CASE NO. 12-2674

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IAN MOBLEY; KIMBERLY MOBLEY; PAUL KAISER; ANGIE WONG; JAMES WASHINGTON; NATHANIEL PRICE; JEROME PRICE; STEPHANIE HOLLANDER; JASON LEVERETTE-SAUNDERS; WANDA LEVERETTE; DARLENE HELLENBERG; LAURA MAHLER

Plaintiffs - Appellees

and

THOMAS MAHLER

Plaintiff

v.

CITY OF DETROIT; VICKI YOST, a Detroit police officer, in her individual capacity; DANIEL BUGLO, a Detroit police officer, in his individual capacity; UNNAMED DETROIT POLICE OFFICERS, in their individual capacities; GREGORY MCWHORTER, Detroit Police Sergeant; ANTHONY POTTS, Detroit Police Sergeant; CHARLES TURNER, Detroit Police Sergeant; MICHAEL BROWN, Detroit Police Officer; BRANDON COLE, Detroit Police Officer; TYRONE GRAY, Detroit Police Officer; SHERON JOHNSON, Detroit Police Officer; KATHY SINGLETON, Detroit Police Officer

Defendants - Appellants.

On appeal from the United States District Court
for the Eastern District of Michigan, Southern Division

APPELLEES' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellees are not subsidiaries or affiliates of any publicly owned corporation, and they know of no publicly owned corporation, not a party to this appeal, that has a financial interest in its outcome.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellees concur in Defendants-Appellants' request for oral argument. This is a case with significant public interest. Plaintiffs allege multiple violations of their Fourth Amendment rights as a result of a widespread police practice of detaining, searching, and charging innocent people with "loitering in a place of illegal occupation," and seizing their motor vehicles for forfeiture under Michigan's "nuisance abatement" statute, all without individualized probable cause. Defendants assert that these practices do not violate the Constitution. The record in this case is voluminous. For all these reasons, this Court's decisional process will be significantly aided by oral argument.

STATEMENT OF THE ISSUES

I. Should the District Court's denial of summary judgment on qualified immunity grounds be affirmed because (1) Defendants arrested Plaintiffs for "loitering in a place of illegal occupation" without individualized probable cause that Plaintiffs knew the facts that made the place illegal, and (2) the Fourth Amendment requirement of individualized probable cause was clearly established?

Defendants-Appellants answer "No."

Plaintiffs-Appellees answer "Yes."

II. Should the District Court's denial of summary judgment on qualified immunity grounds be affirmed because (1) Defendants frisk-searched Plaintiffs and made them empty their pockets without individualized probable cause for an arrest and without individualized reasonable suspicion that they were armed and dangerous, and (2) the Fourth Amendment requirements of individualized probable cause and reasonable suspicion were clearly established?

Defendants-Appellants answer "No."

Plaintiffs-Appellees answer "Yes."

III. Should the District Court's denial of summary judgment on qualified immunity grounds be affirmed because (1) Defendants seized Plaintiffs' cars for forfeiture under Michigan's "nuisance abatement" statute without individualized probable cause for the underlying criminal offense and without individualized probable cause that Plaintiffs' cars were used for an unlawful act enumerated by the nuisance abatement law, and (2) the Fourth Amendment requirements of individualized probable cause were clearly established?

Defendants-Appellants answer "No."

Plaintiffs-Appellees answer "Yes."

STATEMENT OF THE CASE

The Fourth Amendment embodies several fundamental principles that distinguish our free society from a police state. One is that before an individual is detained and charged with a crime, an officer must have probable cause that the individual is committing or has committed a criminal offense. Another is that the government may not seize private property for forfeiture without probable cause that it was used unlawfully. Plaintiffs brought this lawsuit to preserve and protect these constitutional guarantees.

This case arises from a police raid conducted by Defendants at the Contemporary Art Institute of Detroit ("CAID") on May 31, 2008. On the last Friday of each month, the CAID hosted a popular, publicly advertised late-night fundraiser known as "Funk Night," where people who were interested in the local arts and music scene (mostly young people in their twenties) visited the CAID, became members or supporters of the organization, listened to music, danced, and socialized. Unfortunately, the CAID was hosting this event without the license that was allegedly required under state law due to the fact that alcohol was being served. Based upon probable cause that the CAID was thus a "blind pig"[1] and a nuisance under state law, police obtained a warrant to search the CAID.

[1] A "blind pig" is a regional Prohibition-Era term for a "speakeasy," an establishment that sells and serves alcoholic beverages illegally. (Appellants' Br. at 8, citing R. 115, Opinion & Order, Pg ID #3478-3479.)

Unlike the CAID personnel who organized Funk Night, the CAID patrons who attended the event had no reason to know that the CAID was unlicensed or was otherwise operating unlawfully. They were therefore shocked and terrified when, in the middle of a Funk Night event, the search warrant was executed by dozens of police officers who stormed into the CAID with their weapons drawn in a commando-style display of overwhelming force.

The events that followed led to this lawsuit. Despite there being no indication that the 130 patrons innocently attending Funk Night knew that the CAID was unlicensed or knew that Funk Night was in any other way unlawful, the police searched every single person inside the CAID, detained them there for up to three hours, and charged them with the crime of "loitering in a place of illegal occupation"—merely for being present. Then, the police demanded to know who had driven a car to the CAID that night and parked outside or nearby. And despite there being no indication that any of those cars had been used for any unlawful act, the police impounded every single one of them, 41 in total, for forfeiture proceedings under Michigan's "nuisance abatement" law.

Plaintiffs are eight of the patrons who were attending Funk Night when the raid occurred and four people who were not present but owned cars that were seized. Plaintiffs do not challenge the legal basis for obtaining a warrant to search the CAID premises; they assume, for the purpose of this case, that the CAID

should have had a liquor license and was in that sense a "nuisance" under state law. Rather, they challenge as clearly unreasonable under the Fourth Amendment the search and prolonged seizure of their persons for "loitering in a place of illegal occupation" merely because they were present at the CAID, and the seizure of their cars under the "nuisance abatement" statute merely because they were driven there.

Plaintiffs' amended complaint asserts violations of their Fourth and Fourteenth Amendment rights arising from this raid.[2] At the close of discovery, the parties filed cross-motions for summary judgment. Plaintiffs sought summary judgment as to liability against the City of Detroit only.[3] The District Court granted Plaintiffs' motion in part, finding beyond any dispute of fact that Defendants violated Plaintiffs' Fourth Amendment rights, and that the violations were caused by the City's custom or policy during blind pigs raids of detaining and searching every patron and seizing every patron's car based on their mere presence at a location where alcohol was being unlawfully sold.[4] For the same reasons, the District Court denied in part the City of Detroit's motion for summary judgment. These summary judgment rulings pertaining to the liability of the City of Detroit are not before the Court on this interlocutory appeal.

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[2] R. 21, Pls.' 1st Am. Compl. (Sept. 8, 2010).

[3] R. 81, Pls.' Mot. for Summ. J., Pg ID #1283-1330.

[4] R. 115, Opinion & Order, Pg ID #3475-3502.

The individual police officer Defendants (hereafter referred to as "Defendants") also sought summary judgment, raising the defense of qualified immunity.[5] The District Court denied Defendants' motions in part, finding that, under clearly established law, Defendants' searches and seizures of Plaintiffs' persons and cars based on their mere presence at the CAID violated Plaintiffs' Fourth Amendment rights.[6] This case is now before the Court on Defendants' interlocutory appeal from the order denying them summary judgment on qualified immunity grounds.

On appeal, Defendants do not argue that the Fourth Amendment allowed them to detain Plaintiffs or seize their cars based on their "mere presence" at the CAID. Defendants do not even argue that they are entitled to qualified immunity for believing that detaining Plaintiffs or seizing their cars based on their mere presence was reasonable. Instead, Defendants accept Plaintiffs' premise that they could not be detained, and their cars could not be impounded, absent probable cause that Plaintiffs knew or should have known that the CAID was selling alcohol unlawfully. Defendants simply argue that under the "totality of the circumstances," it was reasonable for them to believe that Plaintiffs actually knew

[5] R. 84, Defs. City of Detroit et al.'s Mot. for Summ. J., Pg ID #1791-1818; R. 85, Defs. Yost/Buglo's Am. Mot. for Summ. J., Pg ID #2277-2297.

[6] R. 115, Opinion & Order, Pg ID #3485-3497.

or should have known that the CAID was selling alcohol unlawfully.[7] But in their attempt to recast their conduct with a gloss of reasonableness, Defendants distort the facts in the record below, rely on information they learned long after the incident, and ask this Court to condone bizarre inferences that are the very antithesis of "reasonable."

Ever since the Supreme Court's landmark ruling in *Ybarra v. Illinois*, 444 U.S. 85 (1979), it has been clearly established that the Fourth Amendment requires *individualized* probable cause. A person cannot be arrested or searched, and property cannot be seized, based on mere propinquity to others who are independently suspected of criminal activity. *Id.* Because Plaintiffs were searched and detained, and their cars seized for forfeiture, based on their mere presence at the CAID, and because no reasonable officer could have thought that there was individualized probable cause to search and detain Plaintiffs and seize their cars, Defendants are not entitled to qualified immunity. The District Court's order denying Defendants' motions for summary judgment should therefore be affirmed.

[7] Appellants' Br. at 21, 23, 33, 37-38, 48-53.

