565 U.S. at 515, 132 S.Ct. 1181.
[31] Miranda, 384 U.S. at 458, 86 S.Ct. 1602.

interrogation here was relatively short, and the defendants were released back to their cells at the end of the interrogation, when viewing the circumstances in their totality, the atmosphere was coercive in nature, and the defendants should have been Mirandized prior to interrogation due to the use of force, physical restraints, the interrogation occurring directly after a crime and a raid by the SORT team, and that neither were told they were free to leave.

The Kentucky Supreme Court held that Taylor and Kaballah were subjected to a custodial interrogation, should have received Miranda warnings, and their statements should have been suppressed. Although an error occurred in failing to suppress Taylor's and Kaballah's statements due to the lack of Miranda warnings, the evidence used at trial from the interviews' recordings did not carry weight as to their guilt or innocence and was not a focal point of trial. Therefore, any error was deemed harmless.

The Kentucky Supreme Court affirmed the convictions.

KENTUCKY REVISED STATUTES – CHAPTER 189A
DRIVING UNDER THE INFLUENCE

Commonwealth v. Combs, ---- S.W.3d ---- (Ky. App. 2020)

NOTE: This appeal was decided based upon the version of KRS 189A.010 that was in effect prior to July 1, 2020. Effective July 1, 2020, refusing to submit to any tests of one's blood, breath, or urine shall not be considered an aggravating circumstance for a first offense DUI.

FACTS: On August 6, 2017, Combs hit two pedestrians with her car while they were walking through a crosswalk in front of a Walmart entrance in Hazard, Kentucky. After her arrest, police read Combs the implied consent warnings, which included the information that if she refused consent and was convicted of DUI, her mandatory minimum sentence would be doubled. Combs consented to the blood draw and the results of her blood test were incriminating. A Perry County grand jury returned an indictment charging Combs with one count of first-offense driving under the influence, three counts of first-degree wanton endangerment, one count of no registration plates, one count of no insurance, one count of first-degree possession of a controlled substance, two counts of second-degree assault, one count of prescription drugs not in the proper container, and one count of being a second-degree persistent felony offender.

Combs filed a motion to suppress the results of her blood test, arguing "the taking of the blood test through coercion of the implied consent warning without a search warrant is unconstitutional" and "the implied consent law is unconstitutional[.]" At a suppression hearing, Officer John Holbrook testified that Combs volunteered to him that she takes Suboxone and Keppra for seizures. Officer Holbrook administered field sobriety tests and recognized many signs of intoxication and ultimately arrested Combs for DUI. In a search of Combs's purse

incident to arrest, Officer Holbrook found a prescription bottle for buprenorphine which contained five and a half pills of buprenorphine and two Xanax bars. Suspecting Combs to be under the influence of drugs, Officer Holbrook transported Combs to a local hospital for a blood test. At the hospital, Officer Holbrook read the implied consent warnings to Combs, who ultimately consented the blood draw. Officer Holbrook acknowledged that the implied consent warning he read to Combs included the language that "[i]f you are convicted of KRS [Kentucky Revised Statutes] 189A.010, your refusal will subject you to a mandatory minimum sentence which is twice as long as the mandatory minimum jail sentence that would be imposed if you submit to all requested tests." The implied consent warning was entered into evidence.

Combs testified that she consented to the blood test only because she believed that she would be penalized and her minimum sentence would be doubled.

The Perry Circuit Court granted the motion to suppress. The Commonwealth filed an interlocutory appeal in the Kentucky Court of Appeals.

ISSUE: Under prior law, does a DUI suspect's receipt of an accurate warning that Kentucky's DUI law imposes mandatory minimum sentences on convicted defendants who refuse consent render consent involuntary?

HOLDING: No. In Commonwealth v. Brown,[32] the Kentucky Court of Appeals held that accurate warnings about enhanced penalties for a DUI conviction does not vitiate consent. In reaching this holding, the Court of Appeals in Brown held that, while the doubling of a mandatory minimum jail sentence is unquestionably a criminal sanction, the sanction is contingent upon conviction for the underlying charge, thereby lacking the coercive force of mandating the accused undergo an intrusive test or else accrue an additional criminal charge.

In this case, the Perry Circuit Court made no finding as to whether Combs's consent was a result of being warned about the doubling of mandatory minimum sentences if she refused consent, apparently assuming that Birchfield v. North Dakota[33] foreclosed any consent to a blood draw after the implied consent warnings were read from ever being voluntary. The Court of Appeals also believed that the circuit court apparently believed that the Commonwealth was required to either obtain a warrant or establish exigent circumstances in order to lawfully collect and test Combs's blood and, in the absence of either, believed that suppression of the analysis of her blood was required by law. Thus, the Court of Appeals reversed the order suppressing Combs's blood test and remanded for further findings.

[32] 560 S.W.3d 873 (Ky. App. 2018).

[33] 136 S.Ct. 2160 (2016). Birchfield held that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.

<u>Commonwealth v. Curry</u>, ---- S.W. 3d ---- (Ky. 2020)

FACTS: Louisville Metro Police stopped Curry on I-71 near mile marker 4 in Jefferson County, travelling 93 miles per hour in a 55 miles per hour zone. The officer cited Curry for speeding. In district court, Curry argued that KRS 189.390 was unconstitutional as void for vagueness because a reasonable person could not read the statute and understand which speed limit applied on a given road in Kentucky. The district court concurred with Curry, declared KRS 189.390(3)-(5) unconstitutional and dismissed the matter. The Commonwealth requested certification of the law from the Kentucky Supreme Court.

ISSUE: Is KRS 189.390 unconstitutionally vague?

HOLDING: No. The Fourteenth Amendment provides "[no] state shall ... deprive any person of life, liberty, or property, without due process of law."[34] When a state enacts a criminal law "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement," the state violates due process.[35] The fact that a statute could have been drafted more precisely does not mean the statute as written is invalid; a statute may be upheld so long as the law provides sufficient warning to persons about what conduct is prohibited.[36]

KRS 189.390 establishes the law governing driving speed in Kentucky. Generally, an "operator of a vehicle upon a highway shall not drive at a greater speed than is reasonable and prudent, having regard for the traffic and for the condition and use of the highway." KRS 189.390(3)-(5) specify the maximum reasonable speed on specific sections of road and outline the procedure under which those speeds may be altered. KRS 189.390(3) sets the baseline maximum speed limit for interstate highways and parkways at 65 miles per hour. This is a baseline because KRS 189.330 expressly provides two situations in which those speed limits do not apply: 1) if conditions exist that would require a driver to lower speed to drive in a reasonable and prudent manner, or; 2) if the Secretary of Transportation establishes a different speed limit pursuant to KRS 189.390(4). KRS 189.390(4) permits the Secretary of Transportation to establish a new speed limit on any part of a state highway if an engineering and traffic investigation supports that an increased or decreased speed limit is reasonable or safe under the circumstances and for certain, identified roads.

The Supreme Court held that KRS 189.390(3)-(5) provides ample notice of what conduct is prohibited under the statute and provides specific guidelines for law enforcement and courts to follow. The statute requires the official citation issued following a violation of any speed limit to specify the speed at which the defendant is alleged to have driven and the lawful speed applicable to the exact location at which the violation allegedly occurred. In this case, Curry

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[34] U.S. Const. amend. XIV, Section 1.

[35] <u>Johnson v. United States</u>, 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed. 2d 569 (2015); <u>Stinson v. Commonwealth</u>, 396 S.W.3d 900, 906-08 (Ky. 2013).

[36] See <u>Caretenders, Inc. v. Commonwealth</u>, 821 S.W. 2d. 83, 87 (Ky. 1991). See also <u>Commonwealth v. Kash</u>, 967 S.W.2d 37, 43 (Ky. App. 1997).

was driving 23 miles per hour faster than the highest possible speed limit in Kentucky, so he could not have believed his conduct conformed to any possible interpretation of KRS 189.390.

Thus, the Kentucky Supreme Court certified KRS 189.390 is constitutional as written, is not vague, and provides adequate notice of prohibited conduct.

KENTUCKY REVISED STATUTES – CHAPTER 218A
CONTROLLED SUBSTANCES

Logsdon v. Commonwealth, 601 S.W.3d 477 (Ky. App. 2020)

FACTS: On August 18, 2018, someone referring to himself as "Kyle" called 911 to report that Logsdon was experiencing a heroin overdose. "Kyle" stated that he would not stay with Logsdon until medical assistance arrived because the caller had outstanding warrants. Boone County Deputy Sheriff Jennifer Crittenden responded to the call, and upon arrival observed that Logsdon was conscious but confused. According to Deputy Crittenden, Appellant was holding a syringe with a needle and residue. On the table in front of Appellant was a used container of the narcotic overdose treatment Narcan, a spoon, and a folded paper with what appeared to be heroin residue. Another deputy arrived, as did Florence EMS. Appellant told EMS personnel that a friend had been over, and he gave conflicting statements as to who had administered the Narcan. Logsdon refused medical treatment and would not cooperate with the deputies. Logsdon was charged with one count of possession of a controlled substance in the first degree, second offense, and one count of possession of drug paraphernalia.

Logsdon filed a motion to dismiss in Boone Circuit Court pursuant to KRS 218A.133. This statute exempts from prosecution for possession of a controlled substance or drug paraphernalia persons who have requested medical assistance, or one on whose behalf it has been requested. Logsdon asserted that KRS 218A.133 does not require a third-party caller to remain with the person experiencing an overdose for the exemption to apply. KRS 218A.133 states in pertinent part:

> (2) A person shall not be charged with or prosecuted for a criminal offense prohibiting the possession of a controlled substance or the possession of drug paraphernalia if:
> (a) In good faith, medical assistance with a drug overdose is sought from a public safety answering point, emergency medical services, a law enforcement officer, or a health practitioner because the person:
> 1. Requests emergency medical assistance for himself or herself or another person;

> 2. Acts in concert with another person who requests emergency medical assistance; or
> 3. Appears to be in need of emergency medical assistance and is the individual for whom the request was made;
> (b) The person remains with, or is, the individual who appears to be experiencing a drug overdose until the requested assistance is provided; and
> (c) The evidence for the charge or prosecution is obtained as a result of the drug overdose and the need for medical assistance.

The circuit court interpreted KRS 218A.133(2) as not providing an exemption from prosecution for Logsdon unless the person requesting medical assistance, in this case Kyle, remained with the person requiring assistance (Logsdon) until medical assistance arrived.

Logsdon entered a plea of guilty to one count of possession of a controlled substance in the first degree, second offense, and possession of drug paraphernalia. He was sentenced to three years' imprisonment. An appeal followed.

ISSUE: Does KRS 218A.133(2) provide an exemption from prosecution only if the person requesting medical assistance for remains with the person requiring assistance until medical assistance arrives?

HOLDING: No. The Court of Appeals held that KRS 218A.133(2) provides an exemption from prosecution for possession of a controlled substance or drug paraphernalia irrespective of whether the reporting party remains with the person experiencing the overdose. The statute provides an exemption for Appellant's prosecution because he is the person for whom "medical assistance with a drug overdose is sought," and he is "the individual who appears to be experiencing a drug overdose[.]" KRS 218A.133(2)(a) provides the exemption from prosecution only in the limited circumstance where "[i]n good faith, medical assistance with a drug overdose is sought[.]" Kyle called 911 in apparent good faith seeking medical assistance for Appellant, and it can reasonably be inferred from the used Narcan container on the table in front of Appellant that he was experiencing a drug overdose.

Logsdon's conviction was reversed.

KENTUCKY REVISED STATUTES – CHAPTER 506 INCHOATE OFFENSES

Bowen v. Commonwealth, 605 S.W.3d 316 (Ky. 2020)

FACTS: In December 2018, Bowen lived with his partner, Rebecca Greene, in a farmhouse that they rented. On December 7, 2018, an argument erupted between Bowen and Greene. The couple went to bed around 10:00 PM that evening. Greene ultimately slept on the couch in the living room, still upset from the argument.

Bowen woke the following morning still thinking about the argument. He testified that he wanted to “end it all” and wanted the couple to “be together forever,” so he decided to kill Greene and himself. Bowen then walked to a barn located about 500 feet behind the farmhouse. The barn was owned by the couple's landlord, Larry Darnell. From the barn, Bowen retrieved a loaded .22 caliber revolver, which also belonged to Darnell. Unbeknownst to Bowen, the gun was loaded with two shells of “rat shot” or “snake shot.” This type of ammunition is typically used for pest control and consists of small pellets that spread out when the gun is fired.

Bowen took the gun back into the rental home. He then took an approximately one-hour nap. Upon waking up, he prayed and walked into the living room, where Greene remained asleep on the couch. Bowen then shot Greene in the head with the revolver. According to his own testimony, he intended to kill Greene.

Greene testified that she was sleeping when she heard something and felt pain. She touched her head and realized it was bleeding. She saw Bowen standing over her, and she asked him what he had done. He did not respond. She jumped up from the couch, ran to the kitchen, and retrieved a dishcloth to hold against her head. Bowen testified that when Greene jumped up from the couch, he realized he no longer wanted to kill her. He testified that he laid the gun down and tried to help Greene.

At this point, Greene checked on her son, who was asleep in another room. She also asked Bowen to call 911, but he told her his phone was not working. Greene then called 911 on her own phone. Bowen testified that he helped relay information to the dispatcher. Bowen waited with Greene until law enforcement arrived. Greene testified that, during this time, Bowen tried to get Greene and her son into his car, but she refused. Bowen testified that he wanted to take her to the hospital.

When police arrived, Bowen claimed that he accidentally shot Greene. At an officer's request, he led the officer to the gun, at which point he admitted that he had intended to kill Greene. He was arrested. Meanwhile, Greene received medical treatment. She survived with a wound to her forehead and small metallic particles embedded in the soft tissue of her forehead.

After a one-day trial, a jury found Bowen guilty of one count of attempted murder and one count of theft by unlawful taking of a firearm. He was sentenced to a total of twenty years of imprisonment. This appeal followed.

ISSUES: 1. Is the defense of renunciation available to a criminal defendant who intended to commit the act, engaged in activity to carry out the act, but stopped the act to assist the victim?

2. May a defendant permanently deprive another person of firearm that the defendant intends to use in a murder-suicide, thereby supporting a charge of theft by unlawful taking?

HOLDINGS: 1. No. Under KRS 506.020(1), a defendant charged with attempt to commit a crime may present a defense that "under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant abandoned his effort to commit the crime and, if mere abandonment was insufficient to avoid the commission of the crime, took the necessary affirmative steps to prevent its commission."

In this case, the Kentucky Supreme Court held that Bowen did not abandon or take affirmative steps to prevent the commission of Greene's murder. While Bowen testified that he wanted to help Greene, assisted her in calling 911, and stayed with her until law enforcement arrived, there is no evidence that he made any efforts to abandon his commission of the crime or took any steps to avoid its commission prior to the shooting. Instead, the evidence indicates that he retrieved the gun from the barn, brought it into the home, took a nap, and then shot Greene in the head, with the intent to kill her. It was not until after she jumped up from the couch, still alive, that he decided he no longer wanted to kill Greene. His attempts to help her receive medical treatment do not constitute abandonment, as the crime—the shooting of Greene – had already taken place.

2. Yes. Under KRS 514.030, a person is guilty of theft by unlawful taking or disposition when he unlawfully (a) Takes or exercises control over movable property of another with intent to deprive him thereof; or (b) Obtains immovable property of another or any interest therein with intent to benefit himself or another not entitled thereto.

Bowen argues that there was no evidence to prove an intent to deprive under any of these four definitions. Rather, he argues, the evidence indicated that he intended to use the gun to kill Greene and then himself. If he had done so, he would not have permanently deprived Darnell of the gun, nor would he have been withholding the gun for economic value or for reward or compensation or disposing of the gun so as to make it unlikely that Darnell would recover it. Instead, Bowen contends that Darnell would have been able to simply recover the gun if Bowen's murder-suicide plan had succeeded.

In Hall v. Commonwealth,[37] the Kentucky Supreme Court defined "deprive" as:

> 1) to withhold property of another permanently; 2) to withhold property for so extended a period as to appropriate a major portion of its

[37] 551 S.W.3d 7, 12 (Ky. 2018).

economic value; 3) to withhold property with intent to restore it only upon payment of reward or other compensation; or 4) to dispose of the property so as to make it unlikely that the owner will recover it.

In this case, the Kentucky Supreme Court held that Bowen, had he completed the murder-suicide, would have permanently withheld Darnell's property from Darnell. Bowen took the gun from the barn for the stated purpose of killing Greene and himself. Had Bowen carried out his plan, there would be no abandonment or return of the property by Bowen; rather, he would have been dead, leaving the gun behind as a key piece of evidence that may have been confiscated by police. Furthermore, a reasonable jury could believe that Bowen, who had been arguing with Greene the evening before, intended to kill only Greene and not himself. A reasonable jury could believe that, under those circumstances, he had never planned to return the murder weapon to its rightful owner. Accordingly, the Bowen committed theft by unlawful taking because of his intent to use Darnell's firearm in a criminal act, which would have deprived him of his property permanently.

The Kentucky Supreme Court affirmed the convictions.

KENTUCKY REVISED STATUTES – CHAPTER 507
HOMICIDE

<u>Taylor v. Commonwealth</u>, ---- S.W.3d ---- (Ky. 2020) – Rehearing pending

FACTS: On October 16, 2016 at approximately 3:50 a.m., Taylor fired multiple gunshots from a .38 caliber handgun into the air in the parking lot of a Cook Out Restaurant in Lexington. The Cook Out parking lot was a "hang out" spot for people, with a "party-like" atmosphere. Multiple people began firing shots in response to the shots fired by Taylor. Amidst the gunfire, a .45 caliber bullet struck and killed 17-year-old Trinity Gay. Taylor was convicted of wanton murder with respect to Gay's death, and four counts of first-degree wanton endangerment with respect to four people in Gay's immediate vicinity. Upon being sentenced to 20 years' imprisonment, Taylor appealed to the Kentucky Supreme Court.

ISSUE: Does firing a handgun into the air constitute aggravated wanton conduct sufficient to support a conviction for wanton murder and first-degree wanton endangerment?

HOLDING: Yes. Pursuant to KRS 501.020(3), a person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. Under KRS 507.020(1)(b), a person acts "under circumstances manifesting extreme indifference to human life ... [and] wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person." With respect to first-degree wanton endangerment, Taylor must have engaged in conduct that created a substantial danger of death or serious physical injury to another person.[38]

In other words, "wantonness is the awareness of and conscious disregard of a risk that a reasonable person in the same situation would not have disregarded[.]"[39] For both wanton murder and first-degree wanton endangerment, conduct must have transpired that manifests extreme indifference to the value of human life, i.e., "aggravated wantonness."[40] "To be convicted, the defendant must have both acted with the requisite mental state and created the danger prohibited by the statute."[41]

The Kentucky Supreme Court held that a reasonable jury could have concluded that Taylor wantonly fired multiple shots into the air, amidst a crowd of people during the early morning hours, which set into motion the foreseeable response gunfire that resulted in Gay's death and created a substantial danger of death or serious physical injury to the four people in her immediate vicinity.

The Supreme Court affirmed the convictions.

KENTUCKY REVISED STATUTES – CHAPTER 508
ASSAULT AND RELATED OFFENSES

Farmer v. Commonwealth, 606 S.W.3d 641 (Ky. App. 2020)

FACTS: Farmer was arrested by the Covington Police Department on October 29, 2015, after an incident at the home of Lona Rose. Rose claimed that Farmer punched her in the face multiple times and stole jewelry from her. As a result, Farmer was charged with first-degree

[38] KRS 508.060(1).
[39] Robertson v. Commonwealth, 82 S.W.3d 832, 835 (Ky. 2002).
[40] Brown v. Commonwealth, 174 S.W.3d 421, 426 (Ky. 2005).
[41] Hall v. Commonwealth, 468 S.W.3d 814, 829 (Ky. 2015).

robbery and later with first-degree assault. That charge was later amended to second-degree assault pursuant to KRS 508.020. Farmer entered a plea of not guilty and maintained that he had not injured Rose.

The matter was tried before a jury, where Rose testified that, in the attack, she had sustained blackened eyes, a broken nose and cheekbone, a cut on her mouth requiring stitches, an injury to her temporomandibular joints requiring surgery, and bruising to her neck. She could not eat solid food and was unable to wear her dentures for several days. The jury returned a not guilty verdict on the robbery charge and found Farmer guilty of second-degree assault. On January 9, 2017, the trial court entered a final judgment and sentenced Farmer to ten years' imprisonment. An appeal followed.

ISSUE: To obtain a conviction for second-degree assault when the dangerous instrument in question is a part of the human body, must the evidence demonstrate that serious physical injury actually occurred as a direct result of the use of that part of the human body?

HOLDING: Yes. Farmer was prosecuted under KRS 508.020(1)(b), wherein a person is guilty of second-degree assault when he/she intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument. KRS 500.080(3) defines dangerous instrument as "any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury. According to KRS 500.080(13), "physical injury" is defined as "substantial physical pain or any impairment of physical conduction." "Physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ" constitutes "serious physical injury" under KRS 500.080(15).

In order for Farmer to be convicted of second-degree assault under KRS 508.020(1)(b), the Commonwealth had to prove that Rose had sustained a physical injury through the use of a deadly weapon or a dangerous instrument. The Commonwealth argued that Farmer's fist was a dangerous instrument. But in order for a fist to be considered a dangerous instrument, it must directly cause a serious physical injury. The Commonwealth, in actuality, had to establish that Rose sustained a serious physical injury as a direct result of the use of Farmer's fist in order to establish the elements of this offense. That a fist is readily capable of causing serious physical injury is not enough to establish the "dangerous instrument" element. Not only did the Commonwealth fail to introduce evidence that Rose had sustained a serious physical injury, but it did not introduce any medical expert proof to establish this. And the prosecutor admitted that Rose had only sustained a physical injury, not a serious physical injury, when he argued before the court, meaning that there was not sufficient evidence to support a conviction. Therefore, the Court of Appeals held that Farmer was entitled to a directed verdict of acquittal for the second-degree assault charge.

The conviction for second-degree assault was reversed and remanded to Kenton Circuit Court for an order dismissing the charge.

KENTUCKY REVISED STATUTES – CHAPTER 520
ESCAPE AND OTHER OFFENSES

Eversole v. Commonwealth, 600 S.W.3d 209 (Ky. 2020)

FACTS: Sergeant John Inman and Deputy Shannon Jones from the Laurel County Sheriff's Office were investigating the theft of a Cadillac Escalade on January 26, 2018. They had received a call from the vehicle's owner indicating the vehicle's GM OnStar had pinged at a remote location in a rural part of Laurel County—a field near the end of Lockaby Lane, a single-lane, narrow country road that ended in a one-lane gravel driveway. At midnight, Sergeant Inman arrived in his police cruiser where the blacktop ended, and the gravel driveway began. Deputy Jones was in his cruiser some distance behind Sergeant Inman on Lockaby Lane.
Sergeant Inman saw a white pickup truck on the gravel driveway slowly approach him and he turned his emergency lights on and off to make sure the driver of the white pickup truck knew he was there and to identify himself as an officer. Sergeant Inman pulled his vehicle slightly off the one-lane road, so the pickup truck could pull up beside him. Both vehicles had their headlights on and for a few seconds were window-to-window. Sergeant Inman got a look at the driver when he said "hey" to the driver of the white truck in an attempt to get him to stop. Sergeant Inman assumed the driver was the owner of the property and was attempting to ask him where the Escalade may be in the field. However, in spite of Inman's attempts, the pickup did not stop moving. Once past Sergeant Inman's vehicle, the truck took off at a high rate of speed for the conditions of the one-lane road. By the time Sergeant Inman turned his vehicle around and gave chase, the white pickup truck was out of sight.

Sergeant Inman radioed Deputy Jones informing him the white pickup truck was headed in his direction. Lockaby Lane was a single-lane road and the white pickup truck rapidly reached Deputy Jones's location. As soon as the deputy saw the truck, he activated his emergency lights. Deputy Jones saw the truck crest a hill, accelerate, and continue down the road straight toward his cruiser. Deputy Jones said the white pickup truck never slowed down. To avoid a head-on collision, Deputy Jones drove his vehicle almost completely off the road and into a ditch. The truck left the scene and the driver was not apprehended that night.

Several days later, the Laurel County Sheriff's Office got a tip that Eversole would be at a truck stop in northern Laurel County. Eversole was arrested on a separate charge and a deputy at the scene sent a picture to Sergeant Inman, who positively identified Eversole as the driver of the

white pickup truck from Lockaby Lane. Eversole was never charged with any offenses concerning the stolen Escalade.

At trail, Eversole was found guilty of guilty of first-degree fleeing or evading, first-degree wanton endangerment, reckless driving, and being a first-degree PFO. The trial court sentenced him to twenty years' imprisonment in accordance with the jury's recommendation. An appeal to the Kentucky Supreme Court followed.

ISSUE: Is a person guilty of first-degree fleeing or evading police (and first-degree wanton endangerment) when the person fails to stop a motor vehicle when a police cruiser blocks a single-lane road with its emergency lights on to prevent that person from proceeding on the roadway?

HOLDING: Yes. KRS 520.095 states, in pertinent part:

> (1) A person is guilty of fleeing or evading police in the first degree:
> (a) When, while operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop his or her motor vehicle, given by a person recognized to be a police officer, and at least one (1) of the following conditions exists:
>
> ...
>
> 4. By fleeing or eluding, the person is the cause, or creates substantial risk, of serious physical injury or death to any person or property; or

Sergeant Inman testified he did not expressly tell the truck driver to stop; rather, he turned his emergency lights on and off and he pulled over enough for the pickup truck to pass his cruiser, side-by-side on the one-lane road. When the pickup truck was even with his cruiser, Sergeant Inman said "hey" in an attempt to start a conversation with the truck's driver. However, the driver did not respond to Inman or stop to hear the rest of the attempted conversation. The rate of speed he employed on the one-lane country road while leaving was a clear indication that he knew the officer wanted Eversole to stop and speak with him—and of Eversole's intention to disregard the officer's attempt to get him to stop. Furthermore, Sergeant Inman was not the only officer that evening who attempted to stop the white pickup truck.

When the pickup truck encountered Deputy Jones on Lockaby Lane, the deputy had his emergency lights on and his cruiser blocking the single-lane road. Addressing a vehicle approaching a cruiser or other emergency vehicle sitting in such a posture, KRS 189.930 provides in pertinent part:

> (5) Upon approaching a stationary emergency vehicle or public safety vehicle, when the emergency vehicle or public safety vehicle is giving a signal by displaying alternately flashing yellow, red, red and white, red and blue, or blue lights, a person who drives an approaching vehicle shall, while proceeding with due caution:
> (a) Yield the right-of-way by moving to a lane not adjacent to that of the authorized emergency vehicle, if:
> 1. The person is driving on a highway having at least four (4) lanes with not fewer than two (2) lanes proceeding in the same direction as the approaching vehicle; and
> 2. If it is possible to make the lane change with due regard to safety and traffic conditions; or
> (b) Reduce the speed of the vehicle, maintaining a safe speed to road conditions, if changing lanes would be impossible or unsafe.

Here, since changing lanes was impossible on a single-lane road, pursuant to KRS 189.930, the driver of the truck should have reduced his speed, maintaining a safe speed for a one-lane road in the dark. However, the driver did no such thing. Once the deputy saw the white pickup truck was not going to stop or even slow down (and was, indeed, accelerating), the deputy was forced to drive his cruiser out of the way and into a ditch to avoid a head-on collision. It is reasonable inference that Deputy Jones obviously wanted the pickup truck to stop—and "maintaining a safe speed" pursuant to KRS 189.930 would have included Eversole stopping the truck completely once he neared the cruiser which was blocking the road with emergency lights activated. An inference is the act performed by the jury of inferring or reaching a conclusion from facts or premises in a logical manner so as to reach a conclusion. A reasonable inference is one in accordance with reason or sound thinking and within the bounds of common sense without regard to extremes or excess. It is a process of reasoning by which a proposition is deduced as a logical consequence from other facts already proven.[42]

A reasonable inference that can be drawn from a police cruiser blocking a single-lane road with its emergency lights on is that approaching vehicles should stop—not proceed at an unsafe speed for the roadway and conditions, and even accelerate head-long into the stopped emergency vehicle. The logical consequence of these facts was a visible, non-verbal direction to approaching drivers to stop their vehicles.

With respect to the element of substantial risk of injury or death in KRS 520.095(1)(a)(4), accelerating the vehicle constituted a risk of death or serious physical injury, particularly to Deputy Jones. Accordingly, the elements of fleeing and evading in the first degree were satisfied and this conviction was affirmed.

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[42] Martin v. Commonwealth, 13 S.W.3d 232, 235 (Ky. 1999).

Eversole also challenged his wanton endangerment conviction. Under KRS 508.060(1), a person is guilty of first-degree wanton endangerment when "under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person." In this case, Deputy Jones testified that Eversole drove a truck which sat high enough to come into the cab of his cruiser at a speed around 40-45 miles per hour. Jones said Eversole was accelerating as he approached his cruiser, which was blocking the road and had its emergency lights activated. Just as his conduct created a substantial risk of serious physical injury or death to support the fleeing or evading charge, it created "substantial danger of death or serious physical injury" as to the wanton endangerment charge. This evidence was sufficient to convict Eversole of the offense.

Despite overwhelming evidence of guilt, Eversole's convictions were overturned due to a procedural error committed by the trial court concerning an *ex parte* meeting with a juror.

<u>Fogle v. Commonwealth</u>, 600 S.W.3d 736 (Ky. App. 2020)

FACTS: On July 5, 2016, a law enforcement officer in Campbell County, Kentucky, observed Joseph Fogle operating a motor vehicle at a speed of 81 mph in a 65 mph zone. The officer activated his lights and sirens, but Fogle refused to stop. With the officer still in pursuit, Fogle crossed over from Campbell County, Kentucky, into Ohio, at which time the Kentucky officer alerted Ohio authorities. Fogle was ultimately stopped by the Ohio State Police on State Route 32 in Clermont County, Ohio, and placed under arrest. Law enforcement personnel observed that Fogle had slurred speech, was unsteady on his feet, and had bloodshot, glassy eyes. Following his arrest, Fogle pleaded guilty to operating a motor vehicle under the influence (DUI) in Clermont County, Ohio, pursuant to Ohio law.

Fogle was indicted in Campbell County for first-degree fleeing or evading and speeding. The Commonwealth filed a notice of intent to introduce KRE 4 404(b) testimony of Fogle's condition at the time of his initial arrest, as well as his Ohio DUI conviction. In response, Fogle filed a motion in limine to exclude all such evidence, arguing it was a legal impossibility for him to be in violation of KRS 189A.010 because the Commonwealth had not obtained (and was not seeking) a conviction under that statute.

The trial court found that the Commonwealth could not establish that Fogle violated KRS 189A.010 based on the Ohio DUI conviction making that conviction inadmissible. However, the trial court determined that KRS 520.095(1)(a)2. required the Commonwealth to obtain a separate conviction of KRS 189A.010 because KRS 520.095(1)(a)2. referred to a violation, not an actual conviction. It reasoned that the Commonwealth could establish Fogle violated KRS 189A.010 by introducing evidence of Fogle's condition after he was stopped in Ohio, because the Ohio stop occurred immediately after he was observed driving in Kentucky with the police in pursuit.

Fogle entered a conditional plea to first-degree fleeing or evading police and appealed to the Kentucky Court of Appeals.

ISSUE: Does first-degree fleeing or evading police require evidence of an actual conviction for driving under the influence under KRS 189A.010?

HOLDING: No. KRS 520.095(1)(a)2. requires factual proof that the defendant was in violation of KRS 189A.010 while fleeing or evading police; it does not require the Commonwealth to actually convict the defendant of KRS 189A.010.

KRS 520.095(1)(a)2. provides:

> (1) A person is guilty of fleeing or evading police in the first degree:
> (a) When, while operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop his or her motor vehicle, given by a person recognized to be a police officer, and at least one (1) of the following conditions exists:
> ...
> 2. The person is driving under the influence of alcohol or any other substance or combination of substances in violation of KRS 189A.010[.]

KRS 520.095(1)(a)2. unambiguously states that the defendant need only be found in violation of KRS 189A.010. A "violation" is defined as "[a]n infraction or breach of the law[,]" while in contrast, a "conviction" is "[t]he act or process of judicially finding someone guilty of a crime[.]"[43] The terms are legally distinct. Additionally, "the customary meaning of violation tends toward the broad (any failure to conform to a legal standard) rather than the narrow (a criminal conviction)."[44] Perhaps most telling, however, is that the language of KRS 189A.010, itself, references "prosecutions for violations." The terms "violation" and "conviction" are different in their standards and meanings. Had the General Assembly intended for a conviction or formal prosecution to be necessary with respect to the driving under the influence prong of KRS 520.095, it could have used more precise terms. Accordingly, the Court of Appeals determined that the violation is the act itself, which is distinct from the prosecution and ultimate conviction of having committed the act.

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[43] BLACK'S LAW DICTIONARY (11th ed. 2019).
[44] Prewett v. Weems, 749 F.3d 454, 458 (6th Cir. 2014).

The conviction was affirmed.

OPEN RECORDS

<u>Dept. of Kentucky State Police v. The Courier-Journal</u>, 601 S.W.3d 501 (Ky. App. 2020)

FACTS: A Courier-Journal reporter filed an open records request with the Kentucky State Police requesting:

> An electronic copy of the Uniform Citation File database and all its publicly available fields, which include name; alias; address or city of residence; date of birth; sex; race; vehicle make; vehicle type; vehicle year; color; miles per hour; miles per hour zone; radar violation code; resident status; victim's relationship to offender; ethnic origin; violation date; time; location; breathalyzer results; date of arrest; time; county of violation; violation code; statute; ordinance; charges; post-arrest complaint; name and address of witnesses; officer badge/identification number; assignment; additional offender information.

The Uniform Citation File database referred to by Price is contained in a record management system known as "KyOPS" that tracks KSP's issuance of criminal and traffic citations throughout the Commonwealth. Since 2003, KSP has entered more than eight million individual records into KyOPS at a rate of approximately 1,800 per day. The KSP denied the request under KRS 61.872(6) as imposing an unreasonable burden on the agency. A subsequent open records request by the same reporter, with directions to exclude personal information was also denied by the KSP.

On appeal to the Attorney General, the KSP included an affidavit from Steve Roadcap, the KyOPS Coordinator. Roadcap explained that KyOPS had not been planned to allow for the redaction of entire categories of information such as Social Security numbers, and opined that a redesign of the system to allow such categorical redactions would result in the creation of a new record.

The Attorney General ultimately found that the KSP violated the Open Records Act. The KSP appealed to Franklin Circuit Court. The circuit court affirmed the Attorney General's decision. An appeal to the Kentucky Court of Appeals followed.

ISSUE: Is separating exempt material contained in a public record equivalent to creating a new record under the Kentucky Open Records Act, thereby permitting the agency to categorically a request for records?

HOLDING: No. The Court of Appeals held that modifying the KyOPS database to enable redactions by entire categories of information, as opposed to the tedious and time-consuming review of every individual entry, does not constitute creating a new record because the end product of either process would be exactly the same. Presumably, if the Courier-Journal had

requested only one specific citation from the database, which could have been manually redacted with minimal time and effort, KSP would not have objected on the grounds that it required the creation of a new record or requested costs. The scale of the request does not alter the character of the material requested. Separating exempt material is not equivalent to creating a new record and is mandated by KRS 61.878(4).

The Franklin Circuit Court was affirmed.

Dept. of Kentucky State Police v. Trageser, 600 S.W.3d 749 (Ky. App. 2020)

FACTS: Trageser filed an open records request with KSP to review the disciplinary portions of TFC Woodside's file pursuant to the Kentucky Open Records Act. KSP notified Trageser that it would grant the majority of his request but withhold all Internal Affairs investigative records containing preliminary materials pursuant to the exceptions to KORA listed in KRS 61.878(1)(i) and (j). Trageser appealed to the Office of the Attorney General. The Attorney General ruled that KSP improperly withheld certain portions of the IA files. The Franklin Circuit Court affirmed the OAG. The KSP appealed to the Kentucky Court of Appeals.

ISSUES: 1. Do recommendations and opinions **NOT** relied upon "in the agency's final action" in a disciplinary matter maintain their preliminary characterization and are not subject to public disclosure under the Kentucky Open Records Act?

2. Is information of a personal nature excluded from disclosure under the Kentucky Open Records Act?

HOLDING: 1. Yes. KRS 61.884 states: "[a]ny person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, subject to the provisions of KRS 61.878." KRS 878(1) provides some statutory exceptions:

> (i) Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;
>
> (j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended....

In City of Louisville v. Courier-Journal & Louisville Times Co.,[45] the Court of Appeals held "that investigative files of the [IA Unit] are exempt from public inspection as preliminary under KRS 61.878(g) and (h)." However, that court further noted that "if the [Commissioner] adopts its

[45] 637 S.W.2d 658, 660 (Ky. App. 1982).

notes or recommendations as part of his final action, clearly the preliminary characterization is lost to that extent."[46]

Here, the Court of Appeals held that KSP cannot rely on KRS 61.878(1)(i) and (j) as its basis for withholding the entirety of TFC Woodside's IA investigative files. However, that same statutory authority does provide KSP with a limited authority to withhold portions of the IA file concerning any disciplinary recommendations or opinions not relied upon by the Commissioner in his final decision.

2. Yes. KRS 61.878(1)(a) excludes disclosure of public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy. To determine whether KRS 61.878(1)(a) applies, the agency must: (1) determine whether the information is of a personal nature, and (2) determine whether public disclosure of personal information would constitute a clearly unwarranted invasion of personal privacy.[47]

Under this analysis, the record shows there is information of a personal nature in the 2002 and 2012 IA files regarding TFC Woodside, his family members, and civilians who cooperated with the IA's investigation. The Court of Appeals held that any information such as social security numbers, driver's license numbers, home addresses, and phone numbers is personal in nature and is not disclosable under KRS 61.878(1)(A) as an unwarranted invasion of privacy. Personal information should be redacted.

The Court of Appeals affirmed the Franklin Circuit Court.

RIGHT TO SPEEDY TRIAL/6th AMENDMENT

Commonwealth v. Hensley, ---- S.W. 3d ---- (Ky. App. 2020) – DR Filed 12/10/2020

FACTS: On January 30, 2019, Florence Police were called to the Microtel Hotel to conduct a welfare check on Hensley. Upon arrival, officers entered Hensley's room and saw in plain view drug paraphernalia and what appeared to be heroin residue in tins. The Boone County Grand Jury returned an indictment charging Hensley with possession of drug paraphernalia and first-degree possession of a controlled substance (third or greater offense).

