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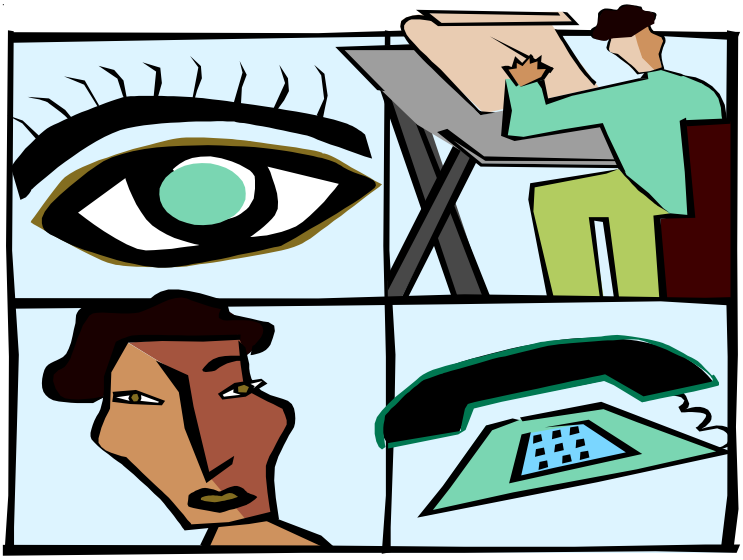
Eyewitness Identification

Kentucky Caselaw On Eyewitness Identification

Criminal Lineups Get a Makeover



- Ten Core Principles: For Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems
- The Psychology of Litigation: Battered Child Syndrome –"Why Didn't She Tell?"
- Rule Amendments

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The Advocate:
Ky DPA's Journal of Criminal Justice Education and Research

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

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FROM THE EDITOR...

Jeff Sherr

The Innocence Projects cites mistaken eyewitness identification as the leading causes of wrongful convictions of the innocent. The combination of this data and research done by leading scholars in the field has shown that is an area in which the law has not kept in stride with the science. Law Enforcement across the country is recognizing the need to make changes in the way they handle eyewitnesses. Jurisdictions including New Jersey, North Carolina, Minneapolis, Boston, Santa Clara (Calif.), and North Hampton (Mass.), have updated their identification procedures.

In 1999, the National Institute of Justice (NIJ) issued the research report *Eyewitness Evidence: A Guide for Law Enforcement.* In 2003, the NIJ published *Eyewitness Evidence: A Trainer's Manual for Law Enforcement.* Both of these publications provide a road map for law enforcement for effective reform.

The subject of mistaken eyewitness identification will be a focus of this and future issues of the Advocate. This month will include an overview of the state of the caselaw in Kentucky by **Glenn McClister**, an article republished with permission for the *Christian Science Monitor*, and a survey of resources available on the internet in a new column called *At Your Fingertips.*

Also appearing:

Ten Core Principles: For Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems adopted by The American Council of Chief Defenders in December of 2004.

Battered Child Syndrome. Diana McCoy, Ph.D. discusses litigation of cases involving this syndrome.

Rule Amendments. Karen Maurer analyses recent amendments to the Rules of Criminal & Civil Procedure.

Call for nominations for **Public Advocacy Awards** to be presented at the DPA Annual Seminar, June 7-9 at the Galt House in Louisville, Kentucky.

Kentucky Caselaw On Eyewitness Identification

by Glenn S. McClister

The *Fry* Case: Ten Eyewitnesses for the Prosecution, and Every One of Them Mistaken

On September 22, 1934, at 7:30 on a Saturday morning, two men robbed the Southern Deposit Bank in Russellville, Kentucky. They had stolen a car in Clarksville, Tennessee on the way to Russellville and, after the bank robbery, they abandoned that first car and stole a second one about six miles out of town. Soon after taking the second car, they stopped for gas.

At least fourteen people encountered the two robbers during the course of that Saturday morning. Ten of those witnesses later came to identify the defendant at trial.

The first four witnesses testified about the robbery itself and the moments immediately following it. Witness No. 1 said that, on the day of the robbery, the defendant was wearing a cap, blue shirt, black shoes, solid-color pants, and that he put on "big, brown goggles" after entering the bank. Witness No. 2 testified that he got to within five steps of the defendant and that he could identify the defendant based upon his voice and his carriage. Witness No. 3 claimed to have come to within two feet of the defendant. After pointing out the defendant at trial, she was asked if she could have been mistaken. She answered, "No, I am not certain that this is the man, though I am satisfied in my own mind that he is." Witness No. 4 said that he came to within about 24 steps of the defendant and that the defendant looked at him, "square in the face."

Witness No. 5 and Witness No. 6 were the two brothers who owned the second car, which was stolen six miles outside of Russellville. They both testified that the defendant had said his car had broken down and he needed a ride. According to their testimony, the defendant pointed a gun at them and then transferred money from the first car to the second. Witness No. 7 was a gas station attendant who estimated that he spent at least ten minutes speaking to the defendant as he delivered the gas into the second stolen car, a Ford. When asked if he could identify the defendant in the courtroom, Witness No. 7 pointed to the defendant and said, "this gentleman right over there with a scar on his face, I think, to the best of my knowledge is one of those men."

Witness No. 8 identified the defendant as the man he had seen sitting on the far side of a Ford automobile as the Ford passed his place of business that Saturday morning, not far from where Witness No. 7 had pumped the gas. Witness No. 9 saw the defendant driving down a "short cut road" in the same area around the same time. When asked, " if there is any way you could be mistaken about this," Witness No. 9 answered, "No, sir," even though he had testified that he had not paid any attention to the people in the car at the time he saw it on the short cut road. Witness No. 10 identified the defendant as someone who "just resembles" the man who stole the car in Clarksville before the robbery in Russellville.

Elmer Fry was a well-known registered pharmacist working in his father's store in Camden, Tennessee on the day of the robbery. He produced fifty-five (55) alibi witnesses in his defense. These witnesses placed Elmer Fry in Camden throughout the events that were taking place up in Russellville, Kentucky on that Saturday morning. Indeed, they put him in Camden from late Friday night until at least Saturday afternoon.

The defense witnesses included a dozen farmers, grocers, dairymen and produce sellers, three postmen, a licensed physician (who, on the morning of the robbery, wrote a prescription for a patient who then had Mr. Fry fill it that morning), two sheriff's deputies and as many school teachers, a Camden city marshal, a licensed dentist, the pastor of the Camden Methodist-Episcopal Church, two football players, the supervisor of the Camden Farm Credit Bureau, a barber, the manager of the Power & Light company, an employee of the county registrar, and, last but not least, the disabled veteran who served as the adjutant of the local American Legion hall.

The defense evidence also included the written prescription and the medicine bottle alluded to above, showing a prescription written by the doctor that Saturday morning and filled by Elmer Fry at his father's pharmacy.

The verdict? "On a trial to a jury he was convicted and his punishment fixed at confinement in the state reformatory for the period of his natural life."

Judge Richardson, writing the opinion for the Court of Appeals of Kentucky (then Kentucky's highest court) made the following remarks:

> "The witnesses of the accused were thoroughly acquainted with him and his place of business. It was not possible for them to be mistaken in the Saturday involved; or of his identity. On the other hand, the witnesses of the Commonwealth observed the participants in the robbery and formed their opinion of the accused's identity during the excitement incident to a tragic robbery, and most of them, at the time, in a room that was poorly lighted; all of them while he was disguised with

goggles, cap, and overalls. While their testimony bears to impress of truth and is entitled to be regarded honest and made in good faith, yet it is in reality a mere expression of an opinion based upon the most casual observation made under the tenseness of excitability. It is perfectly consistent with the hypothesis of mistaken identity."

And, he concluded:

> "As honest as we believe the witnesses of the Commonwealth to be in their conviction of the correctness of their identification of the accused, sifting the whole of the evidence, with the sieve of common sense, measuring it with the compass of experience, viewing it with a disinterested and unbiased mind, actuated by an impelling sense of our duty to administer and enforce the law with perfect fairness and justice, it is our matured view that the verdict of the jury is palpably against the weight of the evidence. ... The judgment is reversed for a new trial, consistent herewith."

You can read the full story of Elmer Fry at *Fry v. Commonwealth*, Ky.App., 82 S.W.2d 431 (1935). It is a cautionary tale for defense lawyers on the power of positive eyewitnesses to sway jurors. One step in combating such evidence is to know the law on eyewitness identifications, so we can use that law to our clients' advantage.

* * * *

- **Show-ups**
- **Photo-lineups and Use of Photos for Identification Pretrial**
- **Corporeal Lineups and Other Pretrial Encounters**
- **Sixth Amendment Challenges: Right to Counsel in Corporeal Lineups**
- **In-Court Identifications and Related Issues**
- **Fourth Amendment Challenges: Fruits of Illegal Arrest**
- **Right to Independent Lineup Procedure**
- **Right to Jury Instructions on Eyewitness Identification**
- **Admissibility of Expert Testimony on Eyewitness Identification**
- **Directed Verdict and Other Issues**

Show-Ups

***Stidham v. Commonwealth*, Ky.App., 444 S.W.2d 110 (1969), 6-13-69**: Show-up, in which the robbery victim was taken to the scene of the arrest of co-defendants, was not unduly suggestive when held within an hour of robbery and when exigencies demanded immediate identification.

***Ashcraft v. Commonwealth*, Ky.App., 487 S.W.2d 892 (1972), 11-3-72**: Show-up, wherein two co-defendants were the only ones present for identification at the police station, was not excluded when there was no evidence of mistaken identification and police needed prompt investigation of an unsolved crime.

***Myers v. Commonwealth*, Ky.App., 499 S.W.2d 277 (1973), 5-18-73**: Show-up identifications should be accepted with caution.

***Sweatt v. Commonwealth*, Ky., 550 S.W.2d 520 (1977), 4-1-77**Show-up identification held in hospital was not the "approved method to secure an identification" but was permissible where, as in *Stovall v. Denno*, it was not known whether the victim would recover.

***Durham v. Commonwealth*, Ky.App., 556 S.W.2d 170 (1977), 7-1-77**: Show-up identification was not "impermissively suggestive" under *Neil v. Biggers*, even though the complaining witness was accosted at night, had only the headlights of an automobile to see by, could not later photo-identify the defendant out of his high school yearbook, and the defendant was presented to the complaining witness in police custody, when show-up was held within two hours after event and (although complaining witness could not initially identify the defendant even then) the complaining witness did finally identify the defendant after police placed a hat on his head.

***Brown v. Commonwealth*, Ky.App., 564 S.W.2d 24 (1978), 3-17-78**: Show-up, in which the witnesses were (a) taken to the scene of the arrest of co-defendants, (b) shown co-defendants standing before the headlights of a police cruiser in handcuffs, and (c) told by police that "they thought they had the two guys," was not impermissively suggestive under *Neil v. Biggers* and *Manson v. Brathwaite* when identification was made within forty-five minutes after the event. (Citing *Stidham*, 1969 and *Jones*, 1977.)

***Lamb v. Commonwealth*, Ky.App., 1985 Ky. App. LEXIS 716, 7-25-85**: The show-up identification of co-defendants taken to the home of the witness was both suggestive and unnecessary because no exigency existed, but was still reliable under the totality of the circumstances. "[C]ourts have rarely found due process violations in identification procedures, even where extreme practices were followed and no exigency existed."

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***Hall v. Commonwealth*, Ky.App., 1990 Ky. App. LEXIS 42, 4-6-90**: Show-up identification, in which the defendant was presented to the witness in handcuffs in the back seat of a police cruiser within one hour and fifteen minutes of the event, was not impermissibly suggestive under the analysis required by *Neils v. Biggers*.

***Savage v. Commonwealth*, Ky., 920 S.W.2d 512 (1995), 10-19-95**: The show-up was necessary under the exigencies referred to in *Stovall v. Denno* and *Stidham v. Commonwealth*; and, although "the show-up procedure is suggestive by its nature," the five *Neil v. Biggers* criteria were met even though the witness could not identify the defendant but noticed only shared characteristics. (Cf., *Riley*, 1981.)

***Roark v. Commonwealth*, Ky., 90 S.W.3d 24 (2002), 9-26-02**: Show-up identification of the defendant was reliable under the *Neil* criteria, even though the witness' first descriptions of her attacker were inconsistent and incomplete, and even though the show-up was not conducted until after the witness had undergone hypnosis to improve her memory of the appearance of her attacker.

Photo-Lineups and Use of Photos for Identification Pretrial

***Wickware v. Commonwealth*, Ky.App., 444 S.W.2d 272 (1969), 2-14-69**: The fact that the only photos shown to the witness in pretrial identification were photos of the defendant was for the jury to weigh as to credibility.

***Watson v. Commonwealth*, Ky.App., 444 S.W.2d 553 (1969), 6-27-69**: When, five months after the robbery allegedly committed by the defendant, the Lexington Police sent photographs of the defendant in the mail asking if the witness "could identify this as the smaller man in the robbery," the court ruled pursuant to *Simmons v. U.S.* that nothing violated the rule in that case.

***Cotton v. Commonwealth*, Ky.App., 454 S.W.2d 698 (1970), 3-20-70**: Objections to pretrial photo-identifications were not preserved for review because defense counsel failed to object to the witness' testimony at time of trial. Photo-identification conducted was the same as approved of in *Simmons v. U.S.*

***Simmons v. Commonwealth*, Ky.App., 459 S.W.2d 780 (1970), 11-13-70**: Pretrial photo-identification of the defendant was not suggestive when the witness testified at trial that the defendant's large nose made him "easy to identify." *Wade* was not applicable when the defendant was not under arrest at the time the pretrial identifications were held. (Citing *Wickware*, 1969.)

***Pankey v. Commonwealth*, Ky.App., 485 S.W.2d 513 (1972), 5-12-72**: Copies of photos used in photo-identifications were discoverable under RCr 7.24(2) when the testimony of the witness was that she failed to identify the defendant at the photo-lineup because the photos of the defendant were not a good likeness. (Cf. *Simmons v. U.S.*)

***Dixon v. Commonwealth*, Ky.App., 505 S.W.2d 771 (1974), 2-15-74**: A photo-lineup consisting of a stack of 10-12 photos, which included two photos of the defendant, was not suggestive when, under the "totality of the circumstances," the witness identified the defendant on seeing the first photo and then again on seeing the second, and had identified the witness on the street on three prior occasions.

***Rolack v. Commonwealth*, Ky.App., 514 S.W.2d 47 (1974), 9-13-74**: The photo-identification in question met the requirements of *Simmons* when all the pictures used were of men of the same apparent age, weight, and height of the defendant, had no distinctive markings on them, and no arrangement of the photos suggested the defendant more than any other.

***Luckett v. Commonwealth*, Ky., 550 S.W.2d 517 (1977), 4-1-77**: Photo-identifications made when all the photos used were mug shots, no more than four were used, the defendant's picture showed the defendant "larger" than others, other photos did not resemble the defendant, the defendant was the only one shown wearing a turtleneck (part of the description given by the witness), and the mug shots had writing on the back of them, was not unduly suggestive when the writing included height and weight information only and was not shown to the witness, the photos showed all persons from waist up only, and one witness was unable to identify the defendant upon first seeing the photos.

***Cane v. Commonwealth*, Ky.App., 556 S.W.2d 902 (1977), 5-27-77**: A photo-lineup, held by showing the witness a book of mug shots of black females, was not unduly suggestive when the "female imitator" co-defendants were photographed at arrest as women, nothing in the procedure suggested that the witness should look for men, and the co-defendants gave every appearance of actually being women.

***Jones v. Commonwealth*, Ky.App., 556 S.W.2d 918 (1977), 7-15-77**: The photo-lineup was impermissibly suggestive when it consisted of six mug shots with writings visible in the photos and the defendant's mug shot listed his day of arrest as one day after the event and listed the charge against the defendant as "ROB" (robbery), and when the defendant was one of only two to be depicted wearing a cap and the witness later testified that the cap was instrumental in making the identification. (Cf., *Luckett*, 1977.)

***Brown v. Commonwealth*, Ky.App., 564 S.W.2d 24 (1978), 3-17-78**: Photo-identification with seven mug shots, showing co-defendants wearing boards suspended around their necks with the date of the event (robbery) and the initials "ROB" on them were impermissibly suggestive and inadmissible under Kentucky precedent (citing *Colbert v. Commonwealth*, Ky.App., 306 S.W.2d 825 (1957); *Preston v. Com-*

monwealth, Ky.App., 406 S.W.2d 398 (1966); and *Jones*, 1977) as well as under federal constitutional law.

***Moore v. Commonwealth*, Ky., 569 S.W.2d 150 (1978), 7-3-78**: Photo-lineup including only two mug shots of the two co-defendants was impermissibly suggestive.

***Beecham v. Commonwealth*, Ky.App., 594 S.W.2d 898 (1979), 10-26-79**: Photo-identification made from "some photographs" including two photos of the defendant was upheld under the "totality of the circumstances."

***Redd v. Commonwealth*, Ky.App., 591 S.W.2d 704 (1979), 12-7-79**: Use of mug shots for photo-identification is permissible, but use of them for in-court identification condemned.

***Adkins v. Commonwealth*, Ky.App., 647 S.W.2d 502 (1982), 12-17-82**: Photo-identification procedures are impermissibly suggestive when "elements in the photographs other than minor variations in the physical features of the individuals pictured mislead witnesses in making their identifications." (Citing *Brown*, 1978 and *Jones*, 1977, but cf., *Durham*, 1977 and *Riley*, 1981.) Note that the court ruled in this case that, although the men pictured in the photos did "not closely resemble one another," they nevertheless "all loosely fit the description" given by the witness. This is, in fact, the approach recommended by the experts. That is, line-ups of any kind should follow descriptions given by the witness, and not rather resemblance to the chief suspect.

***Farley v. Commonwealth*, Ky.App., 1989 Ky. App. LEXIS 102, 8-18-89**: Photograph of defendant used against him in photo-lineup was not protected by husband-wife privilege.

***Ruppee v. Commonwealth*, Ky., 821 S.W.2d 484 (1991), 5-9-91**: When the defendant's theory of the case was mistaken identification due to an overly suggestive photo-lineup, and one witness for the defense had testified that the defendant never appeared "scroungy or unkempt" as he did in the photos, it was not error to allow a police officer to rebut that witness' testimony.

***Sanders v. Commonwealth*, Ky., 844 S.W.2d 391 (1992), 11-19-92**: A photo-lineup consisting of fourteen photos, wherein two of the photos were of the defendant, was not unduly suggestive under the "totality of the circumstances" when the photo-lineup occurred two days after the event, the description given by the witness was a close match to the defendant, and the witness was confident of the identification. To be impermissibly suggestive, a pretrial identification procedure must be so suggestive as to "give rise to the very substantial likelihood of irreparable misidentification."

***Edmonds v. Commonwealth*, Ky., 906 S.W.2d 343 (1995), 9-21-95**: The photo-lineup was not so suggestive as to lead to "irreparable misidentification." (No details given.)

***Dillingham v. Commonwealth*, Ky., 995 S.W.2d 377 (1999), 6-17-99**: The photo-array shown to the witness against the defendant was not impermissibly suggestive when everyone in the array was physically similar to one another and all were clearly in custody.

***Roark v. Commonwealth*, Ky., 90 S.W.3d 24 (2002), 9-26-02**: Witness' identification of the defendant in a photo-lineup, conducted after the witness had undergone hypnosis for the purpose of improving her memory of the appearance of her attacker, was not unduly suggestive.

***Sandifer v. Commonwealth*, Ky., 2004 WL 314620, 2-19-04 (unpublished)**: The photo-lineup shown to the witness was not impermissibly suggestive, despite the fact that (a) the defendant was the only one wearing braids in his hair, (b) the witness was instructed to ignore differences in hair and clothing, and(c) the witness had met and spoken to the defendant the night before, prior to the robbery.

Corporeal Lineups and Other Pretrial Encounters

***Redmon v. Commonwealth*, Ky.App., 321 S.W.2d 397 (1959), 2-27-59**: Allegation that the police pointed out the defendant to the witness before presenting the defendant in a lineup went to the weight of the evidence and not its admissibility.

***Bradley v. Commonwealth*, Ky.App., 439 S.W.2d 61 (1969), 2-28-69**: The lineup was held not to be unduly suggestive when the defendant was made to wear the hat and coat used in the event (robbery). (Cf., *Durham*, 1977, *Jones*, 1977, *Luckett*, 1977, and especially *Riley*, 1981.)

***Thomas v. Commonwealth*, Ky.App., 459 S.W.2d 72 (1970), 10-23-70**: Pretrial irregularities, such as an improper lineup, cannot be raised after a defendant voluntarily enters a plea of guilty.

***Davis v. Commonwealth*, Ky.App., 463 S.W.2d 133 (1970), 12-18-70**: Introduction of testimony concerning uncounseled lineup procedure was harmless error "beyond reasonable doubt" (citing *Chapman v. California*) when lineup was conducted less than two hours after event, witness spent three hours with defendant prior to event, and the subsequent in-court identification was unequivocal. (*See also Hays*, 1971, for use of *Chapman v. California*.)

***Meekly v. Commonwealth*, Ky.App., 467 S.W.2d 360 (1971), 5-21-71**: No showing at all by defendant that lineup was conducted improperly.

***Williams v. Commonwealth*, Ky.App., 474 S.W.2d 381 (1971), 12-17-71**: Objection to allegedly suggestive lineup procedure was not preserved for review by objection at the time of the witness' testimony at trial.

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***Rayburn v. Commonwealth*, Ky.App., 474 S.W.2d 405 (1971), 12-17-71**: There was no basis to allege that an illegal lineup was conducted, when the record of the trial indicated that no lineup was ever held.

***Leigh v. Commonwealth*, Ky.App., 481 S.W.2d 75 (1972), 2-4-72**: Defendant's lineup was not unduly suggestive when composed of both light-skinned and dark-skinned black men (one of whom was the defendant's father, and therefore obviously not in the defendant's general age group). (Citing *Bradley*, 1969.)

***Reed v. Commonwealth*, Ky.App., 479 S.W.2d 608 (1972), 3-31-72**: Objection to testimony concerning the pretrial lineup procedure was not preserved for review when the defendant did not object to that testimony at trial.

***Johnson v. Commonwealth*, Ky.App., 514 S.W.2d 115 (1974), 5-31-74**: It was not reversible error for the court to exclude testimony that the defendant had been misidentified by others as a culprit while standing in on other lineups as a "filler," when no evidence supported the inference that the witness' pretrial identification was therefore also mistaken.

***Herbert v. Commonwealth*, Ky.App., 566 S.W.2d 798 (1978), 3-17-78**: The witness and the defendant ran into each other accidentally as defendant was being transported from another floor and the witness was entering the police station. The witness immediately identified the defendant. This was less suggestive than had the defendant been brought to the store where robbery occurred or than had the witness been brought to the defendant's place of arrest. Given the witness' ability to demonstrate an independent basis for his recollection of the defendant, testimony regarding this pretrial identification was admissible.

***Hockenbury v. Commonwealth*, Ky., 565 S.W.2d 448 (1978), 5-2-78**: Objections to allegedly suggestive pretrial identification procedures were dismissed in this case, based in part upon the assumption that having a gun pointed at him made the witness' recollection of the event more reliable. The court said, "He also looked into a gun barrel at the time he handed over the money. Common sense dictates that such experiences, and the actor's appearance is indelibly imprinted on the mind (sic) of the victims." (According to psychologists, this may or may not be true, given a number of factors unknown in this case. *See also Hall*, 1990, wherein the same assumption is relied upon.)

***Shanks v. Commonwealth*, Ky.App., 575 S.W.2d 163 (1978), 7-14-78**: The lineup was not tainted when, prior to lineup, the witnesses allegedly saw the defendant in court and the detective pointed out the defendant to the witnesses, when both witnesses testified that they had not seen the defendant in court that day.

***Silverburg v. Commonwealth*, Ky., 587 S.W.2d 241 (1979), 9-11-79**: The trial judge acted properly in granting defendant a continuance when the Commonwealth did not provide the defendant with a copy of the lineup report until the day of trial.

***Spanski v. Commonwealth*, Ky., 610 S.W.2d 290 (1980), 12-16-80**: The lineup was not unduly suggestive, when both co-defendants were present in the same lineup that included five others, and the attorney for the defendant was present and signed a statement to the effect that the lineup procedure was fair and unobjectionable.

***Wilson v. Commonwealth*, Ky., 695 S.W.2d 854 (1985), 5-23-85**: Seeing the defendant in handcuffs with co-defendant at arraignment is not impermissibly suggestive when the "Commonwealth has not arranged the confrontation and there is no attempt by its agents to indicate to the witness(es) that 'that's the man.'" The lineup conducted in this case was impermissibly suggestive, constituting a violation of due process, when the two witnesses identified the defendant at a lineup in which the witnesses already knew everyone in the lineup except the defendant. (This case has a good explanation of the analysis to be followed.)

Sixth Amendment Challenges:
Right to Counsel in Corporeal Lineups

***Futrell v. Commonwealth*, Ky.App., 437 S.W.2d 487 (1969), 1-17-69**: Claim regarding illegality of a lineup conducted without the presence of counsel in violation of *Wade*, et. al., was not preserved for review when counsel failed to object to testimony of the witness at trial.

***Wickware v. Commonwealth*, Ky.App., 444 S.W.2d 272 (1969), 2-14-69**: *Wade* did not apply when the defendant was not under arrest at the time the witness was shown photos of the defendant.

***Bradley v. Commonwealth*, Ky.App., 439 S.W.2d 61 (1969), 2-28-69**: *Wade* was not applicable retroactively to a crime committed before that decision. (*See also Bradley v. Commonwealth*, Ky.App., 465 S.W.2d 266 (1971), and *Butcher v. Commonwealth*, Ky.App., 473 S.W.2d 114 (1971).)

***Stidham v. Commonwealth*, Ky.App., 444 S.W.2d 110 (1969), 6-13-69**: There was no right to counsel during a show-up identification conducted one hour after event with exigent circumstances prevailing.

***Cotton v. Commonwealth*, Ky.App., 454 S.W.2d 698 (1970), 3-20-70**: Objections to a lineup held in violation of *Wade* were not preserved for review when defense counsel failed to object to the witness' testimony at trial.

***Brown v. Commonwealth*, Ky.App., 458 S.W.2d 444 (1970), 10-2-70**: Violation of the *Wade* requirement to provide counsel at defendant's lineup was clearly not established when the trial court held an evidentiary hearing on the matter and

testimony clearly established that the defendant had been advised of his right to the presence of an attorney and had refused to request one.

