**No. ______________**

**Supreme Court of the United States**

**Jermaine Tyrone Jones** **Petitioner,**

**vs.**

**United States of America,** **Respondent.**

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## Appendix

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0088p.06

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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| UNITED STATES OF AMERICA, *Plaintiff-Appellant*, v. JERMAINE TYRONE JONES, *Defendant-Appellee*. | } | No. 19-5633 |

Appeal from the United States District Court
for the Western District of Kentucky at Paducah.
No. 5:17-cr-00039-1—Thomas B. Russell, District Judge.

Argued: March 12, 2020

Decided and Filed: March 23, 2020

Before: SUTTON, McKEAGUE, and DONALD, Circuit Judges.

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## COUNSEL

**ARGUED:** Amanda B. Harris, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Frank W. Heft, Jr., FEDERAL PUBLIC DEFENDER, Louisville, Kentucky, for Appellee. **ON BRIEF:** Amanda B. Harris, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Frank W. Heft, Jr., Scott T. Wendelsdorf, FEDERAL PUBLIC DEFENDER, Louisville, Kentucky, for Appellee.

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## OPINION

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SUTTON, Circuit Judge. Officers stopped Jermaine Jones' vehicle to investigate allegations that he committed fourth-degree assault, a misdemeanor in Kentucky. During the stop, they discovered a weapon on Jones, a convicted felon. Indicted for unlawful possession of a firearm, Jones moved to suppress the evidence recovered from the stop on the theory that the Fourth Amendment bars investigatory stops prompted by a completed misdemeanor. The district court reluctantly agreed. Because the Fourth Amendment contains no such rule, we reverse.

## I.

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 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." R.37 at 2.

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. The caution paid off. 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. Officer Parrish violated the Fourth Amendment, Jones claimed, because he 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. R.30 at 7. In Kentucky, her accusation amounted to fourth-degree assault, a misdemeanor. Ky. Rev. Stat. Ann. § 508.030(1)(a).

Relying on dicta from two of our decisions, the court "reluctantly" suppressed the evidence. R.37 at 6–7. The government appealed.

## II.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. When an officer stops a vehicle and questions the occupants, even for a brief moment, that counts as a "seizure" of "persons." *Whren v. United States*, 517 U.S. 806, 809 (1996). Officers may conduct these stops if, among other justifications, "specific and articulable facts," *Terry v. Ohio*, 392 U.S. 1, 21 (1968), support a reasonable suspicion that the car's "occupants are involved in criminal activity," *United States v. Hensley*, 469 U.S. 221, 226 (1985). But what happens if the officer stops a vehicle to investigate criminal activity that already occurred? We know the answer in part. If the activity qualifies as a felony, the Fourth Amendment does not bar the stop. *Id.* at 229.

What about non-felony crimes? Does the Fourth Amendment prohibit officers from making a *Terry* stop to investigate a misdemeanor? Attentive readers of Fourth Amendment caselaw should be skeptical of such a standard. "[T]he touchstone of the Fourth Amendment is reasonableness," not "bright-line rules." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). And the Supreme Court has consistently rejected lower courts' attempts to avoid dealing with "endless variations in the facts and circumstances implicating the Fourth Amendment" by crafting "litmus-paper" tests or "single sentence or paragraph" rules. *Id.* (quotation omitted); *see also Hensley*, 469 U.S. at 226–27.

The Court has given us some of the tools to answer the question already. *Hensley* explained that the "proper way" to identify the "precise limits on investigatory stops to investigate past criminal activity" is to "apply the same test already used to identify the proper bounds of intrusions that further investigations of imminent or ongoing crimes." *Hensley*, 469 U.S. at 228. Courts must balance "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *Id.*

True, *Hensley* left open whether "*Terry* stops to investigate all past crimes, however serious, are permitted." *Id.* at 229. But it did not erect an "automatic barrier" to investigating completed misdemeanors either. *Id.* The Court left it to the lower courts to apply the traditional Fourth Amendment considerations, rather than create an "inflexible rule" if and when the question of investigating a completed misdemeanor (or other non-felony crime) came up. *Id.* at 227.

The Court's guidance has prompted every other circuit to follow the *Hensley* facts-and-circumstances test in considering the misdemeanor side of the problem. *United States v. Hughes*, 517 F.3d 1013, 1017–18 (8th Cir. 2008); *United States v. Grigg*, 498 F.3d 1070, 1076–77, 1081 (9th Cir. 2007); *United States v. Moran*, 503 F.3d 1135, 1141–43 (10th Cir. 2007). In doing so, the circuit cases sometimes come out on the side of the government, *Moran*, 503 F.3d at 1143, sometimes on the side of the defendant, *Grigg*, 498 F.3d at 1081–83; *Hughes*, 517 F.3d at 1018–19.