During a pretrial conference held June 19, 2019, the Commonwealth advised that the suspected heroin residue was forward to the state crime lab for testing on May 6 and, due to the lab's backlog, may not be available for Hensley scheduled August 26 trial. Hensley asserted his right to a speedy trial and opposed any additional attempts to continue trial. The trial court granted the motion to a speedy trial after finding that the lack of lab results was a due process violation.

[46] Id. at 659.
[47] Palmer v. Driggers, 60 S.W.3d 591 (Ky. App. 2001).

During an August 21, 2019 pretrial conference, the Commonwealth informed the trial court that the lab test results were still not available. The Commonwealth moved to continue the trial date claiming unavailability of the case offer. Hensley objected to the motion to continue trial and asserted that his speed trial motion was granted on June 19. The trial court denied the motion to continue and dismissed the case with prejudice. The Commonwealth appealed.

ISSUE: Can backlogs at the state crime laboratory that prevent the timely testing of evidence infringe upon a defendant's right to a speedy trial?

HOLDING: Yes. The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial [.]" This right is incorporated "to the states through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution."[48] Kentucky Constitution Section 11 also guarantees a defendant with the right to a speedy trial.

Under both the federal and state constitutions, courts analyze whether a delay infringes upon a defendant's constitutional right to a speedy trial by applying the four-factor test adopted in Barker v. Wingo.[49] Those four factors are: 1) length of delay; 2) reason for delay; 3) assertion of the right to a speedy trial; 4) prejudice to defendant.[50]

In this case, the Court of Appeals held that the length and reason for the delay in obtaining the lab results negatively impacted Hensley's right to a speedy trial. The Court of Appeals noted that the Commonwealth possessed the evidence on January 30, 2019 but did not submit the evidence to the state crime lab for testing until May. The Commonwealth was aware months in advance that Hensley wanted the results in time for trial, and was fully aware of the lab's backlog in testing. Hensley clearly asserted his right to a speedy trial, and he was not being held for trial on any additional charges. Accordingly, the Court of Appeals held that the delay in this case was presumptive prejudicial to Hensley's right to a speedy trial and that the trial court did not abuse its discretion by dismissing the case with prejudice.

The Court of Appeals affirmed the Boone Circuit Court's order dismissing this prosecution with prejudice.

SEARCH AND SEIZURE

Carlisle v. Commonwealth, 601 S.W.3d 168 (Ky. 2020) Certiorari to SCOTUS filed 10/30/2020

FACTS: Sometime in September 2017 at 3:10 PM, Covington Police Officer Brian Powers stopped a truck for improper equipment, namely, tinted taillights and a loud exhaust. The truck

[48] Smith v. Commonwealth, 361 S.W.3d 908, 914 (Ky. 2012).
[49] 407 U.S. 514, 515, 92 S.Ct. 2182, 33 L. Ed. 2d 101 (1972).
[50] Id.

was driven by Christopher Hughes; Carlisle was the only passenger. Two other officers, Sergeant S. Mangus and Officer Kyle Shepard, arrived on the scene to assist.

The traffic stop was captured on Officer Powers's body cam. The video shows that Officer Powers first approached the driver's side window and explained why he had stopped the truck. He then asked where Hughes and Carlisle were coming from, where Hughes lived (Newport), where the two were headed, where exactly Hughes was staying in Newport, and why they were so far from Newport. Hughes explained that he was living with someone in Newport but was helping someone move nearby, and he was headed to Sunoco for gas. Officer Powers then collected Hughes's license and, while Hughes searched for proof of insurance, also collected Carlisle's identification card. He also asked Hughes if he had ever been arrested, and Hughes responded yes, for possession of drug paraphernalia in 2001.

Officer Powers returned to his cruiser, immediately commenting "shady" to his own passenger. (It is unclear who this passenger is or why he was riding along.) He noted that the computer was running slowly. He also commented that he would "see if they got any prior charges." As he attempted to run Hughes's license number, he commented to his passenger, "We'll see if we can search the car, I don't know if he's gonna allow us to." He had trouble running Hughes's license number because the license was damaged and some of the numbers were illegible, so he contacted dispatch for assistance. Dispatch eventually responded that Hughes's license was suspended.

Officer Powers returned to the driver's side window of the truck. He immediately returned the IDs and proof of insurance to Hughes. After handing back the IDs, Officer Powers explained that Hughes's license was suspended and that the license itself was so damaged that he would need to get a new one. At approximately 3:23:49, Officer Powers stated to Hughes, "So you can't leave, I'm not gonna cite you for it, but you can't leave. You gotta park your vehicle." Hughes responded, "Can I park it right here at Sunoco?" To this question, Officer Powers responded, "Yeah, that's fine, just park it out of the way, okay. Is there anything illegal in the vehicle at all?" This last question was asked at approximately 3:23:55. Hughes responded in the negative. Officer Powers asked, "No weapons, drugs, nothing like that?" Hughes responded that the only thing he had was a pocket knife. At 3:23:58, Officer Powers asked Hughes, "Mind if I take a look?" Hughes responded "no" at approximately 3:23:59, thereby consenting to a search of the truck.

Hughes immediately exited the vehicle and was quickly frisked by Officer Powers. Officer Powers then directed Hughes to move toward the back of the truck where his supervisor was standing, "just wherever you want to stand with him." Carlisle was also instructed to exit the vehicle, at which point he was thoroughly frisked by Officer Shepard. The officer found a pocket knife, which he handed to Officer Powers. The officer also asked Carlisle how much cash he had on him. When the frisk was complete, Officer Powers directed Carlisle to "walk back over with my supervisor," at which point Carlisle walked over to one of the police cruisers parked behind the truck. The body cam shows that another officer pointed to the cruiser, at which point Carlisle sat down on

the front of the cruiser. It is not clear if Carlisle was told that he had to sit there or only that he could sit there.

As Officer Powers began his search of the truck, he commented to one of the other officers that the passenger (Carlisle) was a convicted felon with a prior gun charge, and both men had prior drug charges. Officer Powers then focused his attention on a black drawstring backpack located in the passenger seat, resting against the middle console, while another officer began searching the driver's side. Officer Powers initially pulled two packages of unused syringes from the bag. At this point, he commented to the other officer that "it was under him so...." The other officer asked if he was referencing the passenger, to which Officer Powers responded, "Yeah." As he continued to search the bag, Officer Powers also found several cell phones. When the other officer mentioned that he would start looking through the seat cushions, Officer Powers commented, "It's gonna be on him." The other officer asked if the men had been searched yet, and Officer Powers responded that he had only patted them down, but "I think we got enough now to search." He also commented that "[Officer] Shepard patted this guy down, he's got a ton of money in his pocket."

Ultimately, the other officer found a digital scale in the driver's side door, and Officer Powers pulled from the bag an iPad, several cell phones, and a canister of butane, in addition to the syringes and various personal items like cologne, Tylenol, and an energy drink. In reference to the butane, Officer Powers commented, "Probably shooting meth." The other officer also asked what the butane was for, to which Officer Powers responded, "I've only ever seen that with meth."

Officer Powers then pulled the passenger seat up and picked up a plastic cellophane wrapper from the floorboard. Though it is not clear from his body cam footage, Officer Powers testified at the suppression hearing that there was a white residue on the wrapper. In the video, he stated that there was "at one point something in" the wrapper. In reference to the residue, he also stated, "I don't think there's gonna be enough to do anything with." He also stated, "If anything, it's gonna be on him, I'll check him."

Officer Powers then called dispatch to run the iPad's serial number to check if it was stolen. After doing that, he walked over to Carlisle. Officer Shepard, who had been standing with the men, handcuffed Carlisle, explaining that Carlisle had been acting "super nervous" and was "tensing up," so the officer did not "want to take any chances."

Officer Powers then searched Carlisle's person. He first checked the left pocket of his jeans and discovered a large amount of cash. He then asked Carlisle when he had last taken meth and whether he had any meth on him. Carlisle responded in the negative. Officer Powers then moved to Carlisle's right side and pulled from his waistband a small piece of plastic, apparently the top of a plastic baggie. Officer Powers finished searching Carlisle's pockets and found "suspected marijuana." He then attempted to find the rest of the plastic baggie and ultimately had Carlisle step of out his shoes and out of his jeans. Carlisle wore shorts underneath his jeans. The rest of

the plastic baggie, which contained a suspected narcotic, was found after Carlisle stepped out of his jeans. Carlisle was read his Miranda rights, and the officers then continued to search him, shaking out his shorts and checking his socks and shoes.

After Carlisle was placed in the back of the police cruiser, the officers quickly searched Hughes and, finding nothing, allowed him to leave. Carlisle was ultimately transported to booking, at which point the body cam footage ended.

Carlisle moved to suppress all evidence from the traffic stop, and a hearing was held in which only Officer Powers testified. The body cam footage was also submitted as an exhibit. The trial court ultimately denied the motion. A jury found Carlisle guilty of three counts of first-degree trafficking in a controlled substance. Carlisle was sentenced to a total of twenty years of imprisonment. This appeal followed.

ISSUES:

1. Is a traffic stop extended beyond its original purpose when an officer asks the driver and/or passenger questions concerning travel plans?

2. May an officer ask for the identification and perform a criminal-records check of a driver and any passengers during an otherwise lawful traffic stop to determine an individual's prior contact with law enforcement?

3. Has a passenger of a motor vehicle been unconstitutionally detained if ordered to exit a vehicle during a traffic stop and directed to stand in a specific location?

4. Does law enforcement obtain probable cause to search a passenger based upon the discovery of incriminating evidence on the trunk of a vehicle?

HOLDINGS: 1-2. Yes. In Rodriguez v. United States,[51] the United States Supreme Court held that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation. However, "[a]n officer ... may conduct certain unrelated checks during an otherwise lawful traffic stop," but "he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual."[52] So, the Kentucky Supreme Court examined whether the traffic stop was ongoing and, if the stop was ongoing, whether Officer Powers inquired into matters unrelated to the stop's mission.

Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave.[53] Thus, the authority for the seizure ends

[51] 575 U.S. 348, 350-51 (2015).
[52] Id. at 355.
[53] Arizona v. Johnson, 555 U.S. 323 (2009).

when tasks tied to the traffic infraction are, or reasonably should have been, completed.[54] Here, Officer Powers stopped Hughes's truck for faulty equipment, then learned that Hughes's license was suspended. Though he chose not to cite Hughes for these infractions, he needed to maintain control of the scene to ensure that Hughes did not continue to drive a vehicle with faulty equipment and with a suspended license. In other words, he needed to maintain control of the situation until the vehicle was safely off the road and Hughes (and Carlisle) left the scene on foot or by other means. His continued control over the situation is demonstrated by his instruction to Hughes that he could not leave and would have to park his car, and Hughes's request for permission to park the truck at the Sunoco lot. Under these circumstances, the lawful mission of the traffic stop had not concluded.

The Kentucky Supreme Court next turned to whether Officer Powers inquired into matters unrelated to the purpose of the traffic stop. Rodriguez identified a number of tasks that are ordinary inquiries incident to a traffic stop. These inquiries include "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance."[55] These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly.[56]

In the present case, Carlisle focuses on the questions initially asked to Hughes, including where he lived and where the men were going and why. However, "[g]enerally, questions about travel plans are ordinary inquiries incident to a traffic stop."[57] With respect to criminal records checks, the federal circuit courts are split on the matter, and Kentucky law is unclear.

Ultimately, the Kentucky Supreme Court held in this case that an officer reasonably may ask for the identification and perform a criminal-records check of a driver and any passengers during an otherwise lawful traffic stop to determine an individual's prior contact with law enforcement. Such a task is an ordinary inquiry related to officer safety. Accordingly, Officer Powers's collection of Carlisle's identification and subsequent checking of his criminal history was not an unrelated inquiry that prolonged the traffic stop.

3. No. It is well settled that a police officer may, as a matter of course, order the driver of a lawfully-stopped vehicle to exit the vehicle.[58] Passengers of lawfully stopped vehicles may also be ordered to exit the vehicle.[59] In this case, Carlisle had already been stopped and detained by police while the ordinary inquiries of the traffic stop were conducted, and the detention outside the vehicle lasted less than ten minutes. As such, the intrusion into Carlisle's personal liberty in this case was minimal. The Kentucky Supreme Court concluded that the officers' interest in safety

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[54] Rodriguez, 575 U.S. at 354.
[55] Id.
[56] Id.
[57] United States v. Campbell, 912 F.3d 1340, 1354 (11th Cir. 2019) (citations omitted).
[58] Pennsylvania v. Mimms, 434 U.S. 106 (1977).
[59] Maryland v. Wilson, 519 U.S. 408 (1997).

in this case outweighed the intrusion into Carlisle's personal liberty, and his detention during the search of the truck was reasonable.

4. Yes. In absence of consent, the police may not conduct a warrantless search or seizure without both probable cause and exigent circumstances."[60] The test for probable cause is whether, under the totality of the circumstances, a fair probability exists that contraband or evidence of a crime will be found in a particular place.[61] The exigent circumstances doctrine, on the other hand, "arises when, considering the totality of the circumstances, an officer reasonably finds that sufficient exigent circumstances exist," thereby requiring "swift action to prevent imminent danger to life or serious damage to property, and action to prevent the imminent destruction of evidence."[62] In narcotics cases, the exigent circumstances doctrine "is particularly compelling," as "contraband and records can be easily and quickly destroyed while a search is progressing."[63]

In this case, under the totality of the circumstances, the various items recovered in the search contributed probable cause to search both Hughes and Carlisle. The officers' search of the truck revealed a digital scale, a bottle of butane, several cell phones, two packages of syringes, and a cellophane wrapper covered in white residue. Officer Powers testified at the suppression hearing that these items lead him to believe that the two men would have more paraphernalia on their persons. As he was searching the truck, he can also be heard commenting that he had "only ever seen" butane "with meth." In addition, during the frisk of Carlisle, Officer Shepard apparently felt a substantial amount of cash on Carlisle's person. Under the totality of these circumstances, there was probable cause to believe that Hughes and Carlisle held more contraband on their persons. Because there was a high likelihood that that contraband included narcotics, which could easily and quickly be destroyed, exigent circumstances also existed.

Probable cause to search the driver of a vehicle does not automatically justify a search of a passenger in the same car. This is because passengers in an automobile are not generally perceived to have the kind of control over the contents of an automobile as do drivers. Consequently, "some additional substantive nexus between the passenger and the criminal conduct must appear to exist in order for an officer to have probable cause to either search or arrest a passenger."[64] In this case, however, the officers discovered much of the evidence (the syringes, butane canister, and cell phones) in a backpack sitting in the passenger seat where Carlisle had been seated, and the wrapper with white residue was found behind the passenger seat. Furthermore, Officer Shepard had already discovered that Carlisle carried a substantial amount of cash on his person. The location of the evidence in the truck and the cash on Carlisle's person provided the necessary "substantive nexus" between Carlisle and the possible criminal conduct.

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[60] Guzman v. Commonwealth, 375 S.W.3d 805, 808 (Ky. 2012) (citing Kirk v. Louisiana, 536 U.S. 635, 638 (2002)).
[61] Moore v. Commonwealth, 159 S.W.3d 325, 329 (Ky. 2005) (citation omitted).
[62] Bishop v. Commonwealth, 237 S.W.3d 567, 569 (Ky. App. 2007) (citations omitted) (internal quotation marks omitted).
[63] United States v. Young, 909 F.2d 442, 446 (11th Cir. 1990)
[64] Morton v. Commonwealth, 232 S.W.3d 566, 570 (Ky. App. 2007) (quoting State v. Wallace, 812 A.2d 291, 304 (Md. 2002)).

Therefore, the Kentucky Supreme Court held that the probable cause and exigent circumstances requirements were satisfied, thereby warranting a search of Hughes's person and, given the nexus between Carlisle and the evidence, Carlisle's person.

The Supreme Court affirmed Carlisle's convictions.

Constant v. Commonwealth, 603 S.W.3d 654 (Ky. App. 2020)

FACTS: Lexington Police Officers Johnson and Bueno were dispatched to an apartment on Cross Keys Road to execute a pickup order for seventeen-year-old B.P. Upon arrival, the officers advised the man who answered the door of the reason for their arrival. B.P.'s mother went to B.P.'s bedroom door and attempted to convince B.P. to come out of her bedroom. B.P. initially refused, and B.P.'s mother unsuccessfully tried to open the bedroom door, which was locked. At this point, Officer Johnson went to watch B.P.'s window in case she tried to climb out and escape, while Officer Bueno remained on the landing outside the open apartment door. Four minutes later, Officer Bueno told Officer Johnson over the radio that B.P. had come out of her room.

When B.P. emerged from her bedroom, the officers discovered Constant, a thirty-year-old man, also locked in the bedroom with B.P. B.P.'s mother was not previously aware of Constant's presence in her daughter's bedroom.

During the short time it took to place B.P. in handcuffs, the officers asked a nervous-looking Constant to identify himself. Constant told Officer Bueno that his name was Kevin Smith and provided him with a Social Security number and birthdate. Constant contradicted himself several times, however, and the information proved to be false. Officer Bueno told Constant that he was not being honest.

According to Officer Bueno's report, he needed Constant's identifying information so that he could provide the CDW with information relevant to B.P.'s associations. Officer Johnson testified that they frequently asked for bystanders' identifications when picking up juveniles with habitual truancy or runaway offenses so that they would know where to look in the future. Officer Johnson also stated that he was concerned about B.P. being locked in a bedroom with a grown man who was obviously several years older than B.P.

Once Officer Bueno had handcuffed B.P., Officer Johnson took B.P. out of the apartment and onto the breezeway. Meanwhile, Constant began to pace and shout inside the apartment. Officer Johnson was just about to pat down B.P. when Constant, who was now smoking a cigarette, approached the apartment door to tell B.P. that he loved her and would get her bailed out. Officer Bueno gestured for Constant to stay in the apartment and blocked him from leaving.

Constant took another drag on his cigarette and suddenly bolted from the apartment, knocking Officer Bueno aside. Officer Johnson was forced to let go of B.P. to keep from being dragged down the stairs. Officer Johnson grabbed Constant's shirt to stop him, but Constant was running

so fast that Constant's shirt began to rip and Officer Johnson let go. Officer Johnson pursued Constant down the stairs but was stopped when Constant ran through and slammed an exterior door on Johnson. Officer Johnson fell at the top of another set of steps, got up, and continued chasing Constant through traffic across Cross Keys Road, through a park, and then around a house on Maywick Street. Officer Johnson repeatedly ordered Constant to the ground, but Constant refused to comply until Officer Johnson drew his taser. At this point, Constant became compliant. Constant was subdued and placed under arrest at which time he was searched and found to be in possession of fentanyl. Officer Johnson had been injured during these events, fracturing his left tibia.

Constant was charged with two counts of assault in the third degree, fleeing or evading in the first degree, possession of a controlled substance in the first degree, resisting arrest, giving an officer a false name, and being a persistent felon in the first degree. Constant filed a motion to suppress for unlawful detention and seizure. The suppression motion was denied. Constant entered a conditional guilty plea to the charges and appealed.

ISSUE: May law enforcement briefly detain all individuals, even innocent bystanders, at the scene of an arrest even absent particularized reasonable suspicion of criminal activity?

HOLDING: Yes. Even absent particularized reasonable suspicion, innocent bystanders may be temporarily detained where necessary to secure the scene of a valid search or arrest and ensure the safety of officers and others. This practice has been permitted by the Sixth Circuit in Bletz v. Gribble.[65] Moreover, under Kentucky law, detentions for the purpose of identification must be based on "objective criteria" that criminal activity is afoot.[66] Here, Officer Bueno had a legitimate basis for detaining Constant. Under § 14-47 of the Lexington-Fayette Urban County Government Code of Ordinances, it is a finable offense to "interfere with or obstruct a police officer in the discharge of his duty[.]" The delay in B.P. unlocking and emerging from her bedroom certainly obstructed Officer Bueno from executing the pickup order for B.P., and more evidence was needed to determine whether B.P. or Constant caused the interference. Officer Bueno was justified in briefly detaining Constant to gather more information regardless of his subjective intention.

The Court of Appeals further held that even if Constant's initial detention in B.P.'s home had been unlawful, evidence of his fleeing or evading and possession of a controlled substance would not be suppressed. The exclusionary rule does not extend to suppress evidence of independent crimes taking place as a reaction of an unlawful arrest or search.[67]

The convictions were affirmed.

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[65] 641 F.3d 743, 755 (6th Cir. 2011).
[66] Strange v. Commonwealth, 269 S.W.3d 847, 851 (Ky. 2008).
[67] Commonwealth v. Johnson, 245 S.W.3d 821, 824 (Ky. App. 2008).

K.H. v. Commonwealth, 610 S.W.3d 320 (Ky. App. 2020)

FACTS: On September 21, 2015, Kimberly Kidd reported to University of Kentucky (UK) police that two individuals were in the parking lot adjacent to her workplace striking car windows with an objected, and that they entered her unlocked car. The two individuals fled when Kidd pressed the panic button on her key fob. Kidd described the two individuals as two black males, one in a blue shirt and shorts with a backpack and the other in a gray hoodie with jeans and a backpack.

UK Police Officer Johnson found two individuals matching Kidd's description two blocks from the parking lot where the incident occurred. Lieutenant Ramsey and Officer Morris arrived at the scene. K.H., a fourteen-year-old juvenile, advised Lieutenant Ramsey that he was in the area and not at school because he missed the school bus. Lieutenant Ramsey conducted a pat-down of K.H., who was cooperative. Lieutenant Ramsey located a metal tire iron tucked in K.H.'s clothing. When questioned about the tire iron, K.H. advised that he needed to bring the tire iron to his mother's car.

K.H. was charged with possession of burglary tools and third-degree criminal trespass. After K.H. failed to comply with a diversion agreement in juvenile court, the matter was transferred to district court. In district court, K.H. filed a motion to suppress the fruits of this investigatory stop and frisk. The district court found the stop and frisk to be constitutional and denied the suppression motion. K.H. appealed to circuit court, which affirmed. The Court of Appeals granted discretionary review.

ISSUE: May a police officer stop and frisk a person to investigate a completed misdemeanor that occurred outside of the officer's presence?

HOLDING: Yes. As a matter of first impression, the Kentucky Court of Appeals held that a police officer may stop and frisk a person to investigate a completed misdemeanor that occurred outside of the officer's presence. To conduct a stop and frisk with respect to a completed misdemeanor, courts require a balancing test. In United States v. Hensley,[68] the United States Supreme Court explained that the proper way to identify the precise limits on investigatory stops to investigate past criminal activity is to apply the test already used to identify the proper bounds of intrusion that further investigations of imminent or ongoing crimes. Accordingly, courts that review the reasonableness of a stop to investigate a completed misdemeanor (or other minor infraction) must assess the potential risk to public safety associated with the nature of the offense.

In this case, the Court of Appeals found this Terry stop reasonable. The officer who stopped K.H. was proceeding based on a report that the suspects were breaking into vehicles and had succeeded in entering the witness's car. No investigating officer could know for certain

[68] 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985).

whether any property was taken or what charges ultimately would be brought. Given that breaking into vehicles is often associated with theft, it is reasonable to expect an officer to believe that the suspect may have taken something from the vehicle. Under Kentucky law, officer may execute a Terry stop to investigate theft.[69]

With respect to the various governmental interests at stake, there is a public safety interest present in this case. Property crimes are not free of risk to public safety, nor are property crimes necessarily free of violence.[70] Additionally, the officer stopped K.H. in close temporal and geographic proximity to the crime scene. Had this stop occurred hours or days later, the threat to public safety would have dissipated. Finally, UK Police possessed a reasonable suspicion about middle-school –age individuals walking on a university campus at 9:30 AM when these individuals should have been at their own school.

Another governmental interest that the Court of Appeals examined was crime prevention. In this case, because the suspects abandoned Kidd's vehicle when Kidd pressed the panic button on her key fob, coupled with the fact that these individuals had previously attempted to break into other vehicles, there is no indicator that they would not continue attempted break-ins elsewhere.

With respect to confrontation, K.H. cooperated with the officers. Thus, the intrusion into his privacy interests was less intrusive than a more forceful directive to submit to authority would have been.

Finally, with respect to the strong governmental interest in solving crimes and bringing offenders to justice, time is the most significant factor to examine. The stop in this case occurred in close proximity to the initial dispatch. This particular misdemeanor was not "stale." Moreover, in this case, a juvenile was involved. Kentucky's juvenile code is designed to provide treatment for juvenile offenders in order to rehabilitate them. Treatment and rehabilitation does not occur unless the juvenile offender is apprehended.

Under this balancing test, the governmental interests outweighed the mildly intrusive nature of K.H.'s confrontation with police. Accordingly, the Court of Appeals held this stop to investigate a completed misdemeanor was constitutional.

The Court of Appeals also found the Terry frisk conducted by the officers in this case appropriate. Law enforcement officers are permitted to conduct a reasonable search for weapons for their protection regardless of whether they have probable cause to effect an arrest.[71] As Kidd advised dispatch that the suspects used an instrument to break into cars, it is

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[69] Kotila v. Commonwealth, 114 S.W.3d 226, 234 (Ky. 2003), abrogated on other grounds by Matheney v. Commonwealth, 191 S.W.3d 599 (Ky. 2006), and by Mills v. Dep't of Corr. Offender Info. Services, 438 S.W.3d 328 (Ky. 2014).
[70] United States v. Moran, 503 F.3d 1135, 1142 (10th Cir. 2007).
[71] Adkins v. Commonwealth, 96 S.W.3d 779, 786-87 (Ky. 2003).

reasonable for an officer to believe the suspects could use that instrument to cause harm to the officer. Accordingly, the Court of Appeals held that this Terry frisk was reasonable.

The Court of Appeals affirmed the circuit court's opinion which affirmed the district court's order denying the motion to suppress.

Commonwealth v. Mitchell, 610 S.W. 3d 263 (Ky. 2020)

FACTS: In April 2017, Lexington Police Officer Barks was working off duty at the Richmond Road Walmart. Officer Barks heard a car screeching its tires upon exiting the parking lot. Officer Barks pursued the vehicle and executed a traffic stop at a nearby intersection. Upon approaching the driver's side door, Officer Barks became concerned that the driver was going to pull away, so he immediately smacked the rear of the vehicle to get the driver's attention. Mitchell was a passenger in the vehicle's right rear seat.

Two minutes into the stop, Officer Agayev arrived as backup. Officer Agayev obtained driver's licenses from the three occupants of the vehicle. At this time, Officer Barks began filling out a citation for the driver. Twelve minutes after the initial stop, Officer Agayev completed his background check on the occupants. Thereafter, the officers engaged in a discussion concerning whether to request a canine unit. Agayev had encountered the driver before and recalled the driver's past involvement in narcotics activities. A records check revealed that Mitchell had a criminal history, including firearm-related offenses. The area in question was Officer Agayev's regular beat, and he characterized the Walmart parking lot as a high crime area, particularly with narcotics. During the stop, Mitchell avoided eye contact with the officers and Officer Barks observed Mitchell "digging around" the seat or floorboard area of the car.

At the end of their discussion, dispatch initially advised Officer Barks that a canine unit was unavailable. Approximately a minute later, dispatch advised that a canine unit was en route. Upon learning about the canine unit, Officer Agayev told Officer Barks to take his time filing out the citation. This exchange occurred approximately 16 minutes after the initial stop was executed. The canine unit arrived approximately 28 to 29 minutes after the stop, contemporaneous with Officer Barks' completion of the citation. Prior to the dog sniff, Mitchell advised the officers that firearms were inside the vehicle. The officers found two pistols and a rifle in the vehicle. The officers arrested Mitchell. A grand jury returned an indictment charging Mitchell with possession of a handgun by a convicted felon.

The Fayette Circuit Court denied Mitchell's motion to suppress evidence. Mitchell entered a conditional guilty plea to the charge and appealed to the Court of Appeals. The Court of Appeals reversed the circuit court, holding that the officers impermissibly delayed the completion of the stop beyond its original purpose to discuss and then request the canine unit, a purpose totally unrelated to the original stop. The Kentucky Supreme Court granted discretionary review.

ISSUE: Does the deferred completion of a traffic stop beyond its original purpose to discuss, then request, a canine search impermissibly extend the traffic stop?

HOLDING: Yes. "It has long been considered reasonable for an officer to conduct a traffic stop if he or she has probable cause to believe that a traffic violation has occurred. [72] An officer's subjective motivations for the stop are not relevant as long as an officer has probable cause to believe a traffic violation has occurred.[73] While officers may detain a vehicle and its occupants to conduct an ordinary traffic stop, such actions may not be excessively intrusive and must be reasonably related to the circumstances justifying the initial seizure.[74] A de minimis delay beyond the time needed to pursue the original purpose of the stop fails a constitutional test absent other circumstances.[75]

An officer's ordinary inquiries incident to a traffic stop do not impermissibly extend such stop.[76] Included in such ordinary inquiries are an officer's review of the driver's information, auto insurance and registration, and the performance of criminal background checks of the driver and any passengers.[77] In order to extend the stop beyond that required to complete its initial purpose, something must occur during the stop to create a "reasonable and articulable suspicion that criminal activity is afoot."[78] A stop is unreasonably extended when the "tasks tied to the traffic infraction are – or reasonably should have been – completed…"[79]

The Kentucky Supreme Court held that as long as the officers are diligently working to complete the purpose of the initial stop, a stop is not impermissibly extended merely because one stop is marginally longer than another. Conferences between officers may occur at the scene of a stop if the officers continue to exercise reasonable diligence in completing the purpose of the initial stop.

In this case, the Supreme Court determined that this stop was impermissibly extended by the officers, as evidenced by their discussion to request a canine unit. This discussion was unrelated to the original purpose of the traffic stop, which was an improper start out of the Walmart parking lot. When it comes to pursuing unrelated investigative issues, officers must be able to do so while simultaneously completing the purpose of the stop.

The Kentucky Supreme Court affirmed the Court of Appeals with respect to this ruling. The Supreme Court did, however, remand the matter to the circuit court to make findings of fact concerning whether the officers had reasonable suspicion to suspect whether criminal activity was occurring to justify detaining Mitchell until the canine unit arrived.

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[72] Commonwealth v. Bucalo, 422 S.W.3d 253, 258 (Ky. 2013).
[73] Id.
[74] Davis v. Commonwealth, 484 S.W. 3d 288, 292 (Ky. 2016).
[75] Rodriguez v. United States, 575 U.S. 348, 356-57 (2015).
[76] Id., at 355; Davis, 484 S.W. 3d at 293.
[77] Carlisle v. Commonwealth, 601 S.W.3d 168, 176, 179 (Ky. 2020).
[78] Turley v. Commonwealth, 399 S.W.3d 412, 421 (Ky. 2013).
[79] Smith v. Commonwealth, 542 S.W. 3d 276, 281-82 (Ky. 2018).

Olmeda v. Commonwealth, 601 S.W.3d 183 (Ky. App. 2020)

FACTS: Olmeda was driving his Chevrolet S-10 truck in Paducah when he was pulled over by Deputy Bobby Cook of the McCracken County Sheriff's Office. Deputy Cook stopped Olmeda for vehicle equipment violations, as Olmeda's truck did not have working brake lights, working taillights, or an illuminated license plate. Olmeda could not produce a driver's license upon Deputy Cook's request. At some point during the stop, the deputy learned Olmeda's license had been suspended. Deputy Cook believed he could smell alcohol coming from the vehicle, and he also thought Olmeda's pupils were dilated. Believing Olmeda may be driving under the influence of alcohol, Deputy Cook called dispatch to request the assistance of a unit trained to detect blood alcohol concentration.

Paducah Police Officer Kevin Collins arrived approximately ten minutes later, and Deputy Sheriff Ronnie Giles arrived shortly thereafter. Officer Collins conducted pre-exit tests on Olmeda and did not find any evidence of alcohol impairment. The deputies conferred with Officer Collins, and the three discussed Olmeda's suspended license. Deputy Giles informed Officer Collins of Olmeda's dilated pupils. Officer Collins had previously overlooked that observation but confirmed it by looking at Olmeda's eyes. At that point, Officer Collins believed it was possible that Olmeda was under the influence of drugs rather than alcohol.

Deputy Giles removed Olmeda from the vehicle and asked Officer Collins to call for a K-9 unit. After doing so, Officer Collins began conducting field sobriety tests on Olmeda. Officer Collins had not finished the tests when the K-9 unit arrived and conducted a sniff search around Olmeda's truck. The dog alerted to the presence of drugs in the vehicle. Upon searching Olmeda's truck, the officers discovered small amounts of marijuana and cocaine in the center console, as well as drug paraphernalia. Deputy Giles then placed Olmeda under arrest and transported him to the jail at approximately 1:12 a.m. Olmeda was ultimately charged with possession of marijuana, first-degree possession of a controlled substance (cocaine), and possession of drug paraphernalia.

Olmeda moved the trial court to suppress evidence found during the warrantless search of his vehicle, arguing that the length of his roadside detention was excessive. Even though the trial court found no evidence that Olmeda's eyes were not dilated and there may have been no justification for the field sobriety tests, it denied the suppression motion because Olmeda would not have been free to leave because he had a suspended license.

A jury convicted Olmeda of all of the charged offenses, and he was sentenced to two years in prison. An appeal followed.

ISSUE: May police detain a suspect during a traffic stop until a K-9 unit could arrive to conduct a sniff upon learning that the suspect was operating the motor vehicle on a suspended license?

HOLDING: Yes. "A police officer is authorized to conduct a traffic stop when he or she reasonably believes that a traffic violation has occurred."[80] However, "[a]n officer cannot detain a vehicle's occupants beyond completion of the purpose of the initial traffic stop unless something happened during the stop to cause the officer to have a reasonable and articulable suspicion that criminal activity [is] afoot."[81] A traffic stop may not be extended "beyond its original purpose for the sole purpose of conducting a sniff search—not even for a *de minimis* period of time."[82]

Here, the length of the vehicle's stop was ultimately governed by the fact that Olmeda, even if he were only issued a citation for his offenses, could not legally drive away due to his suspended license. As a result, regardless of whether Olmeda was present, Olmeda's truck would certainly have remained at the scene long enough for the K-9 unit to arrive.

Moreover, the doctrine of inevitable discovery applies in this case because Olmeda's lack of a valid license prevented him from driving the vehicle away from the scene. Therefore, the K-9 unit's discovery of the contraband within Olmeda's truck was inevitable, regardless of whether the investigation into Olmeda's sobriety was appropriate. Inevitable discovery applies because "police were not 'in a better position than they would have been absent the error[.]'"[83]

The convictions were affirmed.

Rhoton v. Commonwealth, 610 S.W. 3d 273 (Ky. 2020)

FACTS: On October 1, 2016, Kentucky State Police Trooper Zalone observed a blue Toyota Camry with an unbelted passenger in Bath County and executed a traffic stop. Upon approaching the driver's side window, Trooper Zalone observed a small, screw-top metal canister, approximately two inches long and one-and-a-half inches wide, in the center console. Based upon training and experience, Trooper Zalone believed this canister was being used to conceal illegal narcotics. Trooper Zalone asked the driver, Rhoton, if he had any drugs in the car. Rhoton denied having any drugs in the car and declined Trooper Zalone's request to search the vehicle.

Trooper Zalone obtained identification for Rhoton and his passenger and returned to his cruiser. While at his cruiser, Trooper Zalone radioed for assistance from a canine unit and

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[80] Commonwealth v. Lane, 553 S.W.3d 203, 205 (Ky. 2018) (citing Commonwealth v. Bucalo, 422 S.W.3d 253, 258 (Ky. 2013)).
[81] Commonwealth v. Smith, 542 S.W.3d 276, 282 (Ky. 2018) (quoting Turley v. Commonwealth, 399 S.W.3d 412, 421 (Ky. 2013)).
[82] Davis v. Commonwealth, 484 S.W.3d 288, 293 (Ky. 2016).
[83] Johnson v. Commonwealth, 522 S.W.3d 207, 211 (Ky. App. 2017) (quoting Commonwealth v. Elliott, 714 S.W.2d 494, 496 (Ky. App. 1986).

began preparing the citation. Trooper Zalone ran the ordinary records checks on Rhoton and his passenger and discovered that the passenger had an unrelated active arrest warrant. The canine unit arrived twenty-five minutes after the initial traffic stop, and while Trooper Zalone was preparing the citation and confirming the passenger's warrant.

The canine alerted to the driver's side door and, upon the door being opened, to the driver's seat. Trooper Zalone searched the areas the dog alerted and found a partially zipped pouch between the driver's seat and center console. Trooper Zalone observed the orange-capped tips of two syringes partially sticking out of the pouch. Upon further inspection, Trooper Zalone found additional syringes and plastic wrap containing crushed and melted pills. The metal canister in the console was empty. Rhoton admitted that the pills were oxycodone. The officers arrested Rhoton, and he was ultimately charged with first-degree possession of a controlled substance, possession of a controlled substance not in original container, and possession of drug paraphernalia.

The Bath Circuit Court denied Rhoton's motion to suppress the evidence seized during the traffic stop, finding that Trooper Zalone did not impermissibly prolong the stop to facilitate the dog sniff. Rhoton entered a conditional guilty plea to the charges and appealed to the Kentucky Court of Appeals. The Court of Appeals affirmed the conviction. The Kentucky Supreme Court granted discretionary review.

ISSUE: Does the discovery of an outstanding warrant for a passenger as part of a traffic stop provide probable cause for the resulting increased duration of the stop, including the increased length of the detention of the driver and passengers until the stop is complete?