STATEMENT OF FACTS

The CAID is a local non-profit arts organization that has hosted art exhibitions, performances, and cultural events in Detroit since 1979. In 2008, the CAID hosted a popular late-night event and fundraiser known as "Funk Night" at its Detroit headquarters on the last Friday of each month; the event was publicly advertised online. Funk Night was an opportunity for those interested in local arts and music to visit the gallery, become members or supporters of the organization, look at art, listen to music, dance, and socialize.[8]

The CAID served alcohol at Funk Night even though, unbeknownst to its patrons, it had no liquor license. After Lieutenant Yost and Sergeant Buglo conducted undercover surveillance at three Funk Night events, Buglo obtained a warrant to search the CAID for evidence of "blind pig" activity. The warrant authorized police to

> seize . . . the following property and things: All suspected controlled substances, all monies, contraband, books, and paraphernalia used in connection with illegal narcotic trafficking and gambling; alcoholic beverages of any type and the money and profits from same; any photographic video and audio equipment, computers, hard drives, any storage devices to store data, commonly used in association with the operation of a **"Blind Pig."** All firearms used in connection with the above described

[8] R. 92-2, Korobkin Declaration and attachments, Pg ID #2484-2487; R. 92-4, Leverette Dep. Pg ID #2512-2516; R. 92-5, L. Maher Dep. Pg ID #2533; R. 92-7, Funk Night Ad, Pg ID #2557; R. 92-8, I. Mobley Dep. Pg ID #2565-2567.

> activities, all ownership occupancy, possession or control of the premises [sic].[9]

The warrant did not authorize the search or seizure of any person or automobile.

On May 31, 2008, Yost and Buglo entered the CAID in an undercover capacity to confirm that alcohol was being served unlawfully. Upon observing the sale of alcohol at the bar just moments after 2:00 a.m., Yost called in a heavily armed raid team to execute the search warrant.[10] The raid commenced at approximately 2:10.[11]

Although the CAID and its proprietors were allegedly violating the law by selling alcohol without a license, Yost and the other officers had no reasonable basis to believe that the unlawfulness of Funk Night was readily apparent to each of the *patrons* who were merely present when the raid occurred. First, everyone at Funk Night was required to show ID to enter, and only persons of drinking age were given a wrist band or hand stamp to indicate that they could drink.[12] Second, although under Michigan law alcohol may not be *sold* after 2:00 a.m., the

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[9] R. 92-11, Search Warrant, Pg ID 2642 (bold in original).

[10] R. 92-10, Buglo Dep. Pg ID #2621-2622; R. 92-12, DPD Report, Pg ID #2653; R. 92-13, Yost Dep. Pg ID #2657.

[11] R. 92-12, DPD Crime Report, Pg ID #2647, 2653; R. 93-1, DPD Activity Logs, Pg ID #2799-2800.

[12] R. 92-8, I. Mobley Dep. Pg ID #2564; R. 92-9, Washington Dep. Pg ID #2585; R. 92-10, Sgt. Buglo Dep. Pg ID #2602; R. 92-16, Hollander Dep. Pg ID #2701-2702; R. 92-19, N. Price Dep. Pg ID #2768.

consumption of alcohol is allowed until 2:30—about twenty minutes after the raid began. Third, given the proper license and permit, an organization like the CAID may lawfully: (a) host special events that continue through the night; and (b) admit persons under the age of 21 provided they are not served alcohol.[13] Fourth, there were 130 patrons attending Funk Night at the time of the raid, many of whom were not even in the same room as the bar where alcohol was being sold.[14]

Plaintiffs Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Nathaniel Price, Stephanie Hollander, Jason Leverette-Saunders, and Darlene Hellenberg were among the 130 patrons attending Funk Night when the raid occurred. Ian, Paul, and James had never been to the CAID before. Paul and Angie were about to leave, having come to pick up a friend who, as it turned out, had already left. Ian, Paul, Angie, James, Stephanie, and Jason were all in a fenced-in courtyard or patio area *outside* the building, where no alcohol was being served. Nathaniel had just arrived and was standing near the front door, and

[13] R. 93-10, MLCC Club Licensee Information, Pg ID #2955-2958; R. 92-13, Yost Dep. Pg ID #2670-2677.

[14] R. 92-3, Leverette-Saunders Dep. Pg ID #2455-2458; R. 92-6, Hellenberg Dep. Pg ID #2541; R. 92-13, Lt. Yost Dep. Pg ID #2664-2668; R. 92-17, Kaiser Dep. Pg ID #2722-2726; R. 92-18, T. Mahler Dep. Pg ID #2756.

Darlene was in a back room where people were dancing.[15] The bar was not visible from any of these areas.[16]

At approximately 2:10 a.m.[17] dozens of police officers stormed the CAID clad in paramilitary raid gear with their weapons drawn. CAID patrons and staff were trampled, manhandled, thrown to the ground, hit, and kicked. Many of the officers were dressed in all-black or dark clothing, did not wear visible badges, and in some cases even wore ski masks concealing their faces. Some of the frightened patrons initially thought the CAID was being robbed because the raid team was not recognizable as police officers.[18]

Supervised and directed by Lieutenant Yost and Sergeants Buglo and Turner, the police searched and detained every single person present. Men and

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[15] R. 92-3, Leverette-Saunders Dep. Pg ID #2498-2499; R. 92-6, Hellenberg Dep. Pg ID #2544; R. 92-8, I. Mobley Dep. Pg ID #2769-2771; R. 92-9, Washington Dep. Pg ID #2584, 2588-2589; R. 92-16, Hollander Dep. Pg ID #2706-2708; R. 92-17, Kaiser Dep. Pg ID #2720, 2723-2726; R. 92-19, N. Price Dep. Pg ID #2769-2771; R. 92-20, Wong Dep. Pg ID #2779-2783.

[16] R. 92-13, Yost Dep. Pg ID #2666-2668; R. 94-2, Hellenberg Declaration, Pg ID #3007; R. 94-3, Supplemental N. Price Declaration, Pg ID #3008.

[17] R. 92-12, DPD Crime Report, Pg ID #2647, 2653; R. 93-1, DPD Activity Logs, Pg ID #2799-2800.

[18] R. 92-3, Leverette-Saunders Dep. Pg ID #2500-2502; R. 92-8, I. Mobley Dep. Pg ID #2569-2570; R. 92-9, Washington Dep. Pg ID #2589-2594; R. 92-16, Hollander Dep. Pg ID #2710-2711; R. 92-17, Kaiser Dep. Pg ID #2726-2737, 2744; R. 92-18, T. Mahler Dep. Pg ID #2757-2762; R. 92-19, N. Price Dep. Pg ID #2772-2775; R. 92-20, Wong Dep. Pg ID #2782-2787.

women were separated into different rooms, patted down, and detained for several hours under police guard while officers "processed" them. Police searched each patrons' pockets and placed their belongings in plastic bags.[19]

Police then charged all 130 patrons attending Funk Night with the misdemeanor crime of "loitering in a place of illegal occupation" in violation of City Code § 38-5-1.[20] It is undisputed that, aside from "loitering in a place of illegal occupation," there was no probable cause to believe any Plaintiff had committed any criminal offense.[21] It is likewise undisputed that "[t]he 'illegal occupation' at issue in this lawsuit is . . . an unlicensed establishment serving

[19] R. 92-3, Leverette-Saunders Dep. Pg ID #2503-2504; R. 92-6, Hellenberg Dep. Pg ID #2546-2548; R. 92-8, I. Mobley Dep. Pg ID #2571-2573; R. 92-9, Washington Dep. Pg ID #2592, 2597; R. 92-13, Lt. Yost Dep. Pg ID #2681-2682; R. 92-16, Hollander Dep. Pg ID #2709-2712; R. 92-17, Kaiser Dep. Pg ID #2729, 2733-2739; R. 92-19, N. Price Dep. Pg ID #2771-2773; R. 92-20, Wong Dep. Pg ID #2788; R. 93-3, Potts Dep. Pg ID #2846; R. 93-4, Cole Dep. Pg ID #2876.

[20] R. 92-10, Buglo Dep. Pg ID #2613, 2619-2620, 2624; R. 92-12, DPD Crime Report, Pg ID #2647-2653; R. 92-13, Yost Dep. Pg ID #2680, 2688; R. 93-2, Turner Dep. Pg ID #2816-2817.

[21] By interrogatory, Plaintiffs asked: "State any and all facts and circumstances known to Defendants at the time of the raid that would support a finding of probable cause that Plaintiffs had committed or were committing a criminal offense other than loitering in a place of illegal occupation." (R. 82-10, Defs.' Resp. to Interrog. #16, Pg ID #1722.) Defendants answered that Buglo testified on page 149 of his deposition that weapons were seized. (*Id*.) However, Buglo's testimony on page 149 is clearly about a different raid at a different place on a different date. (R. 92-10, Buglo Dep. Pg ID #2639-2641.) Defendants provided no other basis for probable cause that Plaintiffs committed any other offense.

liquor without a Michigan liquor license or an establishment, whether licensed or not, selling liquor after legal hours (2:00 a.m.), contrary to Michigan law."[22] Police did not ask patrons whether they knew the CAID was unlicensed or had served alcohol after hours. In their depositions Defendants admitted that each patron was detained, searched, and charged with "loitering" merely for being present.[23] Yost testified that she was responsible for deciding that there was probable cause to detain everyone there.[24]

In what can only be described as a serious distortion of the record, Defendants repeatedly assert in their brief on appeal that they observed CAID patrons openly smoking marijuana.[25] In fact, this "observation" occurred during an undercover surveillance operation *more than a month before* the raid took place, and Defendants admit they had no reason to believe that Plaintiffs were present at

[22] Appellants' Br. at 13 n.4.