***Simmons v. Commonwealth*, Ky.App., 459 S.W.2d 780 (1970), 11-13-70**: *Wade* does not apply to pretrial identification procedures conducted before the arrest of the defendant. (Citing *Wickware*, 1969.)

***Davis v. Commonwealth*, Ky.App., 463 S.W.2d 133 (1970), 12-18-70**: A lineup held without the presence of counsel was improper under *Wade* and *Gilbert*. (The lineup in this case was conducted after arrest but before indictment or preliminary hearing. This is no longer good law. *See Shanks*, 1978.)

***Lewis v. Commonwealth*, Ky.App., 463 S.W.2d 137 (1970), 12-18-70**: Objections to a lineup allegedly held in violation of the *Wade* right to counsel at a lineup were not preserved for review when defense counsel failed to object to the testimony of the witness at the time of trial. (Citing *Cotton*, 1970.)

***Hays v. Commonwealth*, Ky.App., 467 S.W.2d 354 (1971), 3-26-71**: (pre-*Kirby* and *Moore*, not good law) The defendant had a right to counsel at a police lineup once he had been arrested. The Commonwealth did not meet its burden of proving intelligent and voluntary waiver of counsel.

***Meekly v. Commonwealth*, Ky.App., 467 S.W.2d 360 (1971), 5-21-71**: Defendant waived his right to counsel at lineup.

***Ashcraft v. Commonwealth*, Ky.App., 487 S.W.2d 892 (1972), 11-3-72**: *Kirby v. Illinois* does not require exclusion of testimony regarding a pretrial show-up identification for lack of counsel when co-defendants had been arrested as suspects but not yet charged.

***Rolack v. Commonwealth*, Ky.App., 514 S.W.2d 47 (1974), 9-13-74**: The *Wade* right to counsel does not apply to photo-identifications, (Photo-identification in this case was prior to indictment.)

***Cane v. Commonwealth*, Ky.App., 556 S.W.2d 902 (1977), 5-27-77**: Section Eleven of the Kentucky Constitution, on the right to counsel, is co-extensive with the rights guaranteed by the Sixth Amendment to the United States Constitution as construed in *U.S. v. Ash*. The right of counsel does not extend to a right to have counsel present when a witness is shown a photo-lineup the morning of trial.

***Shanks v. Commonwealth*, Ky.App., 575 S.W.2d 163 (1978), 7-14-78**: Pursuant to *Kirby v. Illinois* and *Moore v. Illinois*, the right to counsel's presence at a lineup does not attach, prior to indictment, until the preliminary hearing.

In-Court Identifications and Related Issues

***Farina v. Commonwealth*, Ky.App., 278 S.W. 1097 (1925), 11-24-25**: The use of photographs for the purpose of identifying the defendant in court was inadmissible and improper when the availability of the defendant in the courtroom for identification made the photo-identification incompetent as secondary evidence.

***Roberts v. Commonwealth*, Ky.App., 350 S.W.2d 626 (1961), 10-27-61**: "Mug shots" introduced at trial required reversal when used to imply the defendant's bad character.

***Cotton v. Commonwealth*, Ky.App., 454 S.W.2d 698 (1970), 3-20-70**: Objections to the reliability of a witness' in-court identification as tainted by suggestive pretrial identification procedures were not preserved for review because defense counsel failed to object to the witness' testimony at the time of trial.

***Brown v. Commonwealth*, Ky.App., 458 S.W.2d 444 (1970), 10-2-70**: In-court identifications of the defendant were clearly not tainted by the lineup held in violation of *Wade* under the reliability analysis in *Neil v. Biggers*.

***Simmons v. Commonwealth*, Ky.App., 459 S.W.2d 780 (1970), 11-13-70**: In-court identification of the defendant was not tainted by pretrial suggestiveness when the witness testified at trial that the defendant's large nose made him "easy to identify."

***Davis v. Commonwealth*, Ky.App., 463 S.W.2d 133 (1970), 12-18-70**: Pretrial identification conducted without the presence of counsel did not taint subsequent in-court identification when the lineup identification occurred less than two hours after the event, the witness spent more than three hours with the defendant before the event, and the witness' in-court identification of the defendant was unequivocal.

***Lewis v. Commonwealth*, Ky.App., 463 S.W.2d 137 (1970), 12-18-70**: There was simply no showing that the in-court identification was tainted by any pretrial identification procedure.

***Francis v. Commonwealth*, Ky.App., 468 S.W.2d 287 (1971), 5-28-71**: The appeals court refused to reverse the conviction when the trial judge denied defense request for a hearing outside the presence of the jury on whether the pretrial lineup tainted the in-court identification or whether the in-court identification had an independent basis. The appellate court remanded for a hearing instead. (Note: This is no longer the law in Kentucky, or elsewhere for that matter. *See Ray*, 1977, *Summit*, 1977, *Watkins*, 1978, and most importantly *Watkins v. Sowders*, 449 U.S. 341, 101 S.Ct. 654, 66 L.Ed.2d 549. *Summit* and *Watkins* were appealed to the Supreme Court and the Court ruled that hearings do not have to be held on pretrial taint of an in-court identification. Cross-examination is sufficient to provide the defendant an opportunity to challenge the credibility of the identification.)

***Kelly v. Commonwealth*, Ky.App., 474 S.W.2d 63 (1971), 11-19-71**: Findings of the trial court at hearing regarding

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taint of an in-court identification by an impermissibly suggestive pretrial identification procedure is binding unless clearly erroneous.

***Murray v. Commonwealth*, Ky.App., 474 S.W.2d 359 (1971), 12-17-71**: Introduction of photographs of the defendant at trial, in order to show how the witnesses had identified the defendant, was not error even though the photos bore the writing "LaGrange Penitentiary" and "Armed Robbery." Another photo of defendant introduced into evidence was not error when the photographer who took the photo was the husband of a juror but the juror denied discussing the case with her husband before trial and declared that his minor role in the trial would not effect her. (This short opinion makes no effort to reconcile these rulings with any other caselaw involving mug shots.) For the defendant to be seen by the jurors in handcuffs and shackles prior to trial was not a denial of a fair trial when all jurors told defense counsel in voir dire that it would not affect their decision as to guilt or innocence.

***Williams v. Commonwealth*, Ky.App., 474 S.W.2d 381 (1971), 12-17-71**: The defendant was shackled during the course of the trial and in the presence of the jury. Reversal was not required. (See this case for a fairly comprehensive review of the caselaw. Citing *Blair v. Comm.* 188 S.W. 390, *Marion v. Comm.* 108 S.W.2d 721, and *Tunget v. Comm.* 198 S.W.2d 785, for the appellant; and *Donehy v. Comm.* 186 S.W. 161, *Bayless v. U.S.* 200 F.2d 113 (9th Cir.1953), and *Blaine v. U.S.* 136 F.2d 284 (D.C.1943, for the Commonwealth.) Objection to allegedly tainted in-court identification was not preserved for review by objection to the testimony of the witness at trial.

***Richardson v. Commonwealth*, Ky.App., 483 S.W.2d 105 (1972), 3-31-72**: The rationale of *Simmons v. U.S.* did not apply when an evidentiary hearing clearly revealed that all of the witnesses to identify the defendant had seen him as a customer several times before he passed a forged check, and the witnesses thus had more than a sufficient basis for identification of the defendant independent of any suggestiveness in the pretrial photo lineup.

***Greenup v. Commonwealth*, Ky.App., 489 S.W.2d 512 (1972), 10-20-72**: In-court identification of the defendant by a witness who had failed to identify the defendant from photographs prior to trial was "harmless beyond a reasonable doubt" when testimony revealed that prior failure to the jury.

***Blakemore v. Commonwealth*, Ky.App., 497 S.W.2d 231 (1973), 6-15-73**: Defendant's assertion that the testimony of the only witness to identify him at trial was tainted by the impermissibly suggestive pretrial procedure used upon a second witness by police, to which the first witness was an observer, was not preserved for review by objection and, in fact, the counsel for defendant did not even cross-examine the witness on that matter.

***Russell v. Commonwealth*, Ky.App., 490 S.W.2d 726 (1973), 2-16-73**: A directed verdict of acquittal was not required when the in-court identification of the defendant was not corroborated by identification at a pretrial identification procedure. (See also the section entitled, "Right to Independent Lineup.")

***Myers v. Commonwealth*, Ky.App., 499 S.W.2d 277 (1973), 5-18-73**: Witness' testimony that his in-court identification of the defendant was based on both his independent recollection of the event and the show-up conducted with the defendant at the jail was for judge to decide regarding taint. No abuse of discretion. Affirmed.

***Brison v. Commonwealth*, Ky.App., 519 S.W.2d 833 (1975), 2-21-75**: The in-court identification of the defendant had an independent basis and was, therefore, untainted by an impermissibly suggestive pretrial show-up, when the witness testified that the defendant had been a customer at his clothing store for some time prior to the event.

***Ray v. Commonwealth*, Ky., 550 S.W.2d 482 (1977), 2-18-77**: Failure to hold a hearing to determine whether an in-court identification was tainted by a pretrial lineup stipulated by the Commonwealth to have been improper was not "the preferred course to follow," but did not require reversal when the witness testified about his ability to identify the defendant and was extensively cross-examined by defense counsel.

***Brown v. Commonwealth*, Ky., 551 S.W.2d 557 (1977), 2-18-77**: In-court identification by a sixteen-year-old witness, who did not come forward until the day before the trial and was shown a photo of the defendant before testifying, was not subject to review because no objection was made to her testimony at trial.

***Sweatt v. Commonwealth*, Ky., 550 S.W.2d 520 (1977), 4-1-77**: The in-court identification of the defendant was admissible when the witness had previously identified the defendant at a pretrial photo-lineup and demonstrated an independent recollection of the event, even if the first encounter with the defendant was a one-man show-up in the witness' hospital room. A second in-court identification by a second witness was not inadmissible simply because the Commonwealth failed to disclose that the second witness had previously identified someone other than the defendant as the culprit. (Police had not informed the prosecutor that this had happened.)

***Stephens v. Commonwealth*, Ky., 550 S.W.2d 524 (1977), 4-1-77**: It was not an abuse of discretion to deny a motion for a new trial when a witness, who could not identify the defendant until the second day of the trial, was allowed to then identify the defendant in court. The witness was only one of two who identified the defendant, and other circumstantial evidence linked the defendant to the crime. (*Keser*, 1922, reversing on surprise witnesses, ruled inapplicable.)

***Summit v. Commonwealth*, Ky., 550 S.W.2d 548 (1977), 4-22-77**: It was harmless error to allow an officer to testify to witness' accurate description of the defendant before witness' identification of the defendant had been called into question. No error for the trial court to refuse to conduct a suppression hearing on the in-court identification of the defendant. (Citing *Simmons v. U.S.*)

***Cane v. Commonwealth*, Ky.App., 556 S.W.2d 902 (1977), 5-27-77**: Failure to conduct a hearing on the suggestiveness of a pretrial photo-lineup shown to the witness on the morning of trial would have required vacating a judgment and remand for hearing (per *Francis*) but defense counsel did not request one.

***Jones v. Commonwealth*, Ky.App., 556 S.W.2d 918 (1977), 7-15-77**: In-court testimony regarding a pretrial photo-identification of the defendant was inadmissible due to a blatant Fourth-Amendment violation. Therefore, in-court identification of the defendant was also improper. The case was remanded for a hearing on the "totality of the circumstances" surrounding possible in-court identification even though the pretrial photo lineup was impermissibly suggestive.

***Cain v. Commonwealth*, Ky., 554 S.W.2d 369 (1977), 7-29-77**: Both one witness, who made a pretrial misidentification, and another witness, who voiced doubt about his identification of the defendant at a lineup, gained "much corroborative authenticity" by the unhesitating in-court identification of the defendant by a police officer.

***Harris v. Commonwealth*, Ky.App., 556 S.W.2d 669 (1977), 9-16-77**: A hearing on the possible taint of an in-court identification by a suggestive pretrial identification procedure is preferred, but failure to hold the hearing does not warrant reversal when the witness' subsequent testimony shows the in-court identification to be based solely upon her memory of the event.

***Garrett v. Commonwealth*, Ky., 560 S.W.2d 805 (1977), 12-9-77**: The introduction of a mug shot of the defendant, at a trial wherein the defendant had already been identified in court by another witness, was harmless error when the judge carefully removed all unnecessary markings, identifying numbers and notations, and carefully explained his alterations to the jury.

***Brown v. Commonwealth*, Ky.App., 564 S.W.2d 24 (1978), 3-17-78**: Testimony regarding the fact of an impermissibly suggestive pretrial photo-identification is inadmissible under Kentucky law (*Colbert v. Commonwealth*, Ky.App., 306 S.W.2d 825 (1957); *Preston v. Commonwealth*, Ky.App., 406 S.W.2d 398 (1966), *Jones*, 1977) as well as federal constitutional law. In-court identification of the co-defendants would inadmissible until, on remand, the court holds a hearing to determine the "totality of the circumstances" under *Neil v. Biggers*. A hearing was also required on the reliability of pretrial show-up identifications by two other witnesses. (*See McCloud*, 1985, for an extension of this analysis under Kentucky law.)

***Herbert v. Commonwealth*, Ky.App., 566 S.W.2d 798 (1978), 3-17-78**: In-court identification of the defendant was admissible even after a questionable arrest, when the witness recognized the defendant as a former customer, the witness had ample opportunity to view the defendant, the witness gave police an amazingly accurate description of the defendant's clothing, and the identification was therefore clearly the product of an independent recollection.

***Watkins v. Commonwealth*, Ky., 565 S.W.2d 630 (1978), 5-2-78**: Failure to hold a suppression hearing to review the identification procedures in the case, and failure to suppress testimony regarding any identifications, did not deprive defendant of a fair trial. (Citing *Ray*, 1977.)

***Moore v. Commonwealth*, Ky., 569 S.W.2d 150 (1978), 7-3-78**: It is unnecessary to remand for a hearing regarding the reliability of an in-court identification of the defendant after a suggestive pretrial identification procedure, when the record on appeal is sufficient to allow the appeal court to determine either that: 1) the pretrial identification procedure was not suggestive (citing *Coleman v. Alabama*), 2) the pretrial identification was suggestive but "necessarily so" (citing *Stovall v. Denno*), 3) the pretrial identification procedure was suggestive but the identification of the defendant was nevertheless reliable (citing *Neils v. Biggers*), or 4) admission of the pretrial identification testimony was harmless error (citing *Foster v. California*). Ruled: in-court identification by two witnesses reliable under *Neil v. Biggers* and *Manson v. Brathwaite*.

***Beecham v. Commonwealth*, Ky.App., 594 S.W.2d 898 (1979), 10-26-79**: Testimony to the jury regarding a pretrial identification and a subsequent in-court identification is admissible when the pretrial photo-identification is reliable under *Neil v. Biggers*.

***Redd v. Commonwealth*, Ky.App., 591 S.W.2d 704 (1979), 12-7-79**: Testimony to the jury regarding pretrial identification and subsequent in-court identification is admissible when the photo-lineup consisted of mug shots, but reversal was required when the trial court allowed evidence of the defendant's bad character to come in by way of telling the jury that the mug shots were from past incidents in the defendant's life and were from other armed robberies. (*See Roberts*, 1961).

***Riley v. Commonwealth*, Ky., 620 S.W.2d 316 (1981), 9-1-81**: In-court identification, during which the defendant was made to wear the coat and scarf of the robber, hold the robber's gun, and threaten the witness with the robber's words, was held unduly suggestive when the witness had failed to identify the defendant on three occasions prior to trial.

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***Brock v. Commonwealth*, Ky.App., 627 S.W.2d 42 (1981), 10-30-81**: In-court identification of the defendant was reliable in spite of the fact that the witness was exposed to a photo of the defendant on the day of the trial and prior to testifying. A pretrial photo-identification had been suppressed by trial court, but defense counsel opened the door to that testimony during trial.

***Wilson v. Commonwealth*, Ky., 695 S.W.2d 854 (1985), 5-23-85**: Failure to suppress the in-court identifications of two witnesses, who had identified the defendant in a lineup which violated Fourteenth-Amendment due process, was harmless error in light of overwhelming number of identifications provided by witnesses for whom the lineup was not suggestive and by others who did not participate in the lineup.

***McCloud v. Commonwealth*, Ky., 698 S.W.2d 822 (1985), 10-31-85**: When a witness cannot make an in-court identification of the defendant, testimony regarding a prior photo-identification of the defendant by the same witness is not inadmissible on the grounds that pretrial identifications are only for the purpose of corroborating in-court identifications. Rather, the pretrial identification was competent, material and relevant, and goes to the weight of the evidence. (This case should be read with *Brown*, 1978, which held that, according to *Colbert v. Commonwealth*, Ky.App., 306 S.W.2d 825 (1957), and *Preston v. Commonwealth*, Ky.App., 406 S.W.2d 398 (1966), when a pretrial identification is suggestive, neither the witness nor any other person may use the pretrial identification to corroborate the in-court identification.)

***Gibbs v. Commonwealth*, Ky.App., 723 S.W.2d 871 (1986), 11-7-86**: Use of mug shots of the defendant was permissible at trial, when only defense counsel's inquiry into pretrial photo display involving mug shots opened the door.

***Ruppee v. Commonwealth*, Ky., 754 S.W.2d 852 (1988), 5-19-88**: Testimony from four different witnesses, offered to show that the woman who identified the defendant had said that she was unsure of her identification, was improperly excluded from the trial as hearsay. The prior inconsistent statements were offered not for the truth of the matter asserted but only to show that such statements were made.

***Williams v. Commonwealth*, Ky., 810 S.W.2d 511 (1991), 6-6-91**: Introduction at trial of a mug shot of the defendant did not violate the three-part test of *Redd*, 1979 and *U.S. v. Harrington*, 490 F.2d 487 (2d Cir., 1973).

***Hayes v. Commonwealth*, Ky.App., 837 S.W.2d 902 (1992), 7-3-92**: The in-court identification of the defendant was untainted by an allegedly suggestive lineup procedure when the defendant featured prominently in the witness' in-court recollection of the event.

***Davis v. Commonwealth*, Ky., 899 S.W.2d 487 (1995), 3-23-95**: The defendant was refused a fair trial when the jury pool was allowed to see the defendant in shackles before voir dire when the defense counsel was allowed wide latitude to inquire about possible prejudicial effect during voir dire.

***Edmonds v. Commonwealth*, Ky., 906 S.W.2d 343 (1995), 9-21-95**: Admission at trial of a videotape of the defendant's arrest, showing police in riot gear handcuffing the defendant and others, patting them down, and asking them to identify themselves, was not "inflammatory, provocative, unnecessary, irrelevant." (Note, however, that this was a criminal syndicate case, requiring proof that the defendants were all working together.)

***Perdue v. Commonwealth*, Ky., 916 S.W.2d 148 (1995), 9-21-95**: *Watkins v. Sowders* upheld both *Watkins* and *Summit* to the effect that the Fourteenth Amendment does not require a pretrial hearing on the reliability of pretrial identifications. The defendant bears the burden of seeing that suppression motions go forward.

***Savage v. Commonwealth*, Ky., 920 S.W.2d 512 (1995), 10-19-95**: The in-court identification of the defendant was reliable under the "totality of the circumstances" even if the pretrial show-up identification "may or may not have been suggestive."

***Roark v. Commonwealth*, Ky., 90 S.W.3d 24 (2002), 9-26-02**: In-court identification of the defendant was reliable, even though the witness' first descriptions of her attacker were inconsistent and incomplete, and even though the witness could not identify the defendant in a photo-lineup until after she had undergone hypnosis in order to improve her memory of the appearance of her attacker.

Fourth Amendment Challenges:
Fruits of Illegal Arrest

***Jones v. Commonwealth*, Ky.App., 556 S.W.2d 918 (1977), 7-15-77**: Photos taken of the defendant after arrest and used later in a pretrial photo-identification were inadmissible inasmuch as the defendant's arrest on insufficient information from a confidential informant was patently illegal. In-court testimony regarding the pretrial identification was also therefore inadmissible.

***Herbert v. Commonwealth*, Ky.App., 566 S.W.2d 798 (1978), 3-17-78**: In this case, in which the record does not make possible a determination of whether there was probable cause to arrest the defendant, the resulting identification of the defendant by the suspect is not necessarily automatically inadmissible. Following the language of *Wong Sun*, the court ruled that whether the identification can still be admissible depends upon, "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has come at by exploitation of that illegality or instead

by means sufficiently distinguishable to be purged of the primary taint." Inasmuch as the pretrial identification made by the witness in this case was 1) the result of a pretrial confrontation between the defendant and witness that was completely spontaneous and unplanned and thus 2), id not constitute the "exploitation" of an illegal arrest by police; and inasmuch as 3) the confrontation did not add to the witness' knowledge in any material way, nor did it effect the accuracy of his identification, the in-court identification of the defendant and the testimony regarding the pretrial identification were both admissible. (Distinguished from *Jones*, 1977.)

***Roberts v. Commonwealth*, Ky., 572 S.W.2d 598 (1978), 10-10-78**: The description of defendant given by three different witnesses, "male, white, 17 yrs, slender build, dark green skull cap, with light blond hair sticking straight down," was sufficient for probable cause to arrest on a felony without a warrant, and therefore the pretrial photo-identification of the defendant was not the fruit of an illegal arrest.

***Bedell v. Commonwealth*, Ky., 870 S.W.2d 779 (1993), 4-22-93**: Police had probable cause to detain the defendant under the "totality of the circumstances" when the surviving witness made a tentative identification of the defendant from a "photopac," where that witness described the car driven by the assailant, and where another witness confirmed the description of the car given by the first witness.

***Clark v. Commonwealth*, Ky.App., 2003 WL 1394023, 3-21-03 (unpublished)**: Police had probable cause to arrest the defendant when the officers received face-to-face reports from eyewitnesses at the scene, only moments after the crime had occurred.

Right To Independent Lineup Procedure

***Wilson v. Commonwealth*, Ky., 695 S.W.2d 854 (1985), 5-23-85**: The right of a defendant to an independent lineup procedure is matter for the court's discretion per *Moore v. Illinois*, which (defendant argued) suggested that such a line-up may insure the reliability of identification evidence. No abuse of discretion to refuse such a motion in this case, and a motion made on day of trial is untimely. Compare *Russell*, 1973, wherein the defendant complained of the lack of a pretrial identification prior to an in-court identification, and *Brock*, 1981, wherein the Commonwealth was allowed to wait until the day of the trial to show a photo-lineup to a witness and the court said, "There could and should have been an identification of the accused by the witness prior to the day of the trial." *See also Pankey*, 1972, wherein the defendant wished to show photos, showing unindicted possible participants in the robbery, to witnesses for identification.

***Lynem v. Commonwealth*, Ky., 565 S.W.2d 141 (1978), 4-11-78**: A defendant does not have a constitutional right to his own pretrial lineup. Granting such is within the discretion of the trial court, and it is sufficient to allow the validity of the pretrial lineup conducted by police to be tested at trial.

Right To Jury Instructions on Eyewitness Identification

***Jones v. Commonwealth*, Ky.App., 556 S.W.2d 918 (1977), 7-15-77**: It was not error to refuse an instruction on eyewitness identification, when the substance of the tendered instruction was encompassed in the reasonable doubt instruction.

***Brock v. Commonwealth*, Ky.App., 627 S.W.2d 42 (1981), 10-30-81**: Eyewitness identification instructions are not required in Kentucky (citing *Jones*).

***Evans v. Commonwealth*, Ky., 702 S.W.2d 424 (1986), 1-16-86**: Repeating *Brock* and *Jones*.

Admissibility of Expert Testimony on Eyewitness Identification

***Pankey v. Commonwealth*, Ky.App., 485 S.W.2d 513 (1972), 5-12-72**: Expert testimony, offered on appeal by avowal, regarding the general inaccuracy of eyewitness testimony, without any tests having been performed on the actual witnesses in the case, invaded the province of the jury and was properly excluded

***Gibbs v. Commonwealth*, Ky.App., 723 S.W.2d 871 (1986), 11-7-86**: Issue about providing expert testimony regarding eyewitness accuracy was not preserved for review when counsel offered expert only for the purposes of the suppression hearing and did not also offer it at trial until after the jury had returned its verdict. (The judge evidently made the defense wait until the trial was over to do the avowal.)

***Sholler v. Commonwealth*, Ky., 969 S.W.2d 706 (1998), 7-18-98**: The trial court's decision to exclude the testimony of an expert on eyewitness identification was not preserved for review when the defendant failed to offer an avowal of the expert's testimony.

***Christie v. Commonwealth*, Ky., 98 S.W.3d 485 (2002), 12-19-02**: Overruling *Pankey* and *Gibbs*, the Court ruled that trial courts have the discretion to admit expert testimony on the reliability of eyewitness identification, and the judge's refusal to hear the proffered testimony of the expert in this case was not harmless error, especially since the possibility of cross-racial misidentification was a serious issue in the case.

Directed Verdict and Other Issues

***Miller v. Commonwealth*, Ky.App., 206 S.W. 630 (1918), 12-10-18**: It was not error for the trial court to deny the defendant's motion for a peremptory instruction when an eyewitness testified that she was 150 yards away from the defendant at the time she identified him and defense wit-

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nesses testified that the eyewitness was elsewhere at the time of the event and thus could not have even seen the defendant. Other witnesses placed the defendant in the general area of the event at the time and the credibility of the eyewitness was "the especial province of the jury."

***Keser v. Commonwealth*, Ky.App., 243 S.W. 1020 (1922), 10-3-22**: After a hung jury in his first trial for bootlegging, a surprise witness appeared in the defendant's second trial and was the only witness for the Commonwealth to testify that the defendant was upstairs during a search of his home at the moment that a great quantity of hard liquor came flying out of the second-story window. This testimony so completely contradicted the testimony of other witnesses, and was so obviously the only eyewitness evidence to incriminate the defendant, that the surprise of this witness' testimony warranted reversal.

***Fry v. Commonwealth*, Ky.App., 82 S.W.2d 431 (1935), 5-14-35**: When ten witnesses claimed to have identified the defendant as the culprit and the defendant presented fifty-five alibi witnesses in his defense, the court ruled that the jury's verdict of guilty was "palpably against the weight of the evidence."

***Davis v. Commonwealth*, Ky.App., 162 S.W.2d (1946), 5-26-42**: When two eyewitnesses identified the defendant as the stranger who had passed a forged check, and the defendant proved conclusively that he was living in the Johnson City, TN, Veteran's Home at the time, the court wrote:

> "In this case ... the Commonwealth undertook to prove the guilt of the accused by evidence of identification by strangers who saw him only once and who had no reason to observe him particularly or remember his characteristics and personality, some three months later. There was some discrepancy in their description of the man and one of them admitted a lack of positiveness.... We do not question the honesty of purpose or sincerity of belief of the witnesses for the prosecution, but it is very easy to make a mistake in identity, particularly where there was only a casual observation."