HOLDING: Yes. "It has long been considered reasonable for an officer to conduct a traffic stop if he or she has probable cause to believe that a traffic violation has occurred. [84] An officer's subjective motivations for the stop are not relevant as long as an officer has probable cause to believe a traffic violation has occurred.[85] While officers may detain a vehicle and its occupants to conduct an ordinary traffic stop, such actions may not be excessively intrusive and must be reasonably related to the circumstances justifying the initial seizure.[86] A de minimis delay beyond the time needed to pursue the original purpose of the stop fails a constitutional test absent other circumstances.[87]

An officer's ordinary inquiries incident to a traffic stop do not impermissibly extend such stop.[88] Included in such ordinary inquiries are an officer's review of the driver's information, auto insurance and registration, and the performance of criminal background checks of the driver

[84] Commonwealth v. Bucalo, 422 S.W.3d 253, 258 (Ky. 2013).
[85] Id.
[86] Davis v. Commonwealth, 484 S.W. 3d 288, 292 (Ky. 2016).
[87] Rodriguez v. United States, 575 U.S. 348, 356-57 (2015).
[88] Id., at 355; Davis, 484 S.W. 3d at 293.

and any passengers.[89] In order to extend the stop beyond that required to complete its initial purpose, something must occur during the stop to create a "reasonable and articulable suspicion that criminal activity is afoot."[90]

In this case, Rhoton was stopped because the trooper observed a passenger not wearing a seat belt. During the stop, Trooper Zalone asked for identification from both Rhoton and the passenger from which he ran an ordinary search for outstanding warrants. This warrants search resulted in a notification of an outstanding arrest warrant for Rhoton's passenger, necessitating actions on the trooper's part to verify and execute the warrant. The total encounter was 25 minutes, approximately 10 minutes longer than Trooper Zalone's estimate of what an ordinary stop for a seatbelt violation would take. The return of the outstanding warrant on the passenger provided independent probable cause to extend the stop for an amount of time reasonably necessary to address the outstanding warrant.

Therefore, the Supreme Court held that the discovery of an outstanding warrant as part of a traffic stop provides new probable cause for the resulting increased duration of the stop, and that such increase does not impermissibly delay the individuals subjected to the stop. In the interest of officer safety, all those involved in the stop may be detained until the stop is complete. The new purpose of the stop must be diligently pursued and any prolonging of the stop must be related to this new purpose.

The Kentucky Supreme Court affirmed Rhoton's convictions.

Tucker v. Commonwealth, 611 S.W. 3d 297 (Ky. App. 2020)

FACTS: On July 7, 2017, Lexington Police were investigating several recent burglaries. An e-mail was distributed throughout the police department describing the subject of these burglaries as a black male in his late teens or early twenties wearing a pink North Face backpack. That day, police saw Tucker – who fit the description – and attempted to detain him. Tucker fled and, while running, tossed away a firearm. Police eventually caught Tucker and found the firearm, marijuana, and several of the stolen items.

After detaining Tucker, the police sought a warrant to search his cell phone. Detective Gary Cottrell prepared and signed an affidavit to serve as the basis for a judge's conclusion probable cause for a search warrant existed. The affidavit described Tucker's cell phone by location and by IMEI number. The affidavit sought "[a] complete forensic examination of the above listed Cellular telephone [including] examination by use of specialized software and techniques accepted by the computer forensic scientific community for a proper seizure and retention of digital evidence." The affidavit further stated that "there is probable and reasonable cause to believe and affiant does believe that said property constitutes ... evidence which tends to show that a crime has been committed or that a particular person has committed a crime." After

[89] Carlisle v. Commonwealth, 601 S.W.3d 168, 176, 179 (Ky. 2020).
[90] Turley v. Commonwealth, 399 S.W.3d 412, 421 (Ky. 2013).

describing the circumstance of Tucker's arrest, including the basis of the affiant's/officer's belief Tucker was involved in a series of burglaries between June 27 and July 7, 2017, the affidavit states:

> It is the affiant's experience that cellular devices and cellular phone records can contain information showing whom the subjects have been in contact with and the locations of the contact, during specific time periods. It is also affiant's experience that data that has been deleted from a cellular device can be recovered during a forensic examination of the item.

A judge issued the warrant on July 10, 2017.

The warrant identifies Tucker's cell phone and then authorizes and describes the scope of the search as follows:

> A complete forensic examination of the above listed Cellular telephone to include: phonebook, call history (including received, dialed and missed calls), incoming, outgoing and drafts of text messages, IMEI/ESN/IMSI number, pictures and images, video, audio recordings, ringtones, phone details, memory card and SIM card, for a full forensic examination by use of specialized software and techniques accepted by the computer forensic scientific community for the proper seizure and retention of digital evidence.

The search revealed a video and photograph of Tucker holding an AR-15 rifle that was modified with non-factory parts. Those distinctive features were identified by a homeowner whose rifle was stolen during a burglary reported on May 25, 2017. The search also revealed a text message, delivered on May 25, 2017, referring to an AR-15 rifle. Based on this, police applied for, and received, another search warrant. This time the warrant was for Tucker's DNA. The goal was to match Tucker's DNA with blood evidence left during the May 25 burglary. The Kentucky State Police crime lab matched the evidence to Tucker's DNA, resulting in Tucker being charged with first-degree burglary in a new case.

Tucker's counsel filed a motion to suppress evidence in the original case and the new burglary case. The Fayette Circuit Court denied suppression. Tucker entered a conditional guilty plea for first-degree fleeing or evading police, tampering with physical evidence, receiving stolen property under $10,000, carrying a concealed deadly weapon, attempted tampering with a prisoner monitoring device, and first-degree burglary. The culmination of these sentences ran consecutively for a total of eleven (11) years. Tucker appealed.

ISSUE: May law enforcement search a cell phone pursuant to a “general” search warrant?”

HOLDING: No. Individuals possess a reasonable expectation of privacy in the content's of one's cell phone.[91] Accordingly, a search warrant is generally required before an officer can search the data contained within a person's cell phone, and the warrant must meet the particularity requirement of the Fourth Amendment. The Fourth Amendment's requirement that a warrant "particularly describe[ ] the place to be searched, and the persons or things to be seized ... makes general searches ... impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."[92]

Tucker argued that the search warrant obtained to search the contents of his phone was overbroad because the warrant contained no reference to any specific crime for which the police were to search for evidence and contains no date restriction. The Court of Appeals rejected this argument. While finding that the search warrant at issue is arguably overbroad, the Court noted that it does particularly describe the cell phone to be searched, and it essentially allowed officers to search all the data on Tucker's cell phone. However, when qualified by the limitations of the officer's affidavit, the necessary particularization restricts the search to evidence contained in the cell phone's "phonebook, call history (including received, dialed and missed calls), incoming, outgoing and drafts of text messages, IMEI/ESN/IMSI number, pictures and images, video, audio recordings, ringtones, phone details, memory card and SIM card," "which tends to show that a crime has been committed or that a particular person has committed a crime."[93] The affidavit further limits the scope of the warrant to a search for evidence relating to the string of thefts committed between June 27 and July 7, 2017.

Accordingly, the Court rejected Tucker's claim that the search warrant contained no reference to a specific crime. The fact that the investigating officers searched data not within the specified time range in which the warrant was based does not in and of itself render it a "general" search. As long as the officers are searching files "which could reasonably have contained evidence related to [the crime on which the search warrant was based]," law enforcement does not exceed the bounds of the warrant.[94] Thus, it was reasonable for the officers to search files that pre-dated the crimes which gave rise to the search warrant because officers could discover evidence of preparation or identification of Tucker's associates in data pre-dating the actual crimes. Moreover, Tucker had only owned the phone in question for approximately one month before the crime spree, which necessarily limited the search to a reasonable timeframe.

The search warrant was not overbroad and, therefore, did not lead to a "general" search of Tucker's cell phone.

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[91] Riley v. California, 573 U.S. 373, 385-86, 134 S.Ct. 2473, 2484-85, 189 L. Ed. 2d 430 (2014).
[92] Berger v. New York, 388 U.S. 41, 58, 87 S. Ct. 1873, 1883, 18 L. Ed. 2d 1040 (1967) (citations omitted).
[93] See Rawls v. Commonwealth, 434 S.W.3d 48, 60 (Ky. 2014) (officer affidavit may be incorporated into a search warrant to meet specificity requirements).
[94] Applegate v. Commonwealth, 577 S.W.3d 83 (Ky. App. 2018).

The Court of Appeals affirmed the Fayette Circuit Court.

SUSPECT IDENTIFICATION

Mulazim v. Commonwealth, 600 S.W.3d 183 (Ky. 2020)

On June 15, 2014, Mulazim and Canada robbed Hansford, Smith and Rutherford at gunpoint in their hotel room. During the robbery, Hansford's .45 caliber Springfield XDS was taken. The victims provided descriptions of the suspects that included clothing type and color, hairstyle, and descriptions of the guns they used. The police later met with the victims to obtain spent casings from the stolen handgun and to present photo lineups. Hansford identified Mulazim from a photo lineup, while Smith identified Canada from the photo lineup. Hansford later identified Mulazim as saying "come on nephew" during the robbery.

Five days later, Megan Price was celebrating her birthday with her husband, Jonathan Price. The couple and a group of their friends met at Austin City Saloon in Lexington. Megan and Jonathan went outside a little after midnight to wait for their ride and two men approached them. Megan described one of the men as having dreadlocks and the other man as being shorter with short hair and a dark shirt. One of the men held a gun to Jonathan's head and told him to hand over his money, while the other man tugged at Megan's purse as she tried to hand it over. Megan heard a gunshot and fell, realizing she was shot in the leg. As Megan handed the man with dreadlocks her purse, Jonathan punched the other robber and told Megan to run. Jonathan was also shot, and the man with dreadlocks took his wallet as he fell to the ground. Megan required surgery for her gunshot wound and survived, but Jonathan died from his injuries. A surveillance camera from an adjacent business captured the incident, although the quality of the video played at trial was poor. Megan provided a description of the robbers to the police.

Lexington Police Detective Tim Upchurch was assigned to investigate the Quality Inn robbery. Detective Upchurch entered the serial number of Hansford's stolen Springfield .45 XDS handgun into a national database for stolen weapons. The Bureau of Alcohol, Tobacco and Firearms later recovered Hansford's stolen handgun during a controlled street transaction with a man named Anthony Frye approximately two and a half months after Jonathan Price's murder. Detective Upchurch learned that police believed the same kind of gun stolen at the Quality Inn may have been used in the Austin City Saloon shooting based on the shell casings from the murder scene. Those casings were later compared with casings fired from the recovered handgun. Based on information received, Mulazim and Canada were developed as suspects for the crimes at both the Quality Inn and the Austin City Saloon.

Mulazim and Canada were both charged with the aggravated murder of Jonathan Price, the second-degree assault of Megan Price, and five counts of first-degree robbery, three at the Quality Inn and two at the Austin City Saloon. Mulazim was also charged with tampering with physical evidence.

Prior to trial, Mulazim and Canada filed separate but similar motions to suppress the pre-trial identifications Hansford and Smith made to police, arguing that the photo identification procedures were unduly suggestive and unreliable. Canada argued that the trial court erred by failing to suppress the identification because the photo lineup used an intentionally altered photograph. Specifically, Canada has a small tattoo on his face under his left eye, but the photo of Canada used in the lineup does not show the tattoo.

Officer Dunn testified at the suppression hearing as to how she assembled the photo lineup. Officer Dunn explained that she searched the Fayette County Detention Center website for photos of similar age subjects who had hair, eye color and skin tone comparable to Canada. Officer Dunn testified that Lexington Police guidelines at that time suggested that if a suspect had visible scars or tattoos present then that area of the suspect's face should be obscured in the photo and all subjects in the photo lineup should have the same parts of their faces covered as well. Officer Dunn testified that because another officer gave her the photo of Canada she was unaware at the time she used it that it had been altered.

The trial court denied the motion to suppress, stating the ruling might have been different if the three Quality Inn witnesses identified Canada's photo with absolute certainty. However, Hansford and Rutherford did not identify Canada, and Smith actually selected two photos out of the six photos in the lineup — one of Canada and one of a man incarcerated at the time of the crimes. He wrote "Number 2 & 5 look most like the man with the dreads that robbed me at gunpoint. If I saw them in person I could make a distinction from there and saw (sic) how tall they were." The trial court found that the photo lineup was not unduly suggestive and admitted Smith's pre-trial identification.

At trial, Smith testified that he identified two individuals in the photo lineup that looked like the man with dreadlocks that robbed him at gunpoint and further stated that he had told the police he would be better able to distinguish the men if he could see how tall they were. At that point, the Commonwealth directed Smith's attention to Canada, sitting in the courtroom, and Smith confirmed that he was the one who robbed him. Canada fully cross-examined Smith about his in-court identification and his failure to identify Canada in the photo lineup prior to trial. Smith admitted that he did not say anything to the police about either of the robbers having a facial tattoo. Canada also introduced an expert who testified about the difficulty of cross-racial eyewitness identifications, and who cast doubt on the reliability of in-court identifications.

Canada was acquitted of all charges related to the events at Austin City Saloon, but the jury found him guilty of three counts of first-degree robbery at the Quality Inn and of being a first-degree PFO. Canada received a sentence of fifty years on each count to run concurrently. The jury convicted Mulazim of the three robbery charges related to the Quality Inn incident, tampering with physical evidence, and of being a first-degree PFO. He received a sixty-year sentence. The jury could not reach a decision about Mulazim's guilt on any of the charges related to the Austin City Saloon incident. Both Canada and Mulazim appealed.

ISSUE: Is the inclusion of an intentionally altered photograph of a defendant, specifically the removal of the defendant's facial tattoo, in a photo lineup unduly or impermissibly suggestive?

HOLDING: No. This cases presented an issue of first impression in Kentucky as the sole issue here is the alteration of Canada's photograph to remove his facial tattoo.

Determining whether identification testimony violates a defendant's due process rights requires a two-step process:

> First, the court determines if the identification procedures were impermissibly suggestive. If they were not, then the admission of evidence based thereon does not violate the Due Process Clause, and the inquiry is at an end. If the procedures were unduly suggestive, then the court moves to the second step of the test and determines whether, in light of the totality of the circumstances, the suggestive procedures created a very substantial likelihood of irreparable misidentification.[95]

Under the specific circumstances in this case, the Kentucky Supreme Court found that the identification procedures were not unduly suggestive because Smith was unable to definitively identify Canada's photo as that of the man who robbed him. Smith merely reduced the field of photos from six to two. "The key to the first step is determining whether Appellant stood out of the lineup so much that the procedure was unduly suggestive."[96] Canada's photo does not stand out of the photo lineup. The fact that the other two victims, Hansford and Rutherford, were not able to identify Canada in the photo lineup, further establishes that it was not unduly suggestive.

Ultimately, a determination as to whether a photo lineup is unduly suggestive will be determined on a case by case basis. Here, the lineup would have most likely been challenged as impermissibly suggestive if police left the tattoo on Canada's face because he undoubtedly would have stood out in the lineup. The Kentucky Supreme Court did not address a better alternative as that issue was not before it. Yet, it was noted that participants in lineups inevitably will have differing facial characteristics. It will be difficult, and perhaps impossible, for law enforcement officers to obtain photographs of virtually identical individuals, especially considering the various forms of distinguishing marks, features, and tattoos a person may have.

Digital alteration of photos used in eyewitness identification lineups is a relatively new practice and there is little guidance as to what constitutes a permissible alteration. While facial tattoos are uncommon, many individuals may have other identifying marks on their faces, such as scars, birthmarks, or piercings. These types of features can make it increasingly difficult for law enforcement officers to find similar filler photos when preparing photo lineups. However, a

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[95] Duncan v. Commonwealth, 332 S.W.3d 81, 95 (Ky. 2010).
[96] Oakes v. Commonwealth, 320 S.W.3d 50, 57 (Ky. 2010).

defendant need not be surrounded by individuals nearly identical to him to render a pre-trial lineup and identification admissible. The ultimate concern is whether the manipulation of the defendant's photo resulted in an impermissibly suggestive identification procedure. Here, the Kentucky Supreme Court held that this procedure was not impermissibly or unduly suggestive.

The convictions were affirmed.

<u>Torrence v. Commonwealth</u>, 603 S.W.3d 214 (Ky. 2020)

FACTS: On May 17, 2016, Torrence shot Thomas on 26th Street in Louisville. The shooting left Thomas paralyzed below the waist. Thomas knew the individual who shot him as "Man-Man."

While at the hospital on May 26, Torrence was visited by his sister and girlfriend, who showed Thomas a single photo of Torrence that was downloaded from a social media post. Shortly thereafter on the same day, Thomas reviewed a police-generated six-photo array and picked Torrence as the shooter. The photo array was a standard police array containing six facial photographs including head and neck, all made in front of a grey background. Six African-American men are shown wearing black T-shirts and are approximately the same age. Three of the men have facial hair ranging from a goatee to a slight beard, and all six have mustaches. Skin color in the photos ranges from three with darker tones to three with lighter tones. No photograph has any special or unique features or attributes that draw attention to it. After identifying Torrence, Detective Snider (Louisville PD) collected the single photograph of Torrence from Thomas's family and placed it in the police file. The evidence does not indicate that police requested Thomas's family to show him the single photograph.

Torrence raised no issue with the photo array photos, but objected to the identification made from the array by Thomas after he was shown a single photo of Torrence by his sister or girlfriend as they visited him in the hospital. A black and white copy of the single photo collected by Detective Snider from Thomas's family was admitted into evidence and shows Torrence sitting in a vehicle wearing a hat and track suit, his face clearly visible. The circuit court rejected the challenge to the identification from the photo array.

ISSUE: Is a suspect identification that occurs from a police photo array that occurs following a witnesses being presented by family with a single photo of the subject a procedure so suggestive as to render any identifications unreliable?

HOLDING: No. State action is required for the trial court to exclude an identification procedure. A due process check on the admission of eyewitness identification is applicable when the police have arranged suggestive circumstances leading to an identification by an eyewitness. The United States Supreme Court has not extended pretrial screening for reliability of

identification to situations not arranged by law enforcement.[97] In this case, the single photograph was presented to Thomas by his family, not a government agent. There is no evidence that the family acted at police behest.

The convictions were affirmed.

USE OF FORCE – SELF-DEFENSE

Curry v. Commonwealth, ---- S.W.3d ----, (Ky. 2020)

FACTS: Curry, a convicted felon who was in the custody of the Louisville Metro Department of Corrections' home incarceration program, shot Harris to death at the apartment that they shared. Curry claimed that Harris was getting aggressive with him and "started talking crazy to him." Testimony from other witnesses revealed that Curry requested a peace officer to return him to jail rather than remain on home incarceration, and when that failed had a gun brought to him from his mother's house, along with 9 bullets. Curry was convicted of murder, being a felon in possession of a firearm, and being a persistent felony offender in the first degree. Curry appealed, arguing that the trial court failed to instruct the jury that he was not required to retreat prior to using force against Harris.

ISSUE: Is a criminal defendant entitled to an instruction on no duty to retreat in a murder prosecution when the defendant was engaged in an unlawful activity at the time of the shooting, even though the defendant was lawfully at the location of the shooting and the evidence otherwise supported the instruction?

HOLDING: No. KRS 503.055(3) requires both that a defendant is "not engaged in unlawful activity" and "is attacked in any other place where he or she has a right to be" before the provisions of that statute apply. While Curry was lawfully in Harris' apartment, the trial court declined to give Curry a no duty to retreat instruction because it found that he was a convicted felon in possession of a firearm, which is unlawful under Kentucky law.

The Kentucky Supreme Court affirmed the convictions.

SIXTH CIRCUIT COURT OF APPEALS

ADMINISTRATIVE LAW

A. AGE DISCRIMINATION IN EMPLOYMENT ACT

Miles v. South Central Human Resource Agency, 946 F.3d 883 (6th Cir. 2020)

[97] Perry v. New Hampshire, 565 U.S. 228, 237, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012).

FACTS: South Central Human Resource Agency (SCHRA), a public nonprofit, terminated Cynthia Miles's at-will employment after an investigation uncovered several financial deficiencies and abuse business practices between a contractor and SCHRA. Miles directly supervised some of these programs targeted by the investigation. Miles was not given a reason for her termination other than she was being terminated "at-will."

In response to the termination of her employment, Miles filed an age discrimination complaint with the Equal Employment Opportunity Commission ("EEOC"). In response to the complaint, SCHRA stated that Miles was terminated because of her implication in misconduct by the Comptroller's report and her toxic relationship with her subordinates. The EEOC granted Miles a right to sue under the ADEA and she filed her complaint in district court. During discovery, SCHRA reaffirmed that it terminated Miles because of her implication in misconduct by the Comptroller's report and her toxic relationship with her subordinates.

SCHRA filed a motion for summary judgment, which the trial court granted. Miles appealed.

ISSUE: For an employee to assert a valid claim under the Age Discrimination in Employment Act (ADEA), is the employee required to prove by a preponderance of the evidence (direct or circumstantial) that age was the "but-for" cause of the challenged employment action?

HOLDING: Yes. An "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason."[98] The ADEA only prevents employers from terminating an employee "because of such individual's age."[99] In interpreting that language the Sixth Circuit has stated: "it is not sufficient for the plaintiff to show that age was a motivating factor in the adverse action; rather, the ADEA's 'because of' language requires that a plaintiff 'prove by a preponderance of the evidence (which may be direct or circumstantial) that age was the "but-for" cause of the challenged employer decision.'"[100] Miles does not try to satisfy her burden with direct evidence. Instead, she relies on circumstantial, or indirect, evidence. In evaluating indirect evidence claims under the ADEA, this court uses the well-established McDonnell Douglas[101] burden-shifting framework.

McDonnell Douglas first requires the plaintiff to establish a prima facie case of discrimination. If she can, the burden shifts to the defendant, who must produce legitimate, nondiscriminatory reasons for the adverse employment action. And if the employer can produce those reasons, the burden shifts back to the plaintiff to establish that the proffered reasons are simply pretext for age discrimination. If the plaintiff satisfies this third step, the factfinder may reasonably infer discrimination. SCHRA conceded that Miles can establish a prima facie case of age discrimination

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[98] Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984).
[99] 29 U.S.C. § 623(a)(1).
[100] Scheick v. Tecumseh Pub. Sch., 766 F.3d 523, 529 (6th Cir. 2014) (quoting Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177–78, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009)).
[101] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

as her replacement was twenty years younger, and Miles does not contest the legitimacy or nondiscriminatory nature of the reasons SCHRA offers as motivation for her firing. So this appeal presented one question: is there a genuine dispute about whether SCHRA's proffered rationales for Miles's termination were pretextual?

To satisfy her burden and survive summary judgment, Miles must "produce sufficient evidence from which a jury could reasonably reject [SCHRA's] explanation of why it fired her."[102] This "is a commonsense inquiry: did the employer fire the employee for the stated reason or not?"[103] And ultimately, this burden merges with Miles's overall burden of proving discrimination. [104] Plaintiffs typically show pretext in the following manner: "(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the employer's action, or (3) that the proffered reasons were insufficient to motivate the employer's action."[105] Regardless of the manner chosen, a plaintiff must articulate some cognizable explanation of how the evidence she has put forth establishes pretext and that the true motive was age discrimination. Miles simply failed to do this or offer anything that rebutted SCHRA's justification for ending the employment relationship.

The Sixth Circuit affirmed summary judgment for SCHRA.

Willard v. Huntington Ford, Inc., 952 F.3d 795 (6th Cir. 2020)

FACTS: Willard was a car salesperson for Huntington Ford from 2005-2016. During this time, he was one of Huntington Ford's top producing salespersons. Willard's success won him one of the most visible, and hence desirable, desks in the dealership's showroom, near the door where customers entered, and Willard took full advantage of this prime location. Other employees considered Willard to be "abrasive," and "a bully." Willard's supervisors routinely asked him when he was going to retire, and used ageist insults against Willard, including "grandpa," "dinosaur," and "over the hill." One of the sales managers also overtly favored younger employees.

Willard only received formal discipline twice, but a physical altercation between Willard and another employee led to Willard being suspended for a week for aggressive behavior. Willard refused to sign the Employee Warning Notice presented to him because it did not state the length of the suspension or the return date. Willard did not report for work for a week. Upon Willard's return to work, his employment was terminated because of his failure to return to work or call in. Willard's sales managers also advised him that the termination was also partly because of the physical altercation. Willard was 63 years of age at the time of these events. Willard was replaced with two other employees who were 56 and 52 years of age.

[102] Chen v. Dow Chemical Co., 580 F.3d 394, 400 (6th Cir. 2009) (citation omitted).
[103] Id. at 400 n.4.
[104] Provenzano v. LCI Holdings, Inc., 663 F.3d 806, 812 (6th Cir. 2011).
[105] Chen, 580 F.3d at 400.

Willard sued under the Age Discrimination in Employment Act of 1967 ("ADEA"), alleging that Huntington Ford seized upon the physical altercation and misled him about the length of his suspension so that it could terminate him because of his age. The district court granted summary judgment for Huntington Ford. This appeal followed.

ISSUE: For an employee to assert a valid claim under the Age Discrimination in Employment Act (ADEA), is the employee required to prove by a preponderance of the evidence (direct or circumstantial) that age was the "but-for" cause of the challenged employment action?

HOLDING: Yes. Pursuant to the ADEA, employers may not terminate an individual "because of such individual's age."[106] A plaintiff may present either direct or indirect evidence to prove an ADEA violation.[107] No matter the type of evidence presented, the plaintiff retains the burden of persuasion to demonstrate "by a preponderance of the evidence ... that age was the 'but-for' cause of the challenged employer decision."[108]

ADEA claims relying on indirect evidence of age discrimination are analyzed under the McDonnell Douglas Corp. v. Green,[109] burden-shifting framework. A plaintiff establishes his prima facie case under the ADEA by showing that (1) he is a member of a protected group, (2) he was qualified for the position in question, (3) his employer took an adverse employment action against him, and (4) there are "circumstances that support an inference of discrimination.[110] Willard was a member of a protected group because he was over the age of forty, he was qualified for the position of new-car salesperson; and his termination was an adverse employment action, and so only the fourth factor is disputed. The Sixth Circuit concluded that Willard presented evidence to establish the fourth factor of his prima facie case because he points to evidence that Huntington Ford replaced him with a younger new-car salesperson after he was discharged and that younger salespersons were treated better.

Next, the burden shifts to Huntington Ford to offer legitimate, non-discriminatory reasons for Willard's termination. Huntington Ford offers three. First, Willard did not show up for work on Monday, December 26, 2016, and Tuesday, December 27, 2016, or call to explain his absences. Second, the physical altercation with another employee was sufficient alone to justify his termination. And third, Willard had previous written and verbal disciplinary warnings. Huntington Ford has satisfied its burden.

Finally, Willard must demonstrate that the Huntington Ford's reasons for terminating him are merely pretextual. "An employee may show that an employer's proffered reason for terminating him was pretext by demonstrating 'that the proffered reason (1) has no basis in fact, (2) did not

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[106] 29 U.S.C. § 623(a)(1).
[107] Geiger v. Tower Auto., 579 F.3d 614, 620 (6th Cir. 2009)
[108] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177–78, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009)
[109] 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).
[110] Blizard v. Marion Technical College, 698 F.3d 275 (6th Cir. 2012).

actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct.'"[111] The Sixth Circuit held that a jury could reasonably reject Huntington Ford's proffered reasons for terminating him and could determine that his age was the but-for cause of his termination, based upon the facts that he was provided a warning notice with no suspension length or return date, that the physical altercation events may not have been entirely his fault, the comments made by his superiors relating to his age, and that his disciplinary history was distant from his termination.

The Sixth Circuit reversed and remanded the matter for additional proceedings.

B. AMERICANS WITH DISABILITIES ACT

<u>Fisher v. Nissan North America, Inc.</u>, 951 F.3d 409 (6th Cir. 2020)

FACTS: Fisher began working on Defendant Nissan North America's factory floor in 2003. Approximately 12 years later, Fisher went on extended leave for severe kidney disease and, ultimately, a kidney transplant. When he returned to work, he was still recovering from the transplant, and his attendance suffered. Fisher proposed several different accommodations, some of which were not provided. When he received a final written warning about his attendance, he left work and did not return. Fisher filed suit, centrally claiming that Nissan failed to accommodate his disability and to engage in the interactive process, as required by the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. The district court granted summary judgment to Nissan.

ISSUES:

1. When a claimant alleges that an employer failed to offer a reasonable accommodation under the ADA, must the claimant provide direct evidence of discrimination under the ADA?

2. Does an employee's absences render that employee unqualified for the position if the absenteeism is caused by an employer's underlying failure to accommodate a disability?

3. Does the ADA require employers to make reasonable accommodations to an employee to a qualified individual with a disability?

4. Under the ADA, must the employer engage in an interactive process with the employee to determine how best of accommodate the employee's disability?

HOLDING: 1. Yes. The ADA, codified in 42 U.S.C. § 12101(a)(8), was enacted in response to congressional findings highlighting "the continuing existence of unfair and unnecessary discrimination and prejudice [that] denies people with disabilities the opportunity to compete on an equal basis." When the Act was amended in 2008, "Congress reasserted its goal of 'provid[ing]

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[111] Pierson v. Quad/Graphics Printing Corp., 749 F.3d 530 (6th Cir. 2014).

clear, strong, consistent, enforceable standards' to implement a 'comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' "[112] To that end, the ADA prohibits "discriminat[ion] against a qualified individual on the basis of disability."[113] The Act's broad definition of discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[114]

Under the direct-evidence framework, an employee bears the burden of establishing (1) that he is disabled, and (2) that he is " 'otherwise qualified' for the position despite his or her disability: (a) without accommodation from the employer; (b) with an alleged 'essential' job requirement eliminated; or (c) with a proposed reasonable accommodation."[115] Employers bear the burden of "proving that a challenged job criterion is essential, and therefore a business necessity, or that a proposed accommodation will impose an undue hardship."[116] Notably, although "[a] defendant may use a legitimate, nondiscriminatory rationale as a shield against indirect or circumstantial evidence of discrimination," such a "neutral policy is of no moment" under the direct test.[117] In other words, an employer "may not illegitimately deny an employee a reasonable accommodation" pursuant to "a general policy and use that same policy as a" so-called "neutral basis for firing him."[118]

2. No. An employee's absences does not render that employee unqualified for the position if the absenteeism is caused by an employer's underlying failure to accommodate a disability. In this situation, Fisher's absences were caused by his kidney issues. Therefore, the analysis shifts to whether a reasonable accommodation would avoid the absences.

3. Yes. The ADA requires employers to "mak[e] reasonable accommodations."[119] The plaintiff bears the initial burden of showing "that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases."[120] The defendant then must show either "special (typically case-specific) circumstances that demonstrate undue hardship in the particular

[112] Hostettler v. Coll. of Wooster, 895 F.3d 844, 849 (6th Cir. 2018) (alteration in original) (quoting 42 U.S.C. § 12101(b)(1), (2)).
[113] 42 U.S.C. § 12112(a).
[114] Id. § 12112(b)(5)(A); see also Kleiber v. Honda of Am. Mfg., 485 F.3d 862, 868 (6th Cir. 2007).
[115] Kleiber, 485 F.3d at 869.
[116] Id.
[117] EEOC v. Dolgencorp, LLC, 899 F.3d 428, 435 (6th Cir. 2018).
[118] Id.
[119] 42 U.S.C. § 12112(b)(5)(A); see also Kleiber, 485 F.3d at 868.
[120] U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002).

circumstances,"[121] or that the proposed accommodation eliminates an essential job requirement.[122] The reasonableness of a proposed accommodation is a question of fact.[123]

In this case, Fisher requested to be transferred to more suitable positions, but Nissan provided no assistance or explanation for denial of his requests. 42 U.S.C. § 12111(9)(B) defines reasonable accommodation to include "reassignment to a vacant position." To show disability discrimination in the reassignment context, a plaintiff must show either that "he requested, and was denied, reassignment to a position for which he was otherwise qualified" or that "he requested and was denied some specific assistance in identifying jobs for which he could qualify."[124] If an employee requests assistance in identifying vacant positions—even a request as generic as "I want to keep working for you—do you have any suggestions?"—then "the employer has a duty under the ADA to ascertain whether he has some job that the employee might be able to fill."[125] The employee is not required to use magic words such as "accommodation" and "disability"; rather, we ask whether "a factfinder could infer that [the interaction] constituted a request for an accommodation."[126] Then, "to overcome summary judgment, the plaintiff generally must identify the specific job he seeks and demonstrate that he is qualified for that position."[127]

When an employee requests an reasonable accommodation, the employer must engage in three steps: (1) "identify the full range of alternative positions for which the individual satisfies the employer's legitimate, nondiscriminatory prerequisites"; (2) "determine whether the employee's own knowledge, skills, and abilities would enable her to perform the essential functions of any of those alternative positions, with or without reasonable accommodations"; and (3) "consider transferring the employee to any of these other jobs, including those that would represent a demotion."[128] If a transfer is requested, the position to which the transfer is requested must be vacant. Upon completing the three-step analysis, the employer then is afforded an opportunity to show that Fisher's transfer request would create an undue hardship or remove an essential function of the job.[129]

4. Yes. Once an employee requests an accommodation, the employer has a duty to engage in an interactive process."[130] From that point, "both parties have a duty to participate in good faith."[131] Once the employee "establishes a prima facie showing that he proposed a reasonable accommodation,"[132] "the employer has the burden of showing how the accommodation would

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[121] Id. at 402, 122 S.Ct. 1516,
[122] Kleiber, 485 F.3d at 869.
[123] Cassidy v. Detroit Edison Co., 138 F.3d 629, 634 (6th Cir. 1998).
[124] Burns v. Coca-Cola Enterprises Inc., 222 F.3d 247, 258 (6th Cir. 2000).
[125] Id., at 257.
[126] Smith v. Henderson, 376 F.3d 529, 535 (6th Cir. 2004).
[127] Kleiber, 485 F.3d at 870.
[128] Burns, 222 F.3d at 257
[129] Klieber, 485 F.3d at 869.
[130] Hostettler, 895 F.3d at 857.
[131] Kleiber, 485 F.3d at 871.
[132] Rorrer v. City of Stow, 743 F.3d 1025, 1041 (6th Cir. 2014).

cause an undue hardship."[133] If the interactive process was triggered but not successfully resolved, "courts should attempt to isolate the cause of the breakdown and then assign responsibility."[134] For example, though an employer is not required to propose counter accommodations, such a proposal may be "evidence of good faith."[135] On the other hand, an employer who "determine[s] what accommodation it [is] willing to offer before ever speaking with" the employee does not participate in good faith.[136]

In this situation, Nissan did take steps to facilitate Fisher's transition upon his return to work after surgery by transferring him to a vacant position in the Closures department. When this position proved more strenuous than Fisher's previous position, Nissan obliged with an extension of leave. This demonstrated Nissan's participation in the interactive process. When Fisher began missing work and asked for another accommodation, Nissan did not engage in the process with Fisher.

The Sixth Circuit found that summary judgment was prematurely granted for Nissan and remanded the matter to the district court for additional proceedings.

Tchankpa v. Ascena Retail Group, Inc., 951 F.3d 805 (6th Cir. 2020)

FACTS: Kassi Tchankpa suffered a serious shoulder injury while employed by Ascena Retail Group, Inc. (Ascena). The injury occurred in December 2012 while carrying transporting laptops. Tchankpa requested a work-from-home accommodation wherein he could telecommute three days per week. Ascena requested medical documentation linking his injured shoulder and his work-from-home request. Tchankpa did not provide this documentation until October 2013. The doctor's note stated that Tchankpa could perform his job so long as he could take intermittent breaks and not lift more than ten pounds. Tchankpa ultimately engaged in heated conversations with his superiors and ultimately resigned his employment. The resignation letter complained that Ascena failed to provide Tchankpa ample professional training or appreciate his work. Even after Tchankpa gave his two-weeks' notice, Ascena followed up on his potential leave of absence. All in all, Tchankpa left his job voluntarily and then sued Ascena in September 2016 alleging disability discrimination under the Americans with Disabilities Act (ADA). The district court granted Ascena's motion for summary judgment and dismissed the matter. Tchankpa appealed.

ISSUE: Under the ADA, may an employer request documentation supporting an employee's requested accommodation?

HOLDING: Yes. Employers may require documentation supporting an employee's requested accommodation, and the employer has a right to assess its employee's requested

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[133] Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 202–03 (6th Cir. 2010).
[134] Kleiber, 485 F.3d at 871
[135] Jakubowski, 627 F.3d at 203.
[136] Mosby-Meachem v. Memphis Light, Gas & Water Div, 883 F.3d 595, 606 (6th Cir. 2018).

accommodation.[137] Ascena was within their right to request documentation tying the work-from-home request to the injured shoulder.

When requesting accommodations, the employee bears the burden of proving that the requested accommodation is reasonable and provide medical documentation supporting the accommodation's necessity. In this case, Tchankpa did neither. If anything, his own doctor's report confirmed that Tchankpa could do his job without working from home. Tchankpa claimed that he wanted to work from home because his injured shoulder made driving painful. But he never explained why working from home only three days per week would help him perform his job while injured.

Tchankpa also argues that he was constructively discharged in retaliation for requesting accommodations. A constructive discharge occurs when "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign."[138] To succeed, an employee must also show that the employer intended to oust him.[139] In other words, the employer must have created an objectively intolerable work environment to deliberately force a disabled employee to resign.[140] Otherwise the employer did not commit constructive discharge.

In this case, no constructive discharge occurred. Demotion, reduction in salary, badgering, harassment, humiliation, and sexual assault suggest an objectively intolerable workplace.[141] Lifting laptops, denying his work-from-home request, and receiving negative feedback does not suggest an objective intolerable workplace.

The Sixth Circuit affirmed the grant of summary judgment to Ascena.

C. RELIGIOUS DISCRIMINATION

Small v. Memphis Light, Gas and Water, 952 F.3d 821 (6th Cir. 2020)

FACTS: For over a decade, Small worked as an electrician at Memphis Light. But in early 2013, he suffered an on-the-job injury that required him to change positions. At first, Small expressed interest in a position as a revenue inspector. Instead, Memphis Light offered him a position as a service dispatcher. Without another offer—and at the risk of otherwise being terminated—Small accepted the dispatcher position.

Around the same time, Small raised concerns with Memphis Light that his new position would conflict with the practice of his religion (Jehovah's Witness). Small explained that he had services on Wednesday evenings and Sundays and that he had community work on Saturdays. He asked

[137] Kennedy v. Superior Printing Co., 215 F.3d 650, 656 (6th Cir. 2000)
[138] Talley v. Family Dollar Stores of Ohio, Inc., 542 F.3d 1099, 1107 (6th Cir. 2008) (quoting Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982)).
[139] Id.
[140] See Agnew v. BASF Corp., 286 F.3d 307, 309–10 (6th Cir. 2002).
[141] See, e.g., Agnew, 286 F.3d at 310; Hurtt v. Int'l Servs., Inc., 627 F. App'x 414, 420 (6th Cir. 2015).

the company to reassign him to a different position or to different shifts. But Memphis Light denied the request, explaining that the accommodations would impose an undue hardship on the company and that its union required shifts be assigned based on seniority. Instead, the company suggested that Small swap shifts with his co-workers or use paid time off. Small renewed the same request without success. Yet later, Memphis Light reconsidered its decision and offered Small the option to "blanket swap" shifts—meaning that he could swap his shifts with another employee for an entire quarter.