An across-the-board prohibition on stops to investigate completed non-felonies runs into other problems, including the elusive and evolving nature of the felony-misdemeanor distinction and its disappearance in some instances. While "in earlier times the gulf between the felonies and the minor offences was broad and deep, . . . today the distinction is minor and often arbitrary." *Tennessee v. Garner*, 471 U.S. 1, 14 (1985) (quoting 2 F. Pollock & F. Maitland, *The History of English Law* 467 n.3 (2d ed. 1909)). Once upon a time, "felony" described the most severe crimes. "No crime was considered a felony which did not occasion a total forfeiture of the offender's lands or goods or both." *Kurtz v. Moffitt*, 115 U.S. 487, 499 (1885); *see also Garner*, 471 U.S. at 13 n.11. Today, serious crimes are usually felonies, but not always. In Kentucky, where Jones' arrest occurred, it is a *misdemeanor* to incite a riot, possess burglar's tools, stalk someone, or flee the police. Ky. Rev. Stat. Ann. §§ 508.150, 511.050, 520.100, 525.040. And the Commonwealth treats stealing mail, driving a car without permission (for the second time), and receiving deposits at an insolvent financial institution as felonies. *Id.* §§ 514.100, 514.140, 517.100. Some States leave the classification to prosecutors and judges. *See Ewing v. California*, 538 U.S. 11, 17 (2003). The status of these "wobbler" crimes thus may not be known until the crime is charged or the offender sentenced. *Id.* If our touchstone is reasonableness, it's odd to say that police could stop a suspect on reports he had stolen mail but not on reports he had incited a riot (or assaulted someone)—or that a valid stop to investigate a felony becomes invalid if the prosecutor charges it as a misdemeanor. All of this confirms the danger of using misdemeanor labels alone to define the coverage of the Fourth Amendment.

Treating the offense's misdemeanor label as an idée fixe and ignoring the interests at stake also would not work for the States that have eliminated these distinctions. Take Maine, which divides crimes into five classes. Me. Rev. Stat. Ann. tit. 17-A § 4. The only way to decide how the Fourth Amendment applies to stops investigating a "Class A" or a "Class B" crime is to fall back on other principles—the risks to the community of the crime. And though most States continue to use words like "felony" and "misdemeanor," many have added new variants. Minnesota and Washington criminalize "misdemeanor[s]" and "gross misdemeanor[s]." Minn. Stat. § 609.02; Wash. Rev. Code Ann. § 9A.04.040. And Pennsylvania separates out murders from felonies and misdemeanors. 18 Pa. Stat. & Cons. Stat. Ann. § 106(a)(1). A per se rule against investigating a certain class of crime offers no help in deciding whether seizures related to these bottomless variations are reasonable.

The better rule in this setting is not bright in either direction. It does not say that officers always may make a *Terry* stop of an individual known to have completed a misdemeanor, as *Hensley* permits for completed felonies. And it does not say that officers never may make a *Terry* stop of an individual known to have completed a misdemeanor. It instead falls back on reasonableness, balancing the interests in public safety and personal liberty. The inquiry turns not on whether the suspect already completed a crime. It turns on the nature of the crime, how long ago the suspect committed it, and the ongoing risk of the individual to the public safety. Under this approach, the Fourth Amendment correctly appreciates the distinction between officers who illegitimately invoke *Terry* to stop someone who ran a red light sixth months ago and legitimately use it to stop someone who assaulted a spouse in the past half hour.

These dynamics are captured in two questions. Did an officer stop a suspect to investigate a completed felony? If yes, we move on to consider the reasonableness of the officer's suspicion. If the offense goes by another name, we ask whether *this* stop for *this* offense violates the Fourth Amendment. *See Hughes*, 517 F.3d at 1017; *Grigg* 498 F.3d at 1081; *Moran*, 503 F.3d at 1142. *Hensley* tells us to consider several factors in balancing the security and liberty interests. Does the stop "promote the interest of crime prevention"? *Hensley*, 469 U.S. at 228. Does it further "[p]ublic safety"? *Id.* How strong is the government's interest in "solving crimes and bringing offenders to justice" in this case? *Id.* at 229. And would "[r]estraining police action until after probable cause is obtained" unnecessarily hinder the investigation or allow a suspect to "flee in the interim"? *Id.*

Gauged by these considerations, this stop passes. 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.

Jones resists this conclusion on two grounds.

He points us to three cases that say an officer may not conduct a *Terry* stop to investigate a completed misdemeanor. *Gaddis v. Redford Township*, 364 F.3d 763, 771 n.6 (6th Cir. 2004); *United States v. Roberts*, 986 F.2d 1026, 1030 (6th Cir. 1993); *United States v. Halliburton*, 966 F.2d 1454, 1992 WL 138433, at *4 (6th Cir. 1992) (table). But *Halliburton* is an unpublished decision, which does not bind later panels. *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007). And the cited language in *Roberts* and *Gaddis* is dicta, unnecessary to either outcome. Later decisions of ours confirm the point. *United States v. Collazo*, 818 F.3d 247, 253–54 (6th Cir. 2016); *United States v. Simpson*, 520 F.3d 531, 541 (6th Cir. 2008).

Tacking in a different direction, Jones says we should adopt a per se rule because it accords with Kentucky law. True, Kentucky affords greater protections for its citizens when officers investigate past crimes. *See* Ky. Rev. Stat. Ann. § 431.005(1). But its prerogative to experiment with greater constitutional protections does not require the Fourth Amendment to do the same. *Virginia v. Moore*, 553 U.S. 164, 171 (2008); *see Kansas v. Carr*, 136 S. Ct. 633, 641 (2016).