***Teer v. Commonwealth*, Ky.App., 212 S.W.2d 106 (1948), 6-1-48**: The defendant was sufficiently identified for the case to survive a challenge to the sufficiency of the evidence on appeal when, even though the "detention with carnal intent" occurred on a darkened porch, the single witness to identify the defendant could recognize the defendant's clothes, general appearance, and peculiar mouth odor within thirty minutes of the event.

***Merritt v. Commonwealth*, Ky.App., 386 S.W.2d 727 (1965), 2-5-65**: The defendant was not entitled to a directed verdict when the single eyewitness against him initially failed to remember his height, eye color, and facial scars while describing the robber to the police, when her in-court testimony was inconsistent with the description she gave to the police, and when the defendant was the only person dressed in street clothes in the police lineup. (The defendant's alibi was provided by his mother who testified that he was home asleep at the time of the robbery.)

***Matherly v. Commonwealth*, Ky.App., 436 S.W.2d 793 (1968), 10-18-68**: The defendant was not entitled to a directed verdict at trial even though he called nine alibi witnesses and the Commonwealth's case rested solely upon the identification testimony of a single witness. Juries decide the weight to give to testimony. (Citing *Fry*, 1935, which distinguished between "disinterested alibi witnesses" and the "chums, the coagitators, kin folks, and the member's of the accused's immediate family" who more often make up a defendant's alibi.)

***Wickware v. Commonwealth*, Ky.App., 444 S.W.2d 272 (1969), 2-14-69**: The identification testimony of an eyewitness was not incredible and inadmissible as a matter of law even though she saw the defendant for only seconds, at a distance of 150 feet. Such factors go to weight and not admissibility.

***Burton v. Commonwealth*, Ky.App., 442 S.W.2d 583 (1969), 6-27-69**: The evidence was not insufficient to support a verdict when the witness testified that he saw the defendant leaving the witness' property at 7:30 p.m. when it was "dusky dark" and described the defendant's car as the same as the car the defendant was arrested in (same colors, make, model, year, and Ohio plates), when the defendant could do no more than to ask the court to take judicial notice of the fact that it is always "dark, dark" in Kentucky at 7:30 p.m. in December, and his alibi consisted only of the testimony of his wife.

***Simmons v. Commonwealth*, Ky.App., 459 S.W.2d 780 (1970), 11-13-70**: The identification testimony of the eyewitness was not so weak, nor the defendant's alibi so strong, that the defendant should have been granted his motion for directed verdict at trial.

***Robinson v. Commonwealth*, Ky.App., 474 S.W.2d 107 (1971), 12-3-71**: Inconsistencies in the identification testimony of two eyewitnesses regarding their descriptions of the defendant at the time of the event (tattoos, hat, gun) were not sufficient as a matter of law to render their testimony incredible. Such factors go to the weight and not the admissibility of the testimony.

***Stephens v. Commonwealth*, Ky.App., 489 S.W.2d 249 (1972), 12-15-72**: To sustain a directed verdict. in a case which rested solely upon the identification of the defendant by a single witness for the Commonwealth, the court would have to find either, "that the testimony of the eyewitness was incredible as a matter of law or that the probative value of the evidence in support of Stephens' alibi was so conclu-

sive and of such quality that it destroyed the probative value of the eyewitness evidence or so impaired it that no reasonable person could conclude that Stephens was guilty beyond a reasonable doubt." Directed verdict was not required when the eyewitness carefully described her assailant and unequivocally identified the defendant at the police station, his extradition hearing, and finally in court.

***Burnett v. Commonwealth*, Ky.App., 523 S.W.2d 229 (1975), 4-25-75**: Improper introduction at trial of defendant's prior felony conviction was prejudicial and warranted reversal when there was "a real question as to the identity of the offender."

***Smith v. Commonwealth*, Ky.App., 563 S.W.2d 494 (1978), 3-3-78**: The defendant's conviction had to be reversed when the case against him rested solely upon the in-court identification of the defendant, all other evidence against him was full of "too many unknowns," and the defendant's alibi had been well established.

***McGuire v. Commonwealth*, Ky.App., 573 S.W.2d 360 (1978), 10-6-78**: In this case, the Commonwealth sought to rehabilitate an eyewitness, (who had initially failed to identify the defendant in a pretrial photo-lineup), by introducing testimony from the witness to the effect that he had received threatening phone calls and was too intimidated to identify the defendant. The court said, "These contentions made by the Commonwealth hold about as much water as a sieve." Ruled: 1) It was reversible error to admit testimony about threats made to the witness when the witness could not say that the defendant made the threats or caused them to be made; 2) the police officer could not testify as an "expert" at being able to tell when a witness has identified a suspect (so that he could tell the jury that the witness' reactions to the photo-lineup indicated that the witness did, indeed, recognize the defendant, even if the witness would not say so).

***Compton v. Commonwealth*, Ky., 602 S.W.2d 150 (1980), 6-3-80**: Witnesses, who had failed to identify the defendant prior to trial and who had identified other persons as the culprit, and whose in-court identifications of the defendant had been "buoyed up" be seeing the defendant in shackles the day before trial and then seeing him sitting next to his attorney on the day of trial, were nevertheless not too weak to justify a "tolerably fair" trial, upon the evidence as a whole.

***Commonwealth v. Sawhill*, Ky., 660 S.W.2d 3 (1983), 11-23-83**: This is currently the controlling case on the standard for a directed verdict motion. "With the evidence viewed in the light most favorable to the Commonwealth ...." Take care to expect the objection that any case earlier than this one was decided using a different standard. ■

CRIMINAL LINEUPS GET A MAKEOVER

by Randy Dotinga
The Christian Science Monitor

Defense attorneys have doubted eyewitness testimony throughout the annals of crime, and often with good reason: People don't always accurately recall what they see, even when the stakes are huge.

Consider the playgoers who sat helplessly as Abraham Lincoln was shot at Ford's Theatre on April 14, 1865. Some swore the assassin they watched escape across the stage couldn't possibly have been a man they knew well - acclaimed actor John Wilkes Booth.

Despite eternal questions about the reliability of memory, criminal lineups remain a mainstay of American justice: Witnesses peer at a handful of potential suspects - sometimes in photographs, sometimes in person - and try to pick out the culprit.

But in a small but growing number of jurisdictions, the traditional lineup is undergoing a makeover. Armed with academic studies, defense lawyers and university researchers say the current system, which confronts witnesses with several potential suspects at once, is rigged against the innocent.

"Witnesses compare one person to another in the lineup, they decide who looks most like the perpetrator, and then they decide that must be the perpetrator," says Gary Wells, an Iowa State University psychology professor and a leading reform advocate. "That seems like a reasonable thing to do. The problem is if the real perpetrator is not in the lineup, there's still somebody who looks more like the perpetrator than the others. That somebody is at great risk."

Professor Wells and others support so-called "sequential" lineups, in which witnesses view each person one by one instead of with five others. In a sequential photo lineup, police officers place each photo in front of a witness, ask if the person committed the crime, then pick up the photo, not allowing the witness to see it again.

The witness "can't compare one to another," Wells says. "The theory is that the victim has to dig deeper to compare each person in the lineup to their memory, not to each other. You end up with a somewhat more conservative procedure."

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There's a downside. Wells acknowledges that sequential lineups produce 15 percent fewer accurate identifications, according to some studies.
But the important point is that incorrect identifications dip by a third, Wells says.

The validity of lineups is hardly a trivial question, even in these days of high-tech sleuthing.

"Much has been made of DNA and trace evidence and fiber evidence, and the TV programs like 'CSI' have really built up the expectation of it being available in every case. But it's not available in the majority," says Paul Logli, state's attorney for Winnebago County in Illinois. Eyewitness testimony is vital, he adds, "and it's important that there be accuracy."

Sequential lineups are now routine in Boston and the entire state of New Jersey, and the state of Illinois is testing the system in three jurisdictions. Elsewhere, traditional lineups - typically consisting of photos, not real people lined up behind glass - remain in place.

Many prosecutors oppose mandating the reforms, which they say will give a free pass to criminals. If sequential lineups become routine, "it will be much more difficult for the [witness] to offer any identification," says Joshua Marquis, district attorney of Oregon's Clatsop County, best known as the home to the town of Astoria. "What we're trying to do is find the truth. We ought to make it easier, not make it more difficult."

While he agrees that lineups shouldn't be suggestive, Mr. Marquis says the research supporting reform is "thin"; indeed, some psychology experts question whether existing studies provide enough support for sequential lineups. Marquis is more willing to support another reform, known as "double blind," in which the police officer conducting a lineup doesn't know which one is the actual suspect. But even on that front, he doesn't accept the assumption that cops try to influence lineups.

"There's no percentage for them in doing that," he says. "We don't get bonuses for getting the wrong person convicted. It's the worst nightmare."

And what of wrongful convictions based on false identifications? Marquis isn't too worried about the prospect. "Has it happened? Yes. Is it a big problem? No."

Defense attorneys disagree, pointing to a number of cases like that of an Illinois man who was convicted of rape after the victim picked him out of a lineup even though she'd initially said the assailant had an earring and tattoo; he had neither. DNA evidence later cleared the man. In another case, a Wisconsin woman erroneously identified an innocent man as her rapist, sending him to prison for 18 years before DNA results cleared him in 2003. The victim is now an advocate for criminal lineup reform.

"We know, in general, that erroneous eyewitness identifications are the largest single cause of wrongful convictions," says Rob Warden, director of Northwestern University's Center on Wrongful Convictions.

Ultimately, "eyewitness identifications are so inaccurate that there's a question about whether they even ought to be admissible in court," Mr. Warden adds, pointing out that lie detector tests - generally considered to be 85 percent accurate - aren't admissible in most American courts.

No one seems to expect that skepticism will lead to the demise of criminal lineups and eyewitness testimony. But the double-blind approach is becoming more accepted, and some law-enforcement officials, like Illinois's Mr. Logli, president-elect of the National District Attorneys Association, are willing to accept tests of the sequential approach.

However, Logli acknowledges the ultimate challenge facing the legal system's approach to the criminal lineup: "I don't know how we're going to make it perfect."

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Imagine the burden of knowing that, despite all your legal training, innocent people are probably going to prison because you can't spare more than a few hours to work on each case.

— *Lexington Herald Leader* Editorial, February 16, 2005

At Your Fingertips: Tips on Using the Internet to Quickly Find What You Need

by Jeff Sherr

In February, the National Legal Aid and Defenders Association (NLADA) and the National Association of Criminal Defense Lawyers (NACDL) announced the opening of its new and improved online Forensic Library at:

http://www.nlada.org/Defender/forensics/for_lib

The web page features a wealth of resources regarding the following topics:

- Arson & Explosives
- Autopsies
- Bitemarks
- Blood Spatter
- Canines
- Child Sex Allegations
- Controlled Substances
- DNA
- Eyewitness Identification
- False Confessions
- Fingerprints
- Firearm Ballistics
- Forensic Laboratories – Overarching Issues
- Forensics Library Administration
- Hair & Fibers
- Handwriting
- Photography
- Psychiatric Risk Assessment
- Serology & Bodily Fluids

Within each topic heading, you can find materials such as briefs, motions, legislative proposals, training resources, jury instructions and court opinions. For example, just some of the resources under the **Eyewitness Identification** link include:

- ABA Report 111C on Eyewitness Identification: This 2004 report includes recommendations for reform, best practices, and summarizes the ABA's position on research.
- Proposed Legislation in Rhode Island
- Online Video of New Jersey Dep. AG Linskey on their reforms: This Streaming Video is taken from Dep. AG Lori Linskey's presentation to the D.C. Council on Nov. 15, 2004. It highlights NJ's successful implementation of eyewitness ID reform.
- NIJ: Eyewitness Evidence: A Trainer's Manual for Law Enforcement: Published in 2003. This manual accompanies the 1999 NIJ Guide and expands some of its finer points.
- *People v. Franco* (NY 2001): Motion and supporting memoranda for requiring double-blind sequential procedures in proposed lineup with client. By David Feige
- D.C. Sample Instructions#1: Failure to Follow Proper Procedures
- Online Video of Dr. G. Wells' Primer on Eyewitness ID Research: This Streaming Video is taken from Dr. Gary Wells' presentation to the D.C. Council on Nov. 15, 2004. It highlights the counterintutive results of research on eyewitness ID.
- Trying Identification Cases: An Outline For Raising Eyewitness ID Issues: Lisa Steele, Champion, November 2004, Page 8.

The library also has a link which enables practitioners to submit their own documents ensuring that this resource will continue to grow and evolve to be an invaluable tool for criminal defense attorneys. ■

It is the daily; it is the small; it is the cumulative injuries of little people that we are here to protect....If we are able to keep our democracy, there must be once commandment: THOU SHALT NOT RATION JUSTICE.

- Learned Hand

Address at the 75th anniversary celebration of the Legal Aid Society of New York, Feb. 16, 1951

American Council of Chief Defenders
National Juvenile Defender Center

TEN CORE PRINCIPLES: FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH INDIGENT DEFENSE DELIVERY SYSTEMS

Preamble[1]

A. Goal of These Principles

The Ten Core Principles for Providing Quality Delinquency Representation through Indigent Defense Delivery Systems are developed to provide criteria by which an indigent defense system may fully implement the holding of *In Re: Gault*.[2] Counsel's paramount responsibilities to children charged with delinquency offenses are to zealously defend them from the charges leveled against them and to protect their due process rights. The Principles also serve to offer greater guidance to the leadership of indigent defense providers as to the role of public defenders, contract attorneys or assigned counsel in delivering zealous, comprehensive and quality legal representation on behalf of children in delinquency proceedings as well as those prosecuted in adult court.[3]

While the goal of the juvenile court has shifted in the past decade toward a more punitive model of client accountability and public safety, juvenile defender organizations should reaffirm the fundamental purposes of juvenile court: (1) to provide a fair and reliable forum for adjudication; and (2) to provide appropriate support, resources, opportunities and treatment to assure the rehabilitation and development of competencies of children found delinquent. Delinquency cases are complex, and their consequences have significant implications for children and their families. Therefore, it is of paramount importance that children have ready access to highly qualified, well-resourced defense counsel.

Defender organizations should further reject attempts by courts or by state legislatures to criminalize juvenile behavior in order to obtain necessary services for children. Indigent defense counsel should play a strong role in determining this and other juvenile justice related policies.

In 1995, the American Bar Association's Juvenile Justice Center published *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, a national study that revealed major failings in juvenile defense across the nation. The report spurred the creation of the National Juvenile Defender Center and nine regional defender centers around the country. The National Juvenile Defender Center conducts state and county assessments of juvenile indigent defense systems that focus on access to counsel and measure the quality of representation.[4]

B. The Representation of Children and Adolescents is a Specialty

The Indigent Defense Delivery System must recognize that children and adolescents are at a crucial stage of development and that skilled juvenile delinquency defense advocacy will positively impact the course of clients' lives through holistic and zealous representation.

The Indigent Defense Delivery System must provide training regarding the stages of child and adolescent development and the advances in brain research that confirm that children and young adults do not possess the same cognitive, emotional, decision-making or behavioral capacities as adults. Expectations, at any stage of the court process, of children accused of crimes must be individually defined according to scientific, evidence-based practice.

The Indigent Defense Delivery System must emphasize that it is the obligation of juvenile defense counsel to maximize each client's participation in his or her own case in order to ensure that the client understands the court process and to facilitate the most informed decision making by the client. The client's minority status does not negate counsel's obligation to appropriately litigate factual and legal issues that require judicial determination and to obtain the necessary trial skills to present these issues in the courtroom.

C. Indigent Defense Delivery Systems Must Pay Particular Attention to the Most Vulnerable and Over-Represented Groups of Children in the Delinquency System

Nationally, children of color are severely over-represented at every stage of the juvenile justice process. Research has demonstrated that involvement in the juvenile court system increases the likelihood that a child will subsequently be convicted and incarcerated as an adult. Defenders must work to increase awareness of issues such as disparities in race and class, and they must zealously advocate for the elimina-

tion of the disproportionate representation of minority youth in juvenile courts and detention facilities.

Children with mental health and developmental disabilities are also overrepresented in the juvenile justice system. Defenders must recognize mental illness and developmental impairments, legally address these needs and secure appropriate assistance for these clients as an essential component of quality legal representation.

Drug- and alcohol-dependent juveniles and those dually diagnosed with addiction and mental health disorders are more likely to become involved with the juvenile justice system. Defenders must recognize, understand and advocate for appropriate treatment services for these clients.

Research shows that the population of girls in the delinquency system is increasing, and juvenile justice system personnel are now beginning to acknowledge that girls' issues are distinct from boys'. Gender-based interventions and the programmatic needs of girls, who have frequently suffered from abuse and neglect, must be assessed and appropriate genderbased services developed and funded.

In addition, awareness and unique advocacy are needed for the special issues presented by lesbian, gay, bisexual and transgender youth.

Ten Principles

1. The Indigent Defense Delivery System Upholds Juveniles' Right to Counsel Throughout the Delinquency Process and Recognizes The Need For Zealous Representation to Protect Children

A. The indigent defense delivery system should ensure that children do not waive appointment of counsel. The indigent defense delivery system should ensure that defense counsel are assigned at the earliest possible stage of the delinquency proceedings.[5]

B. The indigent defense delivery system recognizes that the delinquency process is adversarial and should provide children with continuous legal representation throughout the delinquency process including, but not limited to, detention, pre-trial motions or hearings, adjudication, disposition, post-disposition, probation, appeal, expungement and sealing of records.

C. The indigent defense delivery system should include the active participation of the private bar or conflict office whenever a conflict of interest arises for the primary defender service provider.[6]

2. The Indigent Defense Delivery System Recognizes that Legal Representation of Children is a Specialized Area of the Law

A. The indigent defense delivery system recognizes that representing children in delinquency proceedings is a complex specialty in the law and that it is different from, but equally as important as, the legal representation of adults. The indigent defense delivery system further acknowledges the specialized nature of representing juveniles processed as adults in transfer/waiver proceedings.[7]

B. The indigent defense delivery system leadership demonstrates that it respects its juvenile defense team members and that it values the provision of quality, zealous and comprehensive delinquency representation services.

C. The indigent defense delivery system leadership recognizes that delinquency representation is not a training assignment for new attorneys or future adult court advocates, and it encourages experienced attorneys to provide delinquency representation.

3. The Indigent Defense Delivery System Supports Quality Juvenile Delinquency Representation Through Personnel and Resource Parity[8]

A. The indigent defense delivery system encourages juvenile representation specialization without limiting attorney and support staff's access to promotional progression, financial advancement or personnel benefits.

B. The indigent defense delivery system provides a professional work environment and adequate operational resources such as office space, furnishings, technology, confidential client interview areas[9] and current legal research tools. The system includes juvenile representation resources in budgetary planning to ensure parity in the allocation of equipment and resources.

4. The Indigent Defense Delivery System Utilizes Expert and Ancillary Services to Provide Quality Juvenile Defense Services

A. The indigent defense delivery system supports requests for essential expert services throughout the delinquency process and whenever individual juvenile case representation requires these services for effective and quality representation. These services include, but are not limited to, evaluation by and testimony of mental health professionals, education specialists, forensic evidence examiners, DNA experts, ballistics analysis and accident reconstruction experts.

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B. The indigent defense delivery system ensures the provision of all litigation support services necessary for the delivery of quality services, including, but not limited to, interpreters, court reporters, social workers, investigators, paralegals and other support staff.

5. The Indigent Defense Delivery System Supervises Attorneys and Staff and Monitors Work and Caseloads

A. The leadership of the indigent defense delivery system monitors defense counsel's caseload to permit the rendering of quality representation. The workload of indigent defenders, including appointed and other work, should never be so large as to interfere with the rendering of zealous advocacy or continuing client contact nor should it lead to the breach of ethical obligations.[10] The concept of workload may be adjusted by factors such as case complexity and available support services.

B. Whenever it is deemed appropriate, the leadership of the indigent defense delivery system, in consultation with staff, may adjust attorney case assignments and resources to guarantee the continued delivery of quality juvenile defense services.

6. The Indigent Defense Delivery System Supervises and Systematically Reviews Juvenile Defense Team Staff for Quality According to National, State and/or Local Performance Guidelines or Standards

A. The indigent defense delivery system provides supervision and management direction for attorneys and all team members who provide defense representation services to children.[11]

B. The leadership of the indigent defense delivery system adopts guidelines and clearly defines the organization's vision as well as expectations for the delivery of quality legal representation. These guidelines should be consistent with national, state and/or local performance standards, measures or rules.[12]

C. The indigent defense delivery system provides administrative monitoring, coaching and systematic reviews for all attorneys and staff representing juveniles, whether contract defenders, assigned counsel or employees of defender offices.

7. The Indigent Defense System Provides and Supports Comprehensive, Ongoing Training and Education for All Attorneys and Support Staff Involved in the Representation of Children

A. The indigent defense delivery system supports and encourages juvenile defense team members through internal and external comprehensive training[13] on topics including, but not limited to, detention advocacy, litigation and trial skills, dispositional planning, post-dispositional practice, educational rights, appellate advocacy and administrative hearing representation.

B. The indigent defense delivery system recognizes juvenile delinquency defense as a specialty that requires continuous training in unique areas of the law.[14] In addition to understanding the juvenile court process and systems, juvenile team members should be competent in juvenile law, the collateral consequences of adjudication and conviction, and other disciplines that uniquely impact juvenile cases, such as, but not limited to:

1. Administrative appeals
2. Child welfare and entitlements
3. Child and adolescent development
4. Communicating and building attorney-client relationships with children and adolescents
5. Community-based treatment resources and programs
6. Competency and capacity
7. Counsel's role in treatment and problem solving courts15
8. Dependency court/abuse and neglect court process
9. Diversionary programs
10. Drug addiction and substance abuse
11. Ethical issues and considerations
12. Gender-specific programming
13. Immigration
14. Mental health, physical health and treatment
15. Racial, ethnic and cultural understanding
16. Role of parents/guardians
17. Sexual orientation and gender identity awareness
18. Special education
19. Transfer to adult court and waiver hearings
20. Zero tolerance, school suspension and expulsion policies

8. The Indigent Defense Delivery System Has an Obligation to Present Independent Treatment and Disposition Alternatives to the Court

A. Indigent defense delivery system counsel have an obligation to consult with clients and, independent from court or probation staff, to actively seek out and advocate for treatment and placement alternatives that best serve the unique needs and dispositional requests of each child.

B. The leadership and staff of the indigent defense delivery system work in partnership with other juvenile justice agencies and community leaders to minimize custodial detention and the incarceration of children and to support the creation of a continuum of community-based, culturally sensitive and gender-specific treatment alternatives.

C. The indigent defense delivery system provides independent post-conviction monitoring of each child's treatment, placement or program to ensure that rehabilitative needs are met. If clients' expressed needs are not effectively addressed, attorneys are responsible for intervention and advocacy before the appropriate authority.

9. The Indigent Defense Delivery System Advocates for the Educational Needs of Clients

A. The indigent defense delivery system recognizes that access to education and to an appropriate educational curriculum is of paramount importance to juveniles facing delinquency adjudication and disposition.

B. The indigent defense delivery system advocates, either through direct representation or through collaborations with community-based partners, for the appropriate provision of the individualized educational needs of clients.

C. The leadership and staff of the indigent defense delivery system work with community leaders and relevant agencies to advocate for and support an educational system that recognizes the behavioral manifestations and unique needs of special education students.

D. The leadership and staff of the indigent defense delivery system work with juvenile court personnel, school officials and others to find alternatives to prosecutions based on zero tolerance or school-related incidents.

10. The Indigent Defense Delivery System Must Promote Fairness and Equity For Children

A. The indigent defense delivery system should demonstrate strong support for the right to counsel and due process in delinquency courts to safeguard a juvenile justice system that is fair, non-discriminatory and rehabilitative.

B. The leadership of the indigent defense delivery system should advocate for positive change through legal advocacy, legislative improvements and systems reform on behalf of the children whom they serve.

C. The leadership and staff of the indigent defense delivery system are active participants in the community to improve school, mental health and other treatment services and opportunities available to children and families involved in the juvenile justice system.

Notes

1. These principles were developed over a one-year period through a joint collaboration between the National Juvenile Defender Center and the American Council of Chief Defenders, a section of the National Legal Aid and Defender Association (NLADA), which officially adopted them on December 4, 2004.

2. 387 U.S. 1 (1967). According to the IJA/ABA Juvenile Justice Standard Relating to Counsel for Private Parties 3.1 (1996), "the lawyer's principal duty is the representation of the client's legitimate interests" as distinct and different from the best interest standard applied in neglect and abuse cases. The Commentary goes on to state that "counsel's principal responsibility lies in full and conscientious representation" and that "no lesser obligation exists when youthful clients or juvenile court proceedings are involved."

3. For purposes of these Principles, the term "delinquency proceeding" denotes all proceedings in juvenile court as well as any proceeding lodged against an alleged status offender, such as for truancy, running away, incorrigibility, etc.

4. Common findings among these assessments include, among other barriers to adequate representation, a lack of access to competent counsel, inadequate time and resources for defenders to prepare for hearings or trials, a juvenile court culture that encourages pleas to move cases quickly, a lack of pretrial and dispositional advocacy and an over-reliance on probation. For more information, see *Selling Justice Short: Juvenile Indigent Defense in Texas* (2000); *The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana* (2001); *Georgia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2001); *Virginia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2002); *An Assessment of Counsel and Quality of Representation in Delinquency Proceedings in Ohio* (2003); *Maine: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Maryland: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Montana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *North Carolina: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Washington: An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters* (2003).

5. *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 3.

6. A conflict of interest includes both codefendants and intra-family conflicts, among other potential conflicts that may arise. See also *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 2.

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7. For purposes of this Principle, the term "transfer/waiver proceedings" refers to any proceedings related to prosecuting youth in adult court, including those known in some jurisdictions as certification, bind-over, decline, remand, direct file, or youthful offenders.

8. *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 8.

9. *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 4.

10. See National Study Commission on Defense Services, *Guidelines for Legal Defense System in the United States* (1976), 5.1, 5.3; American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992), 5-5.3; American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* (3rd ed., 1993), 4-1.3(e); National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts, Chapter 13*, "The Defense" (1973), 13.12; National Legal Aid and Defender Association and American Bar Association, *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* (NLADA, 1984; ABA, 1985), III-6, III-12; National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems* (1989), 4.1,4.1.2; *ABA Model Code of Professional Responsibility DR 6-101*; *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 5.