Since then Small has remained in the dispatcher position. The parties dispute whether his schedule still conflicts with his religious commitments.

In 2017, Small sued Memphis Light for disability and religious discrimination as well as retaliation. On the eve of trial, the district court granted summary judgment to the company.

Almost immediately, Small filed a motion with the district court to enforce an alleged settlement agreement between the parties. According to Small, the parties had agreed on a settlement right before the summary judgment ruling. But the district court rejected the motion, finding that the parties had never agreed on all the material terms. This appeal followed.

ISSUE: In the context of discrimination on the basis of religion, must an employer offer accommodations that impose an "undue hardship" on the business?

HOLDING: No. Employers not have to offer any accommodation that would have imposes an "undue hardship" on its business—meaning (apparently) anything more than a "de minimis cost."[142] The Sixth Circuit found that Small's proposed accommodation for his religious practices would have been more than a "de minimis cost" for Memphis Light.

The Sixth Circuit affirmed the district court's decision.

ARMED CAREER CRIMINAL ACT

<u>Porter v. United States</u>, 959 F.3d 800 (6th Cir. 2020)

FACTS: Xavier Porter was convicted of numerous robberies during his lifetime. He robbed nine different businesses in Louisville, Kentucky using a pistol-grip shotgun, and was ultimately convicted in federal court for these crimes. He also had three previous convictions for armed robbery in Georgia. The trial court viewed the Georgia armed robbery convictions are violent felonies and enhanced his sentences under the Armed Career Criminal Act.

ISSUE: Is armed robbery a violent offense for purposes of the Armed Career Criminal Act?

HOLDING: Yes. Under the Armed Career Criminal Act, (ACCA), to qualify as a "violent felony," the underlying felony at issue must have "as an element the use, attempted use, or threatened

[142] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977); Tepper v. Potter, 505 F.3d 508, 514 (6th Cir. 2007).

use of physical force against the person of another."[143] To determine whether a felony qualifies, courts look to the statutory elements and judicial interpretations of those elements—not the facts underlying the conviction.[144]

Both history and common sense suggest that robbery with a deadly weapon involves an element of physical force.[145] In United States v. Harris, the Sixth Circuit held that a conviction for armed robbery in Kentucky constitutes a violent felony for purposes of the ACCA.[146] The Sixth Circuit held that Georgia's armed robbery statute also constitutes a violent felony.

The Sixth Circuit affirmed the enhanced sentence.

United States v. Brown, 957 F.3d 679 (6th Cir. 2020) – Certiorari to SCOTUS filed 12/11/2020

FACTS: The Armed Career Criminal Act, 18 U.S.C. § 924(a)(2), (e), increases the sentence for felons who possess firearms from a 10-year maximum to a 15-year minimum if the defendant has three prior convictions that qualify as "violent felonies." In 2007, a jury convicted Brown of being a felon in possession of a firearm in violation of federal law. Brown also had three aggravated-burglary convictions from Tennessee. At the time of his conviction, the district court found the burglary convictions to be violent felonies and sentenced Brown to 180 months in prison. The Sixth Circuit affirmed. On a collateral attack of the sentence, the Sixth Circuit ultimately determined that the Tennessee burglaries were not violent felonies under the Armed Career Criminal Act and ordered Brown released from prison. The United States Supreme Court reversed and remanded for further proceedings.

ISSUE: Is burglary a violent felony for purposes of the Armed Career Criminal Act?

HOLDING: Yes. In Taylor v. United States, the United States Supreme Court defined the elements of generic 'burglary' as 'an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.'"[147] If a state burglary statute sweeps in more conduct than this generic definition of the crime, convictions under the state statute will not qualify as convictions for "burglary" under the federal Act.[148]

On remand, the Sixth Circuit held that Tennessee's burglary statute qualified as a violent felony under the Armed Career Criminal Act.

The Sixth Circuit remanded the matter to the district court with instructions to reinstate Brown's original sentence.

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[143] 18 U.S.C. § 924(e)(2)(B)(i).
[144] See Mathis v. United States, ––– U.S. ––––, 136 S. Ct. 2243, 2248, 195 L.Ed.2d 604 (2016); United States v. Harris, 853 F.3d 318, 320 (6th Cir. 2017).
[145] Cf. Stokeling v. United States, ––– U.S. ––––, 139 S. Ct. 544, 550–52, 202 L.Ed.2d 512 (2019).
[146] 790 F.App'x 770, 774-75 (6th Cir. 2019).
[147] 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).
[148] See Mathis v. United States, ––– U.S. ––––, 136 S. Ct. 2243, 2247–48, 195 L.Ed.2d 604 (2016).

CRIMINAL LAW AND PROCEDURE – ASSAULT

<u>Manners v. United States</u>, 947 F.3d 377 (6th Cir. 2020)

FACTS: In 2011, Manners pleaded guilty to two counts: 1) assault with a dangerous weapon in aid of racketeering in violation of 18 U.S.C. § 1959(a)(3), and 2) use of a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c). The district court sentenced Manners to eighteen months of imprisonment on the first count and 120 months on the second count, to be served consecutively.

In 2016, Manners filed a motion to vacate. The district court denied Manners's motion. The Sixth Circuit affirmed, but the United States Supreme Court granted certiorari and remanded the matter for further consideration.

ISSUE: Is assault with a dangerous weapon in aid of racketeering a crime of violence for purposes of federal sentencing statutes?

HOLDING: Yes. When a felony must be committed with deadly weapon and involves some degree or threat of physical force, it is "crime of violence" under federal criminal statutes. The Sixth Circuit specifically found that Manner's conviction for assault with a dangerous weapon in aid of racketeering constitutes a crime of violence.

The sentence was affirmed.

CRIMINAL LAW AND PROCEDURE – ARSON

<u>United States v. Doggart</u>, 947 F.3d 879 (6th Cir. 2020)

FACTS: Doggart solicited the help of others to burn down a mosque in upstate New York, believing that a small Islamic community in New York was plotting a terrorist attack against New York City. After a plea deal was rejected by the district court, Doggart was convicted after a jury trial of solicitation to damage religious property, solicitation to commit federal arson, and two counts of making a threat in interstate commerce over the telephone. The convictions were reversed by the Sixth Circuit Court of Appeals and remanded to district court after holding that the district court utilized the wrong legal test in determining whether Doggart made a threat because it Doggart made a true threat, his original plea deal may have been erroneously rejected.

On remand, the district court concluded that Doggart made a threat, but rejected the plea deal because the agreement "did not adequately reflect the severity of his conduct." Another appeal followed.

ISSUE: Is a mosque "used in" interstate commerce or in any activity affective interstate commerce, thereby permitting federal arson charges?

HOLDING: No. 18 U.S.C. § 844(i) provides "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned." The Sixth Circuit found that this statute does "not cover the attempted destruction of a local mosque or for that matter any house of worship. In everyday English, one does not think of a mosque that serves a 200-person local community as a building used in commerce, much less interstate commerce."

The Sixth Circuit held that Doggart's actions constituted a state law crime that was best left to the states to prosecute. Therefore, nothing would prevent Doggart from being prosecuted under state law for attempted arson charges. The remaining convictions were upheld.

The Sixth Circuit affirmed in part, reversed in part and remanded for further proceedings.

CRIMINAL LAW AND PROCEDURE – ASSET FORFEITURE

United States v. $39,000 in U.S. Currency, 951 F.3d 740 (6th Cir. 2020).

FACTS: On March 13, 2018, a routine Transportation Security Administration ("TSA") screening indicated the presence of an organic bulk mass in Addonnise Wells' carry-on luggage. Upon examination of the luggage, TSA officials discovered several rubber-banded bundles of mixed-denomination U.S. currency totaling $39,000.00.

On July 30, 2018, the government filed a forfeiture action. Wells filed a verified claim asserting that he is "the sole[ ] and absolute owner of the monies," that he was "in sole and exclusive possession of all these monies when it was unlawfully removed from [his] exclusive possession and control," and that he is being "victimized by the illegal retention of [these] funds." Subsequently, Wells filed an answer to the government's forfeiture complaint, denying the government's allegations on the grounds "that the answer could very well tend to, or actually, violate Claimant's Fifth Amendment rights."

The district court ultimately granted summary judgment to the government. Wells appealed.

ISSUE: In an asset forfeiture proceeding, is the government required to first establish that it lawfully seized the property subject to forfeiture before the defendant is required to provide more than a mere assertion of ownership?

HOLDING: No. Under federal asset forfeiture law, before determining whether the government lawfully seized the defendant property, the property's claimant must establish standing to challenge the lawfulness of seizure.[149] Property claimants "bears the burden of demonstrating an interest in the seized [currency] sufficient to satisfy the court of his standing as a claimant" and, after discovery, "[m]ere physical possession of property does not suffice to

[149] See Supplemental Rule G(8)(a); United States v. $46,340.00 in U.S. Currency, 791 Fed.Appx. 596, 597 (6th Cir. 2020); United States v. $31,000.00 in U.S. Currency, 774 F. App'x 288, 292 n.1 (6th Cir. 2019).

show standing."[150] "[I]nstead, we 'require some explanation or contextual information regarding the claimant's relationship to the seized property.'"[151]

A "universal invocation of the Fifth Amendment during discovery foreclose[s] any way for [a claimant] to sustain this burden."[152] A blanket assertion of the Fifth Amendment privilege does not excuse a claimant's burden of establishing standing at the summary judgment stage, nor can a claimant use this invocation of the privilege as "a sword ... to make one's assertions of ownership impervious to attack."[153] Otherwise, a claimant's invocation of privilege could allow the claimant to proceed with what may be false evidence while depriving the government of any means of detecting the falsity.[154]

The Sixth Circuit held that Wells' invocation of his Fifth Amendment rights defeats his ability to establish standing with respect to the currency. Accordingly, Sixth Circuit affirmed the district court's finding that Wells lacked standing to contest this asset forfeiture.

United States v. Tolliver, 949 F.3d 244 (6th Cir. 2020)

FACTS: Reshon Tolliver was convicted after a jury trial of money laundering conspiracy related to his participation in a nationwide marijuana distribution ring that funneled money and drugs between a supplier in California and a large-scale dealer in Memphis. As a result of his conviction, Tolliver was ordered to forfeit his gambling winnings plus and additional $40,000 what was traced to the money laundering.

ISSUE: With respect to asset forfeiture, must the government show a nexus between the property to be seized and the criminal activity by a preponderance of the evidence?

HOLDING: The government must support forfeiture by a preponderance of the evidence and must show a nexus between the property and the crime. Basically, the government must show that it was more likely than not that the defendant either (1) gained the money from the illegal activity or (2) derived the money from other money or property gained from the illegal activity. In any case, the money must be traceable to the offense.

In this case, Tolliver gambled hundreds of thousands of dollars but put forth no evidence that he had any source of income besides the cuts he got from the money laundering scheme. Indeed, Tolliver filed no tax return for the two years in question. The district court also considered the timing of Tolliver's gambling. He was a long-time gambler, but the amount of money he gambled skyrocketed once he joined the conspiracy. In the five years before his involvement in the

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[150] United States v. $46,340.00 in U.S. Currency, 791 Fed.Appx. at 597.
[151] Id.
[152] Id.
[153] $31,000.00 in U.S. Currency, 774 F. App'x at 292; see also United States v. Certain Real Prop. 566 Hendrickson Blvd., Clawson, Oakland Cty., Mich., 986 F.2d 990, 996 (6th Cir. 1993).
[154] United States v. $99,500.00 U.S. Currency Seized on Mar. 20, 2016, No. 18-4042, 2019 WL 5783471, at *4 (6th Cir. Nov. 6, 2019).

conspiracy, he never gambled with more than $23,000 per year. Yet in 2017, he gambled over thirty times that much at $712,000. The district court did not err in deciding that this made it more likely than not that Tolliver gambled with laundered money.

So too, the district court did not err in adding the $40,000 based on testimony at sentencing. There, the FBI agent said that he spoke with a co-conspirator who said she delivered cash to Tolliver on more than one occasion (plus the bank transfers already accounted for). And wiretap discussions showed that the average amount of cash she delivered was $40,000. The district court found this evidence reliable. But in an abundance of caution, it only added $40,000 to the forfeiture calculation, even though the co-conspirator said she delivered money to Tolliver more than once. Here again, a preponderance of the evidence shows that Tolliver would have received at least $40,000 in cash as part of the money laundering conspiracy.

For these reasons, the Sixth Circuit held that forfeiture calculation was proper and affirmed.

CRIMINAL LAW AND PROCEDURE – EVIDENCE

United States v. Craig, 953 F.3d 898 (6th Cir. 2020)

FACTS: Terrance Craig was involved in a high-speed shootout in the streets of Akron, Ohio and was apprehended wearing a shoulder holster and with gunshot residue on his hands. His DNA was identified on a firearm discovered in the backseat of one of the vehicles. Craig was charged with being a felon in possession of a firearm and took the case to trial. Craig admitted that he possessed a firearm while being a felon but testified that he possessed the gun only long enough to defend himself and his friends during the firefight. On cross-examination, the Government played for the jury a video depicting a masked individual it alleged to be Craig rapping and wielding a firearm that was similar to the gun for which he was charged. Craig denied that he was the masked individual in the video, and the Government did not attempt to introduce the video into evidence. The district court never issued a limiting instruction about whether or how to consider the video, and the Government referenced the video in closing arguments. Craig was convicted of being a felon in possession of a firearm. This appeal followed.

ISSUE: May a criminal conviction be supported by evidence that was published for the jury as an unadmitted exhibit under the guise of impeachment?

HOLDING: No. To authenticate an exhibit, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[155] The proponent must provide sufficient evidence "so that a reasonable juror could find in favor of authenticity or identification."[156] In this case, the Government never attempted to authenticate the video. The Government believed that the video could be used to impeach Craig's testimony under the

[155] Fed. R. Evid. 901(a).

[156] United States v. Jones, 107 F.3d 1147, 1150 n.1 (6th Cir. 1997).

Federal Rules of Evidence. The Sixth Circuit found that playing the video as extrinsic impeachment evidence was not permitted under the Federal Rules of Evidence.

The Sixth Circuit reversed this conviction and remanded for a new trial.

United States v. Dunnican, 961 F.3d 859 (6th Cir. 2020)

FACTS: Keli Dunnican was convicted of being a felon in possession of a firearm, possessing marijuana with the intent to distribute it, and carrying a firearm during and in relation to a drug trafficking crime. Dunnican's conviction arose from a search of his car conducted by agents of the Ohio Adult Parole Authority while he was on parole. The main issue of this appeal was the admissibility of expert-opinion testimony of DEA Special Agent Moses, who spoke regarding the particulars of the illegal marijuana trade and explained specialized drug jargon and transactions.

ISSUE: May a police officer testify as an expert witness if the testimony will aid the jury's understanding of an area, such as drug dealing, not within the experience of the average juror?

HOLDING: Yes. Expert testimony regarding the very specific slang, street language, and jargon used in the illegal drug trafficking trade may be admitted under Federal Rule of Evidence 702.[157] Because such expert testimony is required for both judges and juries to make rational determinations of a defendant's culpability, "[c]ourts have overwhelmingly found police officers' expert testimony admissible where it will aid the jury's understanding of an area, such as drug dealing, not within the experience of the average juror."[158] Moreover, "[l]aw enforcement officers may testify concerning the methods and techniques employed in an area of criminal activity and to establish 'modus operandi' of particular crimes."[159]

In this case, the Sixth Circuit found Moses's testimony properly admitted. Moses offered no opinion on Dunnican's mental state or intent. Rather, Moses, drawing upon his training, experience, and review of the evidence, simply shared his subjective assessment of the facts at hand: that it "appear[ed] to [him]" that the marijuana discovered in Dunnican's car "was packed for resale." At no point did Moses state any opinion of Dunnican's state of mind. Rather, Moses merely offered "general terms" (i.e., the "marijuana was packed for resale") related to the "common practices" of drug dealers "who possess the requisite intent" to distribute marijuana.

The Sixth Circuit affirmed the convictions.

United States v. Hendricks, 950 F.3d 348 (6th Cir. 2020)

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[157] See United States v. Kilpatrick, 798 F.3d 365, 379–81 (6th Cir. 2015).

[158] United States v. Thomas, 74 F.3d 676, 682 (6th Cir. 1996), abrogated on other grounds by United States v. Barron, 940 F.3d 903, 920 (6th Cir. 2019) (emphasis added); see also United States v. Lopez-Medina, 461 F.3d 724, 742 (6th Cir. 2006).

[159] United States v. Pearce, 912 F.2d 159, 163 (6th Cir. 1990).

FACTS: Hendricks was convicted of attempting and conspiring to provide material support to a foreign terrorist organization. Both counts charged Hendricks with conspiring or attempting to provide material support in the form of personnel and services to ISIS. The only evidence introduced linking Hendricks to the offenses was testimony from an FBI undercover agent and other witnesses that Hendricks communicated with ISIS members, viewed himself as an agent of ISIS and acted upon the behalf of ISIS.

ISSUE: May a conviction for a criminal offense be based solely upon circumstantial evidence?

HOLDING: Yes. Hendricks presented no direct evidence of any conversation or meeting with specific ISIS members where he was directed or proposed to establish an ISIS cell. It was not necessary, however, for the government to present such evidence. A conviction may be based on "[c]ircumstantial evidence alone."[160] Circumstantial evidence presented through witnesses with respect to Hendricks's actions was sufficient to secure a conviction.

The conviction was affirmed.

CRIMINAL LAW AND PROCEDURE – FIREARMS

United States v. Ward, 957 F.3d 691 (6th Cir. 2020)

FACTS: On the evening of May 27, 2017, police officers responded to reports of a shooting on Clovia Lane in Memphis, Tennessee. When the officers arrived, witnesses told them that Leon Ward had pulled up in a blue Chevrolet Impala and had fired shots at several individuals gathered in a yard outside one of the houses on the street. Ward then got out of the car and continued shooting, which prompted several of the individuals to return fire. The witnesses then directed the officers to another house, where the officers found Ward inside the kitchen with a severe gunshot wound to his leg. Ward was transported to a hospital. Officers subsequently found an empty, silver and black Springfield Armory XD .40-caliber pistol on the front lawn of the house next to the house where they had found Ward. They also found several spent .40-caliber shell casings in the area. After checking the serial number of the gun, the officers learned that it had been reported stolen a month earlier. A little over two weeks after this incident, on June 13, 2017, Ward—who at the time was still on crutches—was arrested for trying to rob a CVS pharmacy.

Ward has two prior felonies. In 2007, he was convicted in state court of aggravated robbery and subsequently served two and a half years in prison before being paroled. In 2011, he was convicted in federal court of brandishing a firearm during a robbery and was sentenced to seven years in federal prison before being released in December of 2016. Ward pleaded guilty in both instances. At the time of his arrest for the attempted robbery at the CVS, Ward was still on supervised release from his federal conviction.

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[160] United States v. Spearman, 186 F.3d 743, 746 (6th Cir. 199

A federal grand jury indicted Ward for being a felon in possession of a firearm, attempted robbery and brandishing a firearm during a robbery. Ward entered a guilty plea to the robbery charge in exchange for the brandishing a firearm charge being dropped. A jury convicted Ward of the felon-in-possession charge. This appeal followed:

ISSUES: To support a conviction for being a felon in possession of a handgun, is the prosecution required to prove that a defendant knew that he was barred from possessing a firearm because he was a felon?

HOLDING: Yes. In Rehaif v. United States,[161] the United States Supreme Court held that 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. Ward stipulated that he was a felon, and the record was clear that Ward had two prior felony convictions (one state, one federal) and was still on supervised release from his federal felony.

Moreover to obtain a conviction with respect to a felon-in-possession charge under 18 U.S.C. § 922(g)(1), the government must prove beyond a reasonable doubt that: (1) the defendant was a felon; (2) the defendant knew he was a felon; (3) the defendant knowingly possessed a firearm; and (4) that the firearm had traveled through interstate commerce.[162]

In this case, the trial record demonstrates that there was ample evidence from which the jury could have inferred that Ward knowingly possessed the gun. Two witnesses testified that they saw Ward point a silver and black .40-caliber gun out of his blue Impala and fire shots at individuals on Clovia Lane. Another witness testified that he saw a man point a silver and black gun out of the car window, and that he knew the car to belong to Ward. The descriptions of the gun matched the gun that officers later recovered in the yard of the house next to the house where Ward was arrested. Although the officers did not arrest Ward with the gun, the jury could have credited the statements from the witnesses and believed their descriptions of a gun that matched the one recovered close to Ward. Drawing all reasonable inferences in favor of the government, the Sixth Circuit held that the evidence was sufficient for a rational juror to conclude that Ward had possessed a firearm on the date in question. As previously mentioned here, Ward stipulated that he was a felon.

The Sixth Circuit affirmed the conviction.

MIRANDA

United States v. Ramamoorthy, 949 F.3d 955 (6th Cir. 2020)

FACTS: A female passenger on a flight from Las Vegas to Detroit awoke to find her pants unbuttoned and unzipped with Ramamoorthy either inserting or trying to insert his fingers into her vagina. The passenger advised the flight attendants, who escorted her off the plane upon

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[161] ____ U.S. ____, 139 S.Ct. 2191, 204 L.Ed.2d 594 (2019).
[162] Id., at 2200.

landing. Airport police Sergeant Alvarado and Corporal Hunter met Ramamoorthy in the jetway as he came off the plane.

Sergeant Alvarado asked Ramamoorthy, "What's going on today?" In response, and without further questioning, Ramamoorthy immediately began talking about the female passenger, claiming that she fell asleep on him and that he did not know where he had put his hands. He also said he was very tired on the flight because he had taken some Tylenol. Sergeant Alvarado then led him into the airport terminal, where they continued to talk in an area open to the public.

Another officer, Officer Chalmers, arrived and asked Ramamoorthy some questions about what had happened on the flight, to which Ramamoorthy gave similar answers. At the end of their conversation, Ramamoorthy made a written statement of his recollection. In the statement, he repeated that the passenger had slept on him, that he had been in a "deep sleep," and that he did not remember where he had put his hands.

The officers arrested Ramamoorthy and took him to the airport police station, where two FBI agents interviewed him for a little over an hour. Before asking Ramamoorthy any questions about the flight, the agents provided him with a written Miranda waiver form. Ramamoorthy signed the form after reading his rights aloud and discussing them with the agents for about ten minutes. Ramamoorthy then admitted that he had tried to put his fingers inside Laura's pants.

Ramamoorthy moved to suppress the statements he made to the FBI, arguing that he did not knowingly and intelligently waive his Miranda rights because he did not speak English with enough fluency. The district court denied the motion to suppress after finding that Ramamoorthy was an "articulate, natural English speaker" and that the agents had "no contemporaneous reason to believe" that Ramamoorthy did not understand the consequences of waiving his rights.

After a jury trial, Ramamoorthy was convicted of sexual abuse. He appealed.

ISSUE: Is an examination of the validity of a Miranda waiver conducted from the totality of the circumstances from the perspective of law enforcement?

HOLDING: Yes. Statements made in response to custodial police interrogation must be suppressed unless the suspect first waived his Miranda rights 'voluntarily, knowingly and intelligently.'"[163] Waiver is voluntary when "it was the product *965 of a free and deliberate choice rather than intimidation, coercion, or deception."[164] It is intelligent when it is "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[165] "To determine whether a waiver is valid, we examine the totality of the circumstances."[166] We do so "'primarily from the perspective of the police,' such that where

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[163] United States v. Al-Cholan, 610 F.3d 945, 954 (6th Cir. 2010) (quoting Colorado v. Spring, 479 U.S. 564, 572, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987)).
[164] Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).
[165] Id.
[166] United States v. Ray, 803 F.3d 244, 266 (6th Cir. 2015).

‘[the] police had no reason to believe that [the defendant] misunderstood the warnings, ... there is no basis for invalidating [the] Miranda waiver.’”[167]

The Sixth Circuit reviewed the interrogation video with the FBI agents and determined that he officers conducted themselves respectfully and professionally, making no threats and speaking with a calm demeanor. By responding in coherent English, asking thoughtful questions, nodding his head, and signing his initials after reading each right aloud, Ramamoorthy gave every indication to the agents that he understood his rights and the consequences of waiving them. None of the circumstances that the agents could have observed reasonably suggested that Ramamoorthy had asked about the timing of a judicial proceeding because he believed that only statements made to a judge were admissible evidence.

The conviction was affirmed.

SEARCH AND SEIZURE

United States v. Gilbert, 952 F.3d 759 (6th Cir. 2020)

FACTS: On August 29, 2016, Cleveland Police Detective Yasenchack observed a suspected drug transaction at an intersection known for its drug activity. He watched Williams enter and then exit a Jeep Cherokee belonging to Gilbert within a few seconds. Williams shoved a large plastic bag into his shorts as he exited and then drove off in his own vehicle. Yasenchack stopped Williams and recovered almost half a pound of cocaine. Williams later pleaded guilty to state drug trafficking charges.

About two weeks later, Yasenchack saw Gilbert driving the Jeep and conducted a traffic stop. Yasenchack smelled marijuana emanating from Gilbert’s vehicle, but his search only turned up a large amount of cash. After this second encounter, Yasenchack learned that Gilbert had a lengthy criminal history, including 2006 convictions for drug trafficking, drug possession, and possessing a weapon while under disability.

Suspecting that Gilbert was once again distributing narcotics, Yasenchack began surveilling Gilbert and searching his trash. On February 21, 2017, Yasenchack searched the trash placed outside Gilbert’s residence on Rainbow Avenue in Cleveland. Yasenchack found chrome scale weights, a vacuum sealed bag and zip-lock bags (which tested negative for controlled substances). Then, between February and April 2017, Gilbert moved to a house on Yellowstone Road in Cleveland Heights. On April 27, 2017, Yasenchack searched the trash at Gilbert’s Yellowstone Road residence but found nothing suggestive of drug trafficking. In June 2017, Detective Yasenchack again searched Gilbert’s trash at the Yellowstone Road residence and discovered a large vacuum-sealed bag containing “crumbs” of what Yasenchack believed to be marijuana. A field report later confirmed that the crumbs were marijuana.

[167] Al-Cholan, 610 F.3d at 954.

Yasenchack applied for a search warrant the next day to search Gilbert's Yellowstone Road residence. In support of the search warrant application, Yasenchack attested to the following facts: (1) he had witnessed Gilbert participate in a drug transaction on August 29, 2016, which had led to the conviction of Williams; (2) he found "a large quantity of cash" in Gilbert's vehicle following a traffic stop; (3) Gilbert had a lengthy criminal history including 2006 convictions for drug trafficking and drug possession; (4) Yasenchack surveilled Gilbert's homes many times; (5) at one point, Yasenchack had attempted to tail Gilbert's vehicle but broke off surveillance once Gilbert began driving in circles which was "a tactic drug dealers often use to determine if they are being followed"; (6) he had conducted three trash pulls over several months; and (7) the day prior to the search warrant application, he discovered "suspected marijuana crumbs" in Gilbert's trash within a large vacuum sealed bag, which he knew drug dealers often used to conceal the scent of marijuana. Yasenchack also included several boilerplate paragraphs about his training and experience in investigating drug trafficking.

An Ohio judge authorized a search warrant to search Gilbert's Yellowstone Road home, which law enforcement executed the following day. The search yielded nearly four kilograms of heroin (some of which was laced with fentanyl), a handgun, approximately $119,000 in cash, a money counter, numerous cell phones, and a drug ledger.

A federal grand jury subsequently charged Gilbert with possession with intent to distribute heroin, possession with intent to distribute a mixed drug containing heroin and fentanyl, and being a felon in possession of a firearm and ammunition. Gilbert moved to suppress the evidence obtained from his home, arguing that the search warrant did not establish probable cause on several grounds, including that it lacked a sufficient nexus between the alleged drug activity and Gilbert's home. He also contended Detective Yasenchack's affidavit contained falsehoods or reckless misrepresentations. The district court denied the suppression motion, and Gilbert entered a conditional guilty plea to all charges.

On appeal, Gilbert argues that the search warrant that authorized the search of his home purportedly lacked probable cause in violation of the Fourth Amendment.

ISSUE: Would the good faith rule of United States v. Leon[168] apply if evidence is seized in a reasonable, good-faith reliance on a search warrant that is not apparently or obviously defective?

HOLDING: Yes. In United States v. Leon, the Supreme Court created an exception to the exclusionary rule for evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective. When presented with a motion to suppress evidence claiming a lack of probable cause, a court must ask whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's decision.[169] If a reasonably

[168] 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).
[169] United States v. White, 874 F.3d 490, 496 (6th Cir. 2017).

well trained officer would have known that the search was illegal despite the magistrate's issuance of the search warrant, suppression is appropriate.[170]

An affidavit that is so lacking in indicia of probable cause that no reasonable officer would rely on the warrant has come to be known as a "bare bones" affidavit.[171] "We reserve that label for an affidavit that merely 'states suspicions, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge.'"[172] Thus, the affidavit must be so lacking in indicia of probable cause' as to make an officer's belief in its existence objectively unreasonable.[173]

Here, Yasenchack's affidavit was sufficiently meaty to avoid being labeled bare bones. Gilbert argues that Yasenchack "obtained the warrant based on his suspicions alone." Yasenchack's affidavit, however, contained several verifiable facts, including that: (1) Gilbert was party to a large drug transaction on August 27, 2016, and possessed "a large quantity of cash" in his vehicle about two weeks later; (2) law enforcement discovered "a large black vacuum bag with suspected marijuana crumbs," "recent mail addressed to Tyrone Gilbert," and "[b]lack rubber gloves with residue" at his residence the day prior to seeking the search warrant; and (3) Gilbert had previously been convicted of drug trafficking and possession. Indisputably, these are facts. And importantly, these are facts that establish "some connection" between the suspected drug trafficking and Gilbert's Yellowstone Road home, in light of the marijuana taken from Gilbert's trash at that address and his demonstrated history of drug trafficking.[174] Therefore, the search warrant affidavit at least met the minimally sufficient nexus between the illegal activity and the place to be searched' to avoid the bare-bones designation and thus be one upon which an officer can rely in good faith.

Because a reasonably well-trained officer in the circumstances presented here would not know to disregard a judicial determination that probable cause existed, the good-faith exception applies, the Sixth Circuit affirmed Griffin's convictions.

United States v. Jones, 953 F.3d 433 (6th Cir. 2020)

FACTS: On April 30, 2017, Ti'Erica McKinney called the Paducah police department to report a domestic violence incident. Several officers, including Andrew Parrish, arrived at the scene. McKinney told Parrish that she had come home from work to find her ex-boyfriend, Jermaine Jones, inside her house. She asked Jones to leave. When he refused, they began arguing. Matters got out of hand. Jones poured dish detergent over her couch, then chased her out of the home. Once outside, Jones threw Sprite cans and a bottle of dish soap at McKinney as

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[170] Id.
[171] Id., at 498.
[172] United States v. Christian, 925 F.3d 305, 312 (6th Cir. 2019).
[173] Id.
[174] White, 874 F.3d at 497; see also United States v. Abernathy, 843 F.3d 243, 251–52 (6th Cir. 2016) ("It is well established in this Circuit that drug paraphernalia recovered from a trash pull establishes probable cause to search a home when combined with other evidence of the resident's involvement in drug crimes.").

she ran for help. McKinney dodged the cans but did not evade the bottle of dish soap. McKinney eventually returned to see William Snipes, Jones' friend, driving Jones away in a white "Tahoe-like vehicle with a long body."

Officer Parrish took steps to corroborate McKinney's story. He questioned her about reports that other people had come to her aid. McKinney admitted that her brothers had arrived before the police but left when Jones fled to avoid dealing with the authorities. Around the house, Officer Parrish saw items consistent with McKinney's account. He found a soap-stained couch and a bottle of detergent on the floor. He also spotted Sprite cans near McKinney's vehicle and noticed damage to the car. In her front yard, he located the bottle of dish soap that had hit McKinney's back. When McKinney showed Officer Parrish her injury, he pointed out that he could not see any bruising but acknowledged it might take a few days for the harm to show.

Consistent with department policy, Officer Parrish and McKinney filled out a "Domestic Violence Lethality Screen," a questionnaire to determine if an officer should refer a victim to domestic violence resources. She told Officer Parrish that Jones had threatened to kill her in the past, might try to kill her in the future, and could easily obtain a gun. McKinney elaborated that Jones had strangled her and kicked in her front door. She repeatedly told Parrish, without prompting, that she planned to get an emergency protective order against Jones and that she feared he would return to attack her once the officers left.

To allay McKinney's concerns, Officer Parrish stayed in his car next to the house and finished up some paperwork. Shortly after Officer Parrish finished up with McKinney, he saw two black males in a white Chevy Suburban sitting at the intersection near McKinney's home. Parrish pulled the Suburban over and approached the passenger side, where Jones sat. After a brief discussion, Parrish asked Jones to exit the vehicle and escorted him to Parrish's car. A quick pat-down of Jones revealed nothing. Asked about the incident, Jones denied everything: the detergent, the Sprite cans, the dish soap. Parrish did not believe him and arrested him for the assault. He cuffed Jones, conducted a second, more thorough, search, and placed him in the back of his squad car.

Jones began yelling that Parrish had cuffed him too tightly. When Parrish checked the cuffs, he spotted a firearm in the back of his cruiser that he had not seen before. That led to a charge of unlawful possession of a firearm.

Jones moved to suppress the gun arguing that Parrish only stopped the vehicle on the suspicion Jones had committed a crime. To make a valid stop, Jones asserted, Parrish needed a reasonable suspicion of ongoing or imminent criminal activity. At the hearing, Parrish confirmed that he had stopped Jones' vehicle solely to "further investigate" McKinney's allegations of assault. In Kentucky, fourth-degree assault, a misdemeanor.

The district court suppressed the evidence. The government appealed.

ISSUE: Does the Fourth Amendment completely prohibit law enforcement from making a Terry stop to investigate a misdemeanor?

HOLDING: No. The Fourth Amendment does not bar the stop of a vehicle to investigate criminal activity that already occurred if the activity is a felony.[175] In determining whether officers may make Terry stop to investigate completed misdemeanor, courts must balance interests in public safety and personal liberty, taking into consideration nature of crime, how long ago suspect committed it, and ongoing risk of the suspect to public safety. The entire balancing test falls upon reasonableness.

In this case, at the time he pulled Jones over, Parrish had a reasonable suspicion that Jones had assaulted McKinney. He had corroborated almost every part of her account, and the car he saw matched her description. Stopping the vehicle directly promoted the interest of preventing crime. McKinney credibly alleged that Jones intended to harm her or her home.

The stop also promoted public safety. McKinney told the officer that Jones could get a firearm easily, attacked her before, and recently fought with her brothers. Hailing down the vehicle gave Parrish the chance to stop Jones from further violence and threats. By stopping Jones' car to investigate McKinney's allegations of assault, misdemeanor or not, felony or not, Parrish used common sense and acted in eminently reasonable fashion. Accordingly, the Sixth Circuit held that this stop was appropriate.

The Sixth Circuit also found that Parrish possessed probable cause to arrest him for assaulting McKinney. Parrish had more than just McKinney's accusation. He had all of the evidence around him corroborating her story. On top of that, the white Suburban pulled up to the intersection at McKinney's home, just as she had predicted. Once Officer Parrish identified Jones as the passenger, if not before then, his reasonable suspicion "developed into probable cause" to make the arrest.

The Sixth Circuit reversed the district court's order suppressing the firearm.

United States v. May-Shaw, 955 F.3d 563 (6th Cir. 2020)

FACTS: In December 2015, the City of Grand Rapids Police Department began investigating May-Shaw for suspected involvement in drug trafficking. The Department had received tips from Silent Observer—an organization that receives anonymous information from the public—describing vehicles May-Shaw was using to transport drugs and a specific bag where he kept drugs, money, and a gun. A criminal history check on May-Shaw revealed that he had one felony firearm conviction and two felony drug convictions. Based on all of this information, the Grand Rapids police decided to conduct surveillance of the exterior of May-Shaw's apartment building and the parking lot of the apartment complex.

The apartment where May-Shaw lived is one of several units in the complex, which itself abuts a communal parking lot. In the parking lot are covered carports, the interiors of which are easily viewable from a public vantage point on Norman Drive, a road outside of the parking lot. May-

[175] United States v. Hensley, 469 U.S. 221, 226, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985).

Shaw often parked his vehicles under a covered carport close to the entrance to his apartment building. Nothing in the record indicates whether the carport was specifically assigned to him, or if he had just consistently parked there.

The carport is next to a parking lot that is accessible only from Norman Drive, and that entrance affords almost complete visibility of the lot and adjacent apartment complex. The owner of the complex gave police permission to conduct physical and video surveillance of the lot. They had a good view, for only a line of trees obstructs the parking lot from public view on the road, and there was no foliage obstructing the view in February 2016, when the surveillance occurred.

Most of the stakeout, lasting several weeks, was done from a van using remotely operated cameras. Officers would park the van in the lot, moving its location every day or two. Through this method, police observed May-Shaw loading and unloading drugs and cash from his BMW and engaging in what officers believed to be drug deals in the parking lot.

In addition to their surveillance from the van, on January 26, 2016, police installed a camera on a telephone pole on Norman Drive. Officer Mesman, the principal investigator in May-Shaw's case, testified as to the specifics of the pole camera. According to Mesman, the camera was affixed to the pole approximately twenty feet from the ground, and could pan from side to side and up and down. The camera, which recorded continuously for twenty-three days, could produce video as well as still shots. Though officers did not monitor the footage continuously in real time, they reviewed the footage they missed by watching the recorded video.

The pole-camera and van-camera footage captured May-Shaw engaging in what the officers suspected were drug transactions in the parking lot. They based this conclusion on observations of May-Shaw making brief contact with people inside their vehicles, during which time he and the person in the car exchanged something. Also, on several occasions May-Shaw retrieved what appeared to be evidence of drug distribution from his vehicles. For example, on February 17, 2016, officers observed him lean into the front passenger side of one of his vehicles and remove cash and a bag of suspected drugs, hide the items under his jacket, and carry them inside the apartment. The next day, officers watched May-Shaw reach into the back of his car and remove a large stack of cash, which he also took inside the apartment. Soon thereafter, the officers saw him put another two bags, which they also suspected contained drugs and cash, in the trunk of his BMW.