[23] R. 92-10, Buglo Dep. Pg ID #2609, 2617-2620, 2624; R. 92-13, Yost Dep. Pg ID #2668-2669; R. 93-2, Turner Dep. Pg ID #2817, 2825-2827; R. 93-3, Potts Dep. Pg ID #2851-2855; R. 93-5, Gray Dep. Pg ID #2895, 2903-2907; R. 93-7, Johnson Dep. Pg ID #2920-2924; R. 93-8, McWhorter Dep. Pg ID #2934; R. 93-9, Singleton Dep. Pg ID #2941-2943.

[24] R. 92-13, Yost Dep. Pg ID #2688.

[25] Appellants' Br. at 21, 32, 36, 39, 44, 49-51.

that time.[26] Defendants also incredibly assert in their brief that there was an "odor of marijuana" in the outdoor patio area where several Plaintiffs were located;[27] in truth, the record contains no evidence of any odor in the outdoor patio area on the night of the raid, and Defendants admitted that they never went out onto the patio before executing the search warrant.[28] Defendants did state in a deposition more than three years after the raid that they smelled an odor of marijuana in an area of the CAID where Plaintiffs were not present, but Defendants completed a narrative police report at the time of the raid and made no reference to any alleged odor of marijuana.[29] Defendants have in fact admitted that no illegal drugs were found during the raid, even after every single person at the CAID was searched.[30]

Before any of the patrons were allowed to leave, they were asked if they had driven to the CAID and parked outside. If they had, the police impounded their car for forfeiture proceedings under Michigan's "nuisance abatement" statute, M.C.L.

[26] R. 92-10, Buglo Dep. Pg ID #2605-2606; R. 92-11, Warrant Affidavit, Pg ID #2643-2644.

[27] Appellants' Br. at 22, 39.

[28] R. 84-4, Yost Dep. Pg ID #1847; R. 92-13, Yost Dep. Pg ID #2666.

[29] R. 84-5, Buglo Dep. Pg ID #1886; R. 92-12, DPD Report, Pg ID #2653.

[30] R. 83-13, Defs.' Resp. to RFA #5, Pg ID #1790.

§ 600.3801 *et seq.*[31] Drivers were handed a paper entitled "Nuisance Abatement: Notice of Impoundment of Vehicle," which stated:

> The motor vehicle you were driving or in which you were a passenger was seized pursuant to an arrest for a state misdemeanor or a comparable city ordinance violation involving lewdness, assignation, and/or solicitation for prostitution, or used for the unlawful manufacture, storing, possessing, transporting, sale, keeping for sale, giving away, bartering, or furnishing of any controlled substance or any intoxicating liquors . . . .[32]

At Lieutenant Yost's directive and under Sergeant Turner's supervision, the police "abated" the car of every CAID patron who had driven to Funk Night.[33] Among the 44 cars taken that night were those driven by Plaintiffs Ian Mobley, Angie Wong, Nathaniel Price, Jason Leverette-Saunders, and Darlene Hellenberg. Plaintiffs Kimberly Mobley, Jerome Price, Wanda Leverette, and Laura Mahler were not present at the CAID but owned the cars being driven by their respective sons Ian Mobley, Nathaniel Price, Jason Leverette-Saunders, and Thomas

[31] R. 92-3, Leverette-Saunders Dep. Pg ID #2506-2507; R. 92-5, L. Mahler Dep. Pg ID #2525-2528; R. 92-6, Hellenberg Dep. Pg ID #2548-2549; R. 92-8, I. Mobley Dep. Pg ID #2561-2563, 2573-2579; R. 92-10, Sgt. Buglo Dep. Pg ID #2628-2629; R. 92-18, T. Mahler Dep. Pg ID #2764; R. 92-19, N. Price Dep. Pg ID #2773-2774; R. 92-20, Wong Dep. Pg ID #2788-2790; R. 93-2, Sgt. Turner Dep. Pg ID #2831-2833; R. 93-15, K. Mobley Dep. Pg ID #2979-2980; R. 93-18, DPD Follow Up Report, Pg ID #2989-2992; R. 93-19, J. Price Dep. Pg ID #2996-2997.

[32] R. 93-14, Notice of Impoundment of Vehicle, Pg ID #2976.

[33] R. 92-13, Yost Dep. Pg ID #2688; R. 93-2, Turner Dep. Pg ID #2830-2831, 2834-2835.

Mahler.[34] The Mobley vehicle was seized even though Ian had parked at a friend's house a mile away and walked to the CAID.[35]

There is no dispute that the only basis for seizing Plaintiffs' cars was Michigan's "nuisance abatement" statute.[36] It is likewise uncontested that the cars were taken merely because they had transported Plaintiffs to, or near, the CAID. There was no allegation, and no reason to believe, that Plaintiffs used their cars to transport drugs or alcohol, or even that they drove to the CAID knowing that they were driving to an unlicensed establishment or event. Simply driving a vehicle to the location of an unlawful sale of alcohol was considered sufficient to seize it.[37]

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[34] R. 92-3, Leverette-Saunders Dep. Pg ID #2506-2507; R. 92-4, Leverette Dep. Pg ID #2517; R. 92-5, L. Mahler Dep. Pg ID #2525-2528; R. 92-6, Hellenberg Dep. Pg ID #2548-2549; R. 92-8, I. Mobley Dep. Pg ID #2561-2563, 2573-2579; R. 92-18, T. Mahler Dep. Pg ID #2764; R. 92-19, N. Price Dep. Pg ID #2773-2774; R. 92-20, Wong Dep. Pg ID #2788-2790; R. 93-15, K. Mobley Dep. Pg ID #2979-2980; R. 93-18, DPD Follow Up Report, Pg ID #2989-2992; R. 93-19, J. Price Dep. Pg ID #2996-2997. Thomas Mahler was originally a plaintiff in this case but he voluntarily dismissed his claims. His mother Laura Mahler maintains her claim for the seizure of her car.

[35] R. 92-8, I. Mobley Dep. Pg ID #2561-2563, 2573-2579; R. 93-15, K. Mobley Dep. Pg ID #2979-2980.

[36] R. 82-10, Defs.' Resp. to Interrog. #17, Pg ID #1722-1723.

[37] R. 92-10, Buglo Dep. Pg ID #2638; R. 92-13, Yost Dep. Pg ID #2690-2691; R. 93-2, Turner Dep. Pg ID #2835; R. 93-4, Cole Dep. Pg ID #2883; R. 93-7, Johnson Dep. Pg ID #2925.

Angie Wong, Wanda Leverette, and Laura Mahler each had to pay $900 plus towing and storage fees to get their cars back. Ms. Leverette could not get to work for a week because she had no other means of transportation, and Ms. Mahler had to wait three weeks while she borrowed money from family. The Mobleys refused to pay over $900 to recover their car because Ian had done nothing wrong (and had not even parked his car near the CAID), so they contested its forfeiture in circuit court. They were eventually successful, but their car was not returned for over four months. Darlene Hellenberg also challenged the forfeiture, but after *ten months* without her car she agreed to pay $400 and do community service in exchange for its return. Jerome Price paid the $900 "redemption fee" thinking he would get his car back, but his car had already been stolen from the tow lot so he never again saw it (or his $900) again.[38]

The police actions described above are "standard operating procedure" in the City of Detroit.[39] According to the undisputed testimony of officers who have participated in countless "blind pig" raids, *all* patrons present during such raids are detained, searched, and routinely charged with loitering in a place of illegal

[38] R. 92-4, Leverette Dep. Pg ID #2518-2521; R. 92-5, L. Mahler Dep. Pg ID #2529-2532, 2534-2536; R. 92-6, Hellenberg Dep. Pg ID #2552-2556; R. 92-20, Wong Dep. Pg ID #2793-2794; R. 93-15, K. Mobley Dep. Pg ID #2981-2983; R. 93-19, J. Price Dep. Pg ID #2998-3000.

[39] R. 93-20, Defs.' Resp. to RFA #3, Pg ID #3002.

occupation; and *all* cars are seized for nuisance abatement, regardless of whether the patron knows the place is unlicensed or operating unlawfully.[40] And according to a stipulation filed early in this case, Detroit police officers simply "*presume* knowledge of illegal occupation in *any* establishment where alcohol is *present after 2:00 a.m.*"[41] The City of Detroit has recovered over a million dollars in "nuisance abatement" revenue since 2005 as a result of motor vehicle seizures under M.C.L. § 600.3801.[42]

[40] R. 92-10, Buglo Dep. Pg ID #2613-2620, 2625-2628; R. 92-13, Yost Dep. Pg ID #2680, 2687; R. 93-2, Turner Dep. Pg ID #2812-2817, 2835; R. 93-3, Potts Dep. Pg ID #2847, 2856; R. 93-4, Cole Dep. Pg ID #2863, 2884-2885; R. 93-5, Gray Dep. Pg ID #2893-2897, 2909-2910.

[41] R. 16, Rule 26(f) Conference Plan, at 4 (Apr. 20, 2010) (emphasis added).

[42] R. 93-17, Nuisance Abatement Revenue, Pg ID #2988.

STANDARD OF REVIEW

The denial of a motion for summary judgment on qualified immunity grounds is reviewed de novo. *Morrison v. Bd. of Trs. of Green Twp.*, 583 F.3d 394, 399 (6th Cir. 2009). Summary judgment may be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

SUMMARY OF ARGUMENT

The District Court denied Defendants' motions for summary judgment on three distinct violations of the Fourth Amendment: unlawful detention, unreasonable searches of persons, and unreasonable seizure of property. Although each claim involves a slightly different analysis, underlying each is a simple theory that has been a bedrock of Fourth Amendment law for decades: the search or seizure of a person or his property must be based on facts that are *particular* to the individual whose person or property is being searched or seized. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). In this case, because the evidence, viewed in the light most favorable to Plaintiffs, establishes that Defendants ignored those basic principles and violated Plaintiffs' clearly established rights, qualified immunity was properly denied.