11. *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principles 6 and 10.

12. For example, Institute of Judicial Administration-American Bar Association, *Juvenile Justice Standards* (1979); National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts, Chapter 13*, "The Defense" (1973); National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976); American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992); American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* (3rd ed., 1993); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995).

13. *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 9; National Legal Aid and Defender Association, *Training and Development Standards* (1997), Standards 1 to 9.

14. National Legal Aid and Defender Association, *Training and Development Standards* (1997), Standard 7.2, footnote 2.

15. American Council of Chief Defenders, *Ten Tenets of Fair and Effective Problem Solving Courts* (2002).

*The **American Council of Chief Defenders** (ACCD), a section of the National Legal Aid & Defender Association, is dedicated to promoting fair justice systems by advocating sound public policies and ensuring quality legal representation to people who are facing a loss of liberty or accused of a crime who cannot afford an attorney. For more information, see www.nlada.org or call (202) 452-0620.*

*The **National Juvenile Defender Center** (NJDC) is committed to ensuring excellence in juvenile defense and promoting justice for all children. For more information, see www.njdc.info or call (202) 452-0010.* ■

It is more important that innocence be protected than it is that guilt be punished, for guilt and crimes are so frequent in this world that they cannot all be punished. But if innocence itself is brought to the bar and condemned, perhaps to die, then the citizen will say, "whether I do good or whether I do evil is immaterial, for innocence itself is no protection," and if such an idea as that were to take hold in the mind of the citizen that would be the end of security whatsoever.

— John Adams

The Psychology of Litigation
Battered Child Syndrome – "Why Didn't She Tell?"

by Diana McCoy, Ph.D.

A common concern when a juvenile has committed a homicide and later alleges that she or he had been abused by the deceased, often a family member, is why that child told no one despite many opportunities to have done so. This is particularly problematic when the child pointblank denies abuse to the police or his or her attorney yet later tells someone else about the abuse, often during a psychological evaluation.

An understanding of this involves an exploration of child and adolescent developmental norms, gender roles, as well as societal values and how these interplay with Posttraumatic Stress Disorder (PTSD), the usual diagnosis when there has been severe abuse. PTSD is a mental illness resulting from very severe trauma that is perceived as life threatening. It renders the individual in a constant state of anxiety, with coping taking the form of avoiding anything that sets off thoughts of the trauma, in this case some version of abuse. Battered women and combat veterans often warrant this diagnosis as well.

A critical point for anyone working with suspected abuse victims, child or adult, male or female, is the awareness that talking about the abuse before or even after the homicide is something that someone with PTSD most definitely does not want to do. The DSM-IV lists avoidance of talking about the trauma as a symptom of PTSD. To talk about the abuse is to be reminded of behavior from a feared other that was sometimes painful, often humiliating, and always terrifying. An individual with PTSD spends significant energy each day avoiding any reminders that might trigger these unpleasant sensations. So uncomfortable are thoughts of the abuse that not talking about the abuse oftentimes takes priority over working on one's defense with one's attorney, a difficult concept for non-PTSD sufferers to grasp in view of the high stakes involved.

Sometimes a child may take the position that she has told you all you need to know about her horrific experiences with the deceased in order for you to mount a defense on her behalf. She may believe that telling you or anyone else the whole story in every detail should not be necessary, that what she has already told you should be sufficient for you to help her. The paradox confounding child abuse victims is that often they feel tremendous shame for having allowed the abuse to continue yet at the same time were powerless to stop it. Sometimes I will have a child write what was said or done to him or her, since saying it aloud to another person is so unbearably humiliating.

Diana McCoy

In my work with battered women I have found that the usual sequence following a homicide is to first learn from these women about psychological abuse, then physical abuse, and finally sexual abuse, with each step requiring varying amounts of time. My experience with children has been that disclosures are often in the same order but revelations come much quicker.

Young people, especially girls, are much more likely to discuss sexual abuse with a female. In a recent case in which I was involved, the credibility of a preadolescent female's post homicide allegations of sexual abuse was called into question because she told no one about the deceased having sexually abused her after being questioned first by a roomful of male police officers, then her guardian *ad litem* and attorney, both men, and finally a male psychiatrist and male psychologist at the hospital where she was evaluated following the homicide.

The most obvious reason that battered children do not disclose the battering prior to the homicide is that of fear - fear that they will not be believed, fear that they will be put back into the home with the abuser and possibly killed for having told, fear that a loved one or pet will be murdered in retribution, and fear that the abuse revelation will not be kept confidential such that their peer group will learn about the abuse, something teenagers in particular seek to avoid at all costs.

Feeding the concept of fear is the poor self-esteem emanating from being repeatedly and consistently devalued over time as a result of the psychological abuse that is almost always a part of the battering package. Psychological abuse, as distinguished from emotional abuse, is a destructive pattern of consistently tearing someone down so as to shatter his or her self-concept, often putting that person in a state of constant fear, *i.e.*, "No one cares about you," "It doesn't matter to anyone what I do to you," "No one will ever miss

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you if I take you out back and kill you," etc. Habitually feeling oneself to be small and inconsequential from this kind of brainwashing exacerbates the sense of the abuser as having almost superhuman powers. One little girl I interviewed haltingly told me of her stepfather's mistreatment of her in a whisper, so sure was she that he always knew everything she said about him whether he was physically present or not.

Fear of loss of connection, even if that connection is within an abusive family, is a very powerful incentive for female victims to keep silent, with relationship being central to female emotional development (Gilligan, 1982). Despite being a victim of abuse, a female battered child will often not speak out for fear of losing the relationship with the perpetrator, especially since that individual may have alternated abuse with confusing periods of care-taking and even kindness. Maintaining relationships with others within the family is also a consideration as well as relationships that may have been established within the community, with most children these days being well aware that revelations about abuse are likely to disrupt these important affiliations.

Societal issues also come into play to enforce secrecy. It often takes years for females in our culture to sort out the fine points of what they do and do not have to tolerate in our patriarchal society, where those in power are men, the rules are made by men, and women and children are disenfranchised. Since studies indicate that in the United States every six minutes a woman is raped, every fifteen seconds a woman is beaten by her husband or partner, a female's risk of being raped is one in four, and the risk for girls of being sexually abused by an adult is one in three, it is understandably difficult for a female child to have any assurance that she and she alone is in charge of her own body (Mirkin, 1994).

A sense of no one caring stems from being part of a dysfunctional family, where typically family members may know the child is being abused, and the child knows they know, but no one intervenes on his or her behalf. This stems from the fact that these individuals, too, may be abuse victims in some form or fashion, usually at the hands of the same perpetrator, and are at varying levels of fear or denial about their own situation. A child may reason that, if even the people who are supposed to love you do not think your suffering is worth going out on a limb for, then why would anyone else care enough to help?

Abusive families often have a history of frequently moving from place to place for obvious reasons: numerous school changes lessen opportunities for the child to make friends and then confide in these friends, possibly revealing the abuse. In any event, the child, failing to establish trusting relationships within the family, consequently has little experience establishing other kinds of relationships, including peer relationships.

Those battered children who may begin forming peer relationships despite obstacles often do so around age 12 or 13, when the physical development of adolescence begins and heterosexual interest is piqued along with the phenomenon, especially with girls, of "best friends." Inasmuch as best friends, (whose developmental purpose is said to be a kind of rehearsal for what will later be an abiding interest in a mate), are confidantes, this is often a critical juncture when abuse may come to the attention of outsiders.

It is at this point that battered children may elect to "test the water" by making veiled references about the abuse to peers or even parents of peers. It has been my experience that although at the time these children, who are usually well schooled in keeping family secrets, believe they are making very revealing statements to these carefully selected individuals, they may later acknowledge in retrospect that perhaps they did not say as much about the abuse as they thought they had. The recipients of these red flags may sense something is not quite right but not know how to interpret the clues, especially if direct questioning along the lines of "Are you being abused?" meets with a negative response, as is very often the case.

When the abuse reaches the level that the child fears for his or her life, typically because of the same sorts of things a battered woman describes, *i.e.*, an escalating pattern of abusive behavior, outright threats to kill the victim by a particular date, etc., and in the absence of anyone coming to the child's aid, that child, in a state of panic and desperation, may feel she has to save herself because no one else will. In consideration of a child's immaturity in judgment, perception of the abuser as the most powerful being on earth, abbreviated time sense such that a week is akin to a month or more in adult time, and the characteristic impulsivity of youth, a young person, especially one suffering from PTSD and thus highly anxious and sensitized to danger, may take quick action.

Establishing the likelihood that abuse occurred, along with determining the existence of mental illness associated with the abuse, is the basis of the forensic psychological evaluation of the battered child who commits homicide. A link must then be established between the mental disorder and the subsequent criminal act. In self defense cases of this nature, the testimony of an expert in battered child syndrome is helpful to the trier of fact for the same reason that expert testimony about battered woman syndrome is helpful - it can assist in understanding why the child, in view of her previous experiences with the abuser, honestly believed the deceased to have been an immediate threat necessitating violence on her part.

Such an undertaking involves the forensic psychological examiner sifting backwards through time in an effort to learn about the red flags that may have been inadvertently missed or misinterpreted by others. This may include such things

as a teacher believing a teenager is wearing heavy, long sleeved clothing in warm weather to conceal her developing body whereas in actuality this is to protect herself from her father's blows and to hide her bruises; a school mate noticing marks on the abuse victim's wrists and learning they were the result of a suicide attempt but telling no one about this; a review of school disciplinary records noting the child was suspended for fighting and with it later learned that the fight was motivated by the child's abhorrence of being touched; the abuse victim's grades plummeting in the weeks preceding the homicide, coinciding with the perpetrator's abuse escalating, and so forth.

Sometimes the child's violent behavior is in response to repeatedly witnessing the abuse of a beloved third person, with PTSD also a viable diagnosis involving the defense of a third party. In some cases a defense of insanity or diminished capacity may be appropriate for those suffering from PTSD if the person's violent behavior stems from re-experiencing an earlier trauma, such as when a child who is in the throes of a flashback attacks someone because she associates that person with earlier abuse. Mental disorders other than PTSD may stem from the abuse and likewise be relevant, such as major depression, with or without psychosis, and other anxiety disorders. The perpetrator's forcing of an abuse victim to participate in a crime may also warrant an exploration of battered child syndrome and its relevance to a defense of duress.

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Endnotes:

Gilligan, Carole. *In a different voice: psychological theory and women's development.* Cambridge, MA: Harvard University Press, 1982.

Mirkin, Marsha Pravder. Female adolescence revisited: understanding girls in their sociocultural contexts. In Mirkin, Marsha Pravder (Ed.), *Women in context; toward a feminist reconstruction of psychotherapy* (pp.77-95). New York: The Guilford Press, 1994. ■

DPA Welcomes Defender Leaders From Across the Country for its Defender Management Institute

On January 31, DPA convened a three-day Defender Management Institute that attracted some 90 participants and faculty from across the nation. The event, held at the Holiday Inn Cincinnati Airport, featured faculty members from California, the District of Columbia, Georgia, Kentucky, Minnesota, New Mexico, New York, Tennessee, and West Virginia. Participants came from several of those states, plus Missouri, Oregon, and Virginia.

Public Advocate Ernie Lewis greeted the group with a challenge to create communities of hope and justice in their home areas, for indigent clients and also for their own staffs. A theme of the three-day event was that defenders can learn to use their considerable litigation skills in supervising colleagues and managing staff. Leaders, such as field office directing attorneys and also non-attorney supervisors, enjoyed a unique opportunity to step away from their offices and hear from experts in the field. Daily lectures and demonstrations by national and Kentucky presenters added to an experiential program that placed great emphasis on small group work with coaches, where skills were applied to the participants' real-life issues.

Plenary session topics included effective communication, client-centered management, coaching of staff, confronting dysfunction, and the hiring and retention of quality staff. Overlaying all of the sessions was a framework, offered at the outset by Dr. Alma Hall of Georgetown College, for viewing problems and other situations with a goal of choosing the most effective courses of action. Dr. Hall urged participants to use a variety of viewpoints when analyzing a situation, rather than always reverting to just the one or maybe two viewpoints which come most naturally to each individual based upon his or her personality and life experiences.

By opening this outstanding event to non-Kentucky participants for a registration fee, DPA was able to dramatically reduce the cost of the program for some 40 of its own staff. Participants came from DPA's Trial Division, Post-Trial Division, and Law Operations Division. In this way, DPA sought to equip its supervisory staff for achieving excellence in their state government roles and in complying with the rules of professional conduct, which charge attorney supervisors with ensuring their staff's ethical practices.

At the end of the Defender Management Institute, one participant wrote on the evaluation form: "This was some of the best training I have had while at the DPA. The tone, the content, the presentations all were superb. The participation from other states was wonderful." ■

RULE AMENDMENTS

by Karen Maurer

Amendments to the Kentucky Rules of Court went into effect in January. Some of them are pertinent to the practice of criminal law. The rule changes most likely to affect criminal law practice are noted below. This is not an exhaustive list. There are additional amendments, but they are less likely to be pertinent to the practice of criminal law.

Note that many rules have been deleted. This is because the Kentucky Rules of Evidence already cover the subject matter in those deleted rules of practice. Therefore, while it appears that many important rules have been deleted, in fact these rules are simply provided for elsewhere in the KRE.

For a complete list of the rule amendments, see the November 2004 issue of *Bench and Bar*. The rules' amendments became effective January 1, 2005.

I. Amendments to the Rules of Civil Procedure

A. CR 26.01 Discovery methods

CR 26.01 shall read:

(1) Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under Rule 26.03, the frequency of use of these methods is not limited.

(2) Electronic Format. In addition to serving a hard copy, a party propounding or responding to interrogatories, requests for production, or requests for admission is encouraged to serve the discovery request or response in an electronic format (either on a disk or as an electronic document attachment) in any commercially available word processing software system. If transmitted on disk, each disk shall be labeled, identifying the caption of the case, the document, and the word processing version in which it is being submitted. If more than one disk is used for the same document, each disk shall be in the same word processing version, shall be similarly labeled and also shall be sequentially numbered. If transmitted by electronic mail, the document must be accompanied by electronic memorandum providing the forgoing identifying information.

B. CR 26.02(4)(a) Scope of discovery

Subsection (a) of Section (4) of CR 26.02 shall read:

(4) Trial preparation: Experts

Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) After a party has identified any expert witness in accordance with (4)(a)(i) of this rule or otherwise, any other party may obtain further discovery of the expert witness by deposition upon oral examination or written questions pursuant to Rules 30 and 31. The court may order that the deposition be taken, subject to such restrictions as to scope and such provisions, pursuant to paragraph (4)(c) of this rule, concerning fees and expenses as the court may deem appropriate.

C. [CR 43.05 Scope of examination and cross-examination; leading questions]

CR 43.05 is deleted. See KRE 104 and 611.

D. [CR 43.06 Same; examination of adverse party]

CR 43.06 is deleted. See KRE 611.

E. [CR 43.07 Impeachment of witnesses]

CR 43.07 is deleted. See KRE 608 and 609.

F. [CR 43.08 Same; prior contradictory statements]

CR 43.08 is deleted. See KRE 613.

G [CR 43.09 SEPARATION OF WITNESSES]

CR 43.09 is deleted. See KRE 615.

H. [CR 43.10 AVOWALS]

CR 43.10 is deleted. See KRE 103.

I. [CR 43.11 Affirmation in lieu of oath]

CR 43.11 is deleted. See KRE 603.

J. [CR 44.02 Proof of lack of record]

CR 44.02 is deleted.

K. CR 72.02(1) When and how taken

Section (1) of CR 72.02 shall read:

(1) Appeals from the district court to the circuit court in civil cases shall be taken by filing a notice of appeal in the district court and paying the required filing fee.

L. [CR 76.04 Time in which appeals and cross-appeals must be perfected]

CR 76.04 is deleted.

M. CR 76.12(3) and (4)(g) Briefs

Section (3) and Subsection (g) of Section (4) of CR 76.12 shall read:

(3) Number of Copies

(a) Briefs in the Court of Appeals shall be filed in quintuplicate.In the Supreme Court ten copies shall be filed.

(b) Filing of Electronic Briefs on Diskette or CD-ROM. Any party filing a brief on the merits with the Clerk of the Supreme Court may, and is encouraged to, file with the required copies of the paper brief an electronic brief thereof on a floppy disk or CD-ROM (preferred). The Clerk of the Supreme Court shall receive and file the floppy disk or CD-ROM with the papers of that case.

(i) All electronic briefs shall be on a 3.5 floppy disk or CD-ROM that can be read via Microsoft Windows and shall contain in a single file all information contained in the paper brief, including the cover, the table of contents, and the certifications, in the same order as the paper brief. The electronic briefs may also contain hypertext links or bookmarks to cases, statutes and other reference materials available on the Internet or appended to the brief.

(ii) An electronic brief must be formatted in Microsoft Word (preferred) or WordPerfect.

(iii) An electronic brief shall contain a label indicating:

(a) The style and docket number of the case,

(b) The name of the document contained on the diskette or CD-ROM, and

(c) The language format of the document.

(4) Form and content

(g) *Form of citations*. All citations of Kentucky Statutes shall be made from the official edition of the Kentucky Revised Statutes and may be abbreviated "KRS." The citation of Kentucky cases reported after January 1, 1951, shall be in the following form for decisions of the Supreme Court and its predecessor court: *Doe v. Roe*, ___ S.W.2d___ or ___ S.W.3d___ (Ky. [date]), or for reported decisions of the present Court of Appeals, *Doe v. Roe*, ___S.W.2d___ or ___S.W.3d___ (Ky.App. [date]). For cases reported prior thereto both Kentucky Reports and Southwestern citations shall be given.

N. CR 76.16(5)(b) Oral arguments

Subsection (b) of Section (5) of CR 76.16 shall read:

(c) In all cases before the Supreme Court to which paragraph (5)(a) of this rule does not apply, appellant or cross-appellant not later than ten (10) days before oral argument a notice of issues in the order to be argued that the appellant or cross-appellant intends to argue orally, with specific reference to the argument number and page numbers of each issue in the appellant's or cross-appellant's brief. If the appellant or cross-appellant fails to do so, without good cause, the appellant's oral argument or the portion of the cross-appellant's oral argument devoted to issues raised in the cross-appeal shall be limited to answering questions from the court.

O. CR 76.22 Advancement

CR 76.22 shall read:

Appeals may be advanced for good cause shown.

II. Amendments to the Rules of Criminal Procedure

A. RCr 5.06 Attendance of witnesses

RCr 5.06 shall read:

The circuit court, upon request of the foreperson of the grand jury or of the attorney for the Commonwealth, shall issue subpoenas for witnesses. The attendance of witnesses may be coerced as in other judicial proceedings. RCr 7.02 shall apply to grand jury subpoenas.

B. RCr 7.24(3)(B) and (C) Discovery and inspection

Subsections (B) and (C) of Section (3) of RCr 7.24 shall read:

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(B)(i) If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his or her guilt or punishment, the defendant shall, at least 20 days prior to trial, or at such other time as the court may direct upon reasonable notice to the parties, notify the attorney for the Commonwealth in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(ii) When a defendant has filed the notice required by paragraph (B)(i) of this rule, the court may, upon motion of the attorney for the Commonwealth, order the defendant to submit to a mental examination. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, shall be admissible into evidence against the defendant in any criminal proceeding. No testimony by the expert based upon such statement, and no fruits of the statement shall be admissible into evidence against the defendant in any criminal proceeding except upon an issue regarding mental condition on which the defendant has introduced testimony. If the examination ordered under this rule pertains to the issue of punishment (excluding a pretrial hearing under KRS 532.135), the court shall enter an order prohibiting disclosure to the attorneys for either party of any self-incriminating information divulged by the defendant until the defendant is found guilty of a felony offense, unless the parties otherwise enter into an agreement regulating disclosure.

(C) If there is a failure to give notice when required by this rule or to submit to an examination ordered by the court under this rule, the court may exclude such evidence or the testimony of any expert witness offered by the defendant on the issue of his or her mental condition.

C. [RCr 9.46 Expert witnesses]

RCr 9.46 is deleted. See KRE 706.

D. [RCr 9.48 Separation of witnesses]

RCr 9.48 is deleted. See KRE 615.

E. [RCr 9.52 Avowals]

RCr 9.52 is deleted. See KRE 103.

F. RCr 9.78 Confessions, Searches, and Witness Identification; Suppression of Evidence

RCr 9.78 shall read:

If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities, (b) the fruits of a search, or (c) witness identification, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

G RCr 12.05 Petition for Rehearing and Discretionary Review Motion not required for exhaustion

New rule RCr 12.05 shall read:

In all appeals from criminal convictions or post-conviction relief matters a litigant shall not be required to petition for rehearing or to file a motion for discretionary review to either the Kentucky Court of Appeals or Kentucky Supreme Court following an adverse decision of either the circuit court or Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the appellate court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. If rehearing or discretionary review is sought on less than all of the claims of error presented on appeal, the litigant, nevertheless, shall be deemed to have exhausted all available state remedies respecting the claim(s) of error for which rehearing or discretionary review is not sought. Finality of the opinion for all claims of error is governed by CR 76.30(2).

H. RCr 13.03 Review of trial dockets

New rule RCr 13.03 shall read:

At least once a year trial courts shall review all pending criminal actions on their dockets. Notice shall be given to each attorney of record of every case in which no pretrial step has been taken within the last year, that the case will be dismissed in thirty days for want of prosecution except for good cause shown. The court shall enter an order dismissing without prejudice each case in which no answer or an insufficient answer to the notice is made. This rule shall not apply to cases where the trial court has issued an arrest warrant based on the defendant's failure to appear in the case. ■

Public Advocacy Seeks Nominations

We seek nominations for the Department of Public Advocacy Awards which will be presented at this year's 32nd Annual Conference in June. An Awards Search Committee recommends two recipients to the Public Advocate for each of the following awards. The Public Advocate then makes the selection. Contact Lisa Blevins at 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; Tel: (502) 564-8006 ext. 236; Fax: (502) 564-7890; or Email: Lisa.Blevins@ky.gov for a nomination form. **All nominations are to be submitted on this form by April 4, 2005.**

Gideon Award: Trumpeting Counsel for Kentucky's Poor

In celebration of the 30th Anniversary of the U.S. Supreme Court's landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the *Gideon* Award was established in 1993. It is presented at the Annual Conference to a person who has demonstrated extraordinary commitment to equal justice and who has courageously advanced the *right to counsel* for the poor in Kentucky. Clarence Earl Gideon was denied counsel and was convicted. After his hand-written petition to the U.S. Supreme Court was successful, counsel was assigned for his retrial and that counsel obtained an acquittal for Mr. Gideon.

ROSA PARKS AWARD: FOR ADVOCACY FOR THE POOR

Established in 1995, the *Rosa Parks* Award is presented at the Annual DPA Public Defender Conference to a non-attorney who has galvanized other people into action through their dedication, service, sacrifice and commitment to the poor. After Rosa Parks was convicted of violating the Alabama bus segregation law, Martin Luther King said, "I want it to be known that we're going to work with grim and bold determination to gain justice... And we are not wrong.... If we are wrong justice is a lie. And we are determined...to work and fight until justice runs down like water and righteousness like a mighty stream."

NELSON MANDELA LIFETIME ACHIEVEMENT AWARD

Established in 1997, this award honors an attorney for a lifetime of dedicated service and outstanding achievements in providing, supporting, and leading in a systematic way the increase in the right to counsel for Kentucky indigent criminal defendants. Nelson Mandela was the recipient of the 1993 Nobel Peace Prize, President of the African National Congress and head of the Anti-Apartheid movement. His life is an epic of struggle, setback, renewal hope and triumph with a quarter century of it behind bars. His autobiography ended, "I have walked the long road to freedom. I have tried not to falter; I have made missteps along the way. But I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb... I can rest only for a moment, for with freedom come responsibilities, and I dare not linger, for my long walk is not yet ended."

IN RE GAULT AWARD: FOR JUVENILE ADVOCACY

This award honors a person who has advanced the quality of representation for juvenile defenders in Kentucky. It was established in 2000 by Public Advocate Ernie Lewis and carries the name of the 1967 U.S. Supreme Court case that held a juvenile has the right to notice of charges, counsel, confrontation and cross-examination of witnesses and to a privilege against self-incrimination.

PROFESSIONALISM & EXCELLENCE AWARD

The Professionalism & Excellence Award began in 1999. The President-Elect of the KBA selects the recipient from nominations. The recipient is a person who best exemplifies Professionalism & Excellence as defined by the 1998 Public Advocate's Workgroup on Professionalism & Excellence: prepared and knowledgeable, respectful and trustworthy, supportive and collaborative. The person celebrates individual talents and skills, and works to ensure high quality representation of clients or service to customers, taking responsibility for his or her sphere of influence and exhibiting the essential characteristics of professional excellence.

ANTHONY LEWIS MEDIA AWARD

Established in 1999, this Award is named for the *New York Times* Pulitzer Prize columnist and author of *Gideon's Trumpet* (1964). **Anthony Lewis** himself selected the two recipients of the award in 1999. The award recognizes excellence in media coverage of the crucial role played by public defenders play in ensuring a fair court process which yields reliable results, in which the public can have confidence. ■

CAPITAL CASE REVIEW

by David M. Barron

United States Supreme Court

***Howell v. Mississippi*,**
2005 WL 124274
(Jan. 24, 2005) (per curiam)

The Court dismissed the grant of *certiorari* as improvidently granted, holding that the claim was not properly presented to the state as a claim arising under federal law. The Court will not consider a federal-law challenge to a state court decision unless the federal claim "was either addressed by or properly presented to the state court that rendered the decision" being reviewed. "Properly raised" means that the litigant "cites in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim federal." Petitioner did none of this in arguing that the trial court erred in refusing to instruct the jury on the lesser included offense of simple murder or manslaughter, which left the jury with the option of either acquittal or conviction of capital murder. Instead, Petitioner argued that he presented his federal claim by citing a state case that cites a United States Supreme Court case. The Court held that this was too attenuated to constitute proper presentation of a federal claim.

The Court expressly left open whether the requirement that a federal claim be addressed or properly presented in state court before the Court can review the claim off of direct appeal is jurisdictional or prudential. *Author's Note:* Attorneys should 1) raise claims that were not properly presented in state court as federal issues; 2) argue that the rule against reviewing those claims is prudential; and, 3) argue that the circumstances surrounding the claim justify an exception allowing the claim to be adjudicated on the merits.