After witnessing such suspected drug transactions, the officers called in a K-9 unit for a drug-detecting dog sniff of the BMW, where the officers had just seen May-Shaw stash the bags. When the dog circled the BMW, which was parked directly under the carport, it alerted the officers to the odor of narcotics.

Based on the surveillance and dog sniff, the officers sought a search warrant. The police relied primarily on the footage from the pole camera and the surveillance van, which showed different angles of the same conduct described earlier. A state magistrate judge authorized a search warrant for the apartment and three vehicles connected to May-Shaw. The apartment search

resulted in seizure of almost $2,000 in cash, a gun, drug paraphernalia and packaging material, and nearly a pound of marijuana. In their search of the BMW, police found a kilogram of cocaine, some fentanyl, and over $200,000 in cash. The search of one of May-Shaw's other vehicles, a Chevrolet Tahoe, turned up another $486 in cash. Neither May-Shaw nor his third car was present when the police conducted the search. May-Shaw was arrested some months later in Brooklyn, New York.

A federal grand jury in the U.S. District Court for the Western District of Michigan returned a superseding indictment charging May-Shaw with conspiracy to distribute and possess with intent to distribute cocaine, possession with intent to distribute cocaine, and maintaining drug-involved premises.

May-Shaw moved the district court to suppress the evidence seized pursuant to the search warrant, arguing that the warrantless surveillance through the pole camera and the warrantless sniff by the drug-detecting dog of the BMW constituted unconstitutional warrantless searches. The district court denied the motion, holding that (1) May-Shaw had no reasonable expectation of privacy in the parking lot; (2) the area surveilled by the pole camera was not constitutionally protected curtilage of the apartment; (3) the dog sniff was permitted under the Fourth Amendment; and (4) even if the dog sniff was unconstitutional, the remainder of the information in the warrant affidavit was sufficient to support probable cause for the search warrant.

May-Shaw entered a conditional guilty plea to the conspiracy count, preserving the right to appeal the denial of the motion to suppress. He appealed.

ISSUES: 1. Does a person have a right of privacy within a carport in the communal parking lot of an apartment complex, thereby prohibiting the use of a surveillance pole camera?

2. Is a carport located in the communal area of an apartment complex's parking lot curtilage?

HOLDINGS: 1. No. The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. Under Fourth Amendment jurisprudence, there are two ways in which government action may constitute a search. First, when the government gains information by physically intruding into a constitutionally protected area—namely, "persons, houses, papers, and effects,"[176] "'a search within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'"[177] Second, as articulated by the Supreme Court, a search occurs when "a government official invades an area in which 'a person has a constitutionally protected reasonable expectation of privacy.'"[178]

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[176] U.S. Const. amend. IV.

[177] Morgan v. Fairfield Cty., 903 F.3d 553, 561 (6th Cir. 2018) (quoting Florida v. Jardines, 569 U.S. 1, 5, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013)).

[178] Taylor v. City of Saginaw, 922 F.3d 328, 332 (6th Cir. 2019) (quoting Katz v. United States, 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring)).

Under the latter framework, there are two requirements for a government intrusion to constitute a Fourth Amendment search: first, a person must exhibit "an actual (subjective) expectation of privacy" in the place or thing searched; second, the expectation is one "that society is prepared to recognize as 'reasonable.'"[179]

Because the officers' use of the pole camera did not involve any sort of physical intrusion into a constitutionally protected area, May-Shaw must show that he had a reasonable expectation of privacy in the carport. In United States v. Houston, the Sixth Circuit held that affixing a video camera to the top of a utility pole to record the defendant's front porch over a ten-week period did not violate the defendant's Fourth Amendment rights because "agents only observed what [the defendant] made public to any person traveling on the roads" surrounding his home.[180]

In this case, the surveillance footage and photos generated from the pole cameras did not "generate[ ] a precise, comprehensive record of [May-Shaw's] public movements that reflects a wealth of detail about [his] familial, political, professional, religious, and sexual associations,"[181] which could raise significant Fourth Amendment concerns. Rather, the footage and photos only revealed what May-Shaw did in a public space—the parking lot. They captured images of May-Shaw moving things from his car to his apartment. The video showed when he arrived and left the apartment. In other words, the cameras observed only what "was possible for any member of the public to have observed ... during the surveillance period."[182] Accordingly, the Sixth Circuit held that May-Shaw did not demonstrate that when the government surveilled the carport for twenty-three days with the pole camera, it violated his reasonable expectation of privacy. Thus, the use of the pole camera in this instance was constitutional.

2. No. The Fourth Amendment protects people from unreasonable searches of their houses, and the curtilage of the home is protected by the Fourth Amendment.[183] Warrantless dog-sniffs within the curtilage violates the Fourth Amendment.[184]

Courts have identified four factors as guideposts to determining whether an area falls within a home's curtilage: (1) the proximity of the area to the home, (2) whether the area is within an enclosure around the home, (3) how that area is used, and (4) what the owner has done to protect the area from observation from passersby.[185] These factors are not to be applied mechanically; rather, they are "useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so

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[179] Katz, 389 U.S. at 361, 88 S.Ct. 507.
[180] 813 F.3d 282, 288 (6th Cir. 2016).
[181] Jones, 565 U.S. at 415, 132 S.Ct. 945 (Sotomayor, J., concurring).
[182] Houston, 813 F.3d at 290.
[183] See United States v. Dunn, 480 U.S. 294, 300, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987); see also Jardines, 569 U.S. at 6, 133 S.Ct. 1409 (noting that the area "immediately surrounding and associated with the home" is "part of the home itself for Fourth Amendment purposes" (quoting Oliver v. United States, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984))).
[184] Jardines, 569 U.S. at 11–12, 133 S.Ct. 1409
[185] Morgan, 903 F.3d at 561 (citing Dunn, 480 U.S. at 301, 107 S.Ct. 1134).

intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection."[186]

In this case, although the carport where May-Shaw parked his vehicles was the closest in proximity to his apartment, it was not as close to the residence as other structures found to be curtilage have been. Moreover, Sixth Circuit precedent has found that carports located in the driveways of single-family residences were not, absent any other factor, curtilage.

The second factor—whether the area is an enclosure around the home—also cuts against May-Shaw. Here, although the area was enclosed, at least to the extent that the carport had a roof and two side walls, it was not in an enclosure around the residence as was the walled-off driveway in Collins, nor was it enclosed within natural boundaries of the property like a detached garage.

The third factor, which relates to May-Shaw's use of the carport, arguably weighs in his favor because, by regularly parking his car in the carport, he contends it was sufficiently associated with the activities and privacies of domestic life to ostensibly support a finding that it was within the curtilage of his apartment. However, there is no evidence that May-Shaw had any legal right to exclude others from the carport.

Furthermore, May-Shaw did little to protect the area from the view of passersby, and so the fourth factor weighs against him. May-Shaw took no additional steps to protect the area from passersby or his neighbors. Because officers could see into the carport from a camera affixed to a utility pole across a street, it is apparent that May-Shaw did not take significant steps to protect the area from observation.

The Sixth Circuit held that May-Shaw did not show that (1) police surveillance from the pole camera violated his reasonable expectation of privacy; or (2) the dog sniff constituted an unconstitutional search. Accordingly, the Court affirmed the district court's denial of his motion to suppress.

United States v. Sumlin, 956 F.3d 879 (6th Cir. 2020)

FACTS: On March 28, 2015, Carrie Dobbins died in Akron, Ohio after ingesting heroin and fentanyl. Carrie obtained the drugs from Sumlin, who brought them to Carrie's residence. Carrie's mother advised law enforcement that she observed Sumlin's car, a Chrysler 300, parked outside of the residence and saw Sumlin in the living room with Carrie.

Following Carrie's death, and between the span of April 24, 2015 and April 27, 2015, Akron Police Department Detective Mike Schmidt visited an address believed to be Sumlin's residence on Firestone Boulevard in Akron. Detective Schmidt saw a Chrysler 300—the same model of car seen parked in the driveway at Carrie's residence on the morning of March 28, 2015—parked in the driveway of the Firestone Boulevard address. Although the car was registered to Sumlin's

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[186] Dunn, 480 U.S. at 301, 107 S.Ct. 1134.

mother, police records confirmed that Sumlin had been arrested while driving the vehicle in 2014. Further investigation revealed that the utilities of the Firestone Boulevard residence were paid for by Sumlin's then-current girlfriend. Also, according to a police report stemming from an unrelated assault complaint filed in April 2015, Sumlin was identified as living there with this girlfriend. Additional police records from prior years, relating to Sumlin's arrests for the possession of heroin, the possession of cocaine, parole violations, failure to comply with police, and willful fleeing, further connected him to the Firestone Boulevard property.

Aware of these facts, the police turned their focus on Sumlin as a suspect. Based on his personal experience and training, Detective Schmidt prepared an affidavit using the information obtained from the police investigation, including interviews with Julie Dobbins (Carrie's mother), Amanda Kelly (Carrie's sister and Sumlin's ex-girlfriend), Dr. George Sterbenz, and Akron Detective Benjamin Surblis, to obtain a search warrant for the Firestone Boulevard residence.

The affidavit sought authority to search for any evidence relating to drug trafficking, which could include heroin, currency, records and documents, and cellular telephones. Detective Schmidt was particularly focused on locating the (330) 815-4524 telephone, which Sumlin used to communicate with Dobbins on the morning of March 28, 2015. On April 27, 2015, the warrant was approved by Akron Municipal Court Judge Jerry K. Larson. The following day, the Akron police executed the search warrant. Officers seized a number of items, including approximately 190 grams of then-suspected cocaine (which upon further testing, was determined to be fentanyl), 48 grams of suspected heroin; drug trafficking paraphernalia (i.e. multiple scales, a press, a grinder, glassware with residue); $11,920 cash in one location; $2,482 in another location; and eight cellular telephones.

A grand jury indicted Sumlin with drug trafficking. Sumlin moved to suppress the search of his residence, arguing that the affidavit supporting the warrant was insufficient. The district court denied suppression, and a jury convicted Sumlin of all charges. Sumlin appealed.

ISSUE: Is an affidavit supporting a search warrant required to include facts establishing a sufficient nexus between the location to be searched and the alleged criminal activity?

HOLDING: Yes. The affidavit supporting the warrant must contain facts that demonstrate "a fair probability that evidence of a crime will be located on the premises of the proposed search."[187] If "a government agent fails to support his application with this showing of probable cause, a judge should refuse to issue the warrant."[188] "Our review of the sufficiency of the evidence supporting probable cause is limited to the information presented in the four-corners of the affidavit[.]"[189]

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[187] United States v. Jenkins, 396 F.3d 751, 760 (6th Cir. 2005); United States v. Frazier, 423 F.3d 526. 531 (6th Cir. 2005).
[188] United States v. McCoy, 905 F.3d 409, 415 (6th Cir. 2018).
[189] Frazier, 423 F.3d at 531.

Detective Schmidt's affidavit established a sufficient nexus between Sumlin's drug-trafficking activity and his Firestone Boulevard residence to justify the magistrate judge's finding of probable cause. The probable cause analysis involves several components. The government's affidavit needed to demonstrate probable cause (1) that Sumlin was trafficking drugs; (2) that Sumlin lived at the Firestone Boulevard residence; and (3) that evidence of drug trafficking would be found at Sumlin's residence. The government accomplished all three tasks in sufficient detail.

First, the affidavit set forth probable cause to show he was in the illegal drug trade. Relatedly, the affidavit, which includes information and medical confirmation of Carrie's death, shows that she died on March 28, 2015 of a drug overdose. Connecting these pieces, evidence on Carrie's cellphone established that she had exchanged text messages with "TJ"—Sumlin's confirmed drug alias—early in the morning of March 28, 2015. Though the two used coded language, it is reasonable to believe that during this conversation, Sumlin agreed to bring drugs to Carrie. The affidavit also includes witness testimony of the decedent's sister, Amanda Kelly, who not only had purchased drugs from Sumlin, but also had been his girlfriend. Based on her past involvement with Sumlin, Kelly confirmed that he was in fact a drug dealer. Furthermore, according to Kelly, she saw Sumlin in the living room of her mother's residence with her sister at approximately 8:45 a.m. on the morning of March 28, 2015, and his car was in the driveway of her mother's residence. The affidavit also outlines that "TJ's" cellphone number, Facebook account, automobile, and picture were all connected to Sumlin. Collectively, these facts in the affidavit establish probable cause to believe that Sumlin trafficked drugs.

Secondly, the affidavit showed specific detail to establish probable cause that Sumlin lived at the Firestone Boulevard address. Sumlin's car (registered to his mother), which had been seen at Carrie's residence on the morning of March 28, 2015, was subsequently observed by police to have been parked in the driveway of the Firestone Boulevard property on multiple days following Carrie's death. The utilities at the residence were under the name of Sumlin's then-girlfriend. Moreover, earlier that month, police had responded to a domestic disturbance at the residence relating to a fight between Sumlin and his then-girlfriend. And finally, the mother of Sumlin's then-girlfriend told police that Sumlin lived in the Firestone Boulevard residence. Collectively, this evidence not only seems sufficient, but appears overwhelming in its support of the probable cause determination that Sumlin lived at the subject property of the search warrant.

Finally, he affidavit established probable cause to believe that evidence of Sumlin's drug trafficking would be found at the Firestone Boulevard residence. "[I]n the case of drug dealers, evidence is likely to be found where the dealers live."[190] "An affidavit containing credible, verified allegations of drug trafficking, verification that said defendant lives at a particular residence, combined with the affiant officer's experience that drug dealers keep evidence of dealing at their residence," can be sufficient to demonstrate a nexus between the criminal activity and the

[190] United States v. Jones, 159 F.3d 969, 975 (6th Cir. 1998).

suspect residence to validate the warrant—even "when there is absolutely no indication of any wrongdoing occurring at that residence...."[191]

The Sixth Circuit held that the government's affidavit established the requisite nexus. It provided facts showing that Sumlin was a drug trafficker and that he resided at Firestone Boulevard. As Detective Schmidt related in the affidavit, he knew from his personal experience and training that drug dealers like Sumlin routinely keep drug-related items (i.e. records of their drug transactions, equipment, supplies, and weapons) at their residences. Akron police officers also observed Sumlin's car—the same one seen by witnesses parked next to the home of Carrie's mother on the morning of March 28, 2015—parked at the Firestone Boulevard residence multiple times following Carrie's death. We agree with the emphasis placed by the district court on the timing of the text messages exchanged between Carrie and Sumlin. Namely, the back-and-forth exchange, which occurred within a span of twenty-nine minutes, suggested that Sumlin was at his home when Carrie texted that morning, and then necessarily was leaving from his home to deliver the drugs to Carrie. Finally, the Akron police were aware of recent evidence that Sumlin was drug-dealing, as stated in the affidavit. Connecting the pieces of this analysis, there was a sufficient nexus existing between Sumlin's drug trafficking-related activity and his residence.

No Fourth Amendment violation occurred because the four corners of the search warrant affidavit established a sufficient nexus between Sumlin's residence and his criminal activity of drug dealing.

The Sixth Circuit affirmed the convictions.

SEXUAL OFFENSES

United States v. Vinton, 946 F.3d 847 (6th Cir. 2020) – F

FACTS: An undercover FBI analyst posted a "shout" on a social media application called Whisper, which allows its users to post, share photos, and message other users anonymously. The analyst's post featured what the record describes as a photo of an "adult female in a provocative pose" superimposed with the text "Anybody into [name of known series of child pornography] ? ? ##Tab00." Vinton responded by sending a private message to the analyst saying that he was "[j]ust into taboo." When the analyst replied that she was "into incest and young," Vinton added that he also liked "incest and younger women." The analyst described herself as a thirty-six-year-old female with a daughter, and she said, "I think what I'm interested in is not what your [sic] into." Vinton indicated that he wanted to engage in sexual conduct with both the analyst and the fictitious twelve-year-old daughter. The analyst and Vinton then proceeded to have an extended conversation about the three of them—Vinton, the purported mother, and her fictitious twelve-year-old daughter—meeting to have sex. Vinton asked in graphic detail what

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[191] United States v. Goward, 188 F. App'x 355, 358–59 (6th Cir. 2006).

specific sexual acts the daughter could and would perform. The analyst answered his questions and insisted that Vinton be gentle with the minor and make sure the child enjoyed herself. Vinton said he "would be very gentle" and suggested that the FBI analyst could "help with that." Vinton also requested that they exchange photos. The analyst sent a photo of the fictitious daughter, but never sent a photo of herself. Vinton asked several more times for the analyst's photo and sent two photos of himself. First, Vinton sent an unsolicited photo of male genitalia, ostensibly his own, and asked "[d]o you think both of you will like this[?]" Later, Vinton also sent a photo of his face. Vinton never spoke directly to the daughter, but he expressed his interest in both the analyst and her daughter several times, confirming that all three would have sex. Vinton also expressed concern about apprehension by authorities at various points, saying "your daughter scares me a lot," "there is a lot of risk for me," and "something I am also worried about [i]s the cops." But Vinton followed up his concerns each time by affirming his desire to go through with the plan, saying "but I would like to try it" and "I do want to do this ...."

The pair turned to logistics. When Vinton showed up at the chosen meeting place and followed the analyst to her purported home, he was arrested. With Vinton's consent, the police searched his vehicle at the scene, and they found condoms, his phone, and $1,400 in cash. Vinton was then indicted for using a facility of interstate commerce to attempt to persuade, induce, entice, or coerce an individual under the age of eighteen to engage in an unlawful sexual activity in violation of 18 U.S.C. § 2422(b).

The Eastern District of Court of Michigan dismissed the indictment after concluding that Vinton's conduct did not fit the elements of the crime as a matter of law, because a reasonable juror could not find beyond a reasonable doubt that he had the requisite intent to persuade or entice a minor. The government appealed.

ISSUE: To prove that a suspect attempted to entire a minor to engage in illegal sexual activity, must the show that the suspect intended to persuade or entire a minor to participate in unlawful sexual conduct and that a substantial step was taken toward persuading or enticing a minor?

HOLDING: Yes. To prove attempt (as no real minor existed) to entice a minor to engage in illegal sexual activity, the government must show the following two elements: (1) the defendant intended to persuade or entice a minor to participate in unlawful sexual conduct; and (2) the defendant took a substantial step toward persuading or enticing a minor.[192]

In this case, the Sixth Circuit found that a juror could reasonably infer that Vinton satisfied both elements. With respect to the first element, it can be reasonably inferred that Vinton was specifically seeking minors for sex when he logged into the social media application and responded to a post featuring a photo of an adult female in a provocative pose superimposed with the name of a known series of child pornography that depicted prepubescent or young

[192] United States v. Roman, 795 F.3d 511, 517 (6th Cir. 2015).

teenage girls. The undercover police officer indicated in message to defendant that she was interested in someone having sex with her and her daughter and Vinton said that he "would love to try something like that," and he maintained that he "want[ed] to do both [officer and her daughter]" when officer specified that her daughter was twelve years old. The substantial step was completed when communicated with the adult intermediary of the minor to arrange a meeting to engage in illicit sexual conduct and traveled to meet the minor.

The Sixth Circuit reversed the judgment of the district court and remanded the matter for trial.

THREATS

United States v. Howard, 947 F.3d 936 (6th Cir. 2020)

FACTS: Howard was convicted of transmitting a murder threat in interstate commerce, relating to a voicemail message he left for Former United States Attorney Eric Holder at Holder's former law firm (Covington & Burling, LLP) in Covington.[193] Howard clearly identified himself and explicitly stated, "I'm going to kill you" and "I'm going to murder you." Howard left these threats angry about having been convicted and sentenced to other federal crimes.

ISSUE: Is a voicemail left on the individual's voicemail threating death and/or physical harm sufficient evidence of intent to make a threat?

HOLDING: Yes. Under 18 U.S.C. § 875(c), a person is guilty of transmitting in interstate commerce a communication containing a threat to injure another person by sending a message in interstate commerce that a reasonable observer would view as a threat, and that the defendant intended the message as a threat. In this case the Sixth Circuit held that the voicemail message clearly constituted a threat and that the indictment sufficiently detailed the factual and legal basis of the charge.

The conviction 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.

Abu-Joudeh v. Schneider, 954 F.3d 842 (6th Cir. 2020)

FACTS: Jiries Abu-Joudeh lives in Allenton, Michigan, with his wife Yasmeen and three sons. On November 20, 2014, Michael Edwards and Patrick Leaveck—two repossession agents

[193] At the time the opinion was rendered, Mr. Holder was a partner in the firm's Washington, D.C. office.

with Best Recovery Services, LLC—came to the Abu-Joudehs' home to repossess their car. An altercation ensued. According to Yasmeen, one of the agents pushed her and later shoved Jiries into her. But the repossession agents say that Jiries asked Yasmeen to get him a gun, and then hit her when she refused. Whatever happened, the repossession agents called the police, and the Abu-Joudehs moved their car into the garage and shut the door.

Police officers soon arrived at the Abu-Joudehs', specifically Chief Heather Schneider of the Capac Police Department and Trooper Rick Sebring of the Michigan State Police. Yasmeen let the officers into the house and denied that Jiries hit her. But after a scuffle with Schneider, Jiries was arrested for assault.

Following the arrest, two more police cars arrived at the scene, both driven by male officers. One of these officers—whom Yasmeen refers to as the "third officer" to arrive—entered the house and began assisting Schneider and Sebring.

While inside the house, Yasmeen says that the third officer was standing by her and kept her seated on the couch, ordering her to "[s]it down" and repeatedly telling her to "shut up" when she tried to get Jiries his medication. Of particular relevance to this appeal, Schneider's police report suggests that this third officer was Chief Scott Sheets of the Memphis Police Department. Yasmeen also described the third officer as being mostly bald with short blond or dirty-blond hair, medium height and build, relatively young, and wearing a blue uniform. On the other hand, the fourth officer had dark or black hair.

According to Yasmeen, the third officer spoke with the repossession agents and then told Schneider and Sebring that the garage was locked. After that, the third officer—joined by the two repossession agents—took a metal bar and attempted to pry open the main electric door to the garage, presumably to help the agents take the Abu-Joudehs' truck. When this attempt failed, they went around to the side door, which one of them opened, allowing the trio to enter the garage. While Yasmeen did not see which of the three actually opened the side door, Leaveck testified that it was a police officer who let them into the garage, but he was unable to specifically identify the police officer.

Jiries Abu-Joudeh filed suit in federal court. While Abu-Joudeh initially named several police officers and the repossession agents as defendants, the only relevant claim for this appeal is that against Scott Sheets for allegedly breaking into Abu-Joudeh's garage, thereby violating his Fourth Amendment right against unreasonable searches and seizures. The district court granted summary judgment for Sheets. This appeal followed.

ISSUE: To prevail in a claim under 42 U.S.C. § 1983, must a plaintiff show that the defendant was personally involved in the alleged constitutional violation?

HOLDING: Yes. To prevail in a claim under 42 U.S.C. § 1983, a plaintiff must show that the defendant was "personally involved in the [alleged] constitutional violations."[194] This is because, in a suit for damages, "[e]ach defendant's liability must be assessed individually based on his own actions."[195] Thus, to survive summary judgment, a plaintiff must put forward evidence suggesting that the defendant participated in the violation of the plaintiff's rights, since "[a]s a general rule, mere presence at the scene of a search, without a showing of direct responsibility for the action, will not subject an officer to liability."[196]

In this case, the Sixth Circuit held that Yasmeen's testimony is enough to show that it was the officer who broke into the garage, not one of the repossession agents. She said that the third officer grabbed a metal bar and was using it in an attempt to pry open the electric garage door. And while the officer was standing with the two repossession agents at the side door, so Yasmeen could not see which of the three broke open that door, a reasonable juror could easily infer that it was the police officer who did so, given the fact that he was holding the metal bar and had already attempted to open the electric door. Furthermore, Yasmeen's physical description also creates a genuine issue of fact as to whether Sheets was the officer in question. Yasmeen's testimony suggests that neither Schneider nor Sebring opened the garage, leaving only Sheets and the other unidentified officer. But Yasmeen provided physical descriptions of both unidentified officers, testifying that the "third officer" was mostly bald with a small amount of blond or dirty blond hair, whereas the "fourth officer" had dark or black hair. These descriptions are sufficient to survive summary judgment.

The Sixth Circuit reversed the district court and remanded this matter for further proceedings.

Adams v. Blount County, TN, 946 F.3d 940 (6th Cir. 2020)

FACTS: On July 24, 2019, Blount County Deputy Sheriff Burns was dispatched to a call of three suspicion individuals walking near Winchester Drive. Deputy Burns was concerned that one of these individuals may be Dylan Tarbett, a suspect wanted for assaulting a peace officer. Deputy Burns drove by two men, one of whom looked "fidgety." Deputy Burns exited his cruiser, activated his body camera and asked the men to identify themselves. The men identified themselves as Travis Hickman and Joe Eldridge. Eldridge provided his date of birth as "7/87/85" and snickered. Suspicious, Deputy Burns ordered Eldridge to stand "right there" and put his hands behind his head. Deputy Burns patted Eldridge down. As so as the deputy placed his hand in Eldridge's pocket, Eldridge ran. A brief chase ensued, with Deputy Burns catching Eldridge after Eldridge fell. Deputy Burns ordered Eldridge to put his hands behind his back. The men struggled on the ground while Deputy Burns attempted to get Eldridge to roll over. Eldridge complained that he was injured and having a seizure. Deputy Bennett arrived as backup and

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[194] Binay v. Bettendorf, 601 F.3d 640, 650 (6th Cir. 2010); accord, e.g., Burley v. Gagacki, 729 F.3d 610, 619 (6th Cir. 2013).
[195] Pollard v. City of Columbus, 780 F.3d 395, 402 (6th Cir. 2015) (alteration in original) (quoting Binay, 601 F.3d at 650); accord, e.g., Fazica v. Jordan, 926 F.3d 283, 289 (6th Cir. 2019).
[196] Binay, 601 F.3d at 650.

noticed Eldridge appeared to be giving Deputy Burns "a piggy back ride." Deputy Patty arrived and heard Eldridge say that he had a seizure, that Deputy Burns stuck him in the face, and that Eldridge requested Burns to call 911. Deputy Burns advised Deputy Patty that "every time I get up, he runs." Deputy Burns handcuffed Eldridge and threatened him with a taser. Deputy Burns and Deputy Patty escorted Eldridge to Patty's SUV. During the walk to the SUV, Eldridge escaped from the officers and attempted run yet again. Deputy Burns caught up to Eldridge, grabbed him by the waist and lifted Eldridge into the air. During this fall, Eldridge kicked Patty in the groin and ultimately landed on his back. A witness stated that it appeared Eldridge and Deputy Burns got their feet tangled up, causing them to fall to the ground.

Sergeant Boyd arrived at the scene and saw Eldridge handcuffed and lying on the ground with blood coming out of his ears. He called for medical assistance and spoke with Deputies Burns and Patty. The deputies advised that Burns "slammed" Eldridge to the ground. As a result of this incident Eldridge sustained a fractured skull in the rear of the head near the spinal cord and a severe brain injury. Eldridge died as a result of his injuries.

At some point, it was discovered the Eldridge was a false name. Eldridge was actually Anthony Edwards. The medical examiner categorized Edwards' death as a homicide. An administrative review found no violation of the department's general order for the use of force.

Adams, Edwards's fiancée and the mother of his two children, filed a lawsuit pursuant to 42 U.S.C. § 1983 against the county, Deputy Burns and Deputy Patty, alleging excessive force. The district court denied qualified immunity for Burns on the excessive force claim, finding that a genuine issue of material fact existed concerning whether Burns' use of force was excessive. Burns filed an interlocutory appeal to address qualified immunity on the excessive force claim.

ISSUES: 1. Must the plaintiff in a 1983 action carry the burden of proving that a governmental defendant is not entitled to qualified immunity?

2. May a police officer utilize deadly force if the officer has probable cause to believe that the arrestee poses a threat of severe physical harm?

3. May a governmental defendant appeal from a trial court order denying a motion for summary judgment based on qualified immunity if the trial court determines that a genuine issue of material fact is set forth for trial?

HOLDINGS: 1. Yes. To prevail on their § 1983 claim, Plaintiffs "must establish that a person acting under color of state law deprived [Edwards] of a right secured by the Constitution or laws of the United States."[197]

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[197] Smoak v. Hall, 460 F.3d 768, 777 (6th Cir. 2006) (quoting Waters v. City of Morristown, 242 F.3d 353, 358–59 (6th Cir. 2001)).

Burns asserts "the defense of qualified immunity, which shields government officials from 'liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[198] Thus, Plaintiffs carry the burden of proving that Burns is not entitled to qualified immunity.[199] In determining whether law enforcement is shielded from civil liability due to qualified immunity, the court must determine: (1) whether, when viewing the facts in the light most favorable to Plaintiffs, Burns violated Edwards's rights; and (2) whether those rights were clearly established at the time of the alleged violation.[200] "These questions may be answered in either order[.]"[201]

2. Yes. In excessive force cases, the threat factor is "'a minimum requirement for the use of deadly force,' meaning deadly force 'may be used only if the officer has probable cause to believe that the suspect poses a threat of severe physical harm.'"[202]

3. No. A governmental defendant may not appeal a denial of a motion for summary judgment based on qualified immunity "insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."[203] Because the arguments raised by Burns concerning the denial of qualified immunity rely on disputed facts with respect to his use of force rather than an issue of law, an appeal is improper and the Sixth Circuit did not have jurisdiction to consider the matter.

The appeal was dismissed.

Ashford v. Raby, 951 F.3d 798 (6th Cir. 2020)

FACTS: Keyonte Ashford was driving on the highway after having too much to drink. A police officer noticed him speeding at over 100 miles per hour and changing lanes without a turn signal. The officer sped up to follow and soon turned on his lights to indicate that Ashford should pull over. This sent Ashford into a panic attack. Instead of promptly pulling over, he decided to drive somewhere he felt more comfortable stopping (a Walgreens by his home).

Of course, the officer knew nothing about what Ashford was feeling. He knew only what he could see from his perspective: someone had been driving erratically at over 100 mph and was now refusing to pull over. The officer tailed Ashford for more than two minutes while radioing in the details of the chase. Eventually, two backup cruisers arrived. The three police cars then surrounded Ashford and forced him to stop.

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[198] Id. (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).
[199] See v. City of Elyria, 502 F.3d 484, 491 (6th Cir. 2007).
[200] See Campbell v. City of Springboro, Ohio, 700 F.3d 779, 786 (6th Cir. 2012); see also Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).
[201] Goodwin v. City of Painesville, 781 F.3d 314, 321 (6th Cir. 2015).
[202] Mullins v. Cyranek, 805 F.3d 760, 766 (6th Cir. 2015)
[203] Johnson v. Jones, 515 U.S. 304, 320, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995).

At that point, two officers got out of their cars and told Ashford to show his hands. Ashford complied, thrusting his hands out the window. The officers then told Ashford twice to turn his engine off. Ashford did not comply; instead, he simply thrust his hands further out the window.

Officer Michael Raby and his trained police dog Ruger arrived on the scene. Raby took the leading role in the officers' interactions with Ashford. While the other officers told Ashford to keep his hands up, Raby slowly approached Ashford's door and tried to open it. Finding it locked, Raby told Ashford to unlock it, then reached through the window, unlocked the door himself, and pulled it open. With the door open, the officers started telling Ashford to step out of the vehicle.

Ashford did not exit his SUV because it was still in drive, and his foot on the brake was the only thing stopping it from lurching forward into a police cruiser. Ashford was afraid that if that happened, the officers would think he was using his vehicle as a weapon and would shoot him. Unfortunately, Ashford did not think he could turn the vehicle off because that would have required Ashford to retract a hand into the passenger compartment. Ashford was terrified that if he did that, the officers would think he was reaching for a weapon and would shoot him.

Ashford tried to explain this dilemma to the officers and proposed a solution: although he was unwilling to leave the vehicle while it was in drive, the officers were free to reach into the vehicle and park or shut it down themselves (at which point he would gladly get out). But it's unclear whether the officers heard this suggestion amid the noise. The officers just kept telling Ashford to step out of the car. They also warned him that if he did not, Raby would send the dog to apprehend him. After twenty seconds of Ashford's refusal to leave the vehicle (and one final warning about the dog), Raby commanded Ruger to attack.

Ruger made two lunges but failed to lock on to Ashford either time. After the second attempt, Raby stepped in to help, grabbing Ashford's left arm and lowering it for Ruger to bite. Raby and Ruger then pulled Ashford out of the driver's seat and onto the road, where the officers completed the arrest. Afterward, the officers took Ashford to the hospital. He was treated for three puncture wounds and several more superficial injuries to his left forearm.

Ashford later sued Raby under 42 U.S.C. § 1983, claiming that the canine seizure violated his Fourth Amendment right against excessive force. The district court entered summary judgment for Raby based on qualified immunity, finding that Raby's use of force was legal and did not violate clearly established law. Ashford appealed.

ISSUE: To be constitutional under the Fourth Amendment, must an officer's use of force be reasonable under the circumstances?

HOLDING: Yes. To be constitutional under the Fourth Amendment, Raby's use of force only needed to be reasonable under the circumstances.[204] Reasonable does not mean vindicated by

[204] Graham v. Connor, 490 U.S. 386, 396–97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

hindsight.[205] Nor does it mean only the best technique available at the time.[206] In police work, officers usually face a range of acceptable options, not a single, rigid right answer. The reasonableness standard thus "contains a built-in measure of deference to the officer's on-the-spot judgment."[207] This substantive constitutional standard protects [the officer's] reasonable factual mistakes and qualified immunity protects him from liability where he reasonably misjudged the legal standard."[208] Even if the use of force was unreasonable, a remedy pursuant to § 1983 is unavailable unless the unreasonableness of the force was clearly established at the time, and so clear that every similarly situated reasonable officer would have recognized that the force used was excessive in that precise situation.[209]

In this situation, the Sixth Circuit examined whether it was reasonable for Raby to use force to remove Ashford from the vehicle, deploy the dog and reasonably manage the dog during its deployment. The Sixth Circuit, considering the officer's perspective, held that Raby's actions were reasonable because of the fact that Ashford led police on a high-speed chase and was unwilling to exit the vehicle when ordered. With respect to the deployment of the dog, Ashford was unable to identify any authority holding that deployment of the dog in similar circumstances violated the Fourth Amendment unless the dog was improperly trained.[210] There is no evidence indicating that this dog was improperly trained. Finally, with respect to the management of the dog, Raby commanded the dog to release Ashford a couple of seconds after the dog bite Ashford. The dog obeyed the command within seconds. The Sixth Circuit held that "the footage shows that Raby's handling of Ruger during the seizure was responsible and professional. At most, one could argue that Raby could have called the dog off a second or two sooner. But that kind of fine-sliced judgment call amid "tense, uncertain, and rapidly evolving" circumstances just isn't the stuff of a Fourth Amendment violation."

As the Sixth Circuit found no violation of clearly established law, the district court's grant of qualified immunity was affirmed.

Barton v. Martin, 949 F.3d 938 (6th Cir. 2020)

FACTS: Neighbors Dwain Barton and Jill Martin engaged in arguments over stray cats that Martin routinely fed enter Barton's yard. Barton complained to animal control about the cats in the past. On November 3, 2014, a cat attacked Barton's daughter in the backyard. Barton shot a BB gun to scare the cat away and later advised Martin that "the next cat that I see in my yard will be a dead one." Martin falsely reported to police that Barton had shot a stray cat in his

[205] Id. at 396, 109 S.Ct. 1865
[206] Dickerson v. McClellan, 101 F.3d 1151, 1160 (6th Cir. 1996).
[207] Burchett v. Kiefer, 310 F.3d 937, 944 (6th Cir. 2002).
[208] Weinmann v. McClone, 787 F.3d 444, 450 (7th Cir. 2015).
[209] District of Columbia v. Wesby, ––– U.S. ––––, 138 S. Ct. 577, 589, 199 L.Ed.2d 453 (2018).
[210] Indeed, most of this circuit's excessive-force precedents involving police dogs find no violation at all. See Dunigan v. Noble, 390 F.3d 486, 492–93 (6th Cir. 2004); Matthews v. Jones, 35 F.3d 1046, 1051–52 (6th Cir. 1994); Robinette v. Barnes, 854 F.2d 909, 913–14 (6th Cir. 1988).

backyard. The dispatcher advised law enforcement that a woman had called to say that her neighbor was "shooting cats," but did not see any injured animals. Animal control responded and spoke to Barton through a screen door. Barton refused to provide any identification, but denied injuring any animals. Barton advised animal control that he fired a BB gun to scare the cat away. The animal control officer radioed contacted the police department, advising that Barton "admitted to shooting animals."

Ten minutes later, four police cars, with two officers in each car, showed up at Barton's home. The officers pulled "what looked like assault rifles" out of their trunks and "surrounded" Barton's house. Barton provided his identification to the animal control officer. Moments later, "fearing that [Barton] was grabbing a gun," Officer Vann "ripped [their] screen door off [and barged] into [their] house." Vann testified that when he entered Barton's home, he saw Barton "standing in the kitchen" and "at that point," did not perceive a threat from him because Barton did not have "anything in his hands" and was not "in control of any type of a weapon." Nonetheless, Vann "threw [Barton] up against the counter like a linebacker." Barton explained that Vann "lifted [him] up with his elbows underneath [his] body and [his] arm and literally picked [him] up and slammed [him] up against [the] kitchen cupboards, at which point all of the other officers, like ants, followed in, and at which point they all surrounded [him]."

Although both Barton and his wife testified that Barton never resisted arrest, Vann then told Barton to "stop resisting" and to place his hands behind his back because he was under arrest. In response, Barton stated that he could not put his hands or shoulders behind his back due to a previous shoulder injury. Vann responded, "Oh, we'll make it fit." Vann then "grabbed both of [Barton's] wrists and took them both behind [his] back[,] ... shoved them both together[,] and put the handcuffs on [him] as tight as he possibly could." None of the officers involved had a warrant to enter Barton's home or to arrest him.

Vann then "shoved" Barton outside his home, down his porch steps, and into a patrol car. During the drive to the police station, Barton complained that Vann had injured his shoulder when he slammed him against the kitchen cabinets. Upon arriving at the station, Barton was strip searched with one hand handcuffed to the wall, about three feet above his head. He continued to tell officers that his shoulder hurt and "that [Officer Vann] had injured [him]," to which Barton was told to "shut the f*** up unless [he] want[ed] to spend the night there." Officers told him that he was being charged with animal cruelty and issued a citation. Approximately three hours after his arrest, Barton was released on a $500 cash bond. The charge against Barton was later dismissed.