First, Defendants detained 130 patrons for "loitering in a place of illegal occupation" based on their mere presence at the CAID. Defendants do not contest that the hours-long detention was a de facto arrest requiring probable cause. Defendants even agree that they needed probable cause to believe that Plaintiffs *knew* (or should have known) that the CAID was operating unlawfully. Furthermore, they acknowledge that the only "illegal occupation" in this case was the operation of a "blind pig," an establishment that serves liquor without a license or after hours. In light of these concessions, Defendants violated Plaintiffs' clearly

established constitutional rights in detaining them. Defendants clearly had no reasonable basis to believe that every single CAID patron knew that the CAID did not have a liquor license or was selling alcohol after 2:00 a.m.

Second, Defendants frisk-searched every CAID patron and required them to empty their pockets and turn over their belongings to the police. As with an arrest, a warrantless search must be based on articulable facts about the specific individual involved. If there is no individualized probable cause to support an arrest, then a frisk search must be supported by individualized reasonable suspicion that the person is armed and dangerous. Generalized cursory searches are unconstitutional. Plaintiffs' Fourth Amendment rights in this regard were all clearly established long before Defendants violated them here.

Third, Defendants seized the cars of every single patron who had driven to the CAID under Michigan's "nuisance abatement" law, a forfeiture statute. Because Defendants lacked individualized probable cause to arrest Plaintiffs, they likewise lacked probable cause to seize their cars merely for have been driven there. Furthermore, the nuisance abatement law itself specifically enumerates the illegal acts that can give rise to a forfeiture, and in this case there clearly was no probable cause to believe Plaintiffs used their cars for any of those acts. Plaintiffs' rights not to have their cars seized in this fashion were clearly established.

ARGUMENT

"Determining whether government officials are entitled to qualified immunity generally requires two inquiries: First, viewing the facts in the light most favorable to the plaintiff, has the plaintiff shown that a constitutional violation has occurred? Second, was the right clearly established at the time of the violation?" *Alman v. Reed*, 703 F.3d 887, 901 (6th Cir. 2013) (quoting *Miller v. Sanilac County*, 606 F.3d 240, 247 (6th Cir. 2010)). In this case, the District Court properly held that Defendants are not entitled to qualified immunity on three Fourth Amendment counts: (1) unlawful detention; (2) unreasonable search of persons; and (3) unreasonable seizure of property.[43]

The District Court's order should be affirmed. Defendants have failed to demonstrate that they are entitled to judgment as a matter of law. Viewing the evidence in the light most favorable to Plaintiffs and drawing all reasonable inferences in their favor, on each of these three counts (a) Plaintiffs' Fourth Amendment rights were violated, and (b) those rights were clearly established.

[43] R. 115, Opinion & Order, Pg ID #3477, 3505-3506.

I. Unlawful Detention: Defendants violated Plaintiffs' clearly established Fourth Amendment rights against the unreasonable seizure of their persons because there was no individualized probable cause to believe that Plaintiffs were aware of the facts that made the CAID a "place of illegal occupation."

A. Constitutional Violation

A person has been "seized" within the meaning of the Fourth Amendment if a reasonable person under the circumstances would not have felt free to leave. *Gardenhire v. Schubert*, 205 F.3d 303, 313 (6th Cir. 2000). Although brief investigatory stops require only reasonable suspicion under the doctrine of *Terry v. Ohio*, 392 U.S. 1 (1968), a prolonged detention by the police ripens into a de facto arrest requiring probable cause. *Center for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 826-31 (6th Cir. 2007); *see also Dunaway v. New York*, 442 U.S. 200, 207 (1979). In this case, it is undisputed that Plaintiffs were detained and not free to leave the CAID,[44] and Defendants do not contest Plaintiffs' position that their hours-long detention was long enough to ripen into a de facto arrest requiring probable cause.

"Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). Probable cause is required as to

[44] Appellants' Br. at 18; R. 92-10, Buglo Dep. Pg ID #2633-2634; R. 92-13, Yost Dep. Pg ID #2681-2682; R. 93-3, Potts Dep. Pg ID #2848-2850; R. 93-4, Cole Dep. Pg ID #2875-2876; R. 93-5, Gray Dep. Pg ID #2900.

each element of an offense. *Evans v. City of Etowah*, 312 F. App'x 767, 771 (6th Cir. 2009) (denying qualified immunity); *United States v. Griffith*, 193 F. App'x 538, 541 (6th Cir. 2006). This includes any knowledge or *mens rea* element for the particular offense in question. *See BeVier v. Hucal*, 806 F.2d 123 (7th Cir. 1986) (denying qualified immunity in neglect case where arresting officer had no evidence that parents knew their children were in danger and made no inquiry into parents' state of mind), *cited in Griffith*, *supra*.

Here, Defendants do not claim that "loitering in a place of illegal occupation" is a strict liability offense. In other words, the parties are roughly in agreement that, as a legal matter, a person is not guilty of "loitering in a place of illegal occupation" unless she knows (or, according to Defendants, should know) the facts that constitute the illegality. *See Staples v. United States*, 511 U.S. 600, 606 (1994) (stating that a "conventional *mens rea* element . . . would require that the defendant know the facts that make his conduct illegal" (emphasis added)); *People v. Kowalski*, 803 N.W.2d 200, 209 n.12 (Mich. 2011) ("Inferring some type of guilty knowledge or intent is necessary when a statute is silent regarding *mens rea* because without it innocent conduct could be criminalized."). Additionally, Defendants have specifically identified "[t]he 'illegal occupation' at issue in this lawsuit" as "an unlicensed establishment serving liquor without a Michigan liquor license or an establishment, whether licensed or not, selling liquor after legal hours

(2:00 a.m.), contrary to Michigan law."[45] Therefore, Defendants have effectively conceded that, in order to detain Plaintiffs, they were required to have probable cause that Plaintiffs knew (or, say Defendants, should have known) that the CAID did not have a liquor license or was selling liquor after 2:00 a.m.[46]

It is noteworthy that Defendants' concession on this issue, while significant in the context of this appeal, is solely a litigation position, as their deposition testimony clearly reflects that when the raid occurred they considered Plaintiffs' *mere presence* at the CAID sufficient to detain them, regardless of whether they knew (or even should have known) that the CAID was unlicensed or selling alcohol after 2:00.[47] But since probable cause is an objective standard, Defendants are free to argue now that there was no constitutional violation because the facts known to them at the time of the raid gave them probable cause to believe

[45] Appellants' Br. at 13 n.4.

[46] Although Plaintiffs believe that the *scienter* element for loitering in a place of illegal occupation is actual knowledge and Defendants apparently believe it is constructive knowledge ("should have known"), the distinction is immaterial here because Defendants lacked probable cause to arrest Plaintiffs under either standard.

[47] R. 92-10, Buglo Dep. Pg ID #2609, 2617-2620, 2624; R. 92-13, Yost Dep. Pg ID #2668-2669; R. 93-2, Turner Dep. Pg ID #2817, 2825-2827; R. 93-3, Potts Dep. Pg ID #2851-2855; R. 93-5, Gray Dep. Pg ID #2895, 2903-2907; R. 93-7, Johnson Dep. Pg ID #2920-2924; R. 93-8, McWhorter Dep. Pg ID #2934; R. 93-9, Singleton Dep. Pg ID #2941-2943; *see also* R. 16, Rule 26(f) Conference Plan, at 4 (Apr. 20, 2010) ("Detroit Police officers *presume knowledge* of illegal occupation in *any* establishment where alcohol is present after 2:00 a.m." (emphasis added)).

Plaintiffs knew (or should have known) that the CAID was unlicensed or selling alcohol after 2:00. *See Whren v. United States*, 517 U.S. 806 (1996).

The problem with Defendants' argument is that the facts, particularly when viewed in the light most favorable to Plaintiffs, did not give Defendants probable cause to believe that every single patron at the CAID, much less each Plaintiff, knew (or even should have known) that the CAID was unlicensed or was selling alcohol after 2:00. "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause *particularized* with respect to that person." *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (emphasis added). Thus, "[e]ven assuming that [police] had probable cause to believe that *some people* present . . . had committed arrestable offenses, [they] nonetheless lacked probable cause for detaining *everyone* who happened to be [at the CAID]." *Barham v. Ramsey*, 434 F.3d 565, 573 (D.C. Cir. 2006) (emphasis in original).

Consider first the issue of whether the CAID had the liquor license that was allegedly required under state law. The facts known to Yost and the other officers involved in detaining Plaintiffs would not yield a reasonable conclusion that Plaintiffs knew the CAID was unlicensed. This point is perfectly illustrated by Yost's testimony that she spoke with the CAID's proprietor both before and after the night of the raid and advised him that the CAID could host Funk Night events

lawfully if he obtained the proper license in advance.[48] Michigan law allows non-profit organizations such as the CAID to serve alcohol at a special event fundraiser if they obtain such a license.[49] When Yost called in the raid team, she knew that the CAID, rather than heeding her advice, remained unlicensed. But she had no reason to believe that the CAID's *patrons* knew (or even should have known) that the CAID did not obtain the liquor license that would have made the event legal.