That leaves Jones' alternative argument—that we should affirm the district court because Officer Parrish lacked probable cause to arrest him for assaulting McKinney. But probable cause "is not a high bar." *District of Columbia v. Wesby*, 138 S.Ct. 577, 586 (2018) (quoting *Kaley v. United States*, 571 U.S. 320, 338 (2014)). And Parrish cleared it. McKinney told Parrish that Jones assaulted her. "Unless, at the time of the arrest, there is an apparent reason for [an] officer to believe [an] eyewitness was lying, did not accurately describe what he had seen, or was in some fashion mistaken regarding his recollection of the confrontation," that accusation is sufficient to establish probable cause. *Ahlers v. Schebil*, 188 F.3d 365, 370 (6th Cir. 1999) (quoting *United States v. Amerson*, No. 93-6360, 1994 WL 589626, at *3 (6th Cir. Oct. 21, 1994). In this instance, 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. *United States v. Harflinger*, 436 F.2d 928, 934 (8th Cir. 1970); *see Hoover v. Walsh*, 682 F.3d 481, 500 n.53 (6th Cir. 2012).

Jones counters that Officer Parrish lacked probable cause because "it was not shown" that McKinney had sustained a "physical injury"—an essential element of fourth-degree assault. Appellee Br. 31. Jones is getting ahead of himself. Prosecutors, not arresting officers, must prove elements of the offense. *See Thacker v. City of Columbus*, 328 F.3d 244, 256 (6th Cir. 2003). Parrish knew enough facts to conclude Jones had probably assaulted McKinney. She described the pain she experienced and showed him plenty of evidence that confirmed the incident. Although he did not see any bruising on her back, he reasonably inferred that it might take time for bruises to show given how recently the attack occurred. Perhaps at trial, Jones could show that McKinney had not suffered "physical injury" significant enough to satisfy Kentucky's requirements. But at the point of arrest, the facts showed that Jones probably engaged in criminal activity. *Wesby*, 138 S. Ct. at 586.

We reverse.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CRIMINAL ACTION NO. 5:17-CR-00039-TBR

UNITED STATES OF AMERICA, PLAINTIFF

v.

JERMAINE TYRONE JONES, DEFENDANT

**MEMORANDUM OPINION & ORDER**

This matter is before the Court on the United States of America's Motion for Reconsideration. (R. 41). The Defendant, Jermain Tyrone Jones, has declined to respond. This matter is now ripe for adjudication. For the reasons that follow, the Court **DENIES** the United States of America's Motion, (R. 41).

BACKGROUND[1]

On August 30, 2017, Paducah Police Officer Andrew Parrish responded to a disturbance at Ms. McKinney's residence on Farwood Drive. Ms. McKinney explained to Officer Parrish that her then boyfriend, and now Defendant, Jermain Jones had assaulted her by throwing a dish soap bottle at her. Jones had since left with a friend in a white Chevy Suburban. Officer Parrish decided to sit outside McKinney's house to write up the paperwork because McKinney had expressed fears that Jones might return.

After Parrish had finished the paperwork and was getting ready to leave, he saw a white Chevy Suburban with two black males inside of it sitting at the intersection adjacent to

[1] For a more detailed account of the events described herein refer to the Court's November 5, 2018 Memorandum Opinion and Order, (R. 37).

McKinney's house. (Supp. Hearing R. 7: ¶ 1-19). Ms. McKinney having told Officer Parrish multiple times that she was worried Jones would come back, and the vehicle matching McKiney's description, Parrish got behind the Suburban and pulled it over. (Supp. Hearing R. 7: ¶ 1-19). Upon pulling Jones over, Parrish arrested him. After placing Jones in the back of the police car, Parrish found a Hi Point .380 caliber firearm in the back seat of his car alongside Jones.

After, being charged as a felon in possession of a firearm, Jones moved to suppress all evidence, including the Hi Point .380, from the warrantless stop, detention, and arrest on August 30, 2017. The Court held a hearing on the issue on July 23, 2018, at which Officer Parrish testified that he pulled Jones over "to further investigate the allegations made by Ms. McKinney."(Supp. Hearing R. 7: ¶ 10). This piece of testimony was crucial to the Court's conclusion that Officer Parrish conducted a *Terry* stop based on a completed misdemeanor, which the Court, following Sixth Circuit guidance, was forced to find unreasonable under the Fourth Amendment. Consequently, the Court granted Jones's Motion to Suppress. The United States now moves the Court to reconsider. (R. 41).

STANDARD

Although the Federal Rules of Civil Procedure do not provide expressly for "motions for reconsideration," courts generally construe such motions as motions to alter or amend a judgment under Rule 59(e). *E.g., Moody v. Pepsi-Cola Metro. Bottling Co.*, 915 F.2d 201, 206 (6th Cir. 1990); *Taylor v. Colo. State Univ.*, Civil Action No. 5:11-CV-00034-TBR, 2013 U.S. Dist. LEXIS 52872, 2013 WL 1563233, at *8-9 (W.D. Ky. Apr. 12, 2013). Rule 59(e) motions "must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

Pursuant to Rule 59(e), "a court may alter the judgment based on: '(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.'" *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010) (quoting *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005)). "A district court, generally speaking, has considerable discretion in deciding whether to grant [such a] motion, and as a result [the Sixth Circuit] review[s] these types of decisions for abuse of discretion." *Id.* (citing *Morse v. McWhorter*, 290 F.3d 795, 799 (6th Cir. 2002)).