Barton filed a lawsuit pursuant to 42 U.S.C. §1983, alleging illegal entry, wrongful arrest, excessive force, and retaliatory arrest. The district court held that Vann was entitled to qualified immunity with respect to the illegal entry, wrongful arrest, and retaliatory arrest claims, and that Barton failed to raise a genuine issue of material fact on the excessive force claim. The district court also dismissed the state law claims. Barton appealed the district court's grant of summary judgment on the illegal entry, wrongful arrest, and excessive force claims.

ISSUES: 1. Under the Fourth Amendment, can a police officer enter a home without a warrant absent exigent circumstances?

2. Must an arresting officer possess probable cause that a criminal offense has been created prior to executing a warrantless arrest?

3. Does the Fourth Amendment prohibit the use of excessive force while executing an arrest and after a suspect has been rendered incapacitated?

HOLDINGS: The Sixth Circuit reversed the district court's judgment granting qualified immunity to Officer Vann.

Qualified immunity shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[211] Created to protect government officials from interference with their official duties, qualified immunity "is an immunity from suit rather than a mere defense to liability."[212] It allows police officers "breathing room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law."[213] After a defending officer initially raises qualified immunity, the plaintiff bears the burden of showing that the officer is not entitled to qualified immunity.[214]

Qualified immunity involves a two-step inquiry, and courts exercise discretion in deciding in what order to address the questions.[215] First, viewing the facts in the light most favorable to the plaintiff, the court must determine whether the officer committed a constitutional violation.[216] Second, if there is a constitutional violation, the court must determine whether that constitutional right was clearly established at the time of the incident.[217] A right is clearly established when the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."[218] While there need not be "a case directly on point" for the law to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate."[219]

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[211] Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).
[212] Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).
[213] Stanton v. Sims, 571 U.S. 3, 6, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (per curiam) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 743, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)) (internal quotation marks omitted).
[214] Burgess v. Fischer, 735 F.3d 462, 472 (6th Cir. 2013).
[215] Pearson v. Callahan, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).
[216] Burchett v. Kiefer, 310 F.3d 937, 942 (6th Cir. 2002).
[217] Id.
[218] Morrison v. Bd. of Trs. of Green Twp., 583 F.3d 394, 400 (6th Cir. 2009) (quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).
[219] Ashcroft, 563 U.S. at 741, 131 S.Ct. 2074.

1. No. "A police officer's entry into a home without a warrant is presumptively unconstitutional under the Fourth Amendment."[220] Indeed, warrantless entry of one's home is the "chief evil" against which the Amendment is designed to guard.[221] When "exigent circumstances" exist, however, warrantless entries are permissible.[222] Exigent circumstances exist when a reasonable officer could believe that there are "'real immediate and serious consequences' that would certainly occur were a police officer to 'postpone action to get a warrant.'"[223] Thus, exigent circumstances may exist when "the suspect represent[s] an immediate threat to the arresting officers and public."[224] It is clearly established that warrantless entry into a home without an exception to the warrant requirement violated clearly established law.[225]

In this case, while Barton did initially decline to exit his home to speak to the animal control officer, Barton eventually spoke with the animal control officer and indicated that he shot the BB gun only to scare the cat. This was relayed to the officers by animal control. There was no evidence presented to the officers that Barton actually shot a stray cat. Moreover, there was no evidence that Barton was a threat to anyone. Without additional evidence of a threat against the police or bystanders, a report of an armed suspect inside his home does not justify warrantless entry. "Evidence that firearms are within a residence, by itself, is not sufficient to create an exigency ...."[226] Rather, the government must show that the police "possessed information that the suspect was armed and likely to use a weapon or become violent."[227] Thus, officers responding to a shots-fired report must have additional evidence of an immediate threat before entering a home without a warrant.

Ultimately, the Sixth Circuit held that evidence that someone has shot at a stray cat does not indicate willingness to shoot at a human being, and there was no indication that Barton was shooting at strays inside his home; thus, Vann's belief that there was an exigency that precluded procuring a warrant before entering Barton's home was unreasonable.

2. Yes. It is well settled that the Fourth and Fourteenth Amendments require probable cause to justify arresting an individual.[228] A warrantless arrest is reasonable under the Fourth Amendment if the arresting officer has probable cause for the arrest.[229] An officer has probable cause "when, at the moment the officer seeks the arrest, 'the facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information [are] sufficient to

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[220] Ewolski v. City of Brunswick, 287 F.3d 492, 501 (6th Cir. 2002).
[221] United States v. U.S. District Court, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972).
[222] Hancock v. Dodson, 958 F.2d 1367, 1375 (6th Cir. 1992).
[223] Ewolski, 287 F.3d at 501 (quoting O'Brien v. City of Grand Rapids, 23 F.3d 990, 997 (6th Cir. 1994)).
[224] Hancock, 958 F.2d at 1375.
[225] See Armstrong v. City of Melvindale, 432 F.3d 695, 700 (6th Cir. 2006)
[226] United States v. Bates, 84 F.3d 790, 795 (6th Cir. 1996).
[227] Id.
[228] Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964);
[229] See District of Columbia v. Wesby, ––– U.S. ––––, 138 S. Ct. 577, 586, 199 L.Ed.2d 453 (2018).

warrant a prudent man in believing that the [plaintiff] had committed or was committing an offense.'"[230] Under a totality-of-the-circumstances analysis, "probable cause exists only when the police officer 'discovers reasonably reliable information that the suspect has committed a crime.'"[231] "A probable cause determination ... must take account of 'both the inculpatory and exculpatory evidence' then within the knowledge of the arresting officer" at the time of the arrest.[232] An officer "cannot simply turn a blind eye toward potentially exculpatory evidence."[233] A phone call reporting criminal activity, without any corroborating information, does not provide probable cause for an arrest.[234]

In this case, qualified immunity was not available with respect to the arrest because a reasonable jury could find that Vann lacked probable cause to arrest Barton for animal cruelty. Barton's neighbor called to report Barton was shooting at cats. Barton's neighbor was not an eyewitness to the attack on Barton's daughter or Barton's shooting his BB gun at the cat; rather, she called 911 after her confrontation with Barton. Manchester responded to the 911 call and, after speaking with Barton, relayed over police radio that Barton admitted to shooting animals. Upon arriving at Barton's home, Vann did not see a weapon or an injured cat. Nor did any other officer at the scene see any physical evidence of wrongdoing. Additionally, Vann's interaction with Barton did not lead to further corroboration of the neighbor's call prior to the arrest. And, taking Barton's story as true, before Barton was arrested, he denied the allegation that he was shooting at cats and instead told Vann that he had only shot his BB gun at a trampoline pole. Viewing the evidence in Barton's favor, the neighbor's call, by itself without further corroborating evidence, was not enough to establish probable cause for arrest. Based on the information Vann had at the time, including the exculpatory statement offered by Barton, no reasonable officer would have concluded that there was probable cause for arrest.

3. Yes. Use of force that is not objectively reasonable violates the Fourth Amendment.[235] Whether an officer exerts excessive force is determined under an "objective reasonableness" standard.[236] In analyzing objective reasonableness, "courts must balance the consequences to the individual against the government's interests in effecting the seizure,"[237] and consider the "facts and circumstance of each case viewed from the perspective of a reasonable officer on the scene and not with 20/20 hindsight."[238] To determine the objective reasonableness of an officer's use of force, we "pay particular attention to 'the severity of the crime at issue, whether

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[230] Wesley v. Campbell, 779 F.3d 421, 429 (6th Cir. 2015)
[231] Courtright v. City of Battle Creek, 839 F.3d 513, 521 (6th Cir. 2016)
[232] Id.
[233] Logsdon v. Hains, 492 F.3d 334, 341 (6th Cir. 2007).
[234] Courtright, 839 F.3d at 522;
[235] Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).
[236] Kostrzewa v. City of Troy, 247 F.3d 633, 639 (6th Cir. 2001).
[237] Burchett v. Kiefer, 310 F.3d 937, 944 (6th Cir. 2002).
[238] Fox v. DeSoto, 489 F.3d 227, 236 (6th Cir. 2007).

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.'"[239]

In applying these considerations to the facts at hand, it would be clear to a reasonable officer that the amount of force used by Vann against Barton was unlawful. First, Barton was being arrested for animal cruelty, not a crime that would justify the amount of force used here. It was contested as to whether Barton shot the cat, and even if he did, whether he would have been justified in doing so given the attack on his daughter. There was no threat to human safety from Barton's actions.

Second, Barton did not pose an immediate threat to the safety of the officers or others. Vann testified that although he was unsure whether Barton was armed when he initially arrived at the scene, when he entered Barton's home, he saw Barton "standing in the kitchen" and "at that point," did not perceive a threat from him because Barton did not have "anything in his hands" and was not "in control of any type of a weapon." Thus, Vann testified that he realized, at least upon entering Barton's home, that Barton was not armed. Hence, while some use of force may have been reasonable when Vann was unsure whether Barton had a weapon,[240] slamming Barton against the cabinet was no longer reasonable once Vann realized that Barton was not holding anything in his hands.[241]

Third, the facts do not suggest that Barton was resisting arrest or attempting to flee. Both Barton and Vann testified that Barton did not resist or evade arrest. Rather, when Vann told Barton to put his hands behind his back, Barton "complied and was placed under arrest" and "there was no struggle." That Barton did not attempt to evade arrest or flee is corroborated by the fact that he passed his identification through the screen door to his mother-in-law, who was on his porch, to hand to the officers before Vann crashed through the door.

A reasonable jury could also conclude that Vann used excessive force after arresting Barton. Once he was handcuffed, Barton claims that Vann "tossed [him] down" his front porch, elevated about three feet from the sidewalk, to Manchester. This was after Barton told Vann of a prior shoulder injury. The court has "held repeatedly that the use of force after a suspect has been incapacitated or neutralized is excessive as a matter of law."[242] "The reason for this is that once the detainee ceases to pose a threat to the safety of the officers or others, the legitimate government interest in the application of significant force dissipates."[243] "'Gratuitous violence' inflicted upon an incapacitated detainee constitutes an excessive use of force, even when the injuries suffered are

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239 Solomon v. Auburn Hills Police Dep't, 389 F.3d 167, 174 (6th Cir. 2004)
240 See Dunn v. Matatall, 549 F.3d 348, 354 (6th Cir. 2008) (noting that when officer is unsure whether suspect is armed, suspect poses greater threat to officer's safety),
241 See Wells v. City of Dearborn Heights, 538 F. App'x 631, 638 (6th Cir. 2013) (explaining that how much force is reasonable may evolve as an incident progresses and an officer learns new information).
242 Baker v. City of Hamilton, 471 F.3d 601, 607–08 (6th Cir. 2006).
243 Morrison, 583 F.3d at 404–05.

not substantial."[244] As Barton was incapacitated after being handcuffed, Vann tossing Barton down his front porch stairs was unreasonable. There were no officer safety concerns or other legitimate government interests justifying this use of force. This circuit's case law has long recognized the unconstitutionality of using gratuitous force against an incapacitated suspect.[245]

The Sixth Circuit reversed the district court's grant to qualified immunity to Officer Vann and remanded for further proceedings.

Davis v. Gallagher, 951 F.3d 743 (6th Cir. 2020)

FACTS: Davis, and African-American inmate in a Michigan prison, was subjected to racial slurs by Corrections Officer James Gallagher. Davis advised Gallagher that he might file a grievance over Gallagher's perceived racism, to which Gallagher threatened to place him in solitary confinement.

During a second interaction on the same day, Gallagher found heroin in Davis's pocket. Davis alleges that Gallagher planted the heroin during a search. Gallagher stated that he saw Davis place an item in his pocket. Upon being taken to a holding cell for a subsequent investigation, Davis denied possessing heroin. The substance was tested and it was heroin. Davis was charged with one count of felony heroin possession by a prisoner. A jury found Davis not guilty of the offense.

Davis filed an action pursuant to 42 U.S.C. § 1983, alleging numerous constitutional violations, including a Fourth Amendment violation for malicious prosecution. The district court ultimately granted summary judgment for Gallagher. Davis appealed.

ISSUE: Is a malicious prosecution claim viable based upon an assertion that falsified evidence was presented to provide probable cause?

HOLDING: Yes. The elements of a malicious prosecution claim are: "(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."[246]

The only issue on appeal is whether probable cause existed for the criminal prosecution. Where an officer falsifies the evidence that purports to provide probable cause, that fact typically goes a long way in justifying a malicious prosecution claim brought in a § 1983 action.[247] Davis argues that the charges against him were based upon Gallagher planting the heroin on him. This argument is based entirely on Davis's self-serving statements. While self-serving statements

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[244] Id. at 407.
[245] Coley v. Lucas County, 799 F.3d 530, 540 (6th Cir. 2015).
[246] Johnson v. Moseley, 790 F.3d 649, 654 (6th Cir. 2015)
[247] See France v. Lucas, 836 F.3d 612, 626 (6th Cir. 2016).

oftentimes do not create a genuine issue of material fact, thereby allowing a trial court to grant summary judgment, the record before the Sixth Circuit provided no indication that Davis's claim is demonstrably false or totally implausible.

Accordingly, the Sixth Circuit reversed the district court's summary judgment on the malicious prosecution claim and remanded that claim for further proceedings.

Hernandez v. Boles, 949 F.3d 251 (6th Cir. 2020)

FACTS: Hernandez was driving a Yukon SUV in Coffee County, Tennessee when Trooper Boles clocked him driving 77 miles per hour in a 70-mph zone. Boles waited for Hernandez's car to exit Interstate 24, then pulled him over at the side of a local road at 11:52 a.m. Boles was part of a Tennessee Highway Patrol unit called "Interdiction Plus" that "pull[s] people over for minor traffic offenses and then investigate[s] them for more serious crimes." His unit stops motorists for traffic violations such as minor speeding infractions and then, if there are no "indicators" of criminal activity, "they're given a warning ... and they're released." In this case, Boles did not plan to issue Hernandez a ticket for speeding if he saw no such indicators; instead he planned only "to issue him a warning citation."

Betancourt, owner of the Yukon, was sitting in the front passenger seat; Norge Rodriguez and Jose Perez were sitting in the back seat. Boles approached the car and requested Hernandez's driver's license, the car's registration, and proof of insurance. Upon learning that Betancourt owned the car, he also requested Betancourt's license. Boles went back to his patrol car and requested a warrant check from the National Criminal Information Center (NCIC). At 11:59 a.m., seven minutes into the stop, the dispatcher told Boles that the NCIC warrant check was negative.

Boles returned to the Yukon, requested Hernandez to step out for questioning, then asked where he was going, who was in the car, whether he had ever been in trouble, and so on. Trooper Donnie Clark arrived during the questioning. Boles then attempted to question the other occupants of the car but was stymied by their limited English. Hernandez and Betancourt repeatedly denied having anything illegal in the car, but Betancourt refused to consent to a car search. Boles told them to wait a few minutes, and Clark requested a K-9 unit.

Boles then obtained driver's licenses from Rodriguez and Perez and ran NCIC warrant checks on them as well. At about 12:13 p.m., dispatch told him that the warrant checks on Rodriguez and Perez were also negative. Around 12:12 or 12:13 p.m., Clark called the Blue Lightning Operations Center (BLOC), a more comprehensive database that Boles did not have access to, to conduct a more detailed check on all four occupants of the car.

While the Troopers awaited the results from BLOC, a dog handler arrived with a K-9 unit at about 12:17 p.m. The police dog sniffed the exterior of the Yukon, alerting to the odor of drugs. The handler then opened the car doors and the rear compartment and let the drug dog into the car to sniff the interior. The dog did not alert once inside the vehicle; instead, it ate some fast food out of a bag. After the dog did not alert inside the car, the K-9 handler shook the hands of all four

occupants and gave them a thumbs up. The K-9 handler then told Clark, "Donnie, I'm sorry, Bubba."

After the dog failed to alert, Clark received a return call from BLOC. Clark told Boles to call their supervisor and tell him, "We've got a refusal, and the canine didn't hit, and they've got an extensive background—meth." Boles received authorization to conduct a manual search, and Clark searched the Yukon. Clark found some gift cards in the driver's side door and a large number of gift cards rubber-banded together, as well as a bag containing an unknown substance, in a bag in the back seat. Clark later used a scanner to ascertain that the gift cards had been re-encoded with credit card numbers.

Hernandez, Betancourt, Rodriguez and Perez were arrested for possession of 370 re-encoded gift cards and 15 grams of a substance believed to be methamphetamine. Hernandez, Betancourt, and Perez were held in pre-trial incarceration for nine months until the criminal charges against them were dismissed. Rodriguez was held in pre-trial incarceration for only three months before the dismissal of charges because he was bailed out. All four men filed a lawsuit pursuant to 42 U.S.C. § 1983, alleging that the Troopers violated the Fourth Amendment by (a) illegally searching the car and (b) unreasonably extending the car stop. The district court granted qualified immunity to the Troopers on the car search based on case law existing at that time. At trial, the jury found that the car stop was not impermissibly prolonged.

ISSUES: 1. Under the Fourth Amendment, may police officers stop a vehicle that commits a traffic violation and look for evidence of a crime, even if the traffic stop is merely a pretext and the officer does not have an independent reasonable suspicion of criminal activity?

2. May officer prolong a traffic stop to have a drug dog sniff a car absent independent reasonable suspicion to detain the motorists?

3. Is the Fourth Amendment violated when an automobile is manually searched even though the drug dog failed to alert to the car's interior?

HOLDING: 1. Yes. It is well established, however, that police officers may stop a vehicle that commits a traffic violation and look for evidence of a crime, even if the traffic stop is merely a pretext and they do not have an independent reasonable suspicion of criminal activity.[248] In the case, because the trooper observed a traffic violation, the initial stop of the vehicle was found to be proper.

2. No. In Rodriguez v. United States,[249] the Supreme Court held that officers may not prolong a traffic stop to have a drug dog sniff a car—a crime detecting action not ordinarily incident to a traffic stop—absent independent reasonable suspicion to detain the motorist(s). The stop in Rodriguez lasted an additional seven to eight minutes after a citation was issued.

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[248] See Whren v. United States, 517 U.S. 806, 813, 819, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996);

[249] 575 U.S. 348, 135 S. Ct. 1609, 1615–16, 191 L.Ed.2d 492 (2015).

"Like a Terry stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop ... and attend to related safety concerns."[250] "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed;" whichever comes first.[251]

In this case, the traffic stop was not unreasonably prolonged simply to await the arrival of the canine unit. The delay was caused by the troopers checking multiple databases for warrants during the traffic stop. While the BLOC check was not conducted until 20 minutes into the stop (compared to four minutes into the stop for the NCIC check), there is no bright-line rule that officers are limited to checking one database for warrants during a traffic stop. While the Sixth Circuit expressed concerning about the delay with conducting the BLOC check, it affirmed the jury's finding that the stop was not unreasonable prolonged.

3. Yes. The failure of a drug-sniffing dog to alert to a car dispels suspicion.[252] In this case, a jury could determine that the dog's fruitless sniffing of the car interior was sufficiently thorough to dissipate the probable cause to search provided by its initial alert. The dog's handler opened all four of the SUV's doors and the rear compartment, allowing the dog to sniff the whole interior, and the dog spent several minutes inside the car. After the dog failed to alert, moreover, the dog's handler shook the occupants' hands, gave them a thumbs up, and apologized to Trooper Clark for the dog's failure to alert. These actions suggest that the handler felt the dog had cleared the Hernandez-Plaintiffs. Then, when telling Boles what information to relay to their supervisor, Clark said that "the canine didn't hit." A reasonable jury could conclude that the dog's failure to alert inside the car dispelled the probable cause provided by its initial alert to the exterior, and the Troopers could therefore no longer lawfully search the car.

However, qualified immunity was appropriate for the troopers because the law was not specific enough to clearly establish that the manual car search was illegal when the dog failed to alert to the interior. The law must be specific enough to put a reasonable officer on notice that the conduct at issue was unconstitutional.[253]

The Sixth Circuit affirmed the district court.

Hicks v. Scott, 958 F.3d 421 (6th Cir. 2020)

FACTS: Shortly before 11:00 PM on June 9, 2015, Cincinnati Police Officers Doris Scott and Justin Moore responded to a reported incident of menacing in the Northside neighborhood of Cincinnati. When the officers arrived at the scene, Raquella Norman and Jonathan Jones alleged

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[250] Id. at 1614.
[251] Id.
[252] See United States v. Davis, 430 F.3d 345, 356 (6th Cir. 2005) (holding that officers no longer had reasonable suspicion to detain a motorist on suspicion of drug possession and call a second drug-sniffing dog to the scene after the first drug-sniffing dog did not alert)
[253] Brown v. Lewis, 779 F.3d 401 (6th Cir. 2015).

that Quandavier had driven by their home earlier that night and threatened to kill them. According to Jones, the incident occurred after he accused Quandavier of stealing from the couple's house. Jones said that he was scared and believed that Quandavier owned and carried guns.

Scott, concerned that the situation might escalate, asked Officer Christopher Loreaux to locate Quandavier so that the officers could speak with him and get his side of the story. Jones told Scott and Moore that Quandavier lived nearby on Chase Avenue and had been driving a silver Ford Focus with a damaged side-view mirror. Jones could not provide an exact address. Nevertheless, Loreaux drove along Chase Avenue and identified a vehicle fitting Jones's description. The vehicle was parked across the street from 1751 Chase Avenue.

After Loreaux identified the vehicle, Schneider joined him at 1751 Chase Avenue. When Schneider arrived, he placed his hand on the car's hood and felt that it was hot, indicating to him that it had been driven recently. When the officers ran the car's license plate, however, they were unable to find an associated address for Quandavier. The vehicle instead came back as registered to Ariel Wilson.

Shortly after the officers ran the license plate, a woman exited from a door along the side of 1751 Chase Avenue and walked across the street to the Ford Focus. The officers walked over and questioned her. The woman, whom the officers would later learn was Wilson, told Schneider and Loreaux that she had just come from seeing her boyfriend "Jason" in the "second floor apartment." Wilson said that neither she nor anyone else had driven the Ford Focus recently and denied knowing anyone named Quandavier.

At that point, Wilson departed. Schneider found Wilson's account not credible based on his earlier assessment that the car had recently been driven. He concluded that the Ford Focus was likely the vehicle that Quandavier had been driving earlier and, in turn, that Quandavier was likely the boyfriend Wilson had been visiting in the second-floor apartment.

Scott and Moore arrived shortly thereafter. As the four officers—Scott, Moore, Schneider, and Loreaux—stood outside of 1751 Chase Avenue, they heard a voice call out "Ariel" from what they thought was the second floor. The officers deduced that the voice was likely that of Quandavier. They decided to approach 1751 Chase Avenue to see if they could locate and speak with Quandavier.

The structure located at 1751 Chase Avenue is a two-family home divided into two separate apartment units: one unit located on the first floor of the house and another unit located on the second and third floors of the house. A door at the front of the house leads to the first-floor unit. A separate door along the side of the house leads to the upstairs unit. Quandavier rented the upstairs unit.

After knocking on the front door and getting no answer, the officers went to the side of the building where the entrance to the upstairs apartment is located. The door was closed. It had

two deadbolt locks, both clearly visible, and a curtain covering the top half of the door, which was glass. Behind the curtain were metal security bars. The door had no knocker, bells, or nameplates.

The exterior side door opens into a small foyer. A few steps inside is a stairway leading to the building's upper floors. The stairway plateaus onto a small landing, turns 180 degrees to the left, and then continues up. After another few steps, the stairway opens onto a second-floor landing with four doors. According to Quandavier's uncle, Robert Thompson, none of these areas were "accessible to the public" or "shared with the First Floor Apartment."

When Scott knocked on the exterior door, however, it swung open. The officers let themselves in. They acknowledge that they did not have a warrant and that there were no exigent circumstances. Scott entered first, followed by Moore and Schneider. Loreaux remained stationed outside. Neither Scott nor Moore recall any of the officers announcing their presence or identifying themselves as police.

Scott, Moore, and Schneider proceeded up the stairway. When the officers reached the second-floor landing, they observed two closed doors immediately to their left—forming a 90-degree angle—and an area with at least one door to their right. None of the doors had locks, numbers, knockers, or nameplates. Scott knocked at least twice on one of the closed doors to her left. After the second round of knocking, she heard someone descending a stairway behind the other door immediately to her left. She stepped backed slightly.

As the stairway door opened, Scott "saw the barrel of a rifle pointed at [her] face." Moore and Schneider also saw the rifle pointed directly at her. Scott testified that the rifle was "a few feet" from her face when Quandavier opened the door, and Schneider estimated that the end of the rifle was "five feet" or "[m]aybe a few feet" from Scott. Schneider also described Quandavier as "nonchalantly" panning the rifle from left to right "at waist level," adding that it did not appear as though he was "picking out anyone in particular."

As the rifle emerged from the stairway door, Moore reached for its barrel. His hand was on the barrel as Scott fired her weapon. Moore did not instruct Quandavier to drop his rifle before reaching for the barrel, nor did Scott issue any commands before firing her weapon. Schneider estimated that the entire encounter lasted "[t]wo to three seconds, at most."

The bullet from Scott's gun hit Quandavier on the left side of his chest, piercing his lungs and "transecting," or cutting across, "[his] ascending aorta." Quandavier collapsed instantly and Moore was left standing with the rifle in his outstretched hand. Schneider testified that Quandavier was "clearly ... struggling for his life" after being shot. Both Scott and Schneider immediately radioed for paramedics. And Schneider, perceiving a need to provide medical assistance to Quandavier, attempted to first secure him with handcuffs.

Schneider ultimately failed to apply the handcuffs or provide first aid. The amount of blood gushing from Quandavier's wound and mouth prevented him from properly securing

Quandavier's hands. And before Schneider was able to provide Quandavier with any medical attention, he was interrupted by a voice coming from the third floor. Schneider, upon hearing the voice, immediately redirected his efforts to securing the third floor. With the assistance of Moore, he detained the newly discovered individual—an overnight guest of Quandavier's named Robert Boggs—and conducted a sweep of the upstairs. Schneider had no further interaction with Quandavier.

Loreaux had remained stationed outside the building as the other officers looked for Quandavier inside. But when he heard the gunshot, Loreaux immediately entered through the side door and went toward the second-floor landing. He testified that, after nearly reaching the landing, Schneider handed him Quandavier's rifle. Schneider then asked him to retrieve crime scene tape. Loreaux leaned the rifle against the wall of the lower landing and left to retrieve the tape.

As soon as he exited the building, however, Loreaux saw that another officer was already retrieving the tape, so he went back inside. Loreaux estimated that only "30 to 45 seconds" passed between setting down the rifle and his return to the second floor. Loreaux testified that, as soon as he returned, he asked Schneider whether Quandavier still required medical attention. Schneider testified that he did not recall any interaction with Loreaux regarding Quandavier's condition. According to Loreaux, however, Schneider told him that Quandavier was dead. As a result, Loreaux never examined Quandavier and made no attempt to administer first aid. Quandavier died at the scene without receiving medical attention.

In June 2016, Ruby Hicks, administrator of Quandavier's estate, sued Scott, Moore, Schneider, and the City of Cincinnati, alleging federal claims pursuant to 42 U.S.C. § 1983 for unlawful entry, excessive force, and deliberate indifference to a serious medical need, as well as state-law claims for wrongful death and battery. The district court, finding that Scott, Moore, and Schneider committed no constitutional violations, entered summary judgment in their favor based on both federal qualified immunity and immunity under Ohio law. The court also entered summary judgment in favor of the City of Cincinnati, explaining that there could be no municipal liability without an underlying constitutional violation. Hicks timely appealed.

ISSUES:

1. Is it clearly established law that an individual has an objectively reasonable expectation of privacy in a foyer, stairwell, and second-floor landing of a duplex that is not open and accessible to the public?

2. Is it clearly established law that an individual has a right to be free from warrantless entry into an apartment absent an exception to the warrant requirement?

3. If deadly force is utilized by law enforcement, must the use of deadly force be objectively reasonable?

HOLDINGS: 1-2. Yes. The Fourth Amendment protects people from "unreasonable searches and seizures." A search conducted without a warrant is "per se unreasonable,"[254] unless it "falls within a specific exception to the warrant requirement."[255]

There are two analytical approaches to determining whether a Fourth Amendment search has occurred.[256] The most familiar approach examines whether a person claiming Fourth Amendment protection had a "legitimate expectation of privacy" in the place that was searched.[257] This is a two-part inquiry.[258] First, the person claiming Fourth Amendment protection must have "exhibited an actual (subjective) expectation of privacy" in the targeted area.[259] Second, even if the person demonstrates a subjective expectation of privacy, that expectation must also be "one that society is prepared to recognize as 'reasonable'."[260] This is necessarily a fact-dependent inquiry and must be "made on a case-by-case basis."[261]

In recent years, however, the Supreme Court has revived a "property-based" approach to Fourth Amendment searches.[262] Under the property-based approach, "Fourth Amendment rights do not rise or fall with the Katz formulation" but rather retain an irreducible minimum of protection from intrusions into those areas "enumerate[d]" by the Fourth Amendment.[263] In turn, "when the government gains evidence by physically intruding on constitutionally protected areas," it is "unnecessary" to consider whether the intrusion violated a person's reasonable expectation of privacy under Katz; instead, the physical intrusion itself is "enough to establish that a search occurred."[264] As the Supreme Court observed in Jardines, "[o]ne virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy."[265]

Under a property-based approach to Fourth Amendment searches, no location receives greater protection than a person's home and its surrounding areas.[266] "[T]he Fourth Amendment has drawn a firm line at the entrance to the house."[267] To that end, "[w]hen the government gains

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[254] Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967),
[255] Riley v. California, 573 U.S. 373, 382, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014).
[256] See United States v. Jones, 565 U.S. 400, 408–09, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).
[257] Rakas v. Illinois, 439 U.S. 128, 144, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).
[258] See Katz, 389 U.S. at 359, 88 S.Ct. at 516 (Harlan, J., concurring).
[259] Id.
[260] Id.
[261] United States v. King, 227 F.3d 732, 744 (6th Cir. 2000).
[262] Florida v. Jardines, 569 U.S. 1, 11, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013); see also Jones, 565 U.S. at 406–07 & 406 n.3, 132 S.Ct. 945 (finding a Fourth Amendment search based exclusively on the government's "physical[ ] intru[sion] on a constitutionally protected area").
[263] Jones, 565 U.S. at 406, 132 S.Ct. 945.
[264] Jardines, 569 U.S. at 11, 133 S.Ct. 1409; see also United States v. Carriger, 541 F.2d 545, 549–50 (6th Cir. 1976) (finding that Katz added to—rather than displaced—existing property-based protections under the Fourth Amendment).
[265] 569 U.S. at 11, 133 S.Ct. 1409.
[266] See id. at 6, 133 S.Ct. 1409 ("[W]hen it comes to the Fourth Amendment, the home is first among equals."); Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961) ("At the [Fourth Amendment's] very core stands the right of a man to retreat into his own home ....").
[267] Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

information by physically intruding into one's home, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'"[268] The same is true of the physical areas "immediately surrounding and associated with the home."[269] These areas, known as the "curtilage," are treated as "part of [the] home itself for Fourth Amendment purposes,"[270] and receive the same property-based protections as "the interior of a structure,"[271]

Turning to the present case, the district court erred in assuming that the areas intruded upon by Scott, Moore, and Schneider were distinct from Quandavier's apartment. Whether a search occurred, at least under a straightforward application of the property-based approach, depends on the "proper characterization" of those areas.[272] That characterization is a question of fact.[273] It is sufficient at this stage of the litigation that the record contains evidence to support the characterization advocated by Hicks. Quandavier's girlfriend, Ariel Wilson, repeatedly stated that the defendants "went into [Quandavier's] house." She even described the second-floor landing where Quandavier was shot as "his room." That characterization was echoed by Quandavier's uncle, Robert Thompson, who described Quandavier's living area as inclusive of the second floor and stated that no portion of the unit was "accessible to the public" or "shared with the First Floor Apartment." In fact, there is no documentary or testimonial evidence to support the view that these areas were anything other than interior portions of the rear apartment unit.

The layout of the duplex further evidences that the defendants entered a constitutionally protected area. The only kitchen and bathroom associated with the rear unit are located on the second floor and are connected to the third-floor bedroom via the landing. It would be anomalous to find—let alone at summary judgment—that the conduit between these core living spaces is a public corridor, especially when there is evidence that the foyer, stairwell, and landing were controlled and used by only one person: Quandavier. Moreover, even if the foyer and stairwell could be described as distinct from the core living spaces, they are still "intimately tied" to the apartment's interior.[274] Once inside the exterior door, no additional walls or doors divide the foyer and stairwell from the second-floor landing. More so than an exposed front porch, which the Supreme Court recently held out as an "exemplar" of curtilage, the enclosed foyer and stairwell are areas "to which the activity of home life extends."[275] Accordingly, when viewed in a light most favorable to Hicks, the record supports that the defendants invaded a constitutionally protected area.

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[268] Morgan v. Fairfield Cty., 903 F.3d 553, 561 (6th Cir. 2018) (quoting Jardines, 569 U.S. at 5, 133 S.Ct. 1409).
[269] Id.
[270] Oliver v. United States, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984),
[271] Dow Chem. v. United States, 476 U.S. 227, 235, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986).
[272] United States v. Werra, 638 F.3d 326, 331 (1st Cir. 2011).
[273] Richards v. City of Jackson, 788 F. App'x. 324, 329–30 (6th Cir. 2019).
[274] Morgan, 903 F.3d at 561 (quoting United States v. Dunn, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)).
[275] Jardines, 569 U.S. at 7, 133 S.Ct. 1409 (quoting Oliver, 466 U.S. at 182 n.12, 104 S.Ct. 1735).

Moreover, even if we were to accept the defendants' contested characterization of the area as an extended corridor leading to a self-contained apartment on the third floor, Quandavier had a reasonable expectation of privacy in that space. We have long held that tenants of multi-occupancy structures have a reasonable expectation of privacy in "common areas ... not open to the general public."[276] A tenant in a twelve-unit apartment building, for instance, has a reasonable expectation of privacy in a locked common area leading to multiple units.[277] The same is true of an unlocked basement shared by the seven tenants of a duplex: it is expected that only the "tenants and landlord" will frequent such an area.[278] It is only when a tenant should expect that members of the general public will pass through a common space—i.e., persons other than the landlord, co-tenants, and their invited guests—that she loses her reasonable expectation of privacy in that space.[279] Thus, as we explained in Dillard, if a tenant leaves the door to a common hallway unlocked and "ajar," and that hallway leads to the entrance of multiple units, it is not reasonable for the tenant to expect that the area will remain private.[280]

Here, viewing the evidence in a light most favorable to Hicks, the interior corridor is one in which Quandavier had a reasonable expectation of privacy. It is uncontroverted that the corridor led to only one apartment: Quandavier's. And there is no evidence that anyone other than Quandavier and his guests had a right or reason to access that area; indeed, the exterior door—hardly visible from the street—was at the end of a narrow alley running parallel to the duplex. Still, despite the exterior door's withdrawn location, Quandavier took affirmative steps to exclude the public and maintain his privacy. There is evidence that he normally locked the door with multiple deadbolts, rebuffed prying eyes with a privacy curtain, and fortified the glass with security bars. The lack of a doorbell and knocker could also support the inference that he had no interest in admitting strangers. Although the defendants contend that the unlocked door divested Quandavier of any reasonable expectation of privacy, intervening acts unknown to the sole user of an area cannot independently nullify an otherwise justified expectation of privacy.[281]

As the right to be free from warrantless entry into a private residence and its curtilage was clearly established at the time of Quandavier's death, the Sixth Circuit held that the officers herein violated Quandavier's right to be free from unreasonable searches and that qualified immunity was erroneously granted.

3. Yes. The Fourth Amendment's prohibition against unreasonable seizures prohibits the use of excessive force.[282] The test is one of objective reasonableness: "[T]he question is whether

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[276] Carriger, 541 F.2d at 549; see also United States v. Dillard, 438 F.3d 675, 683 (6th Cir. 2006) (recognizing that Carriger remains "controlling in this circuit").
[277] 541 F.2d at 549–52.
[278] King, 227 F.3d at 749–50.
[279] Dillard, 438 F.3d at 684.
[280] Id. at 682–84.
[281] See, e.g., United States v. Kimber, 395 F. App'x 237, 247–48 (6th Cir. 2010) (holding that lock on common hallway door broken by other tenants did not undermine plaintiff's reasonable expectation of privacy).
[282] King v. Taylor, 694 F.3d 650, 662 (6th Cir. 2012).

[an] officer['[']s actions [were] 'objectively reasonable' in light of the facts and circumstances confronting [her]."[283] In assessing those circumstances, we consider three main factors: (1) "the severity of the crime at issue," (2) "whether the suspect pose[d] an immediate threat to the safety of the officers or others," and (3) "whether [the suspect was] actively resisting arrest or attempting to evade arrest by flight."[284] When an officer uses deadly force, the critical factor is whether the suspect presented an immediate danger to the officers or others.[285] To that end, an officer's use of deadly force is only reasonable if she had "probable cause to believe that the suspect pose[d] [such] a threat."[286]

The reasonableness of a particular use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[287] Courts may not substitute our own opinion of "proper police procedure for the instantaneous decision of the officer at the scene."[288] Although the fact that a situation unfolds quickly "does not, by itself, permit [officers] to use deadly force,"[289] we must afford "a built-in measure of deference to [an] officer's on-the-spot judgment."[290] "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[291]

In the present case, Scott reasonably perceived an immediate threat to her safety when a rifle was pointed at her face from five feet away. Although "merely possessing a weapon" does not justify deadly force,[292] the reasonableness of an officer's asserted fear will often turn on whether an armed suspect pointed her weapon at another person.[293] In turn, if a suspect possessed a gun, we will generally deny qualified immunity only if there is a genuine dispute of fact as to whether the gun was pointed at someone.[294]

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[283] Graham v. Connor, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).
[284] Untalan v. City of Lorain, 430 F.3d 312, 314 (6th Cir. 2005) (quoting Graham, 490 U.S. at 396, 109 S.Ct. 1865).
[285] Mullins v. Cyranek, 805 F.3d 760, 766 (6th Cir. 2015).
[286] Untalan, 430 F.3d at 314.
[287] Chappell v. City of Cleveland, 585 F.3d 901, 908 (6th Cir. 2009) (quoting Graham, 490 U.S. at 396, 109 S.Ct. 1865).
[288] Boyd v. Baeppler, 215 F.3d 594, 602 (6th Cir. 2000).
[289] Smith v. Cupp, 430 F.3d 766, 775 (6th Cir. 2005),
[290] Burchett v. Kiefer, 310 F.3d 937, 944 (6th Cir. 2002).
[291] Graham, 490 U.S. at 396–97, 109 S.Ct. 1865.
[292] Jacobs v. Alam, 915 F.3d 1028, 1040 (6th Cir. 2019),
[293] See, e.g., Boyd, 215 F.3d at 599 ("[T]he issue that is material here is ... whether [the suspect] pointed his weapon at the officers and thus posed an immediate threat to them."); David v. City of Bellevue, 706 F. App'x 847, 851 (6th Cir. 2017) ("The key fact ... is whether [the suspect] had his gun pointed at the officers."); Presnall v. Huey, 657 F. App'x 508, 512 (6th Cir. 2016) ("Time and time again, we have rejected Fourth Amendment claims ... when the officers used deadly force only after the suspect[ ] had aimed [her] gun[ ] at [them] ....").
[294] See, e.g., King, 694 F.3d at 662–63 (denying qualified immunity based on dispute as to where gun was pointed); Brandenburg v. Cureton, 882 F.2d 211, 215 (6th Cir. 1989) (same); David, 706 F. App'x at 851–52 (same).