As for the sale of alcohol after 2:00, Defendants argue that probable cause existed because Plaintiffs were present when such sales continued to take place after the time that all lawful sales of alcohol in the State of Michigan must stop. If, when the raid took place at 2:10,[50] Defendants truly had probable cause to believe that *every* CAID patron knew that sale of alcohol was continuing, this might be a viable argument. However, the record reflects that Plaintiffs (like many of the CAID's 130 patrons) were nowhere near the bar, the only place where alcohol was being sold.[51] The CAID was not a small one-room venue in which the sale of

[48] R. 92-13, Yost Dep. Pg ID #2670-2671.

[49] R. 93-10, MLCC Club Licensee Information, Pg ID #2955.

[50] R. 92-12, DPD Crime Report, Pg ID #2647, 2653; R. 93-1, DPD Activity Logs, Pg ID #2799-2800.

[51] R. 92-3, Leverette-Saunders Dep. Pg ID #2455-2458, 2498-2499; R. 92-6, Hellenberg Dep. Pg ID #2541, 2544; R. 92-8, I. Mobley Dep. Pg ID #2769-2771; R. 92-9, Washington Dep. Pg ID #2584, 2588-2589; R. 92-13, Lt. Yost Dep. Pg ID #2664-2668; R. 92-16, Hollander Dep. Pg ID #2706-2708; R. 92-17, Kaiser Dep.

alcohol was clearly visible to all patrons throughout the establishment. In fact, there were between 30 and 50 patrons in the outdoor patio area where no alcohol was being served or sold,[52] and Yost—who arbitrarily decided that probable cause existed for every single patron—admitted during her deposition that: (a) she did not know whether alcohol was being sold on the patio because she never went out there on the night of the raid; (b) the bar where alcohol was being sold was not visible from the patio; and, consequently, (c) the patrons on the patio were detained and charged with loitering solely because they were present, not because they were reasonably suspected of knowing alcohol was being served after 2:00.[53] Indeed, there was no reasonable basis for Yost or any other officer present during the raid to think that Plaintiffs knew (or even should have known) the CAID was selling alcohol after 2:00.

It important to note that under Michigan's liquor laws, licensees may allow their patrons to continue *consuming* alcohol until 2:30, and non-profit organizations such as the CAID may obtain a special permit allowing dance and

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Pg ID #2720, 2722-2726; R. 92-18, T. Mahler Dep. Pg ID #2756; R. 92-19, N. Price Dep. Pg ID #2769-2771; R. 92-20, Wong Dep. Pg ID #2779-2783; R. 94-2, Hellenberg Declaration; R. 94-3, Supplemental N. Price Declaration, Pg ID #3008.

[52] R. 92-17, Kaiser Dep. Pg ID #2724; R. 92-3, Leverette-Saunders Dep. Pg ID #2499-2500.

[53] R. 92-13, Yost Dep. Pg ID #2657, 2664-2669, 2683, 2688.

music events to continue through the night.[54] This is yet another reason that there was no reasonable basis for Defendants to think that Plaintiffs were somehow "on notice" at 2:10 that the CAID was a "place of illegal occupation" just because patrons were still drinking on the premises or just because Funk Night had been advertised as an all-night event. Similarly, although Defendants suggest in their brief that the CAID's illegal status was evident because patrons under 21 were being admitted,[55] this is mistaken because Michigan law allows non-profit organizations with a liquor license to admit minors provided they are not actually served alcohol.[56] Here, the record shows that everyone at Funk Night was required to show ID to enter (including Yost and Buglo), and only persons of drinking age were given a wrist band or hand stamp to indicate that they could drink.[57]

To be clear, Plaintiffs are not arguing that *no one* at the CAID was committing a crime, or that the CAID had dutifully complied with the relevant licensing regulations. Based on probable cause that the CAID's *proprietors* were acting unlawfully and creating a nuisance, the police could have arrested them,

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[54] R. 93-10, MLCC Club Licensee Information, Pg ID #2957-2958.

[55] Appellants' Br. at 19 n.6.

[56] R. 93-10, MLCC Club Licensee Information, Pg ID #2956.

[57] R. 92-8, I. Mobley Dep. Pg ID #2564; R. 92-9, Washington Dep. Pg ID #2585; R. 92-10, Sgt. Buglo Dep. Pg ID #2602; R. 92-16, Hollander Dep. Pg ID #2701-2702; R. 92-19, N. Price Dep. Pg ID #2768.

shut down Funk Night, and told the patrons to go home. But the Fourth Amendment prohibits the prolonged detention of an undifferentiated mass of persons merely for being present at an event that could very well be lawful but, because of facts unbeknownst to them, is not. Because a person's "mere propinquity to others independently suspected of criminal activity" does not amount to probable cause, *Ybarra*, 444 U.S. at 91, Plaintiffs were unlawfully detained at the CAID in violation of their Fourth Amendment rights.

Defendants offer a number of reasons why they think probable cause existed, none of which are persuasive:

1. Alleged Marijuana Evidence. First, Defendants repeatedly assert a grossly distorted "fact" in their brief, i.e. that they observed CAID patrons openly smoking marijuana.[58] Although Defendants emphasize this one point over and over throughout their brief, they neglect to include the additional fact that their "observation" of marijuana use occurred during an undercover surveillance operation *more than a month before* the raid. Defendants have admitted they had no reason to believe that Plaintiffs were present at that time.[59]

[58] Appellants' Br. at 21, 32, 36, 39, 44, 49-51.

[59] R. 92-10, Buglo Dep. Pg ID #2605-2606; R. 92-11, Warrant Affidavit, Pg ID #2643-2644.

Defendants also state in their brief that there was an "odor of marijuana" in the outdoor patio area where several Plaintiffs were located.[60] In truth, the record contains no evidence of any odor in the outdoor patio area on the night of the raid, and Defendants even admitted that they never went out onto the patio before executing the search warrant.[61]

The only evidence of an "odor of marijuana" inside the CAID on the night of the raid is Defendants' subsequent testimony at a deposition more than three years after the raid took place. The credibility and reliability of this testimony is highly questionable, however, given that (a) Defendants completed a narrative police report at the time of the raid and made no reference to an odor of marijuana, and (b) Defendants have admitted that no illegal drugs were found during the raid, even after every single person at the CAID was searched.[62] Thus, if the alleged "odor of marijuana" is in any way material (which, as explained below, it is not), its actual existence is a question of fact for the jury. *See Hale v. Kart*, 396 F.3d 721, 728 (6th Cir. 2005) ("If disputed factual issues underlying probable cause

[60] Appellants' Br. at 22, 39.

[61] R. 84-4, Yost Dep. Pg ID #1847; R. 92-13, Yost Dep. Pg ID #2666.

[62] R. 83-13, Defs.' Resp. to RFA #5, Pg ID #1790; R. 84-5, Buglo Dep. Pg ID #1886; R. 92-12, DPD Crime Report, Pg ID #2653.

exist, those issues must be submitted to a jury for the jury to determine the appropriate facts.").

In any event, even if Defendants detected an odor of marijuana somewhere inside the CAID, that fact would be completely immaterial to the existence of individualized probable cause that Plaintiffs were loitering in a place of illegal occupation. According to Defendants, "The 'illegal occupation' at issue in this lawsuit is . . . an unlicensed establishment serving liquor without a Michigan liquor license or an establishment, whether licensed or not, selling liquor after legal hours (2:00 a.m.), contrary to Michigan law."[63] An odor of marijuana at a crowded event in a large, multi-room arts organization simply has no bearing on whether Defendants had probable cause to believe that every single patron in attendance knew (or even should have known) that the event's organizers did not have a liquor license or were selling alcohol after 2:00.

Defendants cite an unpublished decision, *United States v. $118,170.00 in U.S. Currency*, 69 F. App'x 714 (6th Cir. 2003), for the proposition that "the odor of marijuana alone is sufficient to establish probable cause that marijuana is present and justifies a warrantless search."[64] In that case, however, the police officer smelled marijuana emanating from the inside of a car during a traffic stop,

[63] Appellants' Br. at 13 n.4.

[64] Appellants' Br. at 39.

giving him individualized probable cause to believe that the car's occupants were actually in possession of a controlled substance. *Id*. at 716. That situation is obviously a far cry from detecting an odor of marijuana somewhere in a large facility consisting of multiple rooms and an outdoor patio during a crowded event with over 130 people in attendance. Under such circumstances, unlike during a traffic stop, the odor alone clearly does not give rise to individualized probable cause that everyone present is in possession of a controlled substance.

Furthermore, during written discovery in this case, Plaintiffs specifically asked Defendants to "state any and all facts and circumstances known to Defendants at the time of the raid that would support a finding of probable cause that Plaintiffs had committed or were committing a criminal offense other than loitering in a place of illegal occupation." Defendants did not mention any odor of marijuana in their response.[65] Defendants cannot now claim, for the first time on appeal, that they had probable cause to arrest Plaintiffs for a drug offense.

2. Prior Attendance at the CAID. Defendants' second argument for why they had probable cause is to point out that some of the Plaintiffs had been to the CAID before and thus "had intimate knowledge of the party operations and [its]

[65] See R. 82-10, Defs.' Resp. to Interrog. #16, Pg ID #1722, and additional explanation in footnote 21, *supra.*

illegal activities."[66] This argument is frivolous. It is well known that probable cause "depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at *the time of the arrest*." *Devenpeck*, 543 U.S. at 153 (emphasis added); *see also United States v. Ferguson*, 8 F.3d 385, 391 (6th Cir. 1993) (en banc). When the raid occurred in this case, Defendants knew nothing about any Plaintiff except that he or she was present at the CAID. They have admitted that they had no reason to believe that the same patrons attending one Funk Night were present at previous Funk Nights.[67] Police officers may not cobble together probable cause from facts they learn for the first time at the depositions of the plaintiffs whose rights they have already violated. Facts known to Plaintiffs but not to Defendants at the time of the raid (such as whether some Plaintiffs had been to the CAID before) are clearly irrelevant to the question of whether a Fourth Amendment violation occurred.