DISCUSSION

The United States' Motion asks the Court to reconsider based on a single issue—whether Officer Parrish's stopped Jones as part of an investigation into an ongoing misdemeanor. (R. 41). The United States' Motion is well taken.[2] It is correct that if Officer Parrish was investigating an ongoing misdemeanor, instead of a completed one, the stop might be reasonable under the Fourth Amendment. *See United States v. Simpson*, 520 F.3d 531, 541 (6th Cir. 2008) ("But reasonable suspicion of an ongoing misdemeanor is adequate justification [to initiate a *Terry* stop]."). Indeed, the Court considered this possibility in coming to its original decision. But because neither party had raised the issue, the Court left it unaddressed to avoid what would have, at that point, been unnecessary dicta. The United States' Motion to Reconsider changes things. It invites, indeed requires, the Court to determine whether Officer Parrish stopped Jones to investigate an ongoing crime. The Court finds that he did not.

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[2] Although, the United States never explicitly identifies the grounds upon which they move the Court to reconsider, the Court assumes the government bases their motion on the need to prevent manifest injustice. The Court recognizes that "a motion to reconsider does not afford parties an opportunity to reargue their case." *Zink v. Gen. Elec. Capital Assurance Co.*, 73 Fed. Appx. 858, 861 (6th Cir. 2003); *and see Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). The Court also realizes that this issue arguably should have been raised in the United States' original briefing. However, the Court welcomes the opportunity to address the issue now as one that it should have addressed on its own accord the first time around.

The United States argues that the factual circumstances support the position that Parrish stopped Jones to investigate an ongoing misdemeanor. McKinney had voiced fears that Jones would come back, which lead Officer Parrish to stay parked in front of her residence while he finished his paperwork. While there, Officer Parrish spotted Jones inside a white Chevy Suburban, as described by McKinney, stopped at a red light in the intersection adjacent to McKinney's house. Parrish then pulled Jones over. The Court agrees with the United States that these facts might plausibly support the position that Parrish pulled Jones over to investigate an ongoing crime.

However, despite ample opportunity to do so while on the stand, Parrish never made mention that he pulled Jones over to investigate an ongoing crime. Instead, Parrish testified that he pulled Jones over to investigate the allegations made by Ms. McKinney. This statement could be interpreted one of two ways: it could be interpreted to mean that Parrish pulled Jones over to investigate McKinney's allegations of the completed domestic violence that had occurred earlier that day, or it could be interpreted to mean that Parrish pulled Jones over to investigate McKinney's allegation that Jones would likely return to Ms. McKinney's home, which Parrish might have reasonably suspected to be an ongoing continuation of the earlier domestic violence.[3] However, the following exchange between Mr. Hancock and Officer Parrish makes the former interpretation the more likely accurate:

> Q. Officer Parrish, to sum this up, at the time that you initiated the traffic stop on the vehicle that was operated by Mr. Snipes and Mr. Jones was the passenger, did you believe that a crime *had just taken place* not long before at Ms. McKinney's residence?
> A. Yes, sir. If not, I would not have initiated that traffic stop.

[3] Because the Court finds this interpretation of Parrish's testimony to be a stretch too far, the Court need not address the many issues it might raise, such as whether domestic violence can be reasonably considered ongoing for such a period of time so as to extend to when the alleged assailant has left the scene and is seen later sitting in traffic.

> Q. All right. And prior to you making the decision to place Mr. Jones under arrest for assault fourth degree, domestic violence, did you believe that you had probable cause to prove that Mr. Jones had *committed* that crime?
> A. Again, yes, sir. If I did not believe that, I would not have effected that arrest.

Parrish's testimony makes clear that Parrish believed a crime to have just taken place, and Jones had committed it—not that a crime was ongoing, and Jones was committing it.

Frankly, the Court finds this issue to be an extremely close call, but it does follow existing Sixth Circuit law. The court wrestled with it for some time. But ultimately, the Court believes that the best window into why Officer Parrish pulled Jones over is his own testimony on the subject. To find that Parrish's stop of Jones was part of an investigation into an ongoing misdemeanor would be to ignore the most plausible interpretation of his direct testimony at the suppression the hearing. The Court is unwilling do so. Thus, although well taken, the Court must deny the United States' Motion to Reconsider.

CONCLUSION

For the reasons stated above, IT IS HEREBY ORDERED that the United States of America's Motion to reconsider is DENIED.

A telephonic further proceedings is set on May 17, 2019 at 9:00 a.m. Central. The Court shall place the call.

IT IS SO ORDERED.

Thomas B. Russell

**Thomas B. Russell, Senior Judge**
**United States District Court**

May 10, 2019

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

UNITED STATES OF AMERICA PLAINTIFF

vs. CRIMINAL ACTION NO.: 5:17-CR-00039-TBR

JERMAINE TYRONE JONES DEFENDANT

**PLAINTIFF'S MOTION TO RECONSIDER**
**(Electronically Filed)**

This Court should reconsider its *Memorandum Opinion and Order* [DN 37] granting Jermaine Jones' *Motion to Suppress* [DN 20]. Specifically, this Court should examine whether Officer Parrish's stop of Jones was a part of an investigation into an ongoing misdemeanor offense, and, if so, whether reasonable suspicion supported the stop.