***Bell v. Cone*,**
2005 WL 123827 (Jan. 24, 2005) (per curiam)

Lack of citation as grounds for ruling that state court did not comply with the federal constitution: Under the AEDPA, section 2254(d)'s "deferential" standard, federal courts are not free to presume that a state court did not comply with constitutional dictates solely because the state court failed to cite to the relied-upon case law.

The law governing vagueness challenges to statutory aggravating or mitigating circumstances: A court must "determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms, and, if they have done so, whether those definitions are constitutionally sufficient, *i.e.*, whether they provide some guidance to the sentencer."

The state supreme court applied a narrowing construction to the HAC aggravator: The Court assumed that Tennessee's HAC aggravator was unconstitutional on its face, but held that the statute was constitutional because the Tennessee Supreme Court applied a narrowing construction to the HAC aggravator. Thus, the issue was whether the narrowing construction was applied to the instant case. The Court held that because the Tennessee Supreme Court has previously construed the HAC aggravating circumstance narrowly and has followed that precedent numerous times, absent an affirmative indication to the contrary that did not occur here, a court must presume that a narrowing instruction was applied in the instant case. Even absent this presumption, the Court held that it was clear that a narrowing construction was applied, because the lower court's reasoning in this case closely tracked its rationale for affirming death sentences in other cases where it expressly applied a narrowing construction to the same HAC aggravator.

Tennessee's narrowing construction of the HAC aggravator was not unconstitutionally vague: An aggravating circumstance necessary to impose a death sentence is unconstitutional unless it provides a "principled basis for distinguishing between those cases in which the death penalty was assessed and those cases in which it was not." Applying this to the instant case, the Court held that the HAC aggravator was not "contrary to" clearly established federal law, because the Tennessee Supreme Court applied the exact construction of the HAC aggravator that the Court had previously approved, that the aggravator was "directed at the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

Can an appellate court constitutionally apply a narrow construction to a vague aggravating circumstance? In *Ring v. Arizona*, 536 U.S. 584 (2002), the Court held that the Sixth Amendment requires a jury, rather than a judge, to find the aggravating circumstances that render a defendant death-eligible. Since *Ring* is not applied retroactively, as the Court noted, it is an open question as to "whether an appellate court may, consistently with *Ring*, cure the finding of a vague aggravating circumstance by applying a narrower construction."

Does Supreme Court case law concerning the especially heinous, atrocious, or cruel aggravator (HAC) constitute a "new rule?" The Court expressly assumed, without deciding, that *Maynard v. Cartwright*, 486 U.S. 356 (1988), *Walton v. Arizona*, 497 U.S. 639 (1990), and *Shell v. Mississippi*, 498 U.S. 1 (1990), did not announce a "new rule" of constitutional law

because its resolution was dictated by an earlier United States Supreme Court decision. Thus, these decisions, to the extent the decisions deal with the HAC aggravator, apply retroactively to cases that became final before these three decisions were decided.

Preservation/ fairly presented to state court by operation of mandatory review statutes in capital cases: The Court expressly refused to resolve a conflict between the circuits over whether "a petitioner must raise his constitutional claim in state court in order to preserve it, notwithstanding the existence of a mandatory review statute." The Sixth Circuit has held that Tennessee's "statutorily mandated review of each death sentence, necessarily included the consideration of constitutional deficiencies in the aggravating circumstances found by the jury, and therefore a challenge to the constitutionality of an aggravating circumstance is automatically preserved for federal habeas review by operation of Tennessee's statute requiring review of each death sentence. *Author's Note:* Attorneys representing death row inmates in federal habeas proceedings should respond to an assertion of procedural default by arguing that all sentencing phase errors are automatically preserved for federal habeas review by operation of state statutes requiring mandatory review of all death sentences, and by state statutes requiring proportionality review of all death sentences.

Ginsburg, Souter, and Breyer concurring: When a state court fails to address a claim, there is no basis to assume that the state court "considered it on the merits and resolved it on the merits in accord with the State's relevant law. Nothing in the record would discount the possibility that the issue was simply overlooked. A federal court would act arbitrarily if it assumed that an issue raised in state court was necessarily decided there, despite the absence of any indication that the state court itself adverted to the point." *Author's Note:* Attorneys in federal habeas corpus proceedings should argue that the AEDPA does not apply to claims that were not or may not have been adjudicated on the merits in state court.

***Nance v. Frederick*,**
2005 WL 35835 (Jan. 10, 2005) (GVR)

The Court granted *certiorari*, summarily reversed the grant of a new trial, and remanded for further consideration in light of *Florida v. Nixon, infra*. The South Carolina Supreme Court had granted a new trial after presuming prejudice from trial counsel's ineffectiveness as evinced by counsels' conduct, investigation, preparation, and presentation of the defense at both the guilty and sentencing phase, which the South Carolina Supreme Court characterized as "no meaningful adversarial challenge to the prosecution's case." However, unlike *Nixon*, counsel did not concede guilt at the guilt phase. Instead, trial counsel, who was in ill health, 1) told the jury that he did not ask to represent the defendant; 2) failed to prepare witnesses for their testimony; 3) presented a seven minute mitigation case that mainly incorporated the guilt phase; 4) failed to inform corrections officials that the defendant was not to be given antipsychotic drugs during trial; 5) failed to present any adaptability to prison evidence despite being nominated for the inmate of the year award; 6) failed to present any mitigating social history evidence; and, 7) failed to plead for the defendant's life during closing arguments at the sentencing phase.

***Florida v. Nixon*,**
125 S.Ct. 551 (2004)
(Ginsburg for a unanimous court)
(conceding guilt to jury)

Conceding guilt is not automatically the functional equivalent of a guilty plea: A guilty plea requires a knowing, intelligent and voluntary express waiver of the right to trial. Conceding guilt, however, is not the functional equivalent of a guilty plea because the defendant retains the rights accorded in a criminal trial, including 1) requiring the state to present admissible evidence establishing the essential elements of the offense; 2) the right to cross-examine witnesses; 3) the right to exclude prejudicial evidence; and, 4) the right to appeal.

What about truncated proceedings? The Court left open the door that conceding guilt may be the functional equivalent of a guilty plea when it results in a truncated proceeding where counsel concedes guilt and expressly relieves the prosecution of its obligation to put on complete proof of guilt or persuade a jury of the defendant's guilt beyond a reasonable doubt.

Prejudice is not presumed when counsel concedes guilt without the defendant's express consent: The court held that the presumption of prejudice, reserved for situations where counsel entirely fails to function as the client's advocate, does not apply when counsel concedes guilt during the guilt/innocence phase of a death penalty case. Instead, "when a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising means to avert a death sentence," counsel's performance must be judged under the two-prong standard generally applied to ineffective assistance of counsel claims, which requires that counsel's representation fell below an objective standard of reasonableness, and that the defendant was prejudiced by counsel's deficient performance.

Presumption of prejudice when counsel fails to explain to the defendant that counsel intends to concede guilt: The Court left open the question of whether prejudice is presumed under this circumstance, but provides strong language supporting the presumption of prejudice by repeatedly stating that counsel is obligated to explain his trial strategy to the defendant. *Author's Note:* Thus, merely informing the defendant that guilt will be conceded at trial, without taking efforts to ensure that the defendant understands what that means, appears to be ineffective assistance of counsel, and under some circumstances may allow a presumption of prejudice.

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The difficulty of representing capital defendants: The Court recognized that "[a]ttorneys representing capital defendants face daunting challenges in developing trial strategies." In cases where guilt is overwhelming, "avoiding execution may be the best and only realistic result possible." *Author's Note:* This language should be used to support a claim of deficient performance when counsel failed to adequately investigate and present mitigating evidence when guilt was overwhelming.

***Smith v. Texas*,**
125 S.Ct. 400 (2004) (per curiam)

Texas' unconstitutionally restrictive definition of relevant mitigating evidence: Under Texas and Fifth Circuit precedent, constitutionally relevant mitigating evidence is "evidence of a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, and evidence that the criminal act was attributable to this severe permanent condition." The Court unequivocally rejected this test, holding that it was overly restrictive and does not permit a reasoned consideration of whether death is the appropriate sentence in light of the individual characteristics of the defendant. Applied to the mitigating evidence presented at trial, the Court held that "[t]here is no question that a jury might well have considered petitioner's IQ scores and history of participation in special-education classes as a reason to impose a sentence more lenient than death."

Jury instructions that create an ethical dilemma for the jury are unconstitutional: At the time of trial, Texas law required the jury to answer two questions in the affirmative or negative in determining whether to impose death. The questions focused on whether murder was committed deliberately and whether the defendant posed a continuing threat to society. The trial judge instructed the jury that they shall answer no to at least one of those two questions if they believed a death sentence should not be imposed due to the mitigating evidence. The Court held that this nullification instruction was unconstitutional, because it created an ethical dilemma for the jury, forcing the jury to either follow the written instructions or the oral instructions, and because "the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented."

***Kunkle v. Texas*,**
543 U.S. __ (2004),
No. 04-7271
(Stevens concurring in denial of certiorari)
After noting that it is beyond dispute that the Court "had jurisdiction to enter a stay in order to give [it] time to determine whether [it] had jurisdiction to reach the merits of [petitioner's] federal claim," Stevens acknowledged that petitioner's death sentence was in violation of the Constitution as articulated in *Tennard v. Dretke* (see "Capital Case Review," *The Advocate*, Vol. 26, No. 6, November 2004), and *Smith v. Texas*, (above), but concurred in denying *certiorari* because the state court decision was based on adequate and independent state grounds. [Kunkle was executed on Jan. 25th].

CERT. GRANTS

Johnson v. California, No. 04-6964
"In order to establish a *prima facie* case under *Batson v. Kentucky*, must objector show that it is more likely than not that other party's peremptory challenges, if unexplained, were based on impermissible group bias?"

Gonzalez v. Crosby,
No. 04-6432, case below, 366 F.3d 1253
(11th Cir. 2004) (en banc)
"Whether the court of appeals erred in holding that every Rule 60(b) motion (other than for fraud under b-3) constitutes a prohibited 'second or successive' petition as a matter of law, in square conflict with decisions of this Court and of other circuits."

Mitchell v. Stumpf,
No. 04-637, case below, 367 F.3d 594 (6th Cir. 2004)
1)"Is representation on record from defendant's counsel and/or defendant that defense counsel has explained elements of charge to defendant sufficient to show voluntariness of guilty plea under *Henderson v. Morgan*, 426 U.S. 637 (1976)?"

2) "Does the Due Process Clause require that defendant's guilty plea be vacated when the state subsequently prosecutes another person in connection with crime and allegedly presents evidence at second defendant's trial that is inconsistent with first defendant's guilt?"

Bell v. Thompson,
No. 04-514, case below, 373 F.3d 688 (6th Cir. 2004)
"Did the Sixth Circuit abuse its discretion by withdrawing its opinion affirming the denial of habeas corpus relief six months after Fed.R.App.P 41(d)(2)(D) made issuance of the mandate mandatory, without notice to the parties or any finding that the court's action was necessary to prevent a miscarriage of justice, particularly where state judicial proceedings to enforce the inmate's death sentence had progressed in reliance upon the finality of the judgment in the federal habeas proceedings?"

Mayle v. Felix,
No. 04-563, case below, 379 F.3d 612 (9th Cir. 2004)
"When a habeas petitioner challenging state judgment amends his petition to include a new claim, does amendment relate back to date of filing of his petition and thus avoid the one-year statute of limitations, 28 U.S.C. section 2244(d)(1), so long as the new claim stems from the prisoner's trial, conviction or sentence?"

Medellin v. Dretke,
No. 04-5928, case below, 371 F.3d 270 (5th Cir. 2004)

This case deals with enforcing, in American courts, Vienna Convention violations found by the International Court of Justice, even if the violations were procedurally defaulted or in contravention of American precedent. This case has broad implications for procedural default in capital cases.

1. "In a case brought by a Mexican national whose rights were adjudicated in the *Avena* Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the *Avena* holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?"

2. "In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the *LaGrand* and *Avena* Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?"

Rompilla v. Beard,
No. 04-5462, case below, 355 F.3d 233 (3d. Cir. 2004)
Simmons v. South Carolina related questions presented:
1. "Does *Simmons* require a life without parole instruction where: the only alternative to a death sentence under state law is life without possibility of parole; the jury asks the court three questions about parole and rehabilitation during eleven hours of penalty-phase deliberations; the prosecution's evidence is that the defendant is a violent recidivist who functions poorly outside and who killed someone three months after being paroled from a lengthy prison term; and the prosecution argues that the defendant is a frightening repeat offender and cold blooded killer who learned from prior convictions that he should kill anyone who might identify him?"

2. "Is the state court decision denying the *Simmons* claim "contrary to" and/or "an unreasonable application" of clearly established Supreme Court law where the state court held that a history of violent convictions is irrelevant to the jury's assessment of future dangerousness, while ignoring the jury's questions about parole eligibility and rehabilitation and the prosecution's actual evidence and argument?"

IAC related questions presented:
3. "Has a defendant received effective assistance of counsel at capital sentencing where counsel does not review prior conviction records counsel knows the prosecution will use in aggravation, and where those records would have provided mitigating evidence regarding the defendant's traumatic childhood and mental health impairments?"

4. "Has a defendant received effective representation at capital sentencing where counsel's background mitigation investigation is limited to conversations with a few family members; where the few people with whom counsel spoke indicated to counsel that they did not know much about the defendant and could not help with background mitigation; where other sources of background information, including other family members, prior conviction records, prison records, juvenile court records and school records were available but ignored by counsel; and where the records and other family members would have provided compelling mitigating evidence about the defendant's traumatic childhood, mental retardation and psychological disturbances?"

5. "Does counsel's ineffectiveness warrant habeas relief under AEDPA where the state court sought to excuse counsel's failure to obtain any records about the defendant's history by saying the records contained some information that "was not entirely helpful," by saying counsel hired mental health experts (even though the experts did not do any background investigation and never saw the records), and by showing that counsel spoke to some family members (even though those family members told counsel they knew little about the defendant and could not help with mitigation); and where the state court did not even try to address counsel's failure to interview other family members (who knew the defendant's mitigating history) or counsel's complete failure to investigate the aggravation that the prosecution told counsel it would use?"

Deck v. Missouri,
No. 04-5293, case below, 2004 WL 1152872
"Are the Fifth, Sixth, Eighth, and Fourteenth Amendments violated by forcing a capital defendant to proceed to penalty phase while shackled and handcuffed to a belly chain in full view of the jury, and if so, doesn't the burden fall on the state to show that the error was harmless beyond a reasonable doubt, rather than on the defendant to show that he was prejudiced?"

Dodd v. United States,
No. 04-5286, case below, 365 F.3d 1273 (11th Cir. 2004)
"Does the one-year limitation period in 28 U.S.C. sec. 2255 par.6(3) begin to run (i) when either the Court or the controlling circuit has held that the relevant right applies retroactively to cases on collateral review (as the Third, Fourth, Sixth, Seventh, and Ninth holds), or instead (ii) when the Court recognizes a new right, whether or not it is made retroactively applicable to cases on collateral review (as the Fifth and Eleventh Circuits hold, and the Second and Eighth Circuits have stated in *dicta*)?"

Miller-El v. Dretke,
No. 03-9659, case below, 361 F.3d 849 (5th Cir. 2004)
"Whether the Court of Appeals – in reinstating on remand from this Court its prior rejection of petitioner's claim that the prosecution has purposely excluded African-Americans from his capital jury in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986) – so contravened this Court's decision and analysis of the evidence in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), that "an exercise of this Court's supervisory powers" under Supreme Court Rule 10(a) is required to sustain the protection against invidious discrimination set forth in *Batson* and *Miller-El* and the safeguards against arbitrary fact-finding set forth in 28 U.S.C. secs. 2254(d)(2) and (e)(1)."

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Pace v. DiGuglielmo,
No. 03-9627, case below, 71 Fed. Appx. 127 (3rd Cir.))

"Should this Court grant the writ to resolve a conflict between the Courts of Appeal regarding an important question that this Court explicitly reserved in *Artuz v. Bennett*, 531 U.S. 4 (2000) – whether an untimely state post-conviction petition may be "properly filed" under § 2244(d)(2)? (2) Should this Court grant the writ to resolve a conflict between the Courts of Appeal regarding whether *Carey v. Saffold*, 536 U.S. 214 (2002) answered the question about "properly filed" that *Artuz* reserved? (3) Should this Court grant the writ to answer the question about "properly filed" which was reserved by *Artuz* and which the Third Circuit decided erroneously? (4) Should this Court grant the writ and review the Third Circuit's denial of equitable tolling, where the Third Circuit denies all federal habeas review to petitioners who act appropriately, reasonably and diligently, and as demanded by the exhaustion requirement, in seeking state court remedies?

Rhines v. Weber,
No. 03-9046, case below, 346 F.3d 799 (8th Cir. 2003)

1. "Can a federal court stay (rather than be compelled to dismiss) a sec. 2254 habeas corpus petition which includes exhausted and unexhausted claims, when the stay is necessary to permit a petitioner to exhaust claims in state court without having the one-year statute of limitations in the AEDPA bar the right to a federal petition?"

2. "Is the Eighth Circuit correct that dismissal of a mixed sec.2254 petition is mandated by *Rose v. Lundy*, or are the courts of appeals for the first, second, sixth, seventh, and ninth circuits correct in following the separate concurrences of Justice Souter and Justice Stevens in *Duncan v. Walker*, that a stay of an otherwise timely filed federal petition is permissible in light of the AEDPA?"

Woodford v. Payton,
No. 03-1039, case below, 346 F.3d 1204 (9th Cir. 2003)

"Did the Ninth Circuit violate 28 U.S. C. sec. 2254(d) when it found the California Supreme Court objectively unreasonable in holding that California's 'catch-all' mitigation instruction in capital cases is constitutional as applied to post-crime evidence in mitigation?"

Roper v. Simmons,
No. 03-633, case below, 112 S.W.3d 397 (Mo. 2003)

In addition to the Eighth Amendment constitutionality of executing juveniles, this case also presents the question: "[o]nce this Court holds that a particular punishment is not "cruel and unusual" and thus barred by the Eighth and Fourteenth Amendments, can a lower court reach a contrary conclusion based on its own analysis of evolving standards?"

Sixth Circuit Court of Appeals

Abdur'Rahman v. Bell,
392 F.3d 174 (6th Cir. 2004)

This case dealt with whether and under what circumstances a prisoner may use a Federal Rules of Civil Procedure, Rule 60(b) motion to seek relief from a judgment dismissing a habeas petition.

What is a 60(b) motion?: "The purpose of a 60(b) motion is to allow a district court to reconsider its judgment when that judgment rests on a defective foundation. The factual predicate deals with some irregularity or procedural defect in the procurement of the judgment denying habeas relief." Thus, granting a 60(b) motion "merely reinstates the previously dismissed habeas petition, opening the way for further proceedings."

What is a successor habeas petition?: Successor habeas petitions seek to invalidate the state court's judgment of conviction based on a constitutional error, and are based upon alleged violations of federal rights that occur during the criminal trial. Granting a successor habeas petition invalidates the petitioner's conviction and/or sentence.

A 60(b) motion should not automatically be treated as a successor habeas petition: The court overruled precedent by holding that a "60(b) motion should be treated as second or successor habeas petition only if the factual predicate in support of the motion constitutes a direct challenge to the constitutionality of the underlying conviction. In cases which the factual predicate in support of the motion attacks the manner in which the earlier habeas judgment was procured and is based on one or more of the grounds enumerated in Rule 60(b), the motion should be adjudicated pursuant to Rule 60(b)."

Availability of relief under 60(b)(6): 60(b)(6) provides for relief from judgment for "any other reason justifying relief from the operation of judgment." The Court held that this rule is only available when relief under the five more specific subsections of 60(b) could not be considered. When the claim involves a change in decisional law, extraordinary circumstances also must exist. Further, 60(b)(6) rather than 60(b)(1)'s legal mistake" is the proper subsection to use when a state supreme court clarifies existing state law.

Decisional law v. procedural law: Decisional law is the case law supporting the merits of the claim upon which relief is sought such as the precedent governing prosecutorial misconduct claims or ineffective assistance of counsel claims. Procedural law is the body of law relied upon in determining whether a court can reach the merits of the claim (address the decisional law) such as the law concerning procedural default or exhaustion.

Procedural default v. forfeiture by failure to exhaust: "Procedural default is a judicially created rule, grounded in fealty to comity values and requiring federal courts to respect state

court judgments that are based on an independent and adequate state procedural ground." In procedural default cases, the state court rejects a claim because the petitioner failed to comply with a state law or rule. Exhaustion involves the failure to present a claim to the state court before raising it in federal court. Thus, exhaustion is different from procedural default. "A defendant could fail to exhaust a claim without procedurally defaulting if he could return to the state courts to exhaust. Alternatively, a "defendant could fail to exhaust without defaulting if a clarification in procedural law indicates that he has already taken the necessary action to exhaust," thereby creating a forfeiture by failure to exhaust. Thus, a "federal court's default decision rests upon a presumption about what the state court would do, rather than respect for what a state court actually did." Consequently, when a state court clarifies that the forfeiture by failure to exhaust was based on an incorrect presumption of what the state would do, no one has any interest in enforcing the default. Further, enforcing a default under these circumstances "would disserve the comity interests enshrined in AEDPA by ignoring the state court's view of its own law."

A claim that a federal court erroneously interpreted state law in finding a claim procedurally defaulted is cognizable under 60(b)(6) when a new state court rule clarifies when a state court should find a claim defaulted: After petitioner's federal habeas petition was denied by the district court because petitioner did not seek discretionary review in the state supreme court, the Tennessee Supreme Court promulgated a rule clarifying that criminal defendants were not required to appeal to the Tennessee Supreme court in order to be deemed to have exhausted all available state remedies for purposes of federal habeas review. Petitioner filed a motion under 60(b)(6) to reopen his habeas petition in relation to the previously defaulted *Brady* claim, because of the clarification in state law that proved that the judge erroneously interpreted state law. The court held that the claim was cognizable under 60(b)(6) because 1) the claim did not rely upon a clarification in decisional law, but rather a clarification of procedural law; and, 2) although not necessary, the district court's presumption about Tennessee's procedural rules constitutes an exceptional circumstance because it falls within the second type of procedural barriers, forfeiture by failure to exhaust.

Richey v. Mitchell,
2005 WL 147080
(6th Cir. Jan. 25, 2005)

This case dealt with the sufficiency of the evidence to convict for aggravated felony murder where the arson victim was not the intended victim, and with trial counsel's ineffectiveness in dealing with an arson expert.

Standard of Review: Because the federal habeas petition was filed after the effective date of the Anti-Terrorism and Death Penalty Act (AEDPA), the court applied the AEDPA, and reviewed the district court's legal conclusions *de novo* and its factual determinations under a clearly erroneous standard.

Sufficiency of the evidence claims implicate federal due process: Because the federal constitution's Due Process Clause prohibits a state from convicting a person of a crime without proving the elements of the crime beyond a reasonable doubt, the court rejected the state's argument that a claim that the state failed to prove the petitioner's intent to kill the person who actually died is not cognizable in federal habeas because it touches only on state law.

"The jury shall be instructed" does not change the definition of a crime: The court rejected the state's argument that the words "the jury shall be instructed" means that a portion of the aggravated felony murder statute has no bearing on the elements of the crime as it only deals with jury instructions. In rejecting this argument, the court noted 1) case law and the statute itself require the state to prove the element of specific intent; 2) "there is no meaningful difference between requiring the state to do something and requiring that the jury be informed that the state is required to do something;" and, 3) it is irrational to interpret a statute to allow the elements of crime to change based upon who the fact-finder is.

Transferred intent does not apply when statute says "intended to cause the death of the person killed:" The court held that the common law doctrine of transferred intent does not apply because 1) it would be overreaching to read transferred intent into a statute that already expressly refers to proving specific intent through a permissible inference; and, 2) courts should not render statutory language superfluous. The court also noted that interpreting Ohio's aggravated felony murder statute to permit transferred intent and applying it retroactively violates due process because it creates an unforeseeable result by judicial construction.

The law of procedural default: Where a state prisoner has defaulted federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Procedural default: adequate and independent state ground: A state court decision rests on an adequate and independent state ground only when the state court opinion makes a "plain statement" saying so. When the state court refuses to reach a claim because of procedural default, it will be considered "independent" only if the state court rendering judgment in the case "clearly and expressly states that its judgment rested on a procedural bar." Applying this to the instant case, the court held that there was no independent state ground barring review because the state court mentioned transferred intent without mentioning which claim it was addressing, creating an ambiguity that mandates a presumption that the state court reached the merits of the claim.

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Ineffective assistance of counsel as cause and prejudice to overcome procedural default: When neither trial nor appellate counsel raise a claim, petitioner must overcome two hurdles in order to utilize ineffective assistance of counsel as cause to excuse a procedural default: 1) trial counsel must be found ineffective for not raising the claim; and, 2) appellate counsel must be found ineffective for not arguing that trial counsel was ineffective for failing to raise the claim.

As a threshold matter, the court held that the ineffective assistance of counsel claim was not procedurally defaulted, because the state court has not defined what constitutes "good cause" to file an untimely appeal, and because the "good cause" rule has not been applied with the regularity necessary to constitute an adequate and independent state procedural rule.

The court held that both trial and appellate counsel's performance in failing to understand the elements of the charged offense and holding the state to proving those elements was deficient performance that prejudiced the petitioner because it allowed him to be convicted and sentenced to death for a crime in which the state had failed to satisfy one of the elements. *Author's note:* Although not relevant to the facts of the case, the court noted that "counsel can even be ineffective for failing to raise a legal claim that turns on an unresolved question of law, so long as counsel is aware that an unresolved issue exists."

Counsel's handling of his forensic expert and his failure to challenge the scientific evidence of arson is ineffective assistance of counsel: The purpose of counsel is to make the adversarial testing process work in the particular case. Counsel fails this obligation when counsel's performance is deficient and that deficiency prejudices the petitioner. Counsel's performance was deficient for eight reasons: 1) counsel hired an arson expert solely based on a promotional flier; 2) the expert was unqualified, believed the state's experts were more reliable, and was trained by the people whose conclusions he was being hired to review, all of which are deficiencies that are imputed to counsel because he failed to adequately research and screen his expert witness; 3) counsel waited two months after he was retained and a full month after receiving the state's scientific results to contact an arson expert, and then limited his expert's initial investigation to ten hours; 4) counsel failed to thoroughly inform his arson expert that the state's scientific evidence had been housed in a garbage dump and on a parking lot located near gasoline pumps; 5) counsel failed to understand the evidence used to convict and sentence petitioner – an understanding of that evidence was necessary to present testimony from his own expert and to cross-examine the state's expert; 6) trial counsel never asked his expert for a written report, and had no idea that his arson expert did not conduct his own analysis of the scientific test results; 7) counsel prematurely placed his arson expert on the witness list resulting in the state calling this witness when counsel decided not to have the expert testify; and, 8) counsel failed to offer any competing scientific evidence, which is vital in affording effective representation where there is substantial contradiction in a given area of expertise.