3. Ignorance of the Law. Defendants also suggest that they had probable cause because, "As college students and college graduates or citizens in our society, certainly Plaintiffs had knowledge that it is illegal to sell liquor without a license and to sell liquor after 2:00 a.m."[68] This argument is senseless, as it

[66] Appellants' Br. at 51-52; *see also id.* at 36-37, 46.

[67] R. 92-10, Buglo Dep. Pg ID #2605-2606.

[68] Appellants' Br. at 52; *see also id.* at 32, 46.

conflates two different concepts, ignorance of the law and ignorance of the facts. It is irrelevant whether, "as citizens in our society," Plaintiffs knew what the law prohibits. The question is whether Plaintiffs knew the *facts* that allegedly made the CAID a "place of illegal occupation." Because Defendants had no reason to think that Plaintiffs were aware of these facts, there was no probable cause to justify their arrest. *See BeVier*, *supra*, 806 F.2d 123.

4. Reliance on Yost and Buglo. Finally, some of the Defendants argue that they were entitled to rely on "the information provided to them by Yost and Buglo and the information contained in the Anticipatory Search Warrant as a basis for probable cause."[69] This argument fails for two related reasons. First, they never identify what "information" they received from Yost, Buglo, and the search warrant that they believe gave them individualized probable cause for each Plaintiff. Second, inasmuch as Yost and Buglo did not have probable cause to arrest Plaintiffs, the other Defendants could not derive probable cause from what Yost and Buglo told them. *See Schneider v. Franklin County*, 288 F. App'x 247, 251 (6th Cir. 2008) ("Our case law states that a seizure conducted in reliance on a dispatch is proper only if the law enforcement officer who issued the information possessed the necessary reasonable suspicion."). That is, although the other officers could reasonably rely on Yost, Buglo, and the search warrant having

[69] *Id*. at 35.

informed them that the CAID lacked a liquor license and had sold alcohol after 2:00, they never received any information that could have reasonably led them to believe that each of the CAID's 130 patrons knew the facts that made the CAID's sale of alcohol unlawful. To the contrary, the only reasonable belief that these officers could have had about Plaintiffs was that they were present at the CAID when the raid occurred. Indeed, the officers consistently testified that they took enforcement action that night, including detaining every single patron at the CAID for several hours, based on those patrons' mere presence at the CAID.[70] "[W]here there is a team effort or where the members were an integral part of an unlawful search and seizure," "all members of the team are liable." *Russo v. Massullo*, 927 F.2d 605, 1991 WL 27420 at *5 (6th Cir. 1991) (unpublished).

B. Clearly Established

Police officers are not entitled to qualified immunity if the constitutional "right at issue was 'clearly established' when the event occurred such that a reasonable officer would have known that his conduct violated it." *Martin v. City of Broadview Heights*, __ F.3d __, No. 11-4039, slip op. at 7, 2013 WL 1405247 at *4 (6th Cir. Apr. 9, 2013). In order for a constitutional right to be clearly

[70] R. 93-2, Turner Dep. Pg ID #2817, 2825-2827; R. 93-3, Potts Dep. Pg ID #2851-2855; R. 93-5, Gray Dep. Pg ID #2895, 2903-2907; R. 93-7, Johnson Dep. Pg ID #2920-2924; R. 93-8, McWhorter Dep. Pg ID #2934; R. 93-9, Singleton Dep. Pg ID #2941-2943.

established, there need not be a case with the exact same fact pattern, or even 'fundamentally similar' or 'materially similar' facts; rather, the question is whether the defendants had 'fair warning' that their actions were unconstitutional." *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir. 2005) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

At the time of the raid in this case, it was clearly established that probable cause must be *individualized* with respect to the *particular* person being seized. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981); *Ybarra*, 444 U.S. at 91-94. It was also "well-established that an individual's mere presence at a crime scene does not constitute probable cause for an arrest." *Harris v. Bornhorst*, 513 F.3d 503, 515 (6th Cir. Jan. 14, 2008). Furthermore, "The law has been clearly established since at least the Supreme Court's decision in *Carroll v. United States*, 267 U.S. 132 (1925), that probable cause determinations involve an examination of all facts and circumstances *within an officer's knowledge at the time of an arrest*." *Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir. 1999) (emphasis in original). The Sixth Circuit routinely denies qualified immunity where the plaintiff's central claim is lack of probable cause in violation of the Fourth Amendment, as the law in

that area is clearly established. *See Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 310 (6th Cir. 2005); *Gardenhire*, 205 F.3d at 313.

In this case, Defendant argue that they are entitled to qualified immunity because they had "observed the selling of alcohol, smelled marijuana and observed the smoking of the marijuana and it being passed around."[71] As explained above, this argument is entirely without merit because Defendants observed the sale of alcohol in an area where Plaintiffs were not present, where Defendants knew Plaintiffs could not see that alcohol was being sold, and only ten minutes after a licensed establishment would have been required to stop selling. Moreover, as also discussed above, while Yost and Buglo observed *some people* using marijuana *more than a month before the raid*, they did not observe marijuana use on the night of the raid and certainly had no reason to believe that any of the *Plaintiffs* were using marijuana. Given these facts, and in light of the clearly established law regarding mere presence and the need for individualized probable cause, Defendants are not entitled to qualified immunity.

Defendants also argue that it would have been reasonable for them to infer, under the circumstances, that Plaintiffs knew that the CAID was unlicensed or was selling alcohol after 2:00.[72] This argument should also be rejected. Defendants

[71] Appellants' Br. at 44.

[72] *Id*. at 48.

never explain why such an inference would be reasonable, and it clearly is not. Given the facts in this case, and viewing the evidence in the light most favorable to Plaintiffs, there was no reasonable basis for Defendants to have inferred that every single patron at the CAID, much less any of the individual Plaintiffs, knew the facts that made the CAID a "place of illegal occupation." *See BeVier*, 806 F.2d at 128 (denying qualified immunity in neglect case where arresting officer had no evidence that parents knew their children were in danger and made no inquiry into parents' state of mind).

II. Unreasonable Searches of Persons: Defendants violated Plaintiffs' clearly established Fourth Amendment rights against being unreasonably searched because the incident-to-a-lawful-arrest exception did not apply and there was no individualized reasonable suspicion that Plaintiffs were armed and dangerous.

A. Constitutional Violation

In addition to violating Plaintiffs' clearly established rights against unreasonable seizures by detaining them for up to three hours without probable cause, Defendants violated Plaintiffs' clearly established rights against unreasonable searches by conducting pat-down frisks and emptying their pockets without reasonable suspicion or probable cause. Defendants offer two justifications for these searches.[73] First, they argue that these searches were

[73] *Id*. at 36.

justified under the search-incident-to-a-lawful-arrest exception to the warrant requirement. Second, they argue that these searches were justified for officer safety. Both arguments are meritless.

The search-incident-to-a-lawful-arrest argument obviously turns on whether Defendants had probable cause to arrest Plaintiffs. As explained above, probable cause was lacking. Where there is no probable cause to justify an individual's warrantless arrest, the arrest is not lawful, and thus the search-incident-to-a-lawful-arrest exception does not apply. *Sibron v. New York*, 392 U.S. 40, 62-63 (1968).

As for Defendants' officer-safety argument, a pat-down or frisk search must be supported by *individualized* reasonable suspicion that the person being searched is armed and dangerous; generalized cursory searches based on conclusory references to "officer safety" are unconstitutional. *Ybarra*, 444 U.S. at 91-94; *Bennett v. City of Eastpointe*, 410 F.3d 810, 824 (6th Cir. 2005); *Russo*, 927 F.2d 605, 1991 WL 27420 at *4; *see also United States v. Ritter*, 416 F.3d 256, 268-69 (3d Cir. 2005). Here, it is undisputed that upon entering the CAID, Defendants subjected everyone present to a generalized cursory search. Defendants articulate no basis for reasonably suspecting that any individual at the CAID, much less each Plaintiff, was armed and dangerous.[74]

[74] R. 84-4, Yost Dep. Pg ID #1847-1848; R. 92-13, Yost Dep. Pg ID #2656, 2686-2687; R. 93-2, Turner Dep. Pg ID #2818-2819; R. 93-3, Potts Dep. Pg ID #2846; R. 93-4, Cole Dep. Pg ID #2876.

Furthermore, even when there is individualized reasonable suspicion to justify a pat-down frisk, the Fourth Amendment does not allow police officers to search inside a person's pockets unless the pat-down frisk leads to an individualized reasonable suspicion of contraband or a weapon. *Minnesota v. Dickerson*, 508 U.S. 366 (1993). A verbal order to empty one's pockets is a search within the meaning of the Fourth Amendment. *United States v. Street*, 614 F.3d 228, 233-34 (6th Cir. 2010). Here, Plaintiffs testified that the CAID's patrons were not just frisked, they were all required to empty their pockets and turn over their belongings to the police.[75]

B. Clearly Established

The Fourth Amendment rules identified above were all clearly established at the time of the CAID raid. *See, e.g.*, *Bennett*, 410 F.3d at 824; *Russo*, 927 F.2d 605, 1991 WL 27420 at *4. The District Court's order denying Defendants' motions for summary judgment on Plaintiffs' claims for unreasonable searches of their persons should therefore be affirmed.