The Court's *Memorandum Opinion and Order* [DN 37, pgs. 123-125] accurately summarized the relevant facts. Of particular note to this motion, the Court said "Parrish also told McKinney [Jones' victim] that he would stay in the area and complete his paperwork parked outside her house in response to her fears that Jones would come back." [DN 37, pg 124 )citing Government's Ex. 2 – AXON_Body-Video 2017-08-03_1236)]. As the Court also discussed, Officer Parrish was still inside his car outside the victim's residence when, as she predicted, the vehicle she believed Jones would be in appeared at the intersection adjacent to the victim's home. [DN 37, pg. 124 (citing Supp. Hearing R. 7: ¶1-19)]. Those facts support a determination that a crime was ongoing and that Officer Parrish had reasonable suspicion to believe that Jones had returned to attack McKinney again. Reasonable suspicion to believe that a crime is ongoing is sufficient to warrant a seizure, like the investigatory stop in question here. *United States v. Simpson*, 520 F.3d 531, 541 (6th Cir. 2008) (reasonable suspicion of "*any* crime-no matter how minor," sufficient to justify a traffic stop).

The United States respectfully requests, based on the foregoing, that the court reconsider its prior *Memorandum Opinion and Order* in this case and deny Jones' motion to suppress.

Respectfully submitted,

RUSSELL M. COLEMAN
United States Attorney

*//s// Seth A. Hancock*

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 3, 2018, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following: **Scott Wendelsdorf, Esq.**, Counsel for Defendant.

*//s// Seth A. Hancock*
Seth A. Hancock
Assistant United States Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

UNITED STATES OF AMERICA PLAINTIFF

vs. CRIMINAL ACTION NO.: 5:17-CR-00039-TBR

JERMAINE TYRONE JONES DEFENDANT

**ORDER GRANTING PLAINTIFF'S MOTION TO RECONSIDER**
**(Electronically Filed)**

The Court, having considered Plaintiff's Motion to Reconsider; Defendant's Response thereto; and being sufficiently advised;

IT IS HEREBY ORDERED THAT the court has reconsidered its prior *Memorandum Opinion and Order* [DN37] in this case; and

IT IS FURTHER ORDERED that Plaintiff's Motion to Reconsider is granted and Jermaine Jones' Motion to Suppress is denied [DN20].

cc: USAO (SH)
Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CRIMINAL ACTION NO. 5:17-CR-00039-TBR

UNITED STATES OF AMERICA, PLAINTIFF

v.

JERMAINE TYRONE JONES, DEFENDANT

**MEMORANDUM OPINION & ORDER**

This matter is before the Court on Defendant Jermaine Tyrone Jones's Motion to Suppress. (R. 20). Jones seek to suppress all evidence, including a Hi Point .380 caliber firearm, directly or indirectly obtained from his warrantless stop, detention, and arrest on August 30, 2017. (R. 20). The Court conducted a suppression hearing on July 23, 2018. The United States produced evidence through the direct testimony of Paducah Police Officer Andrew Parrish. Jones produced his evidence through cross-examination of Officer Parrish. Both Parties introduced as evidence video footage from Officer Parrish's body camera.

At the suppression hearing's conclusion, the Court ordered additional briefing on the matter. Accordingly, Jones has filed Defendant's Memorandum in Support of Motion to Suppress (R. 35), and the United States has responded with its Memorandum in Opposition to Defendant's Motion to Suppress. This matter is now ripe for adjudication. For the reasons that follow, the Court **GRANTS** Jones's Motion Suppress. (R. 20).

## BACKGROUND

### A. The Domestic Disturbance Call

On August 30, 2017, Paducah Police Officer Andrew Parrish responded to a disturbance at Ms. Mckinney's residence on Farwood Drive. (Government's Ex. 1). Once there, Ms. McKinney told Officer Parrish that she had been involved in a dispute with her ex-boyfriend, Defendant Jermain Tyrone Jones. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236). She told Officer Parrish that she had arrived home from work to find Jones in her home. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236). When McKinney asked Jones to leave, he refused. According to McKinney, they then got in an altercation that resulted in Jones throwing a dish soap bottle at her, which struck her in the back. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236). McKinney then ran outside where Jones threw cans of sprite at her. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236). McKinney said that she was able to dodge the cans, but they had struck and damaged her car. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236). At this point, McKinney claims that she fled the immediate area while calling the police. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236). When she got back, she witnessed Jones leaving in a "Tahoe-like vehicle with a long body" driven by Mr. Snipes, Jones's friend. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236). Upon Parrish probing McKinney's story, she added that at some point her brothers had come and got into a physical altercation with Jones, but they too had left. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236). Officer Parrish informed McKinney that Jones was legally considered a resident of the house and that if she wanted to him to leave, she would have to go downtown to initiate a formal eviction process. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236). Parrish further instructed McKinney that she would have to go downtown to press criminal charges against Jones. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236).

Officer Parrish witnessed several pieces of evidence that corroborated McKinney's story. Sprite cans were strewn about the yard next to McKinney's vehicle, and her vehicle was damaged. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236). McKinney's couch was stained and smelled of detergent. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236). Parrish also found an empty dish soap bottle on the ground. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236). However, when McKinney showed her back to Officer Parrish, there were no apparent injuries. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236). Officer Parrish noted that it might take some time for bruising to occur. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236). No evidence was collected from the residence.