To establish prejudice, a petitioner need not show that he could not or would not have been convicted. Instead, a petitioner need only undermine the court's confidence in the trial's outcome, which easily is accomplished here, because a qualified arson expert would have undermined the state's evidence that the fire was caused by arson.

***Alley v. Bell*,**
392 F.2d 822 (6th Cir. 2004)

Relying on *Abdur'Rahman, supra*, the court held that petitioner's Federal Rules of Civil Procedure, Rule 60(b) motion should have been filed as a successor habeas petition. But, because petitioner expressly objected to the recharacterization of his 60(b) motion as a habeas petition, the Court remanded the motion to allow petitioner to either withdraw the motion or allow it to be classified as a habeas petition. *Author's Note*: In order to avoid issues of successor habeas petitions, counsel must expressly object to the reclassification of a 60(b) motion as a habeas petition when the 60(b) motion is filed before the initial habeas petition.

A claim in a 60(b) motion that belongs in a habeas petition does not bar consideration of other claims: When a 60(b) motion asserts several claims for relief, the district court must consider each claim individually. Thus, a court can dismiss individual claims without dismissing the entire motion. If any claim within the motion is properly before the court under Rule 60(b), the claim must be considered on the merits.

Relying on new case law to make a vagueness challenge to the heinous, atrocious, and cruel aggravator belongs in a habeas petition: The Court held that this type of claim must be raised in a habeas petition because it "presents a direct challenge to the constitutionality of the underlying conviction."

The *Brady* claims do not show a fraud on the court and therefore are not cognizable under 60(b): Fraud on the court requires "a showing that an officer of the court whose judgment is under attack acted in a manner that is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth." In a 60(b) motion, the petitioner must show that the fraud occurred during the proceedings before the federal district court. The Court, however, failed to reach this issue, holding instead that petitioner failed to show that the state recklessly or willfully concealed evidence, and failed to show that the *Brady* claim was any different than the *Brady* exculpatory evidence claim that would be raised in a first federal habeas petition.

New cases that bolster a claim that the petitioner was unconstitutionally prevented from presenting mitigating evidence at sentencing supports a challenge to the sentence, and therefore is cognizable in a habeas petition not a 60(b) motion.

Mapes v. Tate,
388 F.3d 187 (6th Cir. 2004)
(remedy for ineffective assistance of appellate counsel is a new direct appeal)

Standard of Review:
Mixed questions of law and fact, including ineffective assistance of counsel claims, are reviewed *de novo*, while findings of fact rendered by a habeas court are subject to a clearly erroneous standard of review:

Factors to consider in determining whether direct appeal counsel's performance was deficient: 1) were the omitted issues "significant and obvious?"; 2) was there arguably contrary authority on the omitted issues?; 3) were the omitted issues clearly stronger than those presented"; 4) were the omitted issues objected to at trial?; 5) were the trial court's rulings subject to deference on appeal; 6) did appellate counsel testify in a collateral proceeding as to his appeal strategy, and, if so, were the justifications reasonable?; 7) what was appellate counsel's level of experience and expertise?; 8) did the petitioner and appellate counsel meet and go over possible issues?; 9) is there evidence that counsel reviewed all the facts?; 10) were the omitted issues dealt with in other assignments of error?; 11) was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Counsel was ineffective for not raising on appeal the court's instruction that the jury was not to consider any mitigating evidence related to the prior murder conviction: Reaching the underlying claim is not necessary to decide whether counsel was ineffective on appeal. Instead, all that is required is a determination that, "based on the nature of the underlying claims, there is a reasonable probability that, but for his counsel's failings, the defendant would have prevailed on his appeal." Applying this standard, the court held that counsel was ineffective for not raising the improper instruction claim for the following reasons: 1) counsel "obviously" should have been aware of a United States Supreme Court decision, from the year before trial, holding that the sentencer cannot be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death; 2) all but one of the 12 claims raised on appeal pertained to the guilt phase despite overwhelming evidence of guilt; 3) counsel did not omit questionable claims to focus on more meritorious claims; 4) trial counsel objected to the erroneous instruction at trial; 5) the erroneous instruction was an error of law subject to *de novo* review; and, 6) although the appellate attorneys conferred with a death penalty expert, they had no death penalty appeals experience.

The remedy for ineffective assistance of appellate counsel is a writ of habeas corpus conditioned upon granting a new direct appeal with effective assistance of counsel.

Author's note: This case should be used to argue that the Kentucky Supreme Court must recognize ineffective assistance of appellate counsel, by either allowing a claim to be presented as an IAC of appellate counsel claim in an RCr 11.42 motion resulting in a new direct appeal if successful, or as a motion to reopen the direct appeal.

House v. Bell,
386 F.3d 668 (6th Cir. 2004) (*en banc*)

In a factually intensive case, the court held that petitioner failed to satisfy the miscarriage of justice exception to procedural default because he was unable to prove his actual innocence of the crime, *i.e.*, that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.

Standard for gateway actual innocence claims (actual innocence claims that revive a procedural defaulted claim): more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *See Schlup v. Delo*, 513 U.S. 298

Standard for gateway actual innocence of the death penalty claims: clear and convincing evidence that no reasonable juror would have found the petitioner eligible for the death penalty beyond a reasonable doubt. *See Sawyer v. Whitley*, 505 U.S. 333 (1992).

Kentucky Supreme Court

Thomas Bowling v. Haeberlin,
Case No. 2004-SC-0880, (Nov. 23, 2004) (unpublished)
Order granting a stay of execution pending resolution of Bowling's mental retardation claim that also challenged Kentucky's definition of mental retardation ("seriously" mentally retarded) and lack of post-trial mental retardation procedures.

Thompson v. Commonwealth,
147 S.W.3d 22 (Ky. 2004)(published)
Procedural competency claim v. substantive competency claim: "A procedural competency claim is based upon a trial court's alleged failure to hold a competency hearing, or an adequate competency hearing, while a substantive competency claim is founded on the allegation that an individual was tried and convicted, while, in fact, imcompetent."

Retrospective competency hearing did not violate due process: "The test to be applied in determining whether a retrospective competency hearing is permissible is whether the quantity and quality of available evidence is adequate to arrive at an assessment that could be labeled as more than mere speculation." Retrospective competency hearings satisfy due process when the hearing "is based on evidence related to

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observations made or knowledge possessed at the time of trial." Here, no due process violation occurred because the court relied upon trial hearings, the judge's recollection and observations from trial, and counsel's assertion that defendant was competent to plead guilty.

Appellant was competent to enter a guilty plea: To be competent to plead guilty, the evidence must show by a preponderance that the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational as well as factual understanding of the proceedings against him." Here, sufficient evidence existed supporting a finding of competency, including expert testimony, testimony from the trial prosecutor, and the court's own recollection and observations from trial.

No error in refusing to read testimony back to the jury: Because there was no reason to suspect that the jury was confused or unable to continue deliberations without testimony being read back to them, the court held that the trial court did not abuse its discretion in denying the jury's request to rehear the defendant's testimony.

Jury sentencing over defense objection: The court held that a jury verdict is required in a capital case except by the agreement of all parties.

The court also addressed double jeopardy, various challenges to the aggravating circumstances, prosecutorial misconduct, unanimity instructions at sentencing, various other challenges to sentencing phase jury instructions, jury selection issues, the validity of defendant's guilty plea, the failure to allow the defendant to withdraw his guilty plea, and the admissibility of 1) crime scene photographs; 2) the murder weapon; 3) any evidence of the crime beyond a recitation of the facts since he pled guilty; and, 4) blood spatter evidence. The court also noted that whether a "suppression hearing should have been conducted to limit the evidence introduced during the penalty phase, and such a challenge is not waived by entry of a valid and unconditional guilty plea" is a novel issue that cannot be reached because no suppression motion was presented to the trial court.

Bratcher v. Commonwealth,
Ky., 151 S.W.3d 332 (December 16, 2004)(published)
The court held that listing "capital offense" and "death" as a possible offense is sufficient to give a defendant notice of the charges, and that the grand jury does not need to list aggravating circumstances in the indictment because no findings of fact that increase the sentence beyond the statutory maximum were necessary because the statutory maximum as described in the indictment was death.

***Ronnie Bowling v. Commonwealth*, 2004 WL 2623968 (Ky. 11/18/04) (published):** This decision will be discussed when it becomes final after adjudication of the petition for rehearing. The case involves a Cr 60.02 motion alleging juror misconduct.

Franklin Circuit Court

Baze & Bowling v. Rees, et al.,
No. 04-CI-1094 (Franklin Cir. Ct. Nov. 23, 2004) (unpublished)
(granting a temporary injunction barring the execution of Bowling during the pendency of litigation challenging the chemicals used in lethal injections, the lethal injection execution protocol, and the lack of safeguards and appropriate training of the execution team).

Standard for granting a temporary injunction: The following factors must be considered in determining whether to grant a temporary injunction: 1) irreparable harm to the moving party if the injunction is not granted; 2) a balance of the equities; 3) whether the moving party could have brought the claim earlier to allow consideration on the merits without an injunction ("undue delay"); and, 4) whether a substantial question is at issue.

A death row inmate always will be irreparably harmed by the inmate's execution: The court held that the clearest example of irreparable injury is where the final judgment would be meaningless if the harm occurred before a judgment on the merits. One such situation is where remedial final judgment is entered after a judicial execution.

Equities favor granting an injunction: "A brief delay, during which the status quo is maintained and necessitated by the need for this Court to consider this pending constitutional challenge, is not harm to the Commonwealth."

Plaintiffs did not unduly delay: The Court held that Plaintiffs did not file this suit to delay their execution because 1) before the suit was filed, both Plaintiffs filed an Open Record Act request seeking the execution protocol; 2) the suit was filed before an execution warrant had been signed and while a petition for writ of *certiorari* was pending; 3) the Commonwealth has never disclosed its "manner or means" for lethal injection prior to this lawsuit; and, 4) the lethal injection protocol may continue to change during the litigation.

Public interest supports granting an injunction: "The public interest is best served when the Commonwealth presents and explains its position on the manner and means" of execution. This ensures that "the citizens of Kentucky can be assured their government's duty and responsibility of enforcing a death sentence is being administered in a constitutionally proper manner."

A substantial question is at issue: The Court held that the "constitutionality of Kentucky's manner and means of effecting execution by lethal injection" is a substantial issue.

NEW DEATH SENTENCES —Marco Chapman, and Sherman Nobles (sentencing-Feb). ■

6TH CIRCUIT REVIEW

by Davis Harris

Miller v. Webb,
385 F.3d 666 (6th Cir. 2004)

Petitioner Miller was convicted in Warren Circuit Court of intentional murder, criminal attempt to commit intentional murder, first-degree burglary, and PFO I, and was sentenced to life imprisonment. His federal *habeas corpus* petition was denied by the Federal District Court. The only claim certified and reviewed by 6th Circuit was whether his trial attorney's failure to challenge for cause or strike a juror who knew the victim resulted in ineffective assistance of counsel.

The prosecution's key witness—and only eyewitness—was the victim of the "attempted murder" charge, who was shot and seriously wounded. During the *voir dire* of Petitioner's trial, a juror informed the court that she knew this victim/witness. The juror had led Bible study classes in the local jail, and the victim had been in her group. The juror stated that she was sympathetic to the victim, and believed that the victim "wanted to do better." When pressed, she repeatedly stated that she thought she could be fair, but had some "feelings" about the victim. She further stated that she never asked any of her class-members about their "personal business." Petitioner's attorney made no motion, did not strike her, and she ultimately sat on the jury.

Petitioner filed a state post-conviction motion in which (in relevant part) he claimed that his trial counsel was ineffective for failing to challenge or strike this particular juror. During an evidentiary hearing in the circuit court, the trial attorney stated that this was based on "trial strategy," because this victim was a drug addict, and that "anyone" who knew this victim would necessarily know that she was "completely unworthy of belief" and "could not be trusted." In other words, trial counsel felt that it was a good idea to keep the juror because she should "know" the victim/witness was a drug-addicted liar. The state courts reasoned that this was "sound trial strategy." Petitioner's state post-conviction motion was denied and the denial was affirmed on appeal.

Petitioner filed a federal *habeas corpus* petition. The Federal District Court denied his petition, stating that Petitioner failed to demonstrate that the Kentucky Court of Appeals' decision was contrary to, or an unreasonable application of, clearly established federal law. Though Petitioner had asserted five claims of error, only the juror claim discussed above was certified "appealable" to the 6th Circuit.

The 6th Circuit noted, that in *voir dire*, deference is given to trial counsel as *voir dire* is presumed to be part of trial strategy, *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001), and broad deference is also granted to the trial court, *Mu'Min v. Virginia*, 500 U.S. 415, 423, though the court remains "subject to essential demands of fairness." *Hughes*, 258 F.3d at 457. In this case, the Court found it significant that the juror indicated that she would be partial to and have sympathy for the "victim." Because neither counsel nor the court asked the proper follow-up questions to rehabilitate the juror or obtain an assurance of impartiality, the Court determined that "we are left with a situation like the one in *Hughes* in which we found actual bias."

Thus, the 6th Circuit found that the failure of the Kentucky courts to find ineffective assistance of counsel, for failure to secure a fair and impartial jury by challenging or striking this juror, was an unreasonable application of federal law. The Court reversed the district court and remanded for *habeas corpus* relief.

Munson v. Kapture,
384 F.3d 310 (6th Cir. 2004)

Petitioner was convicted in Michigan of two counts armed robbery and two counts assault with intent to commit sexual conduct. He was sentenced to 25-60 years. The only error raised in Petitioner's direct appeal was that his sentence was disproportionately high. Petitioner's conviction was affirmed.

Petitioner next sought state post-conviction relief, raising five claims: 1) illegal search and seizure resulting in violation of due process, 2) prosecutor misconduct, 3) ineffective assistance of counsel (IAC) for failing to adequately challenge search and seizure, 4) IAC of appellate counsel for not raising IAC on appeal, and 5) cumulative error. The state court denied the prosecutor misconduct claim as defaulted, as it should have been raised on direct appeal. The court addressed and dismissed each of the other claims on their merits. The Michigan Court of Appeals and Supreme Court both denied Petitioner's claims as procedurally defaulted.

Petitioner then filed a federal *habeas corpus* petition in which he raised the same errors. The district court denied the petition, finding that the claims were procedurally defaulted, and that the IAC claims did not constitute "cause" to excuse the procedural default. Even assuming deficient performance, the court stated, the Petitioner failed to show any

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resultant prejudice. The 6th Circuit reviewed this denial *de novo*.

Applying the procedural default test articulated in *Clinkscale v. Carter*, 375 F.3d 430 (6th Cir. 2004), and *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), the 6th Circuit found that Petitioner's claims had been defaulted under the state rule, with the possible exception of the appellate IAC claim. The court next looked to see if adequate "cause and prejudice" were present to excuse the procedural default and look to the merits. Though IAC can constitute cause, the court determined that there was no ineffective assistance in this case. The court reasoned that, even assuming the performance of the trial and appellate counsels to be deficient, the petitioner could not show any prejudice resulting from these errors. With no IAC found, the rest of Petitioner's claims lacked the cause and prejudice to excuse the procedural default. The 6th Circuit affirmed the district court's denial of Petitioner's *habeas corpus*.

Note: *See also Deitz v. Money, supra*, and *Burton v. Renico, supra*, re: procedural default

***Smith v. Stegall*,**
385 F.3d 993 (6th Cir. 2004)

Petitioner's first-degree murder conviction was reversed. Petitioner then pled guilty to second-degree murder in exchange for the state's promise to not recommend a life sentence. At sentencing, the state requested that Petitioner be given a 70 to 100-year sentence. The state also noted that the victim's family wanted Petitioner to receive a life sentence. Counsel made no objection to either recommendation. Petitioner was ultimately sentenced to 35-55 years, plus 2 years for using a firearm. After unsuccessful appeals and post-conviction actions, Petitioner filed for a writ of *habeas corpus* in federal court.

The sole issue reviewed by the 6th Circuit was whether the state court's determination, (that the State had not violated the plea agreement), was "objectively unreasonable" in light of clearly established federal law. Citing *Santobello v. New York*, 404 U.S. 257 (1975), the court found that a breach of a plea agreement by the prosecution constituted "clearly established" grounds for vacating a guilty plea. To determine whether a breach had in fact occurred, the court next noted that plea agreements are interpreted using traditional principles of contract law, *United States v. Robison*, 924 F.2d 612 (6th Cir. 1991), and that in accordance with these principles, the prosecution will be held to the literal terms of the plea agreement. *United States v. Mandell*, 905 F.2d 970 (6th Cir. 1990).

Applying these principles to the instant case, the 6th Circuit determined that because the prosecution literally complied with the terms of the plea bargain, it could not find the state court's denial of Petitioner's motion to be an "objectively unreasonable" interpretation of federal law.

Note: The dissenting judge, quoting *Bercheny v. Johnson*, 633 F.2d 473 (6th Cir. 1980) observed that it is also well-established law that "the law does not permit a criminal defendant to bargain away his constitutional rights without receiving in return … the benefit of his bargain…." In Michigan, a life with parole sentence carries a parole eligibility of 10 or 15 years, depending on the offense. However, a term of years sentence allows parole eligibility only after the inmate has served the years at the "bottom" of the sentence range, *e.g.* after 70 years on a "70 to 100 years" sentence. In other words, though the state did not recommend "life," it effectively recommended life *without* parole, *i.e.*, 70 years until parole eligibility. The dissenting judge expressed fear that this precedent could be construed as encouraging creative prosecutors to offer plea deals which are, as in the instant case, "utterly worthless."

***United States v. Macias*,**
387 F.3d 509 (6th Cir. 2004)

The 6th Circuit reversed Appellant's cocaine conviction finding that the district court erred in denying Appellant's motion for a mistrial. Appellant had a joint trial with one co-defendant. During trial, an inculpatory statement by this non-testifying co-conspirator was introduced from an audio recording. Specifically, the audiotape contained a detective describing the apprehension of the co-conspirator and Appellant, whom he referred to as "Subjects 1 and 2," respectively. Apparently, after a search and arrest, Subject 1 began talking. The detective recounted that Subject 1 told him that he had been paid by Subject 2 to deliver cocaine. Later in the tape, the detective mentioned Subject 2's address, indicating that Subject 2 was in fact Appellant.

Citing *Douglas v. Alabama*, 380 U.S. 415 (1965) and *Bruton v. United States*, 391 U.S. 123 (1968) as precedent, the 6th Circuit held that Appellant's 6th Amendment Confrontation Clause rights were violated by the admission of this evidence, and that an admonition to the jury would have been insufficient to cure the error.

***Sosa v. Jones*,**
389 F.3d 644 (6th Cir. 2004)

Petitioner pled guilty to conspiracy to deliver over 650 grams of cocaine. Of the five drug transactions, only the fifth and final sale involved more than 650 grams. Petitioner sought to withdraw his guilty plea, claiming a denial of due process because of entrapment. The trial court denied this motion, and sentenced Petitioner to the mandatory sentence for this offense, *i.e.*, life without the possibility of parole.

The Michigan Court of Appeals remanded the case for a hearing on entrapment. Petitioner raised "normal" entrapment, and also "sentencing" entrapment (*i.e.*, that the police waited to arrest him until he had delivered enough to be eligible for a higher offense.) Petitioner sought to introduce evidence of ineffective assistance of counsel (IAC), but because his first appeal did not make this claim, he had waived the issue. The trial court found that Petitioner had not been entrapped, applying Michigan's entrapment law which relies primarily on the conduct of the police. Subsequent appeals were fruitless.

Petitioner ultimately filed a federal *habeas corpus* petition, alleging that the defense of entrapment was a constitutional defense, grounded in due process principles, and originating from the U.S. Supreme Court decision of *Sorrells v. United States*, 287 U.S. 435 (1932). After scrutiny of *Sorrells* and subsequent interpretations of entrapment, the 6th Circuit determined that the entrapment defense, discussed in Supreme Court precedent, results from statutory interpretation and is not based on constitutional due process. Thus, the 6th Circuit held that the entrapment defense is not a constitutional defense that could form the basis for habeas relief.

Note: The court mentions that this is an "unfortunate" case, as this offense no longer carries a mandatory LWOP sentence, and his co-conspirator won a new trial and is already out on parole.

***Blackmon v. Booker*,**
394 F.3d 399 (6th Cir. 2004)

Petitioner was convicted of several violent crimes. The prosecution argued that these crimes were gang-related and that, because of gang intimidation, many witnesses would not testify. Two appeals and two state *habeas* petitions were unsuccessful.

Petitioner filed a federal *habeas corpus* petition in the federal district court. The district court granted the petition, finding that the gang-related evidence and prosecution's comments regarding gangs and witness intimidation denied Petitioner his right to due process and a fair trial.

On appeal, the 6th Circuit reversed after a determination that these issues had never been fairly presented to the state courts for consideration, and were therefore procedurally barred. *See Hicks v. Straub*, 377 F.3d 538 (6th Cir. 2004) (articulating factors to determine if *habeas* claims have been fairly presented to state courts). Thus, the 6th Circuit reversed and remanded the case, noting that Petitioner still had recourse available in the state courts on these claims, and that only after the state courts had a fair opportunity to consider the claims would they be appropriate for federal review.

***Burton v. Renico*,**
391 F.3d 764 (6th Cir. 2004)

Petitioner was convicted of first-degree murder and possession of a felony. He was sentenced to life and two years, respectively.

The trial court had appointed counsel for Petitioner. But, Petitioner's family subsequently hired a private attorney to represent him. Private counsel moved for a continuance of the trial, which was scheduled to begin just one month after he entered his appearance. But, the attorney failed to follow the court's rules, which required him to contact the court clerk to schedule a hearing on the motion.

The motion was heard five days prior to trial. Defense counsel argued that he needed more preparation time, especially because of late-arriving discovery materials. The prosecution stipulated to the continuance. But, the court denied the motion. Defense counsel then moved to withdraw, and that motion was granted.

For some reason, the trial did not begin as scheduled. Instead, some three weeks later, the trial judge recused herself. After two more months, the new judge offered Petitioner a continuance to retain new counsel. Petitioner declined, stating that he liked his current court-appointed attorney, and further that he had disagreements with, and could not afford, his previously retained private counsel. Petitioner was convicted, and his appeal was denied.

Petitioner next filed a state post-conviction motion, raising several new issues. The trial court dismissed all issues as waived because they could and should have been raised on direct appeal. The appellate courts agreed.

Petitioner finally filed a *habeas corpus* petition, alleging a denial of the right to counsel of choice, most of the state post-conviction claims, and the ineffective assistance of appellate counsel for failing to raise his "waived" claims on direct appeal. After the district court denied the petition, the 6th Circuit reviewed the right to counsel of choice claim, as well as whether or not the rest of the claims, deemed procedurally defaulted, could be excused from default by finding "cause and prejudice" due to the ineffective assistance of appellate counsel.

On the right to choice of counsel claim, 6th Circuit concluded that the Michigan Court of Appeals' ruling in Petitioner's direct appeal was a reasonable application of federal law. Citing *Powell v. Alabama*, 287 U.S. 45 (1932), the 6th Circuit recognized that a defendant has a right to a "fair opportunity" to retain the counsel of his choice. However, as noted by the state court, the second judge's offer to continue the trial, so that Petitioner could retain another attorney, provided Petitioner with a fair opportunity to secure replace-

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ment counsel. This offer, combined with the fact that Petitioner declined, demonstrated that no substantive 6th Amendment violation occurred.

Next, the 6th Circuit looked to see if ineffective assistance of appellate counsel could serve as cause and prejudice to excuse Petitioner's procedurally defaulted claims. Using the factors articulated in *Mapes v. Coyle*, 171 F.3d 408 (6th Cir. 1999), the Court reviewed each claim of alleged appellate IAC, (*i.e.*, each argument that appellate counsel "should" have raised on appeal), and determined that none of them met the standards for ineffective assistance of appellate counsel. Having found no appellate IAC, the Court concluded that appellate IAC could not serve as cause and prejudice to excuse the procedural default of Petitioner's other claims.

***Deitz v. Money*,**
391 F.3d 804 (6th Cir. 2004)

Petitioner, a foreign national from Mexico, pled guilty to drug trafficking charges and was sentenced to 22 years to life. Two weeks later Petitioner wrote his attorney and told him he wanted to withdraw his plea. Petitioner further claimed that he indicated that he wished to appeal his conviction. His attorney did not file an appeal But over a month later, his attorney did file a trial court motion seeking modification of the sentence. The motion was denied for lack of jurisdiction.

Petitioner proceeded *pro se*, asking to withdraw his plea a year later. The trial court dismissed this motion, which was affirmed by the Court of Appeals after it was re-characterized as an untimely post-conviction motion. Petitioner next sought to file a delayed appeal, and to reopen his direct appeal. The appellate courts denied both of these motions.

Petitioner filed for a writ of *habeas corpus*, raising several claims including ineffective assistance of counsel in failing to file a direct appeal. The district court dismissed the petition, finding all claims procedurally defaulted.

The 6th Circuit reversed the dismissal of Petitioner ineffective assistance of counsel claim. In his motion for a delayed appeal, Petitioner clearly cited ineffective assistance of counsel (*i.e.*, not filing an appeal despite the request to do so) as the reason for the delay. The Ohio courts' refusal to allow him to file a delayed appeal did not constitute an "adequate" ground to bar habeas review, as permission to file a delayed appeal is discretionary. Thus, because the IAC claim was not defaulted, and the IAC alleged constitutes *per se* ineffective assistance, the 6th Circuit reversed the district court, remanding for relief if Petitioner can prove that he asked his attorney to file a timely appeal and that his attorney failed to do so.

***Martin v. Perez*,**
391 F.3d 799 (6th Cir. 2004)

Petitioner alleged innocence to a federal arson charge. In an earlier opinion (*Martin I*, 319 F.3d 799 (6th Cir. 2003)) the 6th Circuit remanded this case back to the district court for an evidentiary hearing to be conducted, in which Petitioner was to be given the opportunity to prove that the bombed property lacked the requisite connection to interstate commerce necessary for a conviction under the federal arson statute, 18 U.S.C. § 844(i).