[75] R. 92-3, Leverette-Saunders Dep. Pg ID #2504; R. 92-6, Hellenberg Dep. Pg ID #2546-2548; R. 92-8, I. Mobley Dep. Pg ID #2572-2573; R. 92-9, Washington Dep. Pg ID #2592, 2597; R. 92-16, Hollander Dep. Pg ID #2712; R. 92-17, Kaiser Dep. Pg ID #2729, 2735; R. 92-19, N. Price Dep. Pg ID #2771-2773; R. 93-3, Sgt. Potts Dep. Pg ID #2846.

III. Unreasonable Seizure of Property: Defendants violated Plaintiffs' clearly established Fourth Amendment rights against the unreasonable seizure of their property because there was no probable cause for the underlying arrest and there was no probable cause to believe Plaintiffs' cars were used for any unlawful act enumerated by the nuisance abatement law.

A. Constitutional Violation

A person's property is seized within the meaning of the Fourth Amendment "when there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook County*, 506 U.S. 56, 61 (1992). The Fourth Amendment applies in the civil as well as criminal context, *id*. at 67, and "place[s] restrictions on seizures conducted for purposes of civil forfeiture," *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993). The "abatement" of vehicles under Michigan law is treated as such a seizure. *See Bennis v. Michigan*, 516 U.S. 442, 453 (1996) (referring to the Michigan's nuisance abatement law as a "forfeiture statute"). "Improperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners . . . , or a tool wielded to punish those who associate with criminals, than a component of a system of justice." *Id*. at 456 (Thomas, J., concurring). Therefore, to seize a vehicle under the nuisance abatement law, police must have probable cause that it is subject to forfeiture under that law. *See Florida v. White*, 526 U.S. 559 (1999); *Soldal*, 506 U.S. at 69; *Krimstock v. Kelly*, 306 F.3d 40, 49-51 (2d Cir. 2002). As with seizures of persons, *see Ybarra*, 444

U.S. at 91, seizures of property must be supported by probable cause as to the particular item being seized.

In this case, there are two independent reasons why seizing Plaintiffs' cars was unconstitutional. First, because Defendants lacked probable cause to arrest Plaintiffs for the underlying offense, loitering in a place of illegal occupation, they also lacked probable cause to seize Plaintiffs' cars. *See Alman v. Reed*, 703 F.3d 887, 903-04 (6th Cir. 2013). Second, Defendants lacked probable cause to believe Plaintiffs' cars were used for any of unlawful act enumerated by the nuisance abatement law. *See* M.C.L. § 600.3801.

1. No Probable Cause for Underlying Arrest

Beginning with probable cause for the underlying arrest, this Court's decision in *Alman v. Reed*, *supra*, is dispositive:

> The seizure of a vehicle in connection with an arrest not supported by probable cause violates the Fourth Amendment in the same manner that the arrest itself violates the Fourth Amendment. . . . [I]f an arrest violates the Fourth Amendment, the subsequent seizure of property based on the invalid arrest violates it as well.

Id., 703 F.3d at 903-04. That case, like this one, involved the seizure of a vehicle under Michigan's nuisance abatement law in connection with the driver's arrest for an offense (in that case, lewdness) that was essentially unrelated to his use of the vehicle. *Id*. at 893-94. This Court concluded that the arrest was without probable cause. The Court then held that because probable cause was lacking for the arrest,

the seizure of the plaintiff's car in connection with that arrest was likewise unconstitutional: "[A]lthough the [nuisance abatement] statute and the Constitution may allow the state to seize a vehicle during an arrest for sexual conduct offenses, neither authorizes such a seizure without probable cause." *Id*. at 904.

Here, *Alman* governs Plaintiffs' Fourth Amendment claims based on the seizure of their cars. Everyone at the CAID who had parked outside or nearby was handed a paper entitled "Nuisance Abatement: Notice of Impoundment of Vehicle," which stated:

> *The motor vehicle you were driving or in which you were a passenger was seized pursuant to an arrest* for a state misdemeanor or a comparable city ordinance violation . . . .[76]

As argued above, Defendants did not have probable cause to arrest Plaintiffs. Therefore, under *Alman*, they did not have probable cause to seize Plaintiffs' cars.

2. No Probable Cause Under Nuisance Abatement Law

Although *Alman* should be dispositive, Plaintiffs' Fourth Amendment claims for the seizure of their cars survives even if Defendants had probable cause to arrest them. It is undisputed that Defendants' only basis for seizing Plaintiffs' cars

[76] R. 93-14, Notice of Impoundment of Vehicle, Pg ID #2976 (emphasis added).

was Michigan's "nuisance abatement" statute, M.C.L. § 600.3801.[77] At the time of the seizure, that law provided as follows:

> Any building, ***vehicle***, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons or ***used for*** *the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance . . . or of any vinous, malt, brewed, fermented, spirituous, or intoxicating liquors or any mixed liquors or beverages*, any part of which is intoxicating, is declared a nuisance, and the furniture, fixtures, and contents of the building, vehicle, boat, aircraft, or place and all intoxicating liquors therein are also declared a nuisance, and all controlled substances and nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance. (Emphases added).[78]

As noted previously, in this case Plaintiffs are not contesting the allegation that the CAID itself was a nuisance. The question is whether *Plaintiffs' vehicles* were a nuisance. Under the plain language of § 600.3801, they were not abatable

[77] R. 82-10, Defs.' Resp. to Interrog. #17, Pg ID #1722-1723.

[78] The statute further provides that the county prosecutor may institute forfeiture proceedings against the nuisance property. M.C.L. § 600.3805. If the property is found to be a nuisance, an injunction is granted against the nuisance activity. *Id*. Then, "all furniture, fixtures and contents" of the property are sold pursuant to an order of abatement. *Id*. § 600.3825. If the nuisance property is a vehicle, boat or aircraft, it must be sold as well. *Id*.

as such unless they were "*used for* the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance . . . or . . . intoxicating liquors" (emphasis added). *Cf. One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965) ("There is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which [a] particular automobile was put that subjects [its owner] to its possible loss.").

Probable cause was lacking in this case because there was plainly no reason for Defendants to believe that each car driven to the CAID by a person attending Funk Night had been "used for the unlawful manufacture, sale, keeping for sale, bartering, or furnishing of any controlled substance . . . or intoxicating liquors." M.C.L. § 600.3801. The proprietors of the CAID may have "used" their *building* for the unlawful sale of liquor, but there was no reason to think that Plaintiffs—mere patrons attending Funk Night—"used" their *cars* for such an act. Defendants had no reason to believe that every patron—much less any individual Plaintiff—brought liquor to the CAID using his or her personal vehicle to transport it.[79]

Defendants argue that Plaintiffs' cars were subject to abatement not because they were used to transport liquor, but merely because they were used to transport

[79] R. 93-4, Cole Dep. Pg ID #2883.

people to the nuisance.[80] But that is not a reasonable interpretation of the statutory requirement that the abated property be "used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any. . . intoxicating liquors." *Id*. In other cases where cars were abated under Michigan's nuisance law, the cars were held to have played a central role in the nuisance activity itself. For example, in *State ex rel. Dowling v. Sill*, 17 N.W.2d 756 (Mich. 1945), the court upheld the abatement of a car whose driver was running a "numbers racket" and using the car to transport betting slips and proceeds, stating that "[t]he use of automobiles as essential tools in this type of gambling is generally recognized." *Id*. at 758. Similarly, in *State ex rel. Reading v. Western Union Tel. Co.*, 57 N.W.2d 537, 540 (Mich. 1953), the court relied on a string of cases where "an automobile, used, as an 'essential tool' and vital link in a gaming operation, to transport mutuel betting tickets, was held to be a nuisance, subject to seizure and sale." *Id*. at 540. By contrast, in *In re Maynard*, 53 N.W.2d 370 (Mich. 1952), the court held that the nuisance statute did not authorize the forfeiture of a third party's vending machines just because they were located inside an establishment that was used for the unlawful sale of liquor: "[T]he presence of these machines may add to the convenience of the customers in purchasing candy or cigarettes but certainly

[80] Appellants' Br. at 51; *see also* R. 92-10, Buglo Dep. Pg ID #2628; R. 92-13, Yost Dep. Pg ID #2690-2695; R. 93-2, Turner Dep. Pg ID #2835; R. 93-4, Cole Dep. Pg ID #2883; R. 93-7, Johnson Dep. Pg ID #2925.

did not contribute to the violation of the liquor law, neither were they implements in the hands of the unlawful operators to further the sale of liquor." *Id.* at 371. In this case, Plaintiffs merely "used" their cars to drive to the CAID. Their cars were clearly not "essential tools" in any nuisance activity, *Sill*, 17 N.W.2d at 758, and they obviously were not "implements in the hands of the [CAID's] unlawful operators to further the sale of liquor," *Maynard*, 53 N.W.2d at 371.

Defendants cite *Bennis*, 516 U.S. 442, for the proposition that a car can be seized from an owner who had no knowledge of the illegality,[81] but that case is inapposite. The Court held in *Bennis* that an innocent *owner* could lose her car in a forfeiture case when the car was, beyond dispute, used unlawfully by someone else. "The Bennis automobile, it [was] *conceded*, facilitated and was used in criminal activity." *Id.* at 453 (emphasis added). In this case, by contrast, the issue is not whether the *owners* of Plaintiffs' cars were innocent. The issue is whether the cars themselves were "used for" an unlawful act.