At the end of Parrish's interaction with McKinney, he completed a Domestic Violence Lethality Screen for First Responders form for the Merryman House per Paducah Police Department policy. (Government's Ex. 3). Parrish also told McKinney that he would stay in the area and complete his paperwork parked outside her house in response to her fears that Jones would come back. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1236).

B. Jones's Subsequent Stop

After Officer Parrish had gotten inside his car and was getting ready to leave, he saw a white Chevy Suburban with two black males inside of it sitting at the intersection adjacent to McKinney's house. (Supp. Hearing R. 7: ¶ 1-19). Ms. McKinney having told Officer Parrish multiple times that she was worried Jones would come back, and the vehicle matching

McKiney's description, Parrish got behind the Suburban and pulled it over. (Supp. Hearing R. 7: ¶ 1-19).

Upon pulling the Suburban over, Officer Parrish approached the passenger side of the vehicle and identified the passenger as Mr. Jones, and the driver as Mr. Snipes. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308). Jones immediately made mention of an incident with Ms. McKinney. Jones identified McKinney as his girlfriend. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308).

Officer Parrish then asked Jones to exit the vehicle. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308). Jones reluctantly complied. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308). Parrish escorted Jones to Parrish's vehicle and did an initial search of his person before proceeding. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308). Nothing was found. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308). On the side of the road next to Parrish's vehicle, Parrish questioned Jones about McKinney's allegations. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308). He denied everything—he didn't know anything about the sprite cans, the detergent on couch, fighting with McKinney's brothers, or throwing dish soap. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308). Parrish then arrested Jones for fourth-degree assualt of Ms. McKinney. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308).

Upon arrest, Jones was searched again. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308). Nothing illegal was recovered. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308). Jones was then placed in the back of Parrish's vehicle. After being in the back of the car for several minutes, Jones began fidgeting. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308). When Officer Parrish opened the back door of the vehicle, Jones started yelling that his hand cuffs were too tight. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308). When checking Jones's cuffs, Officer Parrish found a High Point .380 firearm in the back of his police car. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308). Jones was then taken out of the car and searched for a third time. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308). He was less than cooperative. (Government's Ex. 2 - AXON_Body-Video 2017-08-03_1308).

C. The Suppression Hearing

Officer Parrish was the sole witness to testify at the suppression hearing, his testimony reflected the events described above. (*See generally*, Supp. Hearing). However, one piece of Parrish's testimony is particularly relevant to the Court's analysis: Parrish testified that he stopped the Suburban for no other reason than "to further investigate the allegations made by Ms. McKinney." (Supp. Hearing R. 7: ¶ 10).

DISCUSSION

Jones's Motion to Suppress presents two issues: First, whether Officer Parrish's investigative stop of Jones was lawful. (R. 35). Second, whether Officer Parrish had sufficient probable cause to arrest Jones without a warrant. (R. 35). In post-hearing briefing, the United States argues that the investigative stop was reasonable given Parrish's suspicion that Jones had engaged in past criminal conduct, and that Parrish had sufficient probable cause to arrest Jones for fourth-degree assault. (R.36). Jones disagrees, arguing that the stop violated *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny, and that Officer Parrish knew he did not have sufficient probable cause to arrest Jones. (R. 35).

The Court will start with Parrish's warrantless investigatory stop. Jones argues that the stop violated the Fourth Amendment because Parrish, at best, only had reasonable suspicion of past criminal conduct, which is not enough to justify a warrantless stop. (R. 35). Conversely, the United States argues that the warrantless stop was justified by Parrish's reasonable suspicion that Jones had assaulted McKinney. (R. 36). The Court reluctantly disagrees.

Contrary to Jones's position that past criminal conduct does not justify a warrantless investigatory stop under the Fourth Amendment, the Supreme Court instructs in *United States v. Hensley* that investigatory stops are permitted under the Fourth Amendment provided the officer had "reasonable suspicion, grounded in specific and articulable facts," that the person stopped was involved in, or wanted in connection with, a completed crime. 469 U.S. 221, (1985). However, the Court's Instruction in *Hensley* is restricted to felonies—it does not extend to misdemeanors. *Id.* ("We need not and do not decide today whether Terry stops to investigate all past crimes, however serious, are permitted."). Similarly, while the Sixth Circuit, relying on *Hensley*, routinely upholds investigatory stops based on completed crimes, the crimes involved are always felonies—not misdemeanors, like the fourth-degree assault at issue here. The Sixth Circuit has not decided the issue of whether reasonable suspicion of a completed misdemeanor is sufficient under the Fourth Amendment to justify an investigatory stop so as to be binding on this Court. But it has addressed the issue; once in an unpublished opinion and twice in dicta.

In *United States v. Halliburton*, 966 F.2d 1454 (Table), 1992 WL 138433 (6th Cir. 1992), the Sixth Circuit directly addressed whether a completed misdemeanor justified an investigatory stop. Federal Court Security Officer, Marshal Burris stopped Fenton Halliburton to question him about suspected misdemeanor public exposure from two weeks prior. The Court held that

Burris's stopping Halliburton was unreasonable under the Fourth Amendment because it was based on a completed misdemeanor—not a completed felony. *Halliburton*, WL 138433 at *4.