Here, there is no genuine dispute that Quandavier pointed his rifle directly at Scott in the moments before he was shot. The defendants all testified that, as soon as the door started to open, they could see the rifle barrel pointed at Scott. Scott testified that the rifle was "pointed at [her] face." Whether Quandavier incidentally or deliberately pointed the rifle at Scott is of little relevance: either way, the record shows that, the moment the doorway opened, she was at the business end of a rifle. Quandavier may have had no ill intent when he pointed the rifle at Scott; the issue, however, "is whether a reasonable officer in [Scott's] shoes would have feared for [her] life, not what was in the mind of [Quandavier] when he turned [the corner] with [a] gun in his hand."[295]

Hicks finally argues that Scott's use of deadly force was unreasonable because she placed herself in harm's way and then failed to warn Quandavier before firing. Hicks has a point: Scott may have been negligent or worse in creating the situation when she entered the apartment and failed to announce herself. Under the "segmented analysis" employed by this court, however, "[w]e do not scrutinize whether it was reasonable for the officer to create the circumstances."[296] Instead, the only inquiry that matters is whether, in the "moment" before using deadly force, an officer reasonably perceived an immediate threat to her safety.[297] Here, as already discussed, Scott reasonably perceived such a threat. And it is for this same reason that Scott was not required to give a warning. When the "hesitation involved in giving a warning could readily cause such a warning to be [the officer's] last," then a warning is not feasible.[298] It was not feasible for Scott—unexpectedly confronted with the barrel of a rifle from five feet away—to give a warning before firing her weapon.

The Sixth Circuit held that Scott's use of deadly force was objectively reasonable and affirmed the grant of qualified immunity to Scott.

The Sixth Circuit affirmed in part, reversed in part and remanded for further proceedings.

<u>Howse v. Hodous</u>, 953 F.3d 402 (6th Cir. 2020)

FACTS: One summer night in 2016, Howse was walking home from a convenience store. Along the way, Howse says an unidentified Cleveland Police officer approached and asked whether he had any weapons. Howse said no. The John Doe officer then patted him down and searched his pockets. After finding no contraband, the officer told Howse that he could leave.

When Howse got home, he began climbing the steps on his front porch. The parties dispute what happened next.

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[295] <u>Bell v. City of East Cleveland</u>, No. 96-3801, 1997 WL 640116, at *3 (6th Cir. Oct. 14, 1997).
[296] <u>Thomas v. City of Columbus</u>, 854 F.3d 361, 365 (6th Cir. 2017); see also <u>Dickerson v. McClellan</u>, 101 F.3d 1151, 1160–62 (6th Cir. 1996) (refusing to consider officers' unannounced entry when weighing the reasonableness of deadly force).
[297] <u>Thomas</u>, 854 F.3d at 365.
[298] <u>McLenagan v. Karnes</u>, 27 F.3d 1002, 1007 (4th Cir. 1994).

Howse claimed that several men (two of whom he later identified as Officers Thomas Hodous and Brian Middaugh) pulled up in an unmarked vehicle. Middaugh asked Howse if he lived at the house. Howse replied that he did. Middaugh asked Howse if he was sure that he lived there. Howse said something like "yes, what the f---" in response. That prompted Middaugh to comment that Howse had a smart mouth and a bad attitude. Middaugh then got out of the car, walked toward the porch, and asked Howse (yet again) if he was sure that he lived there. Again, Howse responded yes.

Things escalated from there. Middaugh told Howse to put his hands behind his back and that he was going to jail. Howse disobeyed Middaugh's command to put his hands behind his back. Instead, Howse yelled that he has done nothing wrong and that he lived at the house. Middaugh ran onto the porch, grabbed Howse (who at that point was screaming at the top of his lungs), and threw him down. When Middaugh was on top of him, Howse realized that Middaugh was a police officer. Middaugh, with help from Hodous, then tried to handcuff Howse. But Howse, in his own words, was resisting arrest by screaming and "stiffening up" his body. Howse says he never tried to hit, push, or fight with the officers. And he claims that he "didn't do anything that would be considered offensive" to the officers.

At this point, Howse's mother (who owned the house) showed up. She had heard some commotion and rushed to the front porch. When she arrived, she saw a "chaotic" scene: a man in dark clothing straddled Howse and another man struck Howse with a closed fist, which caused Howse's head to strike the porch. She asked the men (who she later realized were police officers) to stop striking her son—she kept explaining that he lived at the house. After things settled down, the officers put Howse in a police car and took him to jail.

The officers tell a different story. That night, Hodous and Middaugh (along with another officer) were patrolling the area where Howse lived—an area known for violence, drugs, and gang activity. While driving in an unmarked vehicle, they saw Howse lingering suspiciously on the front porch of a house. Howse looked nervous when he saw the unmarked vehicle. Middaugh thought the house was vacant because it appeared to be boarded up and there were bars on the doors.

Based on his training and experience, Middaugh suspected that Howse might be engaged in criminal activity. So Middaugh asked Howse whether he lived there. Howse said he did. Middaugh wanted to investigate more, so he got out of the car, walked toward Howse, and asked him if he was trying to break in. Middaugh doesn't remember exactly what Howse said in response, but he does remember that Howse said "f---" along with some other words. (Hodous, for what it's worth, recalls Howse saying "f--- you" and "leave me the f---alone." R. 25-2, Pg. ID 303.)

When Middaugh reached the front porch, Howse clenched his fists and "squared up" into a fighting stance. Middaugh, afraid that Howse wanted to fight, told Howse to put his hands in the air. Howse ignored that instruction and instead motioned towards his pockets, which prompted Middaugh to grab Howse's arm. Hodous joined Middaugh and tried to restrain Howse, who was grabbing at the officers and flailing around. Howse struck Hodous in the chest. Howse also tried

to rip off Middaugh's flashlight and handcuff case. So Middaugh used a leg sweep to take Howse to the ground. Even while on the ground, Howse resisted the officers by burying his hands underneath his chest. The officers eventually handcuffed him and put him in a police vehicle. It was not until Howse's mother showed up, the officers claim, that they found out that Howse did in fact live at the house.

After Howse was booked into jail, Middaugh signed a complaint charging Howse with assaulting a police officer. Hodous and Middaugh then wrote up "Use of Force" reports detailing what happened on the front porch. These reports said that Howse resisted arrest and struck the officers. After a few days, Howse posted bond and was released. Later, a grand jury indicted Howse on two counts of assault along with one count of obstruction of official business. The State of Ohio eventually dismissed the charges.

Howse then sued Hodous and Middaugh under 42 U.S.C. § 1983 for violating his Fourth Amendment rights and for committing assault and battery under Ohio law. He also sued the City of Cleveland, claiming that the City was responsible for the Fourth Amendment violations. The district court granted summary judgment for the defendants. This appeal followed.

ISSUE: 1. Is it clearly established law that an officer may not tackle a non-compliant suspect and use additional force against the suspect solely because the suspect resists arrest?

2. To succeed on a claim for municipal liability alleging failure to train, what must the plaintiff prove?

HOLDING: 1. No. Qualified immunity shields law enforcement officers from civil liability unless the officers (1) violated a statutory or constitutional right and (2) the unlawfulness of their conduct was clearly established at the time.[299] "Clearly established" means that the law is so clear at the time of the incident that every reasonable officer would understand the unlawfulness of his conduct.[300] In this case, the Sixth Circuit held that the law was not clearly established that that law enforcement cannot tackle a non-compliant suspect and use additional force against him if he resists arrest. Accordingly, the officers are entitled to qualified immunity in this case.

2. Municipalities may be held liable under § 1983 for their own unlawful acts.[301] To be liable, though, it's not enough that a municipality's employees violated someone's constitutional rights. Instead, the plaintiff must show that the municipality itself caused the constitutional violation through one of its own customs or policies.[302] One way to prove liability is to show a municipal

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[299] District of Columbia v. Wesby, ––– U.S. ––––, 138 S. Ct. 577, 589, 199 L.Ed.2d 453 (2018).
[300] Id.
[301] Monell v. Dep't of Social Servs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).
[302] Id., at 694.

policy of inadequate training that led to the constitutional harm.[303] Another way is to show a municipal custom of tolerating rights violations that led to that constitutional harm.[304]

In order to prove failure to train, a plaintiff must show: 1) the training program did not adequately prepare the officers for the tasks they must perform, (2) the inadequacy resulted from the municipality's deliberate indifference, and (3) the inadequacy either closely related to or caused Howse's injury.[305] In this case, Howse cannot meet these elements. Cleveland's training academy's standards exceed state requirements, and Cleveland's police force has explicit written policies instructing officers not to use excessive force. Howse offers no evidence to the contrary—at least relevant to the claims here. On top of that, Howse hasn't shown how any inadequacy in the training program led to his constitutional injuries. Finally, there is no evidence that Cleveland approved of an unlawful activity or that any such approved caused Howse's injuries. On the contrary, Cleveland has taken affirmative steps to combat the unlawful use of excessive force. Those steps include a thorough use-of-force policy and active enforcement of that policy. Take this case. After Hodous and Middaugh filed their Use of Force reports, several other officers reviewed those reports to make sure that the force used was reasonable.

The Sixth Circuit affirmed the grant of qualified immunity.

Jones v. City of Elyria, Ohio, 947 F.3d 905 (6th Cir. 2020)

FACTS: Officers Chalkley and Weber received a call that a potentially intoxicated white male was eating out of a dumpster located behind a shopping plaza. But when the pair responded to the call, they did not see anyone by the dumpsters. Scanning the plaza, the officers eventually spotted Jones, the only white male in the area, talking to two women in the plaza parking lot. Although, as the officers acknowledge, they were not investigating a crime upon making first contact, Weber called out to Jones, asking him to approach the police cruiser. What happened next is deeply disputed.

According to the officers, as Weber called out to Jones, the two women who had been speaking with Jones hurriedly walked away. As they walked past Weber, they thanked him for his help. At the same time, Jones ran behind a nearby clothing donation bin. After repeated instructions from the officers to approach the cruiser, Jones reluctantly complied, emerging from behind the bin with his palms turned down and an unidentified object in each hand. Weber instructed Jones to drop the objects. Jones complied, dropping two green peppers.

Jones then resumed approaching the cruiser. This time, his hands were in his pockets. Concerned that Jones might be concealing a weapon, Weber ordered Jones to keep his hands visible. Jones obeyed only momentarily, quickly returning his hands to his pockets. Once Jones reached the cruiser, Weber instructed Jones to place his hands on the hood. Weber then gave Jones a pat-

[303] Thomas v. City of Chattanooga, 398 F.3d 426, 429 (6th Cir. 2005).
[304] Id.
[305] Winkler v. Madison Cty., 893 F.3d 877, 902 (6th Cir. 2018).

down, as Chalkley assisted. When Jones again attempted to return one hand to his pocket, Chalkley grabbed Jones's hand. Startled, Jones pushed off the hood of the car and attempted to punch Chalkley.

The officers took Jones to the ground. Jones resisted. He drew his arms underneath his body to avoid being handcuffed while kicking his feet at the officers. He attempted to draw his knees under his body in an effort to stand up. And he attempted to reach for Chalkley's holstered firearm. In an effort to subdue Jones, Weber and Chalkley placed their weight on Jones's hip area and struck Jones in his arms and sides with closed fists. Chalkley also punched Jones in the face after Jones grabbed Chalkley's testicles.

Officer Mitchell arrived at the scene during the pat-down. As the scuffle with Jones ensued, Mitchell helped hold Jones's legs, to keep him on the ground. With Mitchell's assistance, Weber was able to tase Jones and end his resistance.

Jones states that he was going home after buying two green peppers from a nearby café when he stopped to have a conversation with two women. After talking to the women, Jones resumed walking, at which point he heard Weber call out.

Eventually realizing that Weber was speaking to him, Jones says he did as he was told. As he came toward the cruiser, Jones removed his hands from his pockets, kept them visible at all times, and then placed them on the hood of the cruiser. Weber and Chalkley performed a pat-down. Jones became nervous that he was being detained for no stated reason, so he looked over his left shoulder to speak with the two officers. In response, the officers took Jones to the ground.

Jones says he offered no resistance, and in fact struggled to breathe as his face was pressed against the concrete by an officer's forearm. Jones could not move his arms due to the weight of the officers on top of him. Despite his lack of resistance, Jones says he was repeatedly punched and tased by Weber and Chalkley, barely maintaining consciousness. Though Mitchell arrived later and assisted Weber and Chalkley with the arrest, Jones does not allege that Mitchell struck or tased him.

In any event, Jones was taken to the hospital where Weber filled out a form to have Jones involuntarily committed. Jones was committed for psychiatric evaluation. Jones was ultimately indicted on charges of assault on a police officers, obstructing official business, and resisting arrest. Jones moved to suppress, arguing that the officers did not have probable cause to make an arrest. The trial court denied suppression. Jones was acquitted of all charged after a jury trial.

Jones filed an action pursuant to 42 U.S.C. § 1983 action, asserting (1) an excessive-force claim against Weber, Chalkley, and Mitchell, (2) a supervisory-liability claim against Chief Duane Whitely, (3) Monell and ratification claims against Whitely and the City of Elyria, and (4) wrongful-arrest and malicious-prosecution claims. Jones also brought state-law claims for assault, battery, wrongful arrest, and malicious prosecution against all named defendants along with a claim for intentional infliction of emotional distress against all named defendants except Whitely.

Qualified immunity was granted to Whitely and the City of Elyria on all claims. The assault and battery claim was dismissed as untimely. The district court, however, denied immunity to the individual officers on the federal excessive-force claim as well as the federal and state-law wrongful-arrest and malicious-prosecution claims. The officers appealed.

ISSUES: 1. Are Terry stops permitted if the officer has a reasonable and articulable suspicion that criminal activity is occurring?

2. Must an arrest be supported by probable cause?

3. Are the reasonable suspicion and probable cause safeguards clearly established?

4. With respect to the assessment of a public official's claim to qualified immunity, will an officer be held responsible for the conduct of others?

5. Does the Fourth Amendment protect citizens from excessive force in the course of an arrest or other seizure from governmental actors?

6. Does the Fourth Amendment protect private individuals against malicious prosecution?

HOLDINGS: 1. Yes. To preserve public safety, courts afford officers broad powers to investigate potential crimes. But those powers have limits. One fundamental limit is the prohibition on stopping and frisking a suspect without reasonable suspicion of criminal activity.[306] Reasonable suspicion, as the phrase is generally defined, means more than a mere hunch or intuition. At a minimum, it requires inferences from specific facts known to the officer that tend to suggest criminal activity.[307] In this case, Weber and Chalkley admit they were not investigating a crime when they initiated contact with Jones. At worst, the officers heard reports that a man fitting Jones's rough description was eating out of a dumpster, a perhaps uncustomary but nonetheless non-criminal activity. Whether Jones then darted behind a donation bin after Weber called out to him is disputed by the parties. But even if that conduct occurred, scurrying away from a consensual conversation with a police officer is likewise not enough to create reasonable suspicion. The Sixth Circuit held that the trial court's denial of qualified immunity was appropriate on this claim.

2. Yes. It is well settled that officers must have probable cause before arresting a suspect.[308] Probable cause is present when the circumstances known to an officer support the belief that a criminal offense has occurred or is ongoing.[309] A finding of probable cause necessarily defeats a

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[306] Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).
[307] Id. at 21, 88 S.Ct. 1868.
[308] Malley v. Briggs, 475 U.S. 335, 340–41, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); Wesley v. Campbell, 779 F.3d 421, 428 (6th Cir. 2015).
[309] Newman v. Township of Hamburg, 773 F.3d 769, 772 (6th Cir. 2014).

wrongful-arrest claim.[310] Here, the Sixth Circuit held that refusing to comply with the request from Weber and Chalkley to submit to a pat-down search does not constitute an affirmative act for the offense of obstructing official business under Ohio law. Thus, the trial court's denial of qualified immunity was appropriate on this claim.

3. Yes. The reasonable suspicion and probable cause safeguards are clearly established rights. The prohibition against conducting a non-consensual pat-down search in the absence of reasonable suspicion of criminal activity has been clearly established for more than five decades. Equally well settled is one's right to freedom from arrest without probable cause.

4. No. This issue arose out of Mitchell's claim of qualified immunity. In the context of assessing a public official's claim to qualified immunity, the Sixth Circuit considers each official on her own terms, examining the relevant events from her perspective in evaluating her entitlement to qualified immunity.[311] Thus, the Sixth Circuit holds that an officer is responsible only for her "own individual conduct and not the conduct of others."[312]

Mitchell was a late-arriving officer, so the courts must consider the circumstances apparent to each officer at the time of arrival. Mitchell could not have known whether her fellow officers had another reason to take Jones to the ground—perhaps a firearm in Jones's pocket. Given the uncertainty, there is no doubt a similarly situated officer would have done precisely the same thing—assist her fellow officers in securing the suspect and ask questions later. And Mitchell's role, it bears reminding, was merely to hold Jones's legs while Weber and Chalkley allegedly engaged in excessive force in detaining Jones. Beyond restraining Jones for purposes of effectuating an arrest, Mitchell took no independent action against Jones that might constitute excessive force. Accordingly, Mitchell was entitled to qualified immunity.

5. Yes. The Fourth Amendment protects individuals from government actors employing excessive force in the course of an arrest or other seizure.[313] The right to not be subject to excessive force during a government seizure is clearly established.[314] Ascertaining whether force was excessive in any given case, however, is a fact-intensive inquiry, one that requires balancing the governmental interest at stake with the extent of the intrusion upon the individual.[315] To strike the balance, courts examine "(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 [the suspect] is actively resisting arrest or attempting to evade arrest by flight."[316] Courts assess these factors

[310] See id. at 772–73.
[311] Binay v. Bettendorf, 601 F.3d 640, 650 (6th Cir. 2010).
[312] Pollard v. City of Columbus, 780 F.3d 395, 402 (6th Cir. 2015).
[313] Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).
[314] Bennett v. Krakowski, 671 F.3d 553, 562–63 (6th Cir. 2011).
[315] Id. at 396, 109 S.Ct. 1865.
[316] Estate of Hill by Hill v. Miracle, 853 F.3d 306, 312–13 (6th Cir. 2017).

from the officer's perspective at the time when the excessive force allegedly occurred, rather than from the perspective of a reviewing court with the benefit of hindsight.[317]

In this case, the Sixth Circuit found that Weber and Chalkley employed excessive force in arresting Jones. By their own admission, the two officers tackled Jones to the ground, placed their weight on top of him, employed "closed fist strikes" on his arms and sides, punched him in the face, and then tased him. They likewise concede that, when they first arrived on the scene, they were not investigating a crime. In fact, they had little more than a vague, generalized suspicion that Jones might be a threat to himself or others. And as these events unfolded, Jones says he neither resisted nor made any attempt to escape, while repeatedly asking the officers to stop. On Jones's version of the facts, these actions were objectively unreasonable.[318]

Mitchell is differently situated than her fellow officers. When Mitchell arrived on the scene, Weber and Chalkley were already struggling with Jones. She did not witness the events that led to the unlawful pat-down, nor do we impute to her the knowledge of facts known only to the other officers. Jones alleges only that Mitchell took hold of his feet while Weber and Chalkley restrained him. Mitchell did not tase Jones or strike him, even on Jones's own version of the events. Additionally, because Mitchell did not witness the events leading up to the altercation, she could have fairly believed that Jones posed a threat to Weber and Chalkley. A reasonable officer in that circumstance would likewise have helped secure the scene. And that is precisely what Mitchell did. As Jones does not say otherwise, Mitchell's actions did not violate Jones's Fourth Amendment rights.

6. Yes. The Fourth Amendment also protects private individuals against unjustified, or malicious, criminal prosecution.[319] To make out a § 1983 claim for malicious prosecution, a plaintiff must establish: "(1) that a criminal prosecution was initiated against the plaintiff and that the defendant ma[d]e, influence[d], or participate[d] in the decision to prosecute; (2) that there was a lack of probable cause for the criminal prosecution; (3) that, as a consequence of a legal proceeding, the plaintiff suffered a deprivation of liberty ... apart from the initial seizure; and (4) that the criminal proceeding must have been resolved in the plaintiff's favor."[320] It is well established law in the Sixth Circuit that governmental officials may be held liable for malicious prosecution when they knowingly include false statements in their investigative materials, where those materials influence the ultimate decision to prosecute.[321]

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[317] Id. at 315.
[318] Aldini v. Johnson, 609 F.3d 858, 867 (6th Cir. 2010) ("There is simply no governmental interest in continuing to beat [an arrestee] after he ha[s] been neutralized, nor could a reasonable officer [think] that there [is].") (internal citations omitted) (alterations in original).
[319] Mills v. Barnard, 869 F.3d 473, 479–80 (6th Cir. 2017).
[320] Id.
[321] Sykes v. Anderson, 625 F.3d 294, 308–09 (6th Cir. 2010).

Here, Weber, Chalkley and Mitchell each filed a narrative report stating that Jones was actively resisting arrest by fighting with the officers. Witnesses at the scene contradicted those reports. Further, probable cause to prosecute was not present. Thus, qualified immunity is not available.

The Sixth Circuit also addressed the state law claims and reversed one judgment with respect to wrongful arrest concerning Mitchell's actions.

Accordingly, the district court was affirmed in part, reversed in part and remanded for further proceedings.

Jones v. Clark County, Kentucky, 959 F.3d 748 (6th Cir. 2020)

FACTS: Lexington Police Detective Flannery tracked the source of a thirty-nine-second video of child pornography to a device that had connected to the internet via a router with an IP address located in Clark County, Kentucky. The video was being shared via the Ares peer-to-peer file sharing network. Detective Flannery contacted Clark County Deputy Sheriff Murray about the video. Deputy Murray obtained a subpoena from the internet provider, AT&T. AT&T identified David Jones at the subscriber associated with the IP address and provided Jones's personal information and address to Deputy Murray. Deputy Murray secured a search warrant for Jones's address. Jones's affidavit noted that Jones was not yet a suspect because Jones did not necessarily have possession of the device connected to the child pornography. According to the affidavit, the purpose of the search was to locate the electronic device(s) used to upload and/or store the illegal video; as well as any "hard copies of images of minors engaged in sexual performances" or other proof of child pornography in the residence.

Murray and his supervisor, Captain Brian Caudill, executed the search warrant along with three other deputies and seized a tablet, cell phone, printer, modem, Xbox gaming console, and three DVDs from Jones' residence. The officers handcuffed Jones as soon as they entered his home and after completing the search they brought him to the Sheriff's Office for further questioning. In his deposition testimony Murray does not clarify the basis for this arrest, explaining only that "there was a download of child pornography associated with an IP address of a router that was in his apartment," and that when Murray arrived at the apartment Jones "was the only one there."

Before the grand jury, Murray clarified that he arrested Jones because of the evidence that a download of child pornography occurred at the IP address associated with Jones' residence. Murray testified that it was not until after Jones was Mirandized that Jones revealed the facts asserted in the Uniform Citation to Murray—that Jones lived alone, was alone the night of the download, and had not shared his router password with anyone. The grand jury ultimately charged Jones with promoting a sexual performance by a minor under sixteen years of age.

After Jones's indictment, Murray received the results of a forensic examination of Murray's telephone. The forensic testing failed to yield a copy of the pornographic video that had been uploaded at Jones' IP address. According to Murray, the tablet was "too new" for a complete

forensic exam to be performed. The phone was thoroughly examined, but all that was discovered was an audio file that appeared to have been partially downloaded through the Ares program. It is unclear if the test results were timely provided to the prosecutors or the defense. The defense retained an expert to conduct a forensic test, which yielded a negative result. The defense's exam also found no evidence "that the defendant ever used a peer to peer file sharing program such as Ares." Jones filed a motion to dismiss the charges against him, which was denied.

Ultimately, the Commonwealth dismissed the charge against Jones without prejudice, based upon the competing expert results.

Jones filed a lawsuit pursuant to 42 U.S.C. § 1983 against Clark County, Sheriff Purdue and Deputy Murray for the alleged violation of his constitutional rights stemming from his arrest and prosecution. He asserted that his Fourth, Fifth, and Fourteenth Amendment rights were violated, that Defendants engaged in a malicious prosecution of him under both state and federal law, that Defendants were negligent and grossly negligent, and that they intentionally inflicted emotional distress upon him. The district court dismissed the matter, but that dismissal was overturned by the Sixth Circuit. Upon the close of discovery on remand, the district court granted summary judgment to Clark County, Sheriff Purdue and Deputy Murray. This appeal followed.

ISSUES:

1. When making a probable cause determination for making an arrest, must an officer consider the totality of the circumstances, including available inculpatory and exculpatory evidence?

2. Can a claim for malicious prosecution be based upon continued detention without probable cause?

3. May supervisory liability under § 1983 attach where the allegation of liability is based upon the supervisor's mere failure to act?

4. Is the right to be free from malicious prosecution a clearly established right under the Fourth Amendment?

HOLDINGS: Yes. This is a claim for malicious prosecution. Under federal law, a plaintiff must prove four elements to establish a malicious prosecution claim: (1) that a criminal prosecution was initiated against the plaintiff and that the defendant "made, influenced, or participated in the decision to prosecute;" (2) that the state lacked probable cause for the prosecution; (3) that the plaintiff suffered a deprivation of liberty because of the legal proceeding; and (4) that the criminal proceeding was "resolved in the plaintiff's favor."[322]

An officer "possesses probable cause when, at the moment the officer seeks the arrest, 'the facts and circumstances within [the officer's] knowledge and of which [she] had reasonably trustworthy information [are] sufficient to warrant a prudent man in believing that the [plaintiff]

[322] Sykes v. Anderson, 625 F.3d 294, 308–09 (6th Cir. 2010).

had committed or was committing an offense.'"[323] A probable cause determination is based upon the "totality of the circumstances" and must consider "both the inculpatory and exculpatory evidence."[324] That means an officer cannot "'simply turn a blind eye' toward evidence favorable to the accused,"[325] nor "ignore information which becomes available in the course of routine investigations,"[326]That said, "[o]nce probable cause is established, an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused."[327]

Jones was charged with promoting a sexual performance by a minor. Under KRS 531.320, "A person is guilty of promoting sexual performance by a minor when knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a minor." KRS 531.300(7) defines "promote" as "to prepare, publish, print, procure or manufacture, or to offer or agree to do the same." Under Kentucky law the "statute is violated when one either actively or passively prepares, agrees, or brings forth through their efforts the visual representation of a minor in a sexual performance before an audience."[328] Thus, if there was probable cause to believe that Jones promoted the sexual performance of a minor by uploading the unlawful video through his router, then there was probable cause to arrest Jones.

At the point of arrest, Murray and his fellow officers knew that Jones owned the router associated with the illegal download. That Jones was alone the night of the download, that his router was password-protected, and that he had heard of the Ares program from a computer class he had taken was determined only after Jones was apprehended and then interrogated.

The fact that Jones owned the router that Lexington Police records indicated was used to upload child pornography and that the router was located in Jones' apartment could "warrant a prudent man in believing that the [Jones] had committed or was committing an offense." [329] Accordingly, Jones's arrest was supported by probable cause.

2. However, a malicious prosecution claim can involve "continued detention" without probable cause.[330] Here, there is a question of fact as to whether probable cause supported Jones's continued detention upon Murray's receipt of the results of the forensic examination conducted by Lexington Police. It could be reasonably inferred that the Commonwealth lacked the evidence it needed to continue its prosecution of Jones once the forensic examination failed to connect Jones' devices with the video. In fact, the prosecutors admitted that it was the

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[323] Wesley v. Campbell, 779 F.3d 421, 429 (6th Cir. 2015)
[324] Id., at 429.
[325] Id., (quoting Ahlers v. Schebil, 188 F.3d 365, 372 (6th Cir. 1999)),
[326] Fridley v. Horrighs, 291 F.3d 867, 873 (6th Cir. 2002).
[327] Ahlers, 188 F.3d at 371.
[328] Clark v. Commonwealth, 267 S.W.3d 668, 678 (Ky. 2008).
[329] Wesley, 779 F.3d at 429.
[330] Spurlock v. Satterfield, 167 F.3d 995, 1006 (6th Cir. 1999); Gregory v. City of Louisville, 444 F.3d 725, 750 (6th Cir. 2006) (recognizing the "subset of malicious prosecution claims which allege continued detention without probable cause").

weakness of the forensic report relative to the defense expert's report that justified the dismissal of charges. Hence, the Sixth Circuit held that Murray was not entitled to summary judgment on the malicious prosecution claim.

3. No. With respect to his claim of supervisory liability against Sheriff Purdue and Clark County, "[s]upervisory liability under § 1983 cannot attach where the allegation of liability is based upon a mere failure to act."[331] Rather, the supervisors must have actively engaged in unconstitutional behavior.[332] "Therefore, liability must lie upon more than a mere right to control employees and cannot rely on simple negligence."[333] "A supervisory official's failure to supervise, control or train the offending individual is not actionable unless the supervisor 'either encouraged the specific incident of misconduct or in some other way directly participated in it.'"[334] "At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers."[335]

Similarly, a county may not be sued under § 1983 solely because an injury was inflicted by one of its employees or agents.[336] Instead, "a plaintiff must show that the alleged federal right violation occurred because of a municipal policy or custom."[337] Such a policy can be shown via "(1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal violations."[338] Additionally, "[t]o succeed on a failure to train or supervise claim, the plaintiff must prove the following: (1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury."[339]

In City of St. Louis v. Praprotnik,[340] the Supreme Court held that when a plaintiff alleges that an unconstitutional municipal policy is evinced by a single decision by a municipal official, "only those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability" and that state law determines whether a municipal official has "final policymaking authority." This Court has distinguished "between 'policymaking' authority, which entails a certain amount of discretion to choose among various plausible alternatives, and 'factfinding' authority, which involves assessing the fixed realities of a situation" and held as a

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[331] Bass v. Robinson, 167 F.3d 1041, 1048 (6th Cir. 1999) (citing Leach v. Shelby Cty. Sheriff, 891 F.2d 1241, 1246 (1989)).
[332] Gregory, 444 F.3d at 751 (citing Bass, 167 F.3d at 1048).
[333] Id.
[334] Shehee v. Luttrell, 199 F.3d 295, 300 (6th Cir. 1999).
[335] Hays v. Jefferson Cty., 668 F.2d 869, 874 (6th Cir. 1982).
[336] Thomas v. City of Chattanooga, 398 F.3d 426, 429 (6th Cir. 2005).
[337] Id. (citing Monell v. Dep't of Social Servs., 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)).
[338] Id.
[339] Ellis v. Cleveland Mun. Sch. Dist., 455 F.3d 690, 700 (6th Cir. 2006).
[340] 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).

result that a coroner's authority to make factual findings regarding a person's cause of death was not policy-making.[341]

In this case, Jones identifies no facts that Sheriff Purdue or Clark County through municipal policy, custom or official action, acted unconstitutionally.

4. Yes. The Supreme Court has held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[342]

The Sixth Circuit has repeatedly held that "individuals have a clearly established Fourth Amendment right to be free from malicious prosecution by a defendant who has made, influenced, or participated in the decision to prosecute the plaintiff."[343] In the present case, Jones contends that Murray violated his right against malicious prosecution by facilitating Jones' unlawful continued detention after the forensics results produced no evidence that Jones' devices contained child pornography. A reasonable jury could find that probable cause for Jones' continued detention dissolved after the forensics test was completed and that rather than tell the prosecutors about this critical development in the case Murray withheld that information and thereby continued Jones' detention. If a jury makes both determinations, then Murray would be liable for malicious prosecution of Jones. Accordingly, Deputy Murray was not entitled to qualified immunity.

The Sixth Circuit affirmed qualified immunity for Sheriff Purdue and Clark County, but reversed the district court's grant of qualified immunity for Deputy Murray and remanded for further proceedings.

Machan v. Olney, 958 F.3d 1212 (6th Cir. 2020)

FACTS: In October 2016, T.R., then in the seventh grade, sought out a school counselor with whom she had met in the past. The counselor was not available, so T.R. instead met with the school principal, Latonya Gill-Williams. T.R. told Gill-Williams that she had been thinking about suicide for the past month, and that "she sees things at home like guns and knives that makes [sic] her want to hurt herself." Gill-Williams called SRO Shawn Olney, who arrived at Gill-Williams's office a few minutes later. Gill-Williams then told Olney what T.R. had told her. Olney called Machan, T.R.'s father, who was at work about 90 minutes away, and told him that T.R. "was being suicidal" and that Olney planned to take her to the hospital for an evaluation. Machan objected and told Olney to keep T.R. at the school until he got there.

Olney took T.R. to the hospital anyway. A video from a police officer's body camera depicts much of what happened there. Jennifer Parker, an emergency-room nurse, conducted a mental-health

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341 Jorg v. City of Cincinnati, 145 F. App'x 143, 147 (6th Cir. 2005).
342 Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).
343 King v. Harwood, 852 F.3d 568 (6th Cir. 2017).

assessment of T.R. and concluded that T.R. needed treatment. Although T.R. did not appear intoxicated or disoriented, the attending physician, Dr. Gerald Friedman, ordered a blood draw as part of the hospital's standard procedure for a mental evaluation. T.R. resisted the blood draw, which tested negative for drugs. Dr. Friedman and other medical staff then talked to T.R. about her suicidal thoughts. Eventually Machan arrived and renewed his objections to T.R.'s presence at the hospital. After considerable discussion with Machan, the hospital's medical staff released T.R. on condition that Machan take her to a nearby mental-health center. Machan then took T.R. there, where they stayed for about 45 minutes before going home.

Machan thereafter sued, claiming among other things that Olney violated T.R.'s constitutional rights and his own, as her father, when Olney took T.R. to the hospital over his objection and by authorizing the blood draw without his consent. Olney moved for summary judgment, which the district court denied on the ground that Olney was not entitled to qualified immunity for her actions. Olney appealed.

ISSUE: Does an SRO violate the Fourth Amendment by taking a student to a hospital for a mental health evaluation based upon probable cause that the student may be a danger to herself?

HOLDING: No. "The Fourth Amendment requires an official seizing and detaining a person for a psychiatric evaluation to have probable cause to believe that the person is dangerous to himself or others."[344] "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."[345]

Here, Olney heard that T.R. herself came to Gill-Williams to say that she had been thinking about suicide, that T.R. had been having suicidal thoughts for about a month, and that she worried about hurting herself with the guns and kitchen knives in her home. Those facts provided Olney with ample grounds to think that T.R. posed a danger to herself, and thus provided probable cause for Olney to take T.R. into protective custody for a mental evaluation. And where the person is suicidal, the mental evaluation can reasonably include a determination whether the person has already acted upon her suicidal thoughts; which means the officer can authorize a blood draw as part of that evaluation.

The Sixth Circuit held that Olney did not violate the Fourth Amendment when she took T.R. to the hospital and authorized the blood draw. Accordingly, Olney was entitled to qualified immunity.

The Sixth Circuit reversed the district court and remanded with instructions to enter judgment in Olney's favor.

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[344] Monday v. Oullette, 118 F.3d 1099, 1102 (6th Cir. 1997).
[345] Ziegler v. Aukerman, 512 F.3d 777, 783 (6th Cir. 2008)

Marquardt v. Carlton and City of Cleveland, Ohio, 971 F.3d 564 (6th Cir. 2020)

FACTS: The City of Cleveland terminated Cleveland EMS Captain Marquardt's employment after a post appeared on Marquardt's personal Facebook page which made incendiary comments regarding the death of twelve-year-old Tamir Rice. Rice was shot and killed by Cleveland police officers after he pointed a gun, eventually revealed to be a toy gun, at people at a recreational facility. Marquardt also posted replies to comments on this post. Marquardt removed the posts within hours. The posts at issue addressed the propriety of this high-profile incident, were intermixed with profanity and racially insensitive language, and expressed regret that Marquardt was not able to be the one who did the shooting, Marquardt's personal Facebook page does not identify him as an employee of the City of Cleveland and the posts were not made during work hours. Marquardt alleges that "an acquaintance with access to his phone made the posts while he slept."

EMS Commissioner Nicole Carlton filed a complaint with the City of Cleveland, alleging that Marquardt's posts violated the City of Cleveland's social media policies. After a hearing, the City notified Marquardt that his employment was terminated because his speech violated City policies and "did not involve a matter of public concern."

Marquardt filed suit under 42 U.S.C. § 1983, alleging that his employment was terminated in retaliation for his protected speech in violation of the First and Fourteenth Amendments. The district court concluded that the posts amounted to speech on a matter of private interest and granted summary judgment for Carlton and the City of Cleveland. Marquardt appealed.

ISSUE: Do disturbing and incendiary comments made by a public employee on the employee's personal social media accounts that address a high-profile incident involving the use of force by police address constitute a matter of public concern?

HOLDING: Yes. To assess whether a public employer impermissibly retaliated against an employee for his speech, courts ask three questions: one, whether the employee engaged in protected speech; two, whether the action taken against the employee would discourage an individual of "ordinary firmness" from engaging in the activity that led to his discipline; and three, whether the employee's protected speech was "a motivating factor" behind the adverse action taken against the employee.[346]

In resolving whether the employee engaged in protected speech, courts employ a separate two-part test. First, was the speech was on a "matter of public concern," and if it was, the court must balance the interests of the employer and employee, asking whether the

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[346] Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 337 (6th Cir. 2010).