Also distinguishable is *Ross v. Duggan*, 402 F.3d 575 (6th Cir. 2004), which Defendants cite for the proposition that a car can be seized for nuisance abatement even when the unlawful conduct occurs outside the car.[82] There are two reasons why *Ross* does not apply here. First, as this Court observed in *Alman*, the plaintiffs

[81] Appellants' Br. at 52.

[82] *Id.* at 50-51.

in *Ross* conceded that their arrests for solicitation and other lewdness offenses were supported by probable cause. *See id.* at 586. In upholding the seizure of cars that "had transported the criminal perpetrators to the sites of their crimes," *id*., *Ross* did not approve the seizure of cars that transport innocent persons to the site of a crime being committed by someone else—here, the CAID's proprietors.

Second, a careful reading of Michigan's nuisance abatement statute reveals that the statutory requirements for abating property in connection with "lewdness, assignation or prostitution," as in the *Ross* case, are different from the requirements for abating property in connection with liquor, at issue here. In *Ross*, the plaintiffs' cars were subject to abatement because they were "used *for the purpose of* lewdness, assignation or prostitution." M.C.L. § 600.3801 (emphasis added). Because there was probable cause that the cars were driven to the scene of the crime "for the purpose of" engaging in those acts, there was probable cause to seize them for nuisance abatement. *Ross*, 402 F.3d at 586. In this case, by contrast, the statute provides that Plaintiffs' cars were subject to abatement only if they were actually "*used for*"—not "used for the *purpose* of"— "the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance . . . or intoxicating liquors." M.C.L. § 600.3801.

This careful statutory distinction between "used for the purpose of" and "used for" is maintained throughout the nuisance abatement law. *See* former

M.C.L. § 600.3801, *supra* ("Any person . . . who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the *purposes or acts* set forth in this section is guilty of a nuisance." (emphasis added)); M.C.L. § 600.3805 (authorizing civil action to abate property that is "used for *any of the purposes* or by any of the persons set forth in section 3801, *or for any of the acts* enumerated in said section" (emphasis added)). Looking to state law for guidance on matters of statutory construction, such a clear distinction cannot be ignored:

> When parsing a statute, we presume every word is used for a purpose. As far as possible, we give effect to every clause and sentence. The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. Similarly, we should take care to avoid a construction that renders any part of the statute surplusage or nugatory.

Pohutski v. City of Allen Park, 641 N.W.2d 219, 226 (Mich. 2002) (citation and quotation marks omitted).

Thus, by using the phrase "used for," in contrast to the phrase "used for the purpose of," the Legislature limited the reach of the nuisance abatement law as to acts involving controlled substances and intoxicating liquors. If a vehicle is not actually "used for" one of the specific unlawful acts enumerated in the statute (i.e., transporting, sale, etc.), it is not an abatable nuisance—even if a driver or passenger uses the car as transport to a place where those unlawful acts are taking place. A car transporting bootleg liquor is a nuisance; but a car transporting a

person to the distillery where bootleg liquor is manufactured is not. *Cf. Howard v. United States*, 423 F.2d 1102, 1104 (9th Cir. 1970) ("The use of an automobile to commute to the scene of a crime does not justify the seizure of that automobile . . . ."). In this case, Plaintiffs' cars were used to drive to the CAID. There was no probable cause to believe they were used to unlawfully manufacture, transport, sell, keep, barter, or furnish alcohol. Therefore, regardless of whether there was probable cause to arrest Plaintiffs for loitering in a place of illegal occupation, there was no probable cause to seize their cars under the nuisance abatement law.

B. Clearly Established

Just as *Alman* governs the question of whether the seizure of Plaintiffs' cars violated their Fourth Amendment rights, it also confirms that those rights were clearly established. Although *Alman* itself was decided after the CAID raid took place, this Court's discussion makes clear that the legal principles involved were neither novel nor in doubt:

> "In the ordinary case, the [Supreme] Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." *United States v. Place*, 462 U.S. 696, 701 (1983). There are, of course, exceptions to that rule, which permit police seizures of property when the exigencies of the situation demand it . . . . *But those exceptions do not disturb the rule that if an arrest violates the Fourth Amendment, the subsequent seizure of property based on the invalid arrest violates it as well.*

Alman, 703 F.3d at 904 (emphasis added). Thus, this Court characterized the "rule" underlying its decision as having been clearly established as early as 1983 in *United States v. Place*. Because there are no "exceptions" here that "disturb the rule," the law must be treated as clearly established.

First, the seizure of Plaintiffs' cars was clearly not "accomplished pursuant to a judicial warrant." *Place*, 462 U.S. at 701. "It is *well-settled* that items to be seized pursuant to a search warrant must be described *with particularity* to prevent the seizure of one thing under a warrant describing another in violation of the Fourth Amendment." *United States v. Richards*, 659 F.3d 527, 536-37 (6th Cir. 2011) (emphases added). Here, neither the warrant nor its affidavit refers in any way to the seizure of automobiles.[83] Nor does the "Return to Search Warrant" list any cars as items having been seized pursuant to the warrant.[84] Therefore, absent an "exception to the rule" against warrantless seizures of property, Defendants' seizure of Plaintiffs' cars was "per se unreasonable within the meaning of the Fourth Amendment" under clearly established law. *Place*, 462 U.S. at 701.

No exception to the warrant requirement could reasonably justify the seizure of Plaintiffs' cars here. Under *United States v. James Daniel Good Real Property*, 510 U.S. at 49, it is clearly established that the Fourth Amendment applies to the

[83] R. 92-11, Search Warrant & Affidavit, Pg ID #2642-2646.

[84] R. 94-1, Return to Search Warrant, Pg ID #3006.

seizure of property for forfeiture purposes. Furthermore, under *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. at 699, it is clearly established that "it is only the alleged ***use*** to which a ***particular*** automobile was put that subjects [its owner] to its possible loss" (emphases added). Similarly, under *Ybarra v. Illinois*—which involved the execution of a search warrant in a public tavern and the Fourth Amendment's constraints on how the police may treat patrons who happened to be present—it is clearly established the probable cause required under the Fourth Amendment must be individualized with respect to the particular person or thing being searched or seized. Finally, under Michigan law, property is not "abatable" unless it plays a central role in the nuisance activity, for example as an "essential tool" or as an "implement in the hands of the unlawful operators" of the nuisance "to further the sale of liquor." *See Western Union*, 57 N.W.2d at 540; *Maynard*, 53 N.W.2d at 371; *Sill*, 17 N.W.2d at 758. And the plain language of the nuisance abatement statute itself requires that a vehicle be "*used for* the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of . . . intoxicating liquors." M.C.L. § 600.3801 (emphasis added).

In light of this clearly established law, there was no objectively reasonable basis for Defendants to have believed that their seizure of Plaintiffs' cars was constitutional. As argued above, Defendants lacked probable cause to arrest Plaintiffs for the underlying offense. Furthermore, there was no probable cause to

believe Plaintiffs' cars were "used for" an unlawful act enumerated in M.C.L. § 600.3801. Because it was clearly established that seizure of property is unreasonable *per se* unless it is described with particularity in a warrant or an exception to the warrant requirement applies, Defendants' seizure of every single CAID patron's car, under the facts of this case as viewed in the light most favorable to Plaintiffs, was unreasonable under clearly established law.

Defendants argue that qualified immunity is appropriate because "Yost was informed by a Wayne County Prosecutor that [her] actions were lawful."[85] This is not really an accurate reflection of the record. Yost's deposition makes passing reference to a "conversation" she had with a Wayne County prosecutor before the raid,[86] but there is certainly no evidence that any prosecutor, with full knowledge of the material facts and circumstances of this raid, actually authorized the seizure of the vehicles. In any event, such approval does not typically immunize a police officer from violating a person's clearly established constitutional rights. *See Ross v. City of Memphis*, 423 F.3d 596, 603 (6th Cir. 2005) ("reliance on the advice of counsel is not usually a component of the qualified immunity defense").

Qualified immunity is especially unwarranted regarding the seizure of the car driven by Ian Mobley and owned by his mother Kimberly Mobley. Ian parked

[85] Appellants' Br. at 55.

[86] R. 92-12, Yost Dep. Pg ID #2689.

his car *a mile away* at the house of an acquaintance and walked to the CAID, but police officers went searching for the car and *drove it to the CAID* so it could be towed away.[87] Although Yost does not personally remember the Mobley vehicle, Yost made the determination to seize all the vehicles that night and other officers testified that under the alleged circumstances the Mobley car would not have been towed without Yost's approval.[88]

[87] R. 92-8, I. Mobley Dep. Pg ID #2573-2579.

[88] R. 92-12, Yost Dep. Pg ID #2688; R. 93-2, Turner Dep. Pg ID #2834-2835; R. 93-4, Cole Dep. Pg ID #2886-2887; R. 93-5, Gray Dep. Pg ID #2908.

CONCLUSION

The District Court's order denying Defendants' motions for summary judgment should be affirmed.

Respectfully submitted,

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Dated: May 1, 2013

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 13,095 words, including footnotes and excluding those parts of the brief not counted under Fed. R. App. P. 32(a)(7)(B)(iii). This brief has been prepared using a proportionally spaced typeface and font, 14-point Times New Roman.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2013, I served the foregoing brief on counsel for Appellants by filing it with the Sixth Circuit's ECF system, which will automatically send a Notice of Docket Activity to Linda D. Fegins at fegil@detroitmi.gov.

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