After a hearing, the district court determined that, because the property involved was a rental property, it had a sufficient nexus to interstate commerce to support Petitioner's conviction under § 844(i). The 6th Circuit affirmed.

***Arnett v. Jackson*,**
393 F.3d 681 (6th Cir. 2005)

During Petitioner's sentencing for obscenity and ten counts of rape (child), the trial judge quoted a Bible verse. Petitioner appealed, claiming that the court impermissibly considered its own religious views during sentencing. The Ohio Supreme Court affirmed the conviction. The federal district court granted Petitioner a writ of *habeas corpus*, finding that the trial court's use of the Bible as a "final source of authority" in sentencing was improper.

The 6th Circuit looked to *Townsend v. Burke*, 334 U.S. 736 (1949), *United States v. Tucker*, 404 U.S. 443 (1972), and *Zant v. Stephens*, 462 U.S. 862 (1983) to determine what constituted clearly established U.S. Supreme Court precedent. These cases hold that a sentencing court's considerations of erroneous, impermissible, or irrelevant information may constitute a due process violation. For a comparable application of this principle, the 6th Circuit looked to the case of *United States v. Bakker*, 925 F.2d 740 (4th Cir. 1991). In *Bakker*, the sentencing judge commented that Bakker gave no concern for his victims and in effect mocked "those of us who do have a religion." The *Bakker* court reversed the defendant's sentence, finding specifically that the trial judge considered its own religious beliefs to be "ridiculed," and improperly weighed its own personal religious principles in sentencing.

After review of the above caselaw, the 6th Circuit determined that nothing in the judge's comments in the instant case indicated that the judge used the Bible or personal religious values as her "final source of authority" in sentencing. As such, the 6th Circuit could not find the Ohio Supreme Court's (unanimous) opinion to be an unreasonable application of federal law.

***Miskel v. Karnes*,**
___ F.3d ___, 2005 WL 129733 (6th Cir. 2005)

Petitioner sought a writ of habeas corpus for relief from her conviction for Operating a Motor Vehicle with a Prohibited Concentration of Alcohol ("OMVI *per se*"). At trial, the court refused to allow Petitioner to conduct cross examination and present expert testimony on the specific issue of whether the breath testing machine and process were generally reliable. Petitioner claimed that this denial constituted violations of the 6th and 14th Amendments: 1) the right to meaningfully cross examine key state witnesses, 2) the right to compel witnesses to testify in her favor, 3) the right to present a meaningful defense and to require the state to prove each element beyond a reasonable doubt.

Reviewing these claims for an unreasonable application of clearly established federal law, the 6th Circuit held: 1) Petitioner had a full and fair opportunity to cross examine the state's witnesses about the procedures and instruments they used, and she was not precluded from challenging the specific machine or procedures used to measure her alcohol content; 2) Petitioner was free to challenge the instrument used to test her, and because effective means were available to challenge the accuracy of her test, refusal to admit expert testimony on general reliability of breath test machines was not an unreasonable application of federal law; 3) the trial court did not require the jury to presume accuracy of Petitioner's breath test, as statute does not create a presumption on its face, and jury instructions properly placed all burdens of proof on the prosecution.

Note: the 6th Circuit often and emphatically repeated that it reviewed this case looking for an "unreasonable application of clearly established federal law as determined by the Supreme Court," a standard highly deferential to the findings of the state courts.

***Souter v. Jones*,**
395 F.3d 577 (6th Cir. 2005)

The 6th Circuit determined that Petitioner raised a "credible claim of actual innocence," and that such a claim is entitled to equitable tolling of the AEDPA's one year statute of limitations.

Petitioner's 1992 murder conviction for a 1979 murder was based almost entirely on the theory that a whiskey bottle, which Petitioner admitted was his, was used as a murder weapon to cut the victim. In 2002, after years of investigation, Petitioner filed for a writ of *habeas corpus*. Petitioner provided several new pieces of evidence including: an affidavit from an investigator who interviewed the bottle manufacturer and a technician who stated that the bottle did not contain any sharp edges; affidavits from several of the doctors who testified, either recanting testimony or admitting speculation; an affidavit from the police technician who admitted the bottle did not have a sharp edge, and the fact that Type-A blood was found was not especially helpful as 43% of the population has this blood type; and several photographs allegedly not available at trial.

The federal district court granted the state of Michigan's motion for summary judgment, finding that the petition was barred by the one-year statute of limitations set forth in 28 U.S.C. Section 2244 (d)(1).

The 6th Circuit reversed the district court and determined that Petitioner made a sufficient showing of actual innocence to equitably toll the AEDPA one year statute of limitations. This case was remanded to the district court for a ruling on the merits.

***Towns v. Smith*,**
395 F.3d 251 (6th Cir. 2005)

Robbery suspect "Richard" was arrested with a gun which was later determined to have been used in a murder. Richard told police that he drove the car, but "Willie and his brother" were the ones who committed the murder. The police looked for Willie Towns and brother Kevin. While looking, they found Petitioner Parrish Towns, who closely matched his brother Kevin's description. For an unknown reason, the police switched focus to Parrish. Parrish was identified in a lineup by the sole eyewitness, who stated that he "couldn't be sure" and admitted making the ID primarily based on weight and height.

During trial, the prosecution was permitted to withdraw Richard as a potential witness. Defense counsel indicated that he might want to call Richard, and asked him to be held in the local jail so that he could speak with him before calling him. Counsel never met with Richard. At trial the next day, counsel did not call Richard. Despite his alibi defense, Petitioner was convicted along with his brother.

Petitioner claimed ineffective assistance of counsel, alleging that his attorney was deficient for failing to adequately investigate Richard and failing to call him as a defense witness. During post-conviction investigation of this claim, Richard stated that he had personal knowledge that Petitioner was not involved in the murder. The 6th Circuit determined that abandoning the investigation of Richard, "a known and potentially important witness" was unreasonable, especially after indicating the need to speak with him. In rejecting the state's claim that the decision to not call Richard may have been based on a fear that he may have given harmful testimony, the 6th Circuit pointed out that due to the failure to investigate Richard, counsel could not have been sufficiently informed to make that determination. Considering the weakness of the state's case, including the admitted hesitancy of the eyewitness, the 6th Circuit affirmed

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the district court's finding of ineffective assistance of counsel and granting of the writ of *habeas corpus*.

***Valentine v. Konteh*,**
395 F.3d 626 (6th Cir. 2005)

Petitioner was convicted of 20 counts of child rape and 20 counts of felonious sexual penetration of a minor, and was sentenced to 40 consecutive life sentences. The 20 child rape indictments were exact carbon copies of one another, as were the 20 felonious sexual penetration indictments. Apparently, the number of charges in the indictments was based upon an approximation by the victim of how many times the offense occurred, *i.e.*, "about 20."

Petitioner sought a writ of *habeas corpus* alleging a due process violation when he was tried and convicted on an indictment which did not include specific dates or actions involved in the offenses. As such, Petitioner argued that he was subjected to double jeopardy. The district court, relying on *Russell v. United States*, 369 U.S. 749 (1962), determined that the state court had unreasonably applied federal due process law. Specifically, *Russell* requires an indictment to 1) sufficiently inform the defendant of the elements charged, indicating what the defendant is facing, and 2) sufficiently describe the charges so that the defendant may plead former acquittal or conviction for the same conduct. Petitioner claimed that the wide time range and the lack of differentiation among the charges rendered the indictment invalid.

The 6th Circuit rejected the claim that the wide range of time given in the indictment ("March 1, 1995 to January 16, 1996") rendered the indictment invalid. The Court noted that, particularly in cases with child and/or sex abuse victims, exact times are difficult if not impossible to ascertain, and ranges are sufficient. However, the 6th Circuit agreed that the lack of *any* distinction between any of the 20 counts of each offense was a problem. Neither the indictment nor the bill of particulars distinguished any of the 20 counts of child rape from one another, nor the 20 counts of felonious sexual penetration from one another. At trial, the victim only testified to what "typically" happened during the abuse. The Court pointed out that, with this testimony and two stacks of 20-count charges, it is highly unlikely that the jury could have considered a particular count on its own, and therefore it is difficult to know exactly what the jury found.

As such, the 6th Circuit found that Petitioner's due process rights against double jeopardy were violated. However, the Court determined that the first of each "type," (*i.e.*, the first child rape count), and the first felonious sexual penetration count were both valid, but the remaining 38 carbon-copy counts included in the indictment (19 of each type) were not valid. Thus, the 6th Circuit affirmed the district court's finding of relief for counts 2-20 and 22-35 (5 had been dropped from an earlier state court appeal), but reversed on counts 1 and 21, thereby allowing the conviction on these two counts to stand. ■

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

- Justice Hugo L. Black
U.S. Supreme Court
Gideon v. Wainwright (1963)

Welcome to My World: Outside Looking In – Part II

The Initial Transfer, Orientation, Reclassification, Subsequent Transfers and Personal Property

by Robert E. Hubbard

In Part I of this series of articles on what happens to a defendant after conviction; we learned how an inmate's custody level is determined and how, based on his or her particular custody level, the inmate is assigned to a corrections institution at a specific security level. This system of classification is designed to protect society and correctional staff, punish the inmate and, perhaps most importantly, provide the inmate opportunities for rehabilitation. What is available for each inmate varies by institution and considers the needs of the individual inmate. Before considering many of the various aspects of incarceration such as visitation, correspondence, religion, health care, job, school, and counseling/treatment programs available to the inmate, let's look at what transpires once the inmate is transferred from the Assessment Center (AC) or another facility and consider the items of personal property the inmate may possess.

Orientation

In addition to the governing KARs and CPPs, each institution is distinct and operates under its own set of Standard Operating Procedures (SOP). As such, the inmate may expect to receive orientation at any institution he is subsequently transferred to. This orientation insures the inmate is aware of the rules and regulations, the programs offered, how to enroll in them, how custody levels may be reduced, how to secure transfers to other institutions and how he is expected to perform while incarcerated. In addition to receiving this information directly from institutional staff, inmates are also supplied an Inmate Handbook that covers this information.

Reclassification

Within 10 working days of arrival at the receiving institution, (whether received from the AC or another institution), a Reclassification Committee will see each inmate. The purposes of this "reclass" are to review the initial or most recent classification document and the inmate's assigned custody level; to revise program placement recommendations and insure the recommended program is realistic; and to assign/review housing assignments. Aside from this initial reclass, the Reclassification Committee has the ongoing responsibility of reviewing all inmates at least once every 6 months to either insure the appropriateness of, or change, their program assignment and status, to review/change work or housing assignments, review/change the inmate's visiting list, recommend restoration of lost good time, and to update the custody level if appropriate.

Unless recommended by the Classification Treatment Officer (CTO) or Classification Committee Chairperson, the inmate may see the Reclassification Committee only once every 6 months. If, at the time of his scheduled reclass, an inmate has any pending matter which might affect the results, *i.e.*, a detainer, a write-up, etc... the scheduled hearing may be postponed provided it is held within the same 6-month period, *i.e.*, either January-June or July-December. The inmate may also request a "Special Reclassification." Special Reclass requests may be granted only once per calendar year. Custody reviews of Class "D" program inmates are specifically provided for under 501 KAR 5:020 and 060 and within the DOC "Classification Manual." Inmates may appeal any classification action to the Warden if in a state facility or to the Classification Branch Manager if in the Class "D" program. Appeals taken at the institutional level to the Warden may be taken up for further review before the Classification Branch Manager if the inmate is not satisfied with the Warden's response.

Transfers

Transfers between institutions are designed to (1) maximize the efficient use of resources; (2) regulate the institutional population; (3) provide adequate security and supervision; (4) meet medical/mental health needs; and (5) ensure protection of the public, staff and other inmates.

Six Types of Transfers

(1) The Initial Placement Transfer – used following completion of initial orientation and classification.

(2) Program Progression Transfer –for the purpose of participation in a program, school, training course, job or other activity designed to meet the needs of the inmate or promote family contact, employment or reintegration into society

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(3) Disciplinary Transfer – for the inmate who has been convicted of a disciplinary infraction, this transfer is designed to place the inmate in a facility better suited to address heightened security needs.

(4) Medical Transfer – allows for an inmate's placement in a facility equipped to deal with medical/mental health needs.

(5) Administrative Transfer – may be directed: a) where there is reasonable suspicion of activity detrimental to the security and operation of the institution; b) when the inmate fails to adjust to the rules or program; c) to facilitate population control; d) to fill a particular job skill; e) to separate inmates who appear to negatively influence each other; f) to provide a secure environment for an inmate in need of protection; g) to separate groups, cliques, etc...appearing to have a negative influence on the institution; or h) when information provided by institutional staff warrants transfer.

While the Administrative Transfer is not considered punitive, the inmate may, nevertheless, be reclassified to a higher custody level if returned from a lower level and a period of reassessment is required.

(6) Emergency Transfer – for security or other substantial reasons. This transfer may be accomplished without the inmate meeting the Reclassification Committee. However, within 10 working days of arrival at the receiving institution, the inmate is entitled to a review by the Reclassification Committee at the receiving institution. Emergency transfers are appropriate when: a) conduct of an individual inmate or group of inmates is of immediate danger to the institution, staff or other inmates; b) the institution is not equipped to contain the inmate's behavior; c) there is a medical/mental health need requiring immediate treatment; d) the inmate is behaving in a violent manner or suspected of being intoxicated; or e) the inmate poses a threat to the security of the institution.

Some additional considerations affecting an inmate's transfer are:

(a) Where the number of approved transfers to Level 1 or 2 institutions exceed the number of available beds, the following priorities are used to determine the order of transfer. 1) AC inmates; 2) inmates returned from Level 1 or 2 institutions for a rule violation but who were found not guilty or whose charges were dismissed; 3) inmates from Level 3 or 4 institutions approved for transfers to a Level 1 or 2 facility; 4) transfers between a Level 1 or 2 and another Level 1 or 2 facility. These priorities may be waived when medical, mental health, security or program needs require transfer or in order to fill institutional vacancies.

(b) Inmates with a good time loss in excess of 90 days are ineligible for transfer to a Level 1 or 2 institution.

(c) Any non-restorable good time loss precludes the inmates from Level 1 or Level 2 placement.

(d) An inmate assigned to a Level 1 or 2 facility, who incurs up to a 90-day good time loss, and who has no more than a total 180-day good time loss, may receive a custody override and remain at the facility.

(e) Generally an inmate will not be transferred from a Community Center to a Level 2 facility except for disciplinary or medical reasons.

(f) In selection of an inmate for Level 3 or 4 placement, priority is given to inmates in next lower custody level with the highest custody scores within the level.

(g) Inmates cannot refuse transfer; if they do, they will be reviewed for disciplinary action and placement at a higher security/custody level.

(h) In many instances an inmate may be transferred to an institution of higher security level without any change in his custody level, *i.e.*, for medical, mental health, program, school, job assignment or administrative reasons.

Transfers are scheduled in the following priority. Transfers made for: 1) medical reasons; 2) security reasons; 3) administrative reasons; 4) initial placement; and 5) program progression. Once transferred, an inmate is generally required to remain at the institution for 6-12 months before being considered for transfer to another facility. Out-of-state transfers may be recommended only for safety/security reasons or special housing, not to enhance visitation.

Population Categories

Once transferred from the Assessment Center the inmate will find himself in 1 of 3 population categories:

1) General Population (GP) – Most inmates fall into this category which may also include inmates in medical or mental health units, and those voluntarily unassigned (UA) (electing not to work).

2) Honor Status – This status is based upon an inmate's a) conduct, b) program/job evaluations and participation, c) security risk, d) good time loss, e) length of time at

the institution, f) the available space, g) the racial balance of the institution and h) the inmate's prior classification documentation.

If placed in Honor status, the inmate's privileges, which may be more contingent upon the actual presence of honor housing, may consist of a) special housing, b) additional visitation privileges, c) additional recreational facilities and time, d) increased leisure opportunities, e) added phone privileges, h) increased canteen privileges, and/or i) other additional privileges varying by institution.

3) Special Management Inmates – This category covers inmates who have been placed in disciplinary segregation, administrative segregation, administrative control status, protective custody and/or special security status.

Disciplinary Segregation is the confinement of an inmate in an individual cell for a specific period of time for violating institutional rules. Administrative Segregation is confinement to a cell, room or highly controlled area for a short period of time in an effort to ensure the safety/security of the institution, the staff or other inmates pending an investigation. Administrative Control Status is alternative maximum security housing for inmates who repeatedly violate rules, or who pose a serious threat to the safety/security of the institution, staff, other inmates or to the offending inmate him/herself. Protective Custody is designed for the inmate in danger of being harmed or who, for reasons other than rule violations, is unable to adjust to living in the general population (GP). Special Security is the maximum security housing used to control the inmate serving a sentence of death.

Inmates may also be placed in Temporary Holding Status pending transport, review for transport, or pending investigation when they are suspects in an incident.

Although Special Management inmates are grouped within the institution in a special management unit (SMU) often referred to simply as "Seg," policy dictates that treatment of the SMU inmate be "fair and humane." While there is a heightened awareness of security and control, with the exception of specific privileges which may be denied anyone in disciplinary segregation, living conditions are similar to those found in the general population. SMU inmates are observed at 30 minute intervals; the violent, mentally ill, or inmates demonstrating unusual or bizarre behavior are observed more regularly, while suicidal inmates are under continuing observation. More specifics on the criteria and procedural requirements for assignment to SMU can be found in Corrections Policy and Procedure (CPP) 10.2 VI. A 1-5; 10.2 VI. B 1-5; and CPP 18.15 V. A-D; 18.15 VI. A-K (for Protective Custody inmates).

As previously noted, the majority of inmates will be placed in the general population and, except for slight differences mandated by different institutions, many of the general facets of incarceration will remain the same, institution to institution. Indeed this is often true even for inmates in other custody classes with changes made only for security/safety precautions. Before closing, let's consider several routine aspects of prison life that deal with personal property.

Personal Property

Personal property, of whatever nature, is limited to reasonable quantities, in light of fire, sanitation, and safety requirements. In addition, there are other limitations on specific types of property:

Clothing

There are 2 general categories of clothing. (1) Personal Clothing is clothing, other than state issue items, that may be possessed and/or purchased through the inmate canteen. (2) State Issued Clothing is supplied by the Department of Corrections.

Since 2001 inmates have been issued and required to wear state issued clothing. Personal items of clothing are limited primarily to recreational wear. The state issue uniform consists of a khaki colored shirt, pants, belt and coat. This state issued uniform is to be worn during program/work hours, typically 8:00 a.m. – 4:00 p.m., and anytime the inmate is out of his living area, dormitory or cellhouse. Special status inmates (*e.g.* SMU inmates) and inmates in specific work areas (*e.g.* Food Service) are provided specially styled, marked and/or colored clothing to denote their status. The inmates are further required to abide by other dress code directives and failure to do so subjects the inmate to an institutional write-up. Each institution provides a laundry facility for laundering of personal and state issued clothing and provides for the replacement of state issue clothing as necessary. Provisions are also made for inmates required to leave the institution, (for attending events such as court, funerals, bedside visits), to be dressed in "presentable clothing" that is "suitable for the reason."

Personal Hygiene and Bedding Items

All institutions provide without charge the following items: climatically suitable clothing, toothbrushes, toothpaste, denture cleanser and adhesive, disposable razors, shaving cream, soap, a comb, toilet paper, a clean mattress and pillow, clean sheets, pillow case, two clean towels, clean blanket, and at KCIW sanitary napkins.

These items are issued in sufficient quantity and frequency to allow the inmate to maintain an "acceptable level of personal hygiene." Additional personal hygiene and bedding items may be purchased and possessed by the inmate provided the inmate does not exceed the quantity allowed.

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Hobby-Craft Materials

If permitted by the specific institution, the inmate is allowed to purchase and use hobby-craft materials. Each institution permitting the craft program has responsibility for developing its own procedures for dealing with and storing the projects.

Legal Materials

Inmates are allowed to maintain materials necessary to their legal actions as well as reference materials, provided they are not available in the law library. The amount of material an inmate may have is established independently by each institution. However, the space allowed cannot be restricted below 2 cubic feet per inmate.

Personal Mail

Each institution has the responsibility for establishing storage limits for personal mail. These established limits take into consideration the total amount of property being stored as well as fire, sanitation, security and housekeeping concerns. The institutions may mandate that personal mail be considered a part of the 2 cubic feet of space set aside for legal materials.

Additional Personal Items

Inmates are allowed numerous other personal items as set forth in Attachment 1 of CPP 17.1. For example, an inmate may possess a watch, rings, necklaces, a photo album, ice chest, eyeglasses, locks, plastic bowls, a clock, fan, a radio, cassette, or CD player, TV, headphones, typewriter, musical instrument(s), extension cord, hairdryer, clothes hangers, cigarettes, pipe tobacco, snuff, chewing tobacco, matches, envelopes, stamps, batteries, playing cards, and table games (no dice). Additionally, an inmate may possess medical items as required for treatment of a specific medical condition or prescribed by a physician. An inmate however cannot possess any device that provides for the electronic storage of information which may facilitate illegal activities or activities which pose a threat to security.

A complete list of authorized property is provided each inmate entering the system. (*See*, Attachment 1, Authorized Property List, CPP 17.1) and the inmate's property is inventoried and tracked throughout the inmate's incarceration by institutional staff using property inventory forms. All additional personal property acquired during the inmate's term of incarceration (either purchased from the canteen or received in the initial and subsequent packages) is added to the inmate's personal property inventory and when, due to a change in institutions, items previously possessed may be determined to be contraband, the inmate is required to dispose of those items. This may be accomplished by having the items sent home, donated to charity or destroyed. Inmates are not authorized to sell, trade or transfer any item of personal property to another inmate however.

Having undergone initial classification, and having been received at their assigned institution and provided/received necessities of life, the inmate can now begin to settle in for the term of his incarceration. In Part III of this continuing series we will discuss more specific information concerning inmate correspondence, visits, telephone use, religious services, marriage, and job opportunities. These matters allow inmates to maintain ties with family, friends, and acquaintances, practice their religious beliefs, and otherwise occupy their time and/or learn a trade in contemplation of their release. Hopefully this additional insight into institutional life will allow you to better understand and address the varied questions posed by the client and/or the client's family. ■

Ours is a government of laws, not men, John Adams said. American society is founded on the commitment to law, binding the rulers as it does the ruled. Our willingness to assure the least among us the guiding hand of counsel is a test of our American faith.

— Anthony Lewis

From foreword of ABA Report; *Gideon's Broken Promise*: America's Quest for Equal Justice
http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf

PLAIN VIEW . . .

Ernie Lewis, Public Advocate

Illinois v. Caballes
125 S.Ct. 834 (2005)

Can the police use a narcotics detection dog on a car that has been lawfully stopped for speeding but for which there is no other reasonable or articulable suspicion? According to the United States Supreme Court, the answer is yes.

Roy Caballes was speeding slightly (71 in a 65) on the interstate in Illinois when he was stopped by Trooper Gillette. While Gillette was writing a ticket, another officer appeared with a narcotics-detection dog. Caballes refused to consent to a search of his car. The trooper walked the dog around Caballes' car while Gillette was writing a warning ticket. The dog alerted at the trunk of the car. A search of the car resulted in a finding of marijuana. Caballes was stopped for less than ten minutes. Gillette was convicted and sentenced to 12 years in prison and a $256,136 fine. The Illinois Supreme Court reversed, finding that the use of the narcotics detection dog had "'unjustifiably enlarge[ed] the scope of a routine traffic stop into a drug investigation.'"

Justice Stevens wrote the opinion of the 6-2 majority (Justice Rehnquist did not take part in the decision). The Court found that Caballes' privacy interests had not been compromised. Caballes had no legitimate interest in protecting the privacy of his contraband. No other interest was effected by subjecting the external part of the car to the narcotics detection dog. "Accordingly, the use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view,'…during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement…A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."

Crucial to understanding this decision is the fact that the stop took less than 10 minutes, time that was needed to process the speeding warning ticket. Justice Stevens reiterated that this situation could potentially violate the Fourth Amendment. "A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."

Justice Souter wrote a dissenting opinion. He would have held that "using the dog for the purposes of determining the presence of marijuana in the car's trunk was a search unauthorized as an incident of the speeding stop and unjustified on any other ground." Justice Souter was particularly concerned about the possibility of error by the dog, which would thereby permit searches of cars based upon nothing other than the error of the dog. He cited a study showing that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time. As a result of this possibility, the "sniff alert does not necessarily signal hidden contraband, and opening the container or enclosed space whose emanations the dog has sensed will not necessarily reveal contraband or any other evidence of crime."

Justice Ginsburg also wrote a dissenting opinion, which Justice Souter joined. She would have analyzed the case under *Terry v. Ohio*, 392 U.S. 1 (1968), whereby the court analyzes first whether the officer's stop is justified at its inception and second whether the stop is "'reasonably related in scope to the circumstances which justified the interference in the first place.'" For her, the time of the ten-minute stop was not dispositive. "The unwarranted and nonconsensual expansion of the seizure here from a routine traffic stop to a drug investigation broadened the scope of the investigation in a manner that, in my judgment, runs afoul of the Fourth Amendment."

For Justice Ginsburg, the majority has abandoned the second prong of the *Terry* inquiry by its analysis, and broadened the power of the police to conduct suspicionless searches. She raises interesting and troubling possibilities. "Under today's decision, every traffic stop could become an occasion to call in the dogs, to the distress and embarrassment of the law-abiding population…Today's decision…clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots" "Nor would motorists have constitutional grounds for complaint should police with dogs, stationed at long traffic lights, circle cars waiting for the red signal to turn green."

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Devenpeck v. Alford
125 S.Ct. 588 (2004)

Justice Scalia poses the question presented in this case: "whether an arrest is lawful under the Fourth Amendment when the criminal offense for which there is probable cause to arrest is not 'closely related' to the offense stated by the arresting officer at the time of arrest."

The case arose under a suit pursuant to 42 U.S.C. § 1983. Alford had been arrested after he had helped a disabled vehicle, during which it appeared he was impersonating a police officer. He was charged with a violation of Washington's privacy act for recording a conversation with the police during their arrest of him, as well as using "wig-wag" headlights. The charges were later dismissed, and Alford filed suit alleging unlawful arrest and imprisonment. The jury found for the police, but the 9th Circuit reversed. The 9th Circuit held that the police did not have probable cause to arrest on the privacy act charge. There was no probable cause for the offenses of impersonating a law-enforcement officer or obstructing a law-enforcement officer because those offenses were not "'closely related'" to the offense for which Alford was arrested.