"employee's free speech interests outweigh the efficiency interests of the government as an employer."[347]

Speech involves a matter of public concern when it can be "fairly considered as relating to any matter of political, social, or other concern to the community."[348] To resolve the public/private distinction, the "content, form, and context of a given statement, as revealed by the whole record" must be examined[349] The shocking and no doubt painful aspects of Marquardt's comments are not examined by the courts because whether speech is shocking or inappropriate is irrelevant to whether it concerns a public matter.[350]

The Sixth Circuit concluded that Marquardt's Facebook posting concerning Rice's death addressed a matter of public concern. The posts were written against the backdrop of the fatal police shooting of Tamir Rice, which attained widespread local and national scrutiny. The Sixth Circuit believed that these posts directly related to a subject of general interest and were of value and concern to the public, regardless of how distasteful the postings were. Moreover, Marquardt was not personally or professionally impacted by the Rice shooting, and the context of the posts gives no indication that the speech concerned primarily a matter of Marquardt's personal interest. The posts constituted matters of public concern because they related to a "matter of political, social, or other concern to the community."

The Sixth Circuit reversed the district court's determination that Marquardt's speech did not constitute a matter of public concern and remanded to the district court to address whether Marquardt's free speech interests outweigh the interest of the Cleveland EMS in the efficient administration of its duties.

NOTE: On remand, the Sixth Circuit did note "the well-settled rule that the government, when acting as an employer, may regulate employee speech to a greater extent than it can that of private citizens, including to discipline employees for speech the employer reasonably predicts will be disruptive."[351]

<u>Pineda v. Hamilton County, Ohio</u>, 977 F.3d 483 (6th Cir. 2020)

FACTS: On November 9, 2013, Pineda and his wife attended an event at the Inner Circle Nightclub in Cincinnati. The nightclub contracted with the Hamilton County Sheriff's Office to employ off-duty officers for security in its parking lot. Deputies Cotton, Berry and Nobles

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[347] Rorrer v. City of Stow, 743 F.3d 1025, 1047 (6th Cir. 2014); see also Handy-Clay v. City of Memphis, 695 F.3d 531, 544 (6th Cir. 2012).
[348] Connick v. Myers, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).
[349] Mosholder v. Barnhardt, 679 F.3d 443, 449–50 (6th Cir. 2012) (quoting Connick, 461 U.S. at 147–48, 103 S.Ct. 1684).
[350] See Rankin v. McPherson, 483 U.S. 378, 387, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987).
[351] See Waters v. Churchill, 511 U.S. 661, 671–73, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994).

worked the parking lot, off-duty but dressed in uniform. Cotton and Berry are African-American.

An altercation occurred at the club's closing time. During this altercation, a bouncer struck Pineda in the face and chipped two teeth. Thereafter, a sheriff's deputy immediately struck Pineda unconscious by striking him in the back of the head with a baton. Pineda believed the deputy was African-American, but was unable to specifically identify which deputy struck him. The deputies denied striking anyone with a baton. A subsequent investigation by the sheriff's office did not determine whether any deputy struck Pineda.

Pineda filed a civil lawsuit pursuant to 42 U.S.C. § 1983 against the Hamilton County Sheriff's Officer and Deputies Cotton, Berry, and Nobles, alleging excessive force and failure to properly investigate the allegations. The district court granted summary judgment for all governmental defendants. Pineda appealed to the Sixth Circuit.

ISSUES: 1. Under 42 U.S.C. § 1983, is a plaintiff required to prove that a specific defendant was personally at fault and that the defendant's culpable conduct, not somebody else's, caused the plaintiff's injuries?

2. May a nearby officer who does not actively participate in the use of excessive force still violate the Fourth Amendment if the officer fails to intervene to stop a fellow officer's use of such force?

3. To support a municipal liability claim based on ratification of an inadequate investigation, must the plaintiff demonstrate an inadequate investigation in the case at hand, as well as a clear and persistent pattern of previous inadequate investigations?

HOLDINGS: 1. Yes. To support liability under Section 1983, a plaintiff must prove both that a defendant was personally at fault and that the defendant's culpable conduct (not somebody else's) caused the injury. Mere proximity to a wrongdoer does not authorize punishment.[352] Proof of a causal connection between the defendant's unconstitutional action and the plaintiff's injury is required under Section 1983.[353]

In this case, Pineda could not identify the deputy who allegedly struck him. Although Pineda and others testified that an African-American deputy struck him, two African American deputies were working that night and Pineda failed to identify through any evidence who actually struck him, and there are no allegations that all three deputies committed a specific constitutional violation.

2. Yes. A nearby officer who does not actively participate in the use of excessive force may still violate the Fourth Amendment if the officer fails to intervene to stop a

[352] Hessel v. O'Hearn, 977 F.2d 299, 305 (7th Cir. 1992).
[353] Hartman v. Moore, 547 U.S. 250, 259-63, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006).

fellow officer's use of force.[354] To establish bystander liability, the plaintiff must establish that "(1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring."[355]

Bystander liability is not available in this case because Pineda's evidence suggests that the attacking deputy hit him suddenly and only one time while the other deputies were are different locations. Thus, both elements of the failure to intervene claim failed. Moreover, an excessive use of force lasting ten seconds or less does not give a defendant enough time to perceive the incident and intervene to stop the force.[356]

3. Yes. Section 1983 liability may occur if an agency's own unconstitutional policy or custom caused the plaintiff's injury. An allegation of a single failure to investigate a single plaintiff's claim does not fulfill this rule of law.[357] As a result, a claim based on inadequate investigation requires not only an inadequate investigation in the instant case, but also a clear and persistent pattern of violations in earlier instances.[358] There must be a link between the local entity's failure to investigate and the plaintiff's injury.[359]

In this case, Pineda only challenges a single failure to investigate his own excessive-force claim and has made no attempt to show several separate instances of the alleged rights violation. There is no pattern of failing to investigate by the Hamilton County Sheriff's Office.

The Sixth Circuit affirmed the district court.

Rudd v. City of Norton Shores, 977 F.3d 503 (6th Cir. 2020)

FACTS: Rudd, a resident of Norton Shores, Michigan, alleged that his ex-wife abducted their children with assistance from her attorney, Melissa Meyers. Rudd called the North Shores Police Department several times, but the police refused to assist because his ex-wife's attorney is married to Norton Shore's city manager, Mark Meyers. During these events, Melissa Meyers obtained a personal protection order against Rudd, claiming that Rudd was stalking and harassing her. Rudd asserted that Melissa Meyers's allegations were false. Rudd later filed an official complaint with the police department criticizing the city manager, a former police chief and several officers, alleging bias. Rudd claims the complaint led to retaliation from Melissa Meyers, who alleged that Rudd violated the terms of the protective order by coaching his son's soccer team at a tournament that Melissa Meyers attended. While the protective order had been removed from a law enforcement database, Melissa Meyers demanded Rudd stipulate to another, indefinite order because of Rudd's complaint against her husband and the North

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[354] Fazica v. Jordan, 926 F.3d 283, 289 (6th Cir. 2019).
[355] Id., at 289.
[356] Alexander v. Carter for Byrd, 733 F. A'ppx 256, 265 (6th Cir. 2018).
[357] Burgess v. Fischer, 735 F.3d 462, 478-79 (6th Cir. 2013).
[358] David v. City of Bellevue, 706 F. App'x 847, 853 (6th Cir. 2017).
[359] Meirs v. Ottawa County, 821 Fed.Appx. 445, 453 (6th Cir. 2020).

Shores Police Department. In the meantime, Melissa Meyers moved a court to authorize the police department to re-enter the protective order into the state law enforcement database and to hold Rudd in contempt of court. The police department placed the order in the database without authorization from the court.

Thereafter, the city attorney (Hughes) forwarded a cease-and-desist letter to Rudd, demanding Rudd to be mindful of his statements to others concerning Mark Meyers, alleging that some of Rudd's statements were defamatory. The saga ended when a judge found the contempt of court motion to be frivolous and ordered the protective order removed from the law enforcement network database.

Rudd filed a pro se lawsuit pursuant to 42 U.S.C. § 1983 alleging that the Meyers, various governmental officials of North Shores, Michigan State Police Lieutenant Chris McIntire, and several private actors violated his First Amendment rights by conspiring to retaliate against him for speech critical of Mark and Melissa Meyers and the North Shores police. The district court dismissed Rudd's complaint. This appeal followed.

ISSUE: May public officials conspire to retaliate against a citizen because of the citizen's criticism of the public officials?

HOLDING: No. Freedom of speech protects the right of an ordinary citizen to criticize public officials, generally without fear of criminal or civil repercussions.[360]

The First Amendment prohibits state actors from "abridging the freedom of speech ... or the right of the people ... to petition the Government for a redress of grievances."[361] To state a First Amendment claim, Rudd must show that his conduct fell within the "freedom of speech" or the right "to petition," and he must show that the defendants "abridg[ed]" these rights by taking adverse actions against him because of his protected activities. In other words, Rudd must show that: (1) he engaged in protected conduct; (2) the defendants took an adverse action against him; and (3) a causal connection exists between the two.[362]

The Sixth Circuit held that Rudd's complaint plausibly alleges all three elements with respect to several of the named defendants. Rudd's complaint to the City of North Shores was a protected expression because he criticized public officials for the way in which they handled his earlier request for assistance with the kidnapping complaint. Rudd sustained an adverse action when Melissa Meyers sought to have Rudd held in contempt of court, when the protection order was placed in the law enforcement network database by the police department, and with the forwarding of the cease-and-desist letter. Finally, the district court held that Rudd demonstrated a casual connection between his protected conduct (filing the complaint) and the adverse actions.

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[360] Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998).
[361] U.S. Const. amend. I.
[362] Novak v. City of Parma, 932 F.3d 421, 427 (6th Cir. 2019).

The 6th Circuit reversed the district court with respect to Rudd's claims involving First Amendment retaliation and remanded for further proceedings.

Seales v. City of Detroit, Michigan, 959 F.3d 235 (6th Cir. 2020)

FACTS: Detroit Police Officer Zberkot with the Detroit Fugitive Apprehension Team was asked to arrest Roderick Siner, who goes by Marvin Seals, on a fugitive arrest warrant. Zberkot, instead, arrested Marvin Seales at his place of employment. Seales insisted that "[y]ou got the wrong guy." Seales told Officer Zberkot "like, 20 times" that he was innocent. He also asked Officer Zberkot to check his wallet because it contained identification showing he was not their man. Officer Zberkot "kind of chuckled" at this idea, reviewed Seales' wallet, and said Seales' identification could be "fake or phony."

Nevertheless, officers handcuffed Seales and drove him to a Detroit precinct. Zberkot prepared the arrest paperwork, then other officers took possession of Seales. Those officers did not fingerprint Seales, search him, take his mugshot, or interrogate him. Seales spent two nights in a holding cell. Zberkot's total involvement in this matter was approximately two hours.

The case was then called in court for arraignment. Because the court did not have records on a Marvin Seales, he was sent to the "end of the line." Ultimately, Seales stated that he was Roderick Siner because "he wasn't going to get past that point it I didn't." At that point, Seales was transferred to the Wayne County Jail where he stayed two weeks. He filed a grievance with jail personnel concerning the mistaken identity. He also signed a medical intake form as "R. Siner" because that was the name he was booked under and he was afraid that he would not receive medical attention if needed. Approximately two weeks after his arrest, Seales was released after the victim of the crime told a prosecutor during a preliminary examination that Seales was not the man that shot him.

In April 2012, Seales filed a lawsuit under 42 U.S.C. § 1983 for unlawful arrest and unlawful detention under the Fourth and Fourteenth Amendments against Officer Zberkot and the City of Detroit. The City of Detroit then filed for bankruptcy, staying the case. In 2015, the district court granted summary judgment for the City of Detroit. The district court denied qualified immunity for Zberkot, and a jury ultimately awarded Seales $3.5 million on the unlawful arrest and unlawful detention claims. Zberkot appealed.

ISSUE: Is a police officer who possessed probable cause to arrest an individual whose name was very similar to an alias used by an individual named on an arrest warrant, and whose interaction with the individual lasted for just over two hours, liable for unlawfully detaining the individual?

HOLDING: No. If the State detains a person "in the face of repeated protests of innocence," the detention may "deprive the accused of liberty ... without due process of law" depending "on

what procedures the State affords defendants following arrest and prior to [a] trial."[363] Not all wrongful detentions violate due process, however. "The Constitution does not guarantee that only the guilty will be arrested."[364] The reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers" means that officers are not obliged to investigate each claim of innocence during the short period they detain suspects.[365] An officer maintaining custody of the accused is not required to perform an error-free investigation of mistaken identity claims.[366] A plaintiff must prove that his jailers "acted with something akin to deliberate indifference in failing to ascertain" that the person in custody is not the person wanted on the warrant.[367]

In this case, Officer Zberkot, as an arresting officer, had little more to do with Seales' detention. That's when the rest of the criminal process took over. He did not fingerprint Seales, interrogate him, or for that matter stay at the prison where he could hear complaints about his innocence. He spent less than three hours on the case, nearly all of it involved in doing the one thing our prior panel made clear he was not liable for: initially detaining Seales through execution of the arrest warrant. Moreover, Seales had the opportunity to speak with a judge within forty-eight hours of his initial arrest and decided to say that his name was "Roderick Siner." He went down the same road early in the jail process by saying, again, that he was Rodrick Siner in filling out the paperwork. Whatever his explanations for offering this alias, they cannot be laid at the feet of Officer Zberkot. The officer had nothing to do with the sequencing of cases in court that day, and he had nothing to do with providing medical care to detainees. None of this remotely suggests that Officer Zberkot denied Seales due process by unlawfully detaining him under the Fourteenth Amendment.

The Sixth Circuit held that Seales sued the wrong person. Officer Zberkot merely helped to arrest Seales and initiated the booking procedures, all legitimately under the Fourth Amendment. He was not Seales' jailer. Seales admits that other officers at the precinct had the responsibility to maintain custody over him. Seales offers no explanation why Zberkot, as opposed to the jailers, bears responsibility for the fifteen-day detention.

As no deliberate indifference was present concerning Zberkot's actions in this matter (although the Sixth Circuit did note that Zberkot could have been more respectful of Seales instead of laughing at the idea that Seales' identification would have exculpated him), the Sixth Circuit reversed the district court's decision.

Stewart v. City of Euclid, Ohio, 970 F.3d 667 (6th Cir. 2020)

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[363] Baker v. McCollan, 443 U.S. 137, 145, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979).
[364] Id.
[365] Id.
[366] Id.
[367] Gray v. Cuyahoga Cty. Sheriff's Dep't, 150 F.3d 579, 583 (6th Cir. 1998).

FACTS: Around 7:00 a.m. on March 13, 2017, a Euclid, Ohio resident called police to report a suspicious black car parked outside of her residence, idling, with parking lights on. Luke Stewart was sleeping inside the vehicle. Stewart was there because he hoped to spend the night at a friend's house, but simply parked on the street when his friend did not answer the phone. Officers Rhodes and Catalani were dispatched to check on the vehicle.

Officer Catalani arrived first. Catalani shined his flashlight through the car's windows and saw a digital scale in the center console area, a marijuana blunt in the passenger's seat, and an aluminum screw top from a wine bottle. Catalani ran the vehicle's license plate and discovered that the vehicle's owner had an outstanding warrant. Catalani believed Stewart looked too young to be the owner.

Officer Catalani advised to Officer Rhodes over the radio that "we're goina [sic], uh, end up pulling this guy out." Neither officer activated dashboard cameras, body microphones, or the blue and red overhead lights on their cruisers.

When Officer Rhodes arrived, they positioned their cruisers around Stewart's car in an effort to prevent Stewart from fleeing in the vehicle. The officers then approached the vehicle. Catalani approached from the driver's side and Rhodes from the passenger's side. Catalani knocked on the window, causing Stewart to wake up. Stewart waived at Catalani and started the car. Catalani yelled for Stewart to stop and opened the driver's side door to keep the vehicle from moving. Catalani grabbed Stewart's left arm to pull him away from the gearshift and out of the vehicle. Catalani then reached around Stewart's head with his right arm in an attempt to reach a pressure point under Stewart's jaw. Meanwhile, Rhodes opened the passenger door and began pushing Stewart out of the car. Stewart put the vehicle into gear and drove his vehicle into the back of Rhodes' police vehicle, which was parked directly in front of Stewart's car. Stewart continued driving the car. Because the car began moving into traffic, Rhodes pulled himself into Stewart's car and Catalani released himself from Stewart and began pursuit on foot. Stewart began driving the car within the speed limit and asked Rhodes, "Why are you in my car?" Rhodes then attempted to gain control of the gearshift and the ignition keys while striking Stewart in the side of the head with a closed fist. The car continued moving. Rhodes eventually deployed his taser six times into Stewart's right side. The car stopped in the intersection of South Lake Shore and East 222nd Street while attempting to make a left-hand turn. Another struggle for control of the car ensued. Stewart regained control, and drove the car onto a curb. The car ended up in the neutral gear. Believing that Stewart was about to strike a telephone pole, Rhodes fired two shots into Stewart's torso with his service pistol. After being shot, Stewart attempted to strike Rhodes for the first time. Rhodes then shot Stewart three additional times, striking him in the back, chest, and wrist. Stewart died from his wounds. Approximately 59 seconds elapsed from the time Stewart began to flee to the time Rhodes fired his pistol.

Stewart's mother filed a lawsuit pursuant to 42 U.S.C. § 1983 against Officers Rhodes, Catalani and the City of Euclid, alleging that the officers used excessive force, along with various tort

claims under Ohio law. The district court awarded qualified immunity to Rhodes and the City of Euclid.[368] Stewart's mother appealed.

ISSUE: 1. Is the law clearly established that an officer's use of deadly force against a fleeing motorist while the officer was in the car violated the Fourth Amendment's prohibition against the use of excessive force?

2. Does distasteful elements of a deadly force training program, and nothing more, constitute deliberate indifference to the rights of citizens?

HOLDING: 1. No. It was not clearly established in March 2017 that an officer's use of deadly force against a fleeing motorist while the officer was in the car violated the Fourth Amendment's prohibition against the use of excessive force.

Qualified immunity shields an officer from liability insofar as the officer's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[369] Qualified immunity thus entails two steps: (1) whether the public official's conduct violated a constitutional right, and (2) whether that right was clearly established at the time of the events.[370]

The Fourth Amendment protects against unreasonable seizures, which includes the use of excessive force by law enforcement.[371] Shooting Stewart constituted a seizure under the Fourth Amendment.[372] To be constitutional, the seizure must be reasonable, and reasonableness of the seizure depends on context. Officers may use "some degree of physical coercion or threat" to effect an arrest, but the amount of force must be objectively reasonable under the totality of the circumstances.[373] Important considerations for determining reasonableness include: the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.[374] In deadly force cases, the most critical factor is the immediate danger to officers and members of the public in the area.[375] Where an officer has probable cause to believe the suspect poses a threat of serious physical harm, it is not constitutionally unreasonable to prevent escape by using deadly force.[376]

The totality of the circumstances are considered as they would have appeared to a reasonable officer on the scene rather than with the 20/20 vision of hindsight.[377] Moreover, the Sixth

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[368] Claims against Catalani were not addressed in this appeal.
[369] Pearson v. Callahan, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).
[370] Godawa v. Byrd, 798 F.3d 457, 462 (6th Cir. 2015).
[371] Lattis v. Phillips, 878 F.3d 541, 547 (6th Cir. 2017).
[372] Smith v. Cupp, 430 F.3d 766, 774 (6th Cir. 2005).
[373] Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).
[374] Id.
[375] Cass v. City of Dayton, 770 F.3d 368, 375 (6th Cir. 2014).
[376] Garner, 471 U.S. at 11, 105 S.Ct. 1694.
[377] Graham, 490 U.S. at 396, 109 S.Ct. 1865,

Circuit does not scrutinize whether it was reasonable for the officer to create the circumstances that led to the situation when assessing the reasonableness of the use of force.[378]

The Sixth Circuit first examined whether a constitutional violation occurred. In this case, the circumstances showed that Rhodes may have been justified to use force to stop Stewart. Stewart drove into a police car at the beginning of the interaction; the vehicle unexpectedly stopped in the middle of an intersection, and Stewart drove onto a pedestrian sidewalk. All of this occurred at approximately 7:00 a.m. in a residential neighborhood with a school nearby. Rhodes was also unsecured in the vehicle during these events, and Stewart was aware that he was operating his vehicle despite Rhodes's efforts to stop him.

However, these circumstances did not justify the use of deadly force. Stewart was not aggressive towards Rhodes despite being hit by Rhodes's fists and taser. In fact, Stewart rarely attempted to defend himself, and did not display or attempt to use any weapon. Stewart's driving was also not so dangerous to constitute an immediate threat to the safety of the officers or others. Stewart's driving was at a low speed and the shooting actually occurred while the car was in neutral and was not moving forward. No bystanders or pedestrians were located along the route. Accordingly, the 6th Circuit held that Rhodes's use of deadly force was unreasonable and he violated Stewart's right to be free from an unreasonable seizure.

The law concerning the use of deadly force by an officer who is involved in an incident with a suspect while a passenger in the suspect's car was not clearly established. "Indeed, few cases have ever considered the danger faced by an officer inside a fleeing suspect's vehicle and at what point it justifies the use of deadly force."

As the law was not clearly established, the Sixth Circuit held in a 2-1 decision that Rhodes was entitled to qualified immunity.

2. No. A municipality may be held liable for the constitutional violations of its employees when the municipality's custom or policy led to the violation.[379] But only where a municipality's failure to train its employees in a relevant respect evidences a deliberate indifference to the rights of its inhabitants can such a shortcoming be properly thought of as a city policy or custom that is actionable under Section 1983.[380] A municipal policymaker cannot exhibit fault rising to the level of deliberate indifference to a constitutional right when that right has not yet been clearly established.[381] The violated right in a deliberate-indifference case thus

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[378] Thomas v. City of Columbus, Ohio, 854 F.3d 361, 365 (6th Cir. 2017); Livermore v. Lubelan, 476 F.3d 397, 406 (6th Cir. 2007).

[379] Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 694-95 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)

[380] City of Canton v. Harris, 489 U.S. 378, 389, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

[381] Hagans v. Franklin Cty. Sheriff's Office, 695 F.3d 505, 511 (6th Cir. 2012).

must be clearly established because a municipality cannot deliberately shirk a constitutional duty unless that duty is clear.[382]

In this case, the Euclid Police Department's deadly force training program involved inappropriate and tasteless elements. The presentation materials included jokes trivializing the use of force, including a graphic showing an officer beating a prone and unarmed suspect with the caption "[p]rotecting and serving the poop out of you." The presentation linked to a Chris Rock comedy routine in which Rock repeatedly jokes about police beating citizens on grounds of race and shows clips of officers beating suspects. However inappropriate this training might have been, Stewart's rights were not clearly established. Thus, violation of Stewart's rights cannot be the "known or obvious consequence" disregarded by the City of Euclid through its training program. Accordingly, the Monell claim against the City of Euclid fails.

The Sixth Circuit affirmed the district court's decision to grant qualified immunity to Officer Rhodes and the City of Euclid with respect to the federal law claims. As the state law claims were not properly considered by the district court, the Sixth Circuit remanded the matter to the district court to determine whether it should exercise supplemental jurisdiction over the state law claims.

Tlapanco v. Elges, 969 F.3d 638 (6th Cir. 2020)

FACTS: In 2014, A.F., a 14-year-old girl, advised her school's resource officer and Oakland County Deputy Sheriff Elges that an individual known as "anonymous" was threatening to release nude images of her hacked from her phone if she did not forward additional images to "anonymous." These threats were transmitted to A.F. from March 4-March 6 through a messaging application called Kik. Deputy Elges sent a request to Kik seeking information on the individual using the username "anonymous." The distinction between a display name and username is critical because a Kik user only has one unique username, but a user can change the display name at any time, and the display name in not unique to that user.

Deputy Liposky assisted Deputy Elges on this investigation and extracted information from A.F.'s phone and iPod, including information regarding her Kik messages. This information was exported into an Excel spreadsheet that was later provided to Elges. The spreadsheet includes columns for direction (i.e., sent or received), attachments, time, display name, username, and contents of the message. The content in the time, display name, and username columns appears cut off and incomplete unless the cells in the spreadsheet are expanded. When the cells in the spreadsheet are expanded, the display name of the individual threatening A.F. is "anonymous," but the username is "anonymousfl." Elges looked at the report but did not expand the cell for username, thereby missing the last two letters of the cell. Thus, Elges erroneously believed that both the username and the display name of the suspect were "anonymous." Based on this information, Elges traced the email addressed used by

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[382] Arrington-Bey v. City of Bedford Heights, Ohio, 858 F.3d 988, 994-95 (6th Cir. 2017).

“anonymous” to Tlapanco, with the IP address Tlapanco used to access Kik around this time traced to two locations in New York City. Deputy Elges then sought a search warrant for the two New York City locations associated with the IP addresses, one for Kingborough Community College and one for Tlapanco’s apartment. New York Police Department Officer Thornton swore to the warrant request without conducting any additional investigation and received the warrants. Officers executed a search of the Brooklyn apartment on May 21, 2014, and seized a variety of electronic devices, including several iPods, a desktop computer, laptops, and several thumb drive storage devices.

During a subsequent interview, Tlapanco stated that he created a Kik account with the username “anonymous” in January 2013, but had only actively used the account since March 2014. Tlapanco denied sending any messages to A.F., and denied having any images from A.F. or any underage girls. A forensic analysis of Tlapanco’s devices recovered over 18,000 images from his iPod, but none of the images were from A.F. Some of the images were “similar” to the ones requests by A.F.’s blackmailer. The earliest date of the messages stored on the iPod were from March 17, 2014, which is consistent with Tlapanco’s statement that he did not begin using the “anonymous” username on Kik under March 2014.

The Oakland County Prosecutor’s Office charged Tlapanco with eight counts relating to child sexually abuse acts, using a computer to commit a crime, and accosting a minor for immoral purposes. The NYPD arrested Tlapanco on the warrant and extradited him to Michigan. After three weeks in custody, the prosecutor dismissed the charges after realizing that they had arrested Tlapanco, who used the username “anonymous” and not the blackmailer, who used the username “anonymousfl.”

Upon dismissal, the trial court ordered that Tlapanco’s electronic devices be returned to him. Undersheriff McCabe directed the data from these devices be copied so that the sheriff’s office could retain a forensic mirror of the data contained on these devices.

Tlapanco filed two lawsuits pursuant to 42 U.S.C. § 1983 alleging Fourth Amendment violations resulting from the search of his apartment, the seizure of his electronic devices, his imprisonment, and the copying of the information contained on those electronic devices. The district court granted summary judgment for all defendants on the basis of qualified immunity. Tlapanco appealed.

ISSUES:

1. Is the law clearly established that an individual has a constitutional right to be free from unreasonable searches and seizures predicated on an officer’s reckless submission of false statements in a warrant affidavit?

2. Is the law clearly established that an individual has a right to be free from arrest without probable cause?

3. Is the right to be free from malicious prosecution clearly established?

4. Is it clearly established that the Fourth Amendment prohibits law enforcement from retaining a forensic mirror of a suspect's electronic devices after returning the devices pursuant to a court order?

HOLDINGS: 1. Yes. "[t]he right to be free from warrantless searches of one's home is clearly established, as is the right to be free from searches predicated on an officer's intentional or reckless submission of false statements in a warrant affidavit."[383]

Under the Fourth Amendment, a search warrant may be issued only "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the ... things to be seized."[384] "Probable cause exists 'if the facts and circumstances are such that a reasonably prudent person would be warranted in believing that an offense had been committed and that evidence thereof would be found on the premises to be searched.'"[385] The officer must examine "the totality of the circumstances, recognizing both the inculpatory and exculpatory evidence."[386] "In the context of child pornography, an affidavit that connects a defendant, an offending username, and the defendant's residence is enough to establish probable cause for a search." [387]

In the Fourth Amendment search and seizure context, "[p]olice officers are entitled to rely on a judicially secured warrant for immunity from a § 1983 action for illegal search and seizure unless the warrant is so lacking in indicia of probable cause, that official belief in the existence of probable cause is unreasonable."[388] However, "an officer cannot rely on a judicial determination of probable cause if that officer knowingly makes false statements and omissions to the judge such that but for these falsities the judge would not have issued the warrant."[389]

Qualified immunity shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[390] A plaintiff may challenge an officer's qualified immunity defense in a civil rights case by showing that (1) the officer's warrant affidavit contained a false statement or omission that was made either deliberately or with reckless disregard for the truth; and (2) the false statement or omission was material to the finding of probable cause.[391] A plaintiff shows substantial evidence of deliberate falsehood or reckless disregard when, for example, he presents proof that at the

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[383] McCallum v. Geelhood, 742 F. App'x 985, 991 n.6 (6th Cir. 2018)
[384] U.S. Const. amend. IV.
[385] Peffer v. Stephens, 880 F.3d 256, 263 (6th Cir. 2018) (quoting Greene v. Reeves, 80 F.3d 1101, 1106 (6th Cir. 1996)).
[386] Gardenhire v. Schubert, 205 F.3d 303, 318 (6th Cir. 2000).
[387] United States v. Carter, 792 F. App'x 366, 368 (6th Cir. 2019) (citing United States v. Elbe, 774 F.3d 885, 890 (6th Cir. 2014)); see also United States v. Lapsins, 570 F.3d 758, 766 (6th Cir. 2009).
[388] Yancey v. Carroll County, 876 F.2d 1238, 1243 (6th Cir. 1989).
[389] Id.
[390] Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).
[391] See Vakilian v. Shaw, 335 F.3d 509, 517 (6th Cir. 2003); Sykes v. Anderson, 625 F.3d 294, 305 (6th Cir. 2010).

time the officer swore out the affidavit, she knew of or possessed information that contradicted the sworn assertions."[392]

In this case, the information Elges left out of the warrant applications obviously negated probable cause because it demonstrated that Tlapanco was not the Kik user harassing A.F. Tlapanco demonstrated: (1) Elges knew the difference between a display name and username yet failed to confirm the username of the user threatening A.F.; (2) the Kik activity log showed that the username "anonymous" did not send the messages to A.F.; and (3) Elges possessed A.F.'s messages and a spreadsheet compiling the messages showing that the messages were sent from username "anonymousfl." Viewing the evidence in the light most favorable to Tlapanco, a reasonable jury could find that Elges recklessly disregarded information in his possession negating probable cause that the username "anonymous," and by extension Tlapanco, was responsible for hacking A.F. or sending the messages. Therefore, qualified immunity is not available to Deputy Elges and a jury must consider whether the statements of fact or omissions in the search warrant affidavit were made recklessly.

2. Yes. To prevail on a false arrest claim under § 1983, "a plaintiff [must] prove that the arresting officer lacked probable cause to arrest the plaintiff."[393] An arrest is supported by the requisite probable cause when, at the time of that arrest, "the facts and circumstances within [the officer's] knowledge and of which [she] had reasonably trustworthy information [are] sufficient to warrant a prudent man in believing that the [plaintiff] had committed or was committing an offense."[394] A showing of probable cause provides a complete defense to a claim of false arrest.[395]

Because Tlapanco's arrest warrant was issued by a judge, he must make a substantial showing that Elges's sworn statements supporting the arrest warrant included "material false statements [made] either knowingly or in reckless disregard for the truth to establish probable cause for an arrest."[396] In addition to the evidence discussed above, Tlapanco points to other exculpatory evidence gathered by Elges after the interview with Tlapanco and the search and seizure of his devices. In particular, Tlapanco provides evidence Elges knew: (1) none of Tlapanco's devices included images of A.F. or Kik messages with A.F., and (2) Tlapanco denied soliciting or receiving images from minors. Because a reasonable jury could find that Elges's sworn statements supporting the arrest warrant were recklessly indifferent to the truth that Tlapanco did not hack or communicate with A.F., and Tlapanco's right to be free from arrest without probable cause was clearly established, the Sixth Circuit found that Elges is not entitled to qualified immunity.

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[392] Butler v. City of Detroit, 936 F.3d 410, 419 (6th Cir. 2019).
[393] Voyticky v. Village of Timberlake, 412 F.3d 669, 677 (6th Cir. 2005).
[394] Wesley v. Campbell, 779 F.3d 421, 429 (6th Cir. 2015)(alterations in original).
[395] Halasah v. City of Kirtland, 574 F.App'x 624, 629 (6th Cir. 2014).
[396] Vakilian, 335 F.3d at 517.

3. Yes. Under the Fourth Amendment, an individual has a right to be free from malicious prosecution by a defendant who has made, influenced, or participated in the decision to prosecute the plaintiff by knowingly or recklessly making false statements that are material to the prosecution either in reports or in affidavits filed to secure warrants.[397]

The elements of a malicious prosecution claim are: (1) "that a criminal prosecution was initiated against the plaintiff and that the defendant 'ma[d]e, influence[d], or participate[d] in the decision to prosecute' "; (2) "that there was a lack of probable cause for the criminal prosecution"; (3) "that, 'as a consequence of a legal proceeding,' the plaintiff *655 suffered a 'deprivation of liberty' ... apart from the initial seizure"; and (4) that "the criminal proceeding must have been resolved in the plaintiff's favor."[398]

In this case, there is no dispute that the third and fourth elements for a malicious prosecution claim have been met. Tlapanco sustained a deprivation of liberty and that the proceeding was ultimately resolved in his favor. The second element has also been met under the lack of probable cause finding for the arrest.

With respect to the first element, an officer can be liable for malicious prosecution if the officer influenced or participated in the decision to prosecute.[399] "Providing reports, affidavits, or other investigative materials containing falsehoods, omissions, or misstatements to a prosecutor can constitute participation when (1) those materials formed the basis for the charge," and "(2) the falsehoods, omissions, or misstatements were made deliberately or with reckless disregard for the truth."[400] Tlapanco provided evidence that Elges participated in and influenced the decision to prosecute. Elges requested the arrest warrant from the Oakland County Prosecutor's Office and swore out the arrest warrant to the judge. Although a prosecutor authorized the arrest warrant and created the charging document, Elges supplied the reports and investigative materials forming the basis for the specific charges. The evidence shows Elges influenced and participated in the decision to prosecute, thus satisfying the first element.

The Sixth Circuit held that Elges was not entitled to qualified immunity for this claim.

4. No. The Sixth Circuit held that there is no clearly established Fourth Amendment right against investigators retaining a forensic mirror of electronic devices after returning the physical devices to the suspect. Because no clearly established constitutional or statutory right existed prohibiting the sheriff's office from retaining a forensic mirror of Tlapanco's electronic devices, Undersheriff McCabe is entitled to qualified immunity.

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[397] King v. Harwood, 852 F.3d 568, 582-83 (6th Cir. 2017).
[398] Sykes v. Anderson, 625 F.3d 294, 308-09 (6th Cir. 2010).
[399] Sampson v. Village of Mackinaw City, 685 F. App'x 407, 417 (6th Cir. 2017).
[400] Meeks v. City of Detroit, 727 F. App'x 171, 178 (6th Cir. 2018).

The Sixth Circuit affirmed the district court's order granting of qualified immunity to McCabe and the Oakland County Sheriff's Office, but reversed the decision granting qualified immunity to Elges.

UNITED STATES SUPREME COURT

Kansas v. Glover, 589 U.S. ----, 140 S.Ct. 1183 (2020)

FACTS: While on routine patrol, Douglas County (Kansas) Deputy Sheriff Mark Mehrer observed a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ being operated by a male subject. Deputy Mehrer ran the license plate through the Kansas Department of Revenue's file service. The registration check indicated that the plate was assigned to a 1995 Chevrolet 1500 pickup truck, registered to Charles Glover, Jr. Deputy Mehrer was further advised that Glover's driver's license was revoked. Based solely upon this information and believing that the male operator was Glover, Deputy Mehrer executed a traffic stop. During the stop, Deputy Mehrer identified the truck's driver as Charles Glover, Jr. Glover was charged with driving as a habitual violator. Glover filed a motion to suppress all evidence seized during the stop. The district court granted Glover's motion to suppress. The Kansas Supreme Court affirmed the district court, holding that Deputy Mehrer was unable to articulate reasonable suspicion of criminal activity to justify this stop because his belief that Glover was operating the vehicle was "only a hunch." The United States Supreme Court granted certiorari.

ISSUE: For purposes of an investigative stop under the Fourth Amendment, is it reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary?

HOLDING: Yes. When a police officer lacks information negating an inference that a person driving is the vehicle's owner, an investigative traffic stop made after running the vehicle's license plate and learning that the registered owner's driver's license has been revoked is reasonable under the Fourth Amendment.

RATIONALE: The ultimate touchstone of the Fourth Amendment is reasonableness.[401] The Fourth Amendment permits an officer to initiate a brief investigative stop when the officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity"[402] that is considerably less than either preponderance of the evidence or probable cause.[403] Reasonable suspicion does not have to be perfect.[404] In articulating reasonable

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[401] Heien v. North Carolina, 574 U.S. 54, 60, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014)(quoting Riley v. California, 573 U.S. 373, 381, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014)).
[402] United States v. Cortez, 449 U.S. 411, 417-418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); see also Terry v. Ohio, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).
[403] Prado Navarette v. California, 572 U.S. 393, 397, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014) (quotation altered); United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).
[404] Heien, 574 U.S. at 60.

suspicion, officers are also permitted to make "commonsense judgments and inferences about human behavior."[405]

States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles and that licensing, registration and vehicle inspection requirements are being observed. [406] Further, research has proven that drivers with revoked licenses frequently continue to drive and therefore pose safety risks to other motorists and pedestrians. Specifically, the United States Supreme Court cited studies which found that 75% of suspended or revoked drivers continue to drive, and 19% of traffic fatalities involve an invalid operator's license.

In this case, Deputy Mehrer observed a male suspect operate a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ. The deputy learned from running this license plate that the truck's registered owner, Glover, had a revoked license. From these facts, Deputy Mehrer drew the commonsense inference that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop. Combining database information and commonsense judgments in this context is fully consonant with Fourth Amendment precedent.

The United States Supreme Court did stress that all seizures must be justified at their inception, taking the totality of the circumstances into account. Accordingly, the presence of additional facts may dispel reasonable suspicion. For example, if the registered owner of the vehicle is identified as a male in his mid-sixties, but the officer observed that the driver is a female in her mid-twenties, the totality of the circumstances would not justify a stop absent some other violation of the law.

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[405] Illinois v. Wardlow, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).
[406] Delaware v. Prouse, 440 U.S. 648, 658, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

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