Since *Halliburton*, The Sixth Circuit has addressed the issue twice—both times in dicta. In *United States v. Roberts*, 986 F.2d 1026, (6th Cir. 1993), the Sixth Circuit held that officers had not violated the defendant's Fourth Amendment rights for stopping him based on a reasonable suspicion that he was drunk. In dicta, the *Roberts* Court stated, "[i]n Hensley, the Supreme Court held that police may stop a person to investigate if they 'have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony,' *but not for a completed misdemeanor*." United States v. Roberts, 986 F.2d 1026, 1030 (6th Cir. 1993) (emphasis added) (citation omitted).

Similarly, in *Gaddis v. Redford Twp.*, 364 F.3d 763, 785 (6th Cir. 2004), the Sixth Circuit again determined that driving while drunk constitutes an ongoing crime for Fourth Amendment purposes. And again, in dicta and citing *Roberts*, the court stated that "[p]olice may also make a stop when they have reasonable suspicion of a completed felony, *though not of a mere completed misdemeanor*." *Gaddis,* 364 F.3d at 771 n.6 (emphasis added).

The Court notes that the Ninth and Tenth Circuits both declined to follow the Sixth Circuit's holding in *Halliburton*. Instead, those courts take the position that completed misdemeanors may justify an investigatory stop provided the government's interest in the stop outweighs the intrusion on individual freedom. *United States v. Grigg*, 498 F.3d 1070, 1081 (9th Cir. 2007); *United States v. Moran*, 503 F.3d 1135, 1141 (10th Cir. 2007). Frankly, this position is appealing. It better aligns with the Court's reasoning in *Hensley*, and in no way runs afoul of its holding.

However, district courts are obliged to follow their respective circuit courts' precedent unless that precedent has been overturned by the court of appeals sitting in banc or by a Supreme Court opinion. *See, United States v. Forman*, 990 F. Supp. 875, 882 (E.D. Mich. 1997); *See also, Loftus v. Southeastern Pennsylvania Transportation Authority*, 843 F. Supp. 981, 984 (E.D. Pa. 1994) (stating federal district courts must follow their respective circuit court's decision unless overruled by the Supreme Court). While the Court recognizes that the Sixth Circuit has not necessarily established binding precedent on the issue, *Halliburton,* in conjunction with the dictum from *Roberts* and *Gaddis,* is enough to convince the Court that the Sixth Circuit is more likely to find an investigative stop based on a completed misdemeanor unreasonable under the Fourth Amendment. Thus, so must this Court.

Officer Parrish's testimony at the suppression hearing makes it clear that he stopped Jones because he suspected him of fourth-degree assault in violation of Kentucky Revised Statute 508.030. (Supp. Hearing R. 7: ¶ 10) ("I got behind the vehicle and initiated a traffic stop to further investigate the allegations made by Ms. McKinney."). Fourth-degree assault is a misdemeanor. Ky. Rev. Stat. § 508.030 (2). Therefore, this Court has no choice but to find that Officer Parrish's investigatory stop violated the Fourth Amendment.

Because the initial stop violated Jones's Fourth Amendment rights, his subsequent arrest was also illegal. Therefore, all evidence recovered during the stop and subsequent arrest, including the Hi Point .380 firearm, must be suppressed as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 485, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963).

Because the firearm and all evidence collected from the stop must be suppressed as discussed above, to decide whether Officer Parrish had probable cause to effectuate the arrest is unnecessary. Jones's Motion to Suppress (R. 20) is granted.

## CONCLUSION

Having considered the testimony and evidence presented during the suppression hearing held on July 28, 2018, and the subsequent briefing, and being otherwise sufficiently advised; IT IS HERBY ORDERED that Defendant Jermaine Jones's Motion to Suppress (R. 20) is GRANTED.

A telephonic further proceedings is set on NOVEMBER 14, 2018 at 9:15 a.m. Central Time. The Court shall place the call to counsel.

Thomas B. Russell

**Thomas B. Russell, Senior Judge**
**United States District Court**

November 5, 2018

cc: Counsel of Record

COMMONWEALTH OF KENTUCKY

# UNIFORM CITATION

COURT

## OFFENDER / VIOLATOR

AGENCY: PADUCAH POLICE DEPARTMENT
ORI: 0730100

NAME: LAST, FIRST, MI, FILIAL: JONES, JERMAINE T.
ATTN:
HOME PHONE: UNKNOWN
ALIAS NAME: LAST, FIRST, MI, FILIAL:
EMERGENCY PHONE: UNKNOWN

ADDRESS (NUMBER, NAME, SUFFIX): [redacted] HARRISON ST
KENTUCKY RESIDENT STATUS: ☑ F: FULL-TIME ☐ P: PART-TIME ☐ N: NON RESIDENT

| CITY | STATE | ZIP CODE/EXTENSION | MARITAL STATUS | VICTIM'S RELATIONSHIP TO OFFENDER |
|---|---|---|---|---|
| PADUCAH | KY | 42001 | SINGLE | OTHERWISE KNOWN |

| ID TYPE | ID ST | ID NUMBER | S. S. NUMBER | HEIGHT | WEIGHT | HAIR COLOR | EYE COLOR |
|---|---|---|---|---|---|---|---|
| OPERATOR'S LICENSE | KY | J89045022 | [redacted] | 5' 06" | 165 | BLACK | BROWN |

☐ COMMERCIAL VEHICLE ☐ PLACARDED HAZARDOUS VEHICLE

ETHNIC ORIGIN: ☐ HISPANIC ☑ NON HISPANIC

ALCOHOL/DRUG INVOLVEMENT: ☐ ALCOHOL ☐ DRUGS ☐ UNKNOWN

DATE OF BIRTH: [redacted]
SEX: ☑ MALE ☐ FEMALE
RACE: ☐ WHITE ☑ BLACK ☐ AM. INDIAN OR ALASKA ☐ ASIAN

B.A. RESULTS:
☐ BREATH NOT REQUESTED
☐ BLOOD NOT REQUESTED
☐ URINE NOT REQUESTED

PLACE OF EMPLOYMENT / OCCUPATION: | CITY: | STATE:

## VEHICLE

VEHICLE MAKE: | VEHICLE MODEL: | VEH. YEAR: | VEHICLE COLOR:
VEH. TYPE: | REGISTRATION: STATE, YEAR, NUMBER: | VEHICLE IDENTIFIERS: | MPH: | IN MPH ZONE: | VIOL. KEY:

## DATE / TIME

| VIOLATION DATE | | | VIOLATION TIME | EXACT LOCATION OF VIOLATION | MILES | DIRECTION | CITY | COUNTY | SECTOR |
|---|---|---|---|---|---|---|---|---|---|
| 08 | 30 | 2017 | 2:21 PM | 1137 ELMDALE DR | | | PADUCAH | MCCRACKEN | 5 |

| ARREST DATE | | | TIME OF ARREST | EXACT LOCATION OF ARREST | MILES | DIRECTION | CITY | COUNTY | SECTOR |
|---|---|---|---|---|---|---|---|---|---|
| 08 | 30 | 2017 | 3:15 PM | 1137 ELMDALE DR | | | PADUCAH | MCCRACKEN | 5 |

## CHARGES AND POST-ARREST COMPLAINT

| NUMBER | | | VIOLATION CODE | ASCF | STATUTE/ORD. | CHARGE(S) | STARTING CASE | ENDING CASE | DRUG TYPE |
|---|---|---|---|---|---|---|---|---|---|
| 1 | of | 3 | 00797 | 0 | 508.030 | 1 | 17-35194 | | |
| 2 | of | 3 | 01403 | 0 | 512.040 | 1 | 17-35194 | | |
| 3 | of | 3 | 52196 | 0 | 527.040 | 1 | 17-35194 | | |
| | of | | | | | | | | |

POST-ARREST COMPLAINT
Charge 1: ASSAULT, 4TH DEGREE (DOMESTIC VIOLENCE) NO VISIBLE INJURY
Charge 2: CRIMINAL MISCHIEF 3RD DEGREE
Charge 3: POSSESSION OF FIREARM BY CONVICTED FELON

Officers were dispatched to [redacted] Farwood Drive in reference to a disturbance between [redacted] and Jermaine Jones. Upon arrival, Jones had fled the area in a white in color Chevy Suburban driven by William Snipes. [redacted] stated she recently ended her relationship with Jones and he was at her residence when she asked him to leave. She stated he became upset and began pouring laundry detergent on her furniture in her living room and then attempted to assault her. [redacted] advised she fled her residence and Jones began throwing items at her such as a Sprite can and Gain dish soap. Her vehicle was struck with the Sprite can causing damage and she was struck with the dish soap and complained of back pain. A white Chevy Suburban was seen in the area with two black male occupants inside. A traffic stop was conducted and Jones was identified as a passenger and Snipes the driver. Jones denied the assault and stated he did not know what happened. After Jones was arrested he began moving a lot in the back seat of my patrol car. I then found a Hi Point firearm in his possession and he was convicted of a felony in 2008. Mr. Jones was very uncooperative throughout the entire investigation. Investigation recorded using a body worn camera.

## COURT

| COURT DATE | COURT TIME | | COURT LOCATION |
|---|---|---|---|
| ARRESTED | | ☐ PAYABLE ☑ COURT | MCCRACKEN |

COURT CASE NUMBER:
TOTAL PREPAYABLE AMOUNT: NOT PREPAYABLE

YEAR: 17

## CASE

WITNESS 1 NAME: LAST, FIRST, MI, FILIAL: STONE, OFFICER
STATE: KY ZIP CODE: 42001
WITNESS 1 ADDRESS (NUMBER, STREET, SUFFIX): 1400 BROADWAY ST
CITY: PADUCAH
WITNESS 2 NAME: LAST, FIRST, MI, FILIAL:
STATE: ZIP CODE:
WITNESS 2 ADDRESS (NUMBER, STREET, SUFFIX):
CITY:

☐ SERVING WARRANT FOR OTHER AGENCY SPECIFY: -

☑ IN-CAR VIDEO
☐ FINGERPRINTS
☐ PHOTOS
☑ EVIDENCE HELD

| OFFICER SIGNATURE | BADGE/I.D. NUMBER | ASSIGNMENT |
|---|---|---|
| Parrish, A. | 336 | 5 |

CONTROL NUMBER: CO87833
TYPE: 2