Justice Scalia issued a unanimous opinion of the Court (absent the Chief Justice) reversing the decision of the 9th Circuit. The Court rejected the holding of the 9th Circuit that the "probable-cause inquiry is further confined to the known facts bearing upon the offense actually invoked at the time of the arrest, and that (in addition) the offense supported by these known facts must be 'closely related' to the offense that the officer invoked."

The Court reiterated their opinion in *Whren v. United States*, 517 U.S. 806 (1996) that the state of mind of the arresting officer is irrelevant to the probable cause equation. "That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." "Subjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest."

The Court also rejected the 9th Circuit's holding that the offenses for which there was probable cause had to be closely related to the offense for which the defendant was arrested. "The rule that the offense establishing probable cause must be 'closely related' to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest is inconsistent with this precedent. Such a rule makes the lawfulness of an arrest turn upon the motivation of the arresting officer-eliminating, as validating probable cause, facts that played no part in the officer's expressed subjective reason for making the arrest, and offenses that are not 'closely related' to that subjective reason…This means that the constitutionality of an arrest under a given set of known facts will 'vary from place to place and from time to time'…depending on whether the arresting officer states the reason for the detention and, if so, whether he correctly identifies a general class of offense for which probable cause exists."

Ragland v. Commonwealth
2004 WL 2623926, 2004 Ky. LEXIS 284 (Ky. 2004)
(Commonwealth's Rehearing Petition granted on 2/17/05, and supplemental briefing ordered)

This is the somewhat infamous case involving the killing of a University of Kentucky football player while he celebrated his 21st birthday. One of the issues in the case involved the seizure of evidence pursuant to a federal search warrant. The warrant had been obtained during a federal investigation of drug trafficking as well as possession of a firearm by an unlawful user or addicted person.

The affidavit in support of the warrant recited information from the defendant's former girlfriend regarding the location of a rifle and the location of marijuana-growing operations. The affidavit also described 3 DUI arrests during which the defendant was in possession of marijuana. The affidavit describes nine "trash pulls" that resulted in the seizure of marijuana and other associated papers.

Ragland challenged the admission of the evidence seized pursuant to the warrant on the basis of staleness. The Court, while rejecting the defendant's argument, reviewed the law surrounding staleness. Citing from *United States v. Spikes*, 158 F. 3d 913 (6th Cir. 1998), the Court noted that the "'"function of a staleness test in the search warrant context is not to create an arbitrary time limitation within which discovered facts must be presented to a magistrate…Rather, the question of staleness depends on the "inherent nature of the crime."…Instead of measuring staleness solely by counting the days on a calendar, courts must also concern themselves with the following variables: "the character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), the place to be searched (mere criminal forum of convenience or secure operational base?)., etc."'" Under these factors, the Court approved of the search, saying that the information from the girlfriend, while arguably stale, "was corroborated by Appellant's possession of marijuana at the time of his recent arrests and the marijuana and drug-related evidence found during the 'trash pulls' at his parents' respective residences." In terms of the rifle, the Court held that the staleness test was different for the rifle than for marijuana.

The Court also rejected Ragland's argument that there was false and misleading information in the affidavit pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). "Without detailing each allegation and the evidence refuting it, suffice it to say that the trial court's finding in that respect was supported by substantial evidence."

Meghoo v. Commonwealth
2004 WL 2418037, 2004 Ky. App. LEXIS 316 (Ky. Ct. App 2004)

On July 27, 2000, Gerry Meghoo drove his truck into a weigh station on I-65 near Elizabethtown. A Kentucky Department of Transportation, Division of Vehicle Enforcement Officer, began to discuss different violations committed by Meghoo, including failure to accurately maintain a logbook. Eventually, the officer called in a canine unit. The dog alerted near the rear doors of the trailer. The officer obtained the keys from Meghoo and opened the trailer. The dog alerted to a cardboard box, ripping it open. Two bales of marijuana were found in the box. Meghoo was arrested and charged with trafficking in marijuana five pounds or more. After his suppression motion was overruled, he entered a conditional guilty plea preserving the right to challenge the search of his truck.

The Court affirmed the trial court in an opinion written by Judge Schroder and joined by Judges Minton and Taylor. The Court first held that a Vehicle Enforcement Officer had the legal authority to arrest Meghoo for trafficking in marijuana even though it was not an offense related to transportation. Meghoo had challenged this authority under KRS 281.656 as well as *Howard v. Transportation Cabinet,Commonwealth of Kentucky*, Ky., 878 S.W.2d 14 (1994). "While we would agree that the offense of trafficking in marijuana (KRS 218A.1421) is not an offense related to motor vehicles, Meghoo was also charged with possession of drugs in a commercial vehicle which is a violation of a federal regulation (49 C.F.R. § 392.4) as well as state law (KRS 281.600—enabling the adoption of federal motor carrier safety regulations through 601 KAR 1:006, Section 2 and declaring that violations of those adopted regulations to be violations of KRS 281.600). Thus, the VEOs had the legal authority to search for controlled substances in Meghoo's truck." Based upon this authority, the Court held that they also had the authority to arrest for an offense discovered in the course of a motor vehicle search, based upon a citizens' arrest theory. "We believe that once they lawfully discovered the marijuana, the VEOs had the authority to make a citizen's arrest for any non-motor-vehicle-related felony offense surrounding the marijuana."

Meghoo also challenged the scope of the search conducted by VEO, saying it went beyond that allowed by the regulations. The Commonwealth asserted that the search of the truck was consensual because the defendant had consented after arrest as well as giving his keys to the VEO. The Court held that Meghoo had not consented to a search of the truck. "Officer Chelf admittedly did not ask Meghoo if he could search the trailer or if he could have the keys, but rather directed Meghoo to give him the keys after the officer had already broken the seal to the trailer. Meghoo knew the dog and the VEOs were there to search the trailer, and he likely knew that he was not free to leave the scene. We believe that Meghoo had to feel that he had no choice but to give Officer Chelf the keys."

The Court's holding that there was no consent was of little help to Meghoo, however. The Court held that under *New York v. Burger*, 482 U.S. 691 (1987) the search was a valid regulatory search pursuant to the administrative search exception for closely regulated businesses. After the initial search was conducted, the VEOs had probable cause under the automobile exception to conduct a complete search without a warrant. "From our review of the totality of the circumstances in this case—the inaccurate log book, handwritten bills of lading, discrepancies between the log book and bills of lading, lying about the bills of lading, Meghoo's nervousness, and the alert to the presence of drugs in the trailer by the dog—the VEOs had sufficient probable cause to conduct a search of the trailer."

Commonwealth v. Murray
2004 WL 2827254 , 2004 Ky. App. LEXIS 354 (Ky. Ct. App 2004)

This case involves an interpretation of the open fields doctrine. Murray had property on which he had a RV with electricity and a mobile home. Both backed up to a wooded area. In December of 2001 the Kentucky State Police received a tip that Murray was burying marijuana in the woods behind the RV and mobile home. Two officers went to the property without a warrant, crossed through the property and into the woods. They turned over a rock and found buried marijuana. A warrant was obtained which resulted in additional evidence being found. Murray was indicted for trafficking in marijuana while in possession of a firearm and possession of drug paraphernalia while in possession of a firearm. He moved to suppress and the trial court sustained the motion, finding that the officers had walked through the curtilage illegally and that had tainted the seizure of the evidence pursuant to a warrant. The Commonwealth appealed.

The Court of Appeals reversed in an opinion by Judge Vanmeter and joined by Judges Minton and Guidugli. The Court relied upon *Oliver v. United States*, 466 U.S. 170 (1984) to hold that the warrantless search in an open fields did not violate the Fourth Amendment, irrespective of a trespass on the curtilage. "'[I]n the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment."

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Judge Guidugli concurred in the judgment. He stated that the majority opinion relied upon the trial court's thin findings that the marijuana was located outside the curtilage (even though it was only 50 ft. down the path). Implied in his concurring opinion is that he questioned whether the marijuana had been found within the curtilage, and thus within the protections of the Fourth Amendment.

Jones v. Commonwealth
2004 WL 2415872, 2004 Ky. App. LEXIS 321 (Ky. Ct. App. 2004)

A Harlan police officer drove to Jones' home to serve him with an EPO. When the officer approached the house, Jones and another man who had been talking beside a parked car separated and Jones began walking toward his house. The officer asked him to stop, but Jones kept going toward his house. The officer prevented Jones from shutting the door as Jones went inside. The officer began serving the EPO when he noticed a "bulge" in Jones' pocket. The officer conducted a *Terry* patdown and felt what he believed to be a prescription pill bottle. The officer asked Jones to give him the object and Jones declined initially, but eventually complied by taking out the bottle and throwing the pills (OxyContin) on the ground. Jones was charged with trafficking in a controlled substance, tampering with physical evidence, and resisting arrest. Jones moved to suppress, which was denied. Jones entered a conditional plea of guilty, and appealed to the Court of Appeals.

The Court of Appeals, in a decision written by Judge Tackett and joined by Judges Schroder and Emberton reversed the opinion of the Harlan Circuit Court. The Court found the initial *Terry* frisk to have been lawfully based upon a reasonable and articulable suspicion. The Court found, however, that the officer had erred by asking Jones to hand him the prescription bottle. Under *Minnesota v. Dickerson*, 508 U.S. 366 (1993) and *Commonwealth v. Crowder*, Ky., 884 S.W. 2d 649 (1994), a *Terry* frisk can result in the seizure of contraband only when the object that is found is clearly contraband. It is not immediately apparent that a prescription bottle is contraband.

The Court rejected the Commonwealth's contention that probable cause existed to seize the pill bottle. The Court noted that at the moment of the seizure, "its contraband nature was not readily apparent, and the officer's actions exceeded the scope of an allowable warrantless search under *Terry*."

Judge Emberton filed a dissenting opinion. He criticized the majority for ignoring the fact that it was the defendant rather than the officer who removed the bottle from Jones' pocket. "Therefore, the seizure of the bottle was a valid search based upon consent…The record indicates only that Jones was hesitant to remove the bottle from his pocket. Being reluctant is not the same as being coerced." Judge Emberton also believed that even without the consent the seizure of the bottle was proper. "Giving consideration to the totality of the circumstances: having viewed what appeared to be a drug transaction; knowing Jones had attempted to separate himself from Officer Teagle; and having conducted a patdown search that revealed a prescription pill bottle, Officer Teagle was justified in believing that the bottle contained illegal drugs." Thus, Judge Emberton would have found probable cause to believe the bottle contained illegal drugs.

United States v. Lattner
385 F.3d 947, 2004 Fed.App. 0344P (6th Cir. 2004)

The police received a complaint that a particular location was involved in drug trafficking. In response, the police went there and began surveillance over 3 days. They saw people come and go with small items in their hands. On one opportunity, an officer asked a person leaving the apartment whether "'Marty was open for business,'" and in response the buyer showed the officer what appeared to be cocaine in his hand. Thereafter the police attempted a controlled buy from the location, but the person there told the officer that they had no cocaine then but to come back. The police then sought a warrant, the execution of which revealed a good quantity of illegal narcotics. Lattner was indicted and tried and sentenced to 170 months in prison.

The Sixth Circuit, in an opinion written by Judge Forester and joined by Judges Siler and Rogers, affirmed the conviction. The Court ruled that the actions of the police in obtaining a warrant had been in compliance with the Fourth Amendment. The Court rejected the defendants assertions that the information was stale, that there was nothing to prove that what was in the buyer's hand was cocaine when he showed it to the officer, and that the fact that the controlled buy was unsuccessful meant that there was no probable cause. "Here, the affiant verified the initial anonymous complaint of narcotics trafficking through a three-day independent investigation combining surveillance and an attempt at a controlled purchase by an informant. The affiant further made contact with one of the people seen leaving the premises and confirmed that the person was in possession of suspected contraband that had been purchased from the person accused by the anonymous complainant of selling drugs at 2416 Monterey. Based on the anonymous complaint, a statement from a person seen leaving the premises, and the affiant's direct observations and training and experience, it was sufficiently probable that evidence of narcotics trafficking would be found at 2416 Monterey."

Mills v. City of Barbourville, et. Al
389 F.3d 568, 2004 Fed.App. 0389P (6th Cir. 2004)

This is a civil case filed pursuant to 42 U.S.C. § 1983. Lisa Mills had been arrested pursuant to a search warrant, and later strip-searched at the Knox County jail. When charges were ultimately dismissed, Mills filed a civil suit against the city of Barbourville, numerous police officers, Knox County, and numerous jailers. The district court issued a summary judgment in favor of the defendants.

The Sixth Circuit, in an opinion written by Judge Merritt and joined by Judges Moore and Duggan, reversed the summary judgment. First, the Court reversed stating that the "affidavit supporting the search warrant for plaintiff's home was not supported by probable cause and a reasonable officer in Officer Broughton's and Chief Smith's positions should have known that there was not probable cause to conduct the search." The Court notes that the affidavit said only the following: "'Affiant received information from…: A male juvenile that Lisa Mills had sold the male juvenile a marijuana cigarette for five dollars. Affiant conducted the following investigation: On the 1st day of March a male juvenile gave a signed written statement to Officer Broughton stating that he had purchased a marijuana cigarette for five dollars from Lisa Mills." The statement of the juvenile was not attached to the affidavit, and nothing was included in the affidavit saying why the defendant's home at 801 North Allison was being searched.

The problem with the affidavit, according to the Court, is that "the affidavit did not mention that Cox had purchased the marijuana at that location. The underlying affidavit neither connects the searched residence to any illegal activity nor states that a person engaging in illegal activity away from the residence lives at the searched residence." As a result, "the affidavit does not provide the required nexus between the place to be searched and Lisa Mills."

United States v. Richardson
385 F.3d 625, 2004 Fed.App. 0325P (6th Cir. 2004)

Ricky Collier was driving a car on I-65 in Tennessee when he was pulled over for reckless driving. The police began to question Collier as well as the defendant, his wife Shirley Richardson, and their son Darnell. Eventually, the officer told Collier that he was going to issue him a warning citation and shook his hand. When Collier turned around to go back to his car, the officer said "just hang out right here for me, okay?" The officer then went back to the car and began to question the other three occupants. He asked for permission to search the car. He asked them to get out of the car and empty their pockets. The defendant said his pockets were too tight to empty, so the officer patted him down and found a handgun. Richardson was charged with possession of a firearm by a convicted felon. He moved to suppress and the district court granted the motion. The United States appealed.

In a decision written by Judge Martin and joined by Judge Moore, the Sixth Circuit affirmed the decision suppressing the gun. First, the Court held that the defendant had been seized once the traffic stop ended. Because Collier would not have felt free to leave when the officer asked him to "hang out here," that constituted a seizure. And "when the driver is not free to leave, neither are his passengers; indeed, the passengers are at the mercy of any police officer who is withholding the return of their driver."

Because a seizure occurred, there had to be reasonable and articulable suspicion to seize Collier and the Richardsons. The Court reiterated that a reasonable suspicion is "'more than an ill-defined hunch; it must be based upon a particularized and objective basis for suspecting the particular person…of criminal activity.' *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690, 66 L. Ed. 2d 621 (1981)." The Court agreed with the district court that nervousness, conflicting explanations for their trip, and the movement of Darnell Richardson into the passenger seat did not constitute reasonable suspicion. "Absent reasonable suspicion, the evidence obtained as a result of the unlawful detention in this case must be suppressed as fruit of the unlawful seizure."

Judge Kennedy dissented. In his view, there was no seizure when the officer told Collier to "hang out here." "Officer Fisher's request to Collier that he remain outside the car after he had handed Collier the citation so that he could ask the owner for her consent to search the vehicle did not transform the encounter into an unlawful detention."

United States v. Sandridge
385 F.3d 1032, 2004 Fed.App. 0332P (6th Cir. 2004)

Sandridge appeals from the district court finding that the police officer had reasonable suspicion to pull him over when he saw him driving in Chattanooga, Tennessee, after having conduct a computer check several weeks before and finding that the defendant was driving without a license.

In an opinion written by Judge Cole and joined by Judges Marbley and Moore, the Sixth Circuit affirmed the lower court. The Court found that by checking the defendant's license status several weeks before, the officer had a reasonable suspicion that the defendant was still driving without a license. The Court rejected the argument that the information from several weeks prior was stale and thus the reasonable suspicion had dissipated. "Driving without a valid license is a continuing offense—in contrast, say, to a speeding or parking violation…Accordingly, Officer Grubb had a reasonable basis for suspecting that Sandridge still lacked a valid license on March 27 and, therefore, Grubb was permitted to stop Sandridge briefly to determine whether the crime was still being committed."

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United States v. Smith
386 F.3d 753, 2004 Fed.App. 0355P (6th Cir. 2004)

Officers in Norwood City, Ohio received information that a large shipment of cocaine had arrived at a residence, that it was hidden in a special compartment of a Chevrolet Lumina parked in the garage, that there were 5 people in the garage including one who had drug and weapons convictions, and that there were weapons in the house. The officers asked for a search warrant, and specifically asked to be allowed to execute the warrant at night and to be allowed not to knock and announce. The warrant allowed for the search to be conducted at night, but no reference was made to excepting the knock and announce requirement. The police executed the warrant by breaking down the door with a ram. Smith was caught outside, and was told that his Chevrolet had evidence in it and would be torn up unless Smith cooperated. Smith cooperated. 37 kilograms of cocaine was found in the Chevrolet. Smith was charged with possession with intent to distribute more than 5 kilograms of cocaine. His motion to suppress was denied. Smith entered a conditional plea of guilty and appealed.

The Sixth Circuit, in an opinion by Judge Polster and joined by judges Daughtrey and Cole affirmed the district court. The Court analyzes the knock and announce issue very carefully, and rejects the government's various contentions that the search warrant in this case was legally executed. The Court rejected the arguments that there were exigent circumstances justifying the entry by force without knocking.

The Court further rejected the argument that the search should be justified by the good faith exception. "[W]e hold that there is insufficient evidence to establish a good faith objective belief by a well-trained officer that a warrant containing no provision for a no-knock entry in fact authorized such an entry. Had the officers executing the warrant seized evidence from inside the residence, it would have to be suppressed."

Having prevailed on the no-knock issues, however, the defendant ultimately did not win. Rather, because the evidence against the defendant was found in the Chevrolet, and because the search of the Chevrolet was authorized in the warrant, and finally because the evidence was not found in the house which had been entered by force, the Court found that the cocaine did not have to be suppressed due to the violation of the knock and announce rule.

Reynolds v. City of Anchorage
379 F.3d 358, 2004 Fed.App. 0264P (6th Cir. 2004)

Katherine Reynolds was a juvenile placed in Bellewood Home in Anchorage, Kentucky. It was reported to officers that the girls in her dorm were suspected of being under the influence of drugs. Drug paraphernalia was found, and Reynolds insinuated that she might have drugs in her "undergarments." As a result, a female officer, Watson, was asked to come to Bellewood. Watson arrived and conducted a strip search of all of the girls. When nothing was found, Reynolds filed a civil suit pursuant to 42 U.S.C. #1983. The district judge granted a summary judgment, and Reynolds appealed.

In a decision written by Judge Friedman and joined by Judge Nelson, the Sixth Circuit affirmed the granting of the summary judgment motion. The Court noted that *Bell v. Wolfish*, 441 U.S. 520 (1979) held that "visual body cavity inspections during strip searches of pre-trial detainees and convicted prisoners after they had contact with outsiders were not 'unreasonable' searches under the Fourth Amendment." The Court also relied upon *Dobrowolskyj v. Jefferson County*, 823 F. 2d 955 (6th Cir. 1987), which held that "the strip search of a detainee in a local jail pursuant to a policy of so searching detainees before moving them into an area of the jail where they would have contact with the general prison population, was not an unreasonable search…."

Applying these and other precedents to the facts of this case, the Court found that the search conducted by Watson was reasonable and thus not violative of the Fourth Amendment. The Court balanced the Bellewood Home's "strong interest in eliminating and preventing drugs on the premises by its residents" with the "highly invasive procedure" employed by Watson, and found that the search had been "conducted in a way to minimize its intrusive effect…Considering all the circumstances, we conclude that Officer Watson's strip search of Reynolds was not unreasonable."

Judge Moore dissented. She asserted that the search here was not a valid "special needs" search. "Police officers, invited onto private property, cannot initiate a warrantless strip-search of citizens merely because some other authority has the right to search those citizens to maintain order in its facility." Under a "reasonableness" analysis, Judge Moore also viewed the search as illegal. "I believe this search was still unreasonable, because the key problem with this search is that the government had no interest in it beyond a generalized interest in law enforcement, and that interest cannot justify the strip-search, particularly of a minor, based merely on reasonable suspicion."

United States v. Parker
373 F.3d 770, 2004 Fed.App. 0197P (6th Cir. 2004)

This case arose when Michelle Madison was appointed temporary trial commissioner in Ohio County, Kentucky. She also served as a "Chief Lieutenant Deputy Jailer." In that capacity, she signed two search warrants that were used to search the home of the Suttons. Based on the evidence found during the execution of the warrant, Parker and the Suttons were indicted. When the motion to suppress was affirmed, the government appealed.

In a decision written by Judge Duggan and joined by Judges Moore and Merritt, the Sixth Circuit affirmed the lower court. The issue in the case is whether Madison was a neutral and detached magistrate under the meaning of the Fourth Amendment. *See Shadwick v. City of Tampa*, 407 U.S. 345 (1972). The Court found that she was not because she was "not sufficiently disengaged from activities of law enforcement to satisfy the Fourth Amendment's neutral and detached requirement," and the warrants were void from the beginning.

United States v. Martin
2005 U.S. App. LEXIS 601,2005
FED App. 0019P (6th Cir. 2004)

The police had entered into an agreement with the Public Housing Authority in Inkster, Michigan to provide security as a result of its being a high crime area. The police had authority to bar people from the housing projects, and had done so with Rickey Martin. In March of 2002, the officers saw Martin and another person who had been barred from the projects walking on the sidewalk. They stopped their car intending to arrest Martin for trespassing on the public housing property. Martin ran, tossing a revolver during the chase. Eventually, Martin was arrested. Martin moved to suppress the gun for violation of the Fourth Amendment. The district judge found that the sidewalk where the defendant was walking was not owned by the public housing authority. However, because the court found that the defendant had abandoned the gun, he denied the motion, and Martin appealed.

The Sixth Circuit affirmed in a decision by Judge Kennedy joined by Judges Martin and Moore. The Court agreed with the lower court that the defendant had abandoned the gun by throwing it away during the chase. The Court's holding is based upon its application of *California v. Hodari D*, 499 U.S. 621 (1991). "In *Hodari D.*, the Supreme Court established the rule that when a suspect refuses to submit to a show of authority by the police, the suspect is not seized by the police until such time as he or she submits or is forced to submit to police authority. *Id.*, at 626. As such, because a seizure does not occur when a mere show of authority occurs, but only when one yields to a show of authority, the Fourth Amendment does not apply to anything one may abandon while fleeing the police in an attempt to avoid a seizure."

United States v. Herndon
393 F.3d 665, 2005 Fed.App. 0003P, (6th Cir. 2005)

Weedle was taking his truck to a car wash lot in 2002 when Memphis police officers saw that his license plate sticker was falling off. They checked the tag number which showed that it had expired a year earlier. They began to question Herndon, and then checked out the information and found he was driving on an expired driver's license and that he had multiple warrants for his arrest. A search of his truck revealed a .380 handgun and 182 pills. Herndon pled guilty to illegally possessing a firearm, and reserved the right to appeal.

The Sixth Circuit affirmed the conviction in a decision written by Judge Gilman joined by Judges Sutton and McKeague. The Court held that the search of the vehicle was illegal as a search incident to a lawful arrest. The Court relied upon the new case *Thornton v. United States*, 124 S. Ct. 2127 (2004), where the Court held that "'*Belton* governs even when an officer does not make contact until the person arrested has left the vehilcle.' *Id*. At 2129. 'So long as an arrestee is the sort of "recent occupant" of a vehicle such as petitioner was here, officers may search that vehicle pursuant to the arrest.'"

United States v. Montgomery
377 F. 3d 582, 2004 Fed.App. 0243P (6th Cir. 2004)

This case arose following the stopping of a vehicle, in which Montgomery was driding, for speeding by an Ohio State High Patrolman. The officer found that Montgomery was driving on a suspended license. The officer observed a stem on the floorboard of the car while checking the identifications of the passengers. Everyone was ordered out of the car, and they were searched and placed in a police car. During the search of the car, cocaine and marijuana were found. After this search, the officer patted Montgomery down and searched his shoes, where crack cocaine was found. Montgomery filed a motion to suppress the cocaine found in his shoe. The district court held that the shoe search was a legal search incident to a lawful arrest. Montgomery appealed.

The Sixth Circuit affirmed in a decision written by Judge Kennedy and joined by Judges Boggs and Russell. Montgomery based his entire appeal on the search of his shoes. The Court agreed with the lower court that the search of the shoes was a legal search incident to a lawful arrest. "In sum, under the search-incident-to-a-lawful-arrest rule, the troopers' warrantless evidentiary search of defendant's person passes muster under the Fourth Amendment because the troopers had probable cause to arrest defendant independent of the search and because defendant's lawful custodial arrest either preceded the search or quickly followed it."

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SHORT VIEW . . .

1. The status of mandatory DNA testing remains up in the air. In *Nicholas v. Goord*, 2004 WL 1432533, 2004 U.S. Dist. Lexis 11708 (S.D.N.Y. 2004), the U.S District Court for the Southern District of New York held the requirement consistent with the Fourth Amendment using the familiar balancing test. The Court did not rely upon the "special needs" doctrine, which was used by the Tenth Circuit in *United States v. Kimler*, 335 F. 3d 1132 (10th Cir. 2003). In *United States v. Kincade*, 345 F. 3d 1095 (9th Cir. 2003), a panel of the Ninth Circuit held mandatory DNA testing of felons to violate the Fourth Amendment. That decision has been vacated pending a rehearing *en banc*. *United States v. Kincade*, 354 F. 3d 10000 (9th Cir. 2003).

2. *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004). The *en banc* Ninth Circuit has held that taking blood without a warrant and without a threshold level of suspicion from convicted felons for purposes of creating a DNA data bank does not violate the Fourth Amendment. A panel of that Court had held there to be a Fourth Amendment violation. The Court relied upon *United States v. Knights*, 534 U.S. 112 (2001) and its totality of the circumstances analysis to reach its conclusion. A similar conclusion has been reached recently in *State v. Raines*, 75 Cr. L. 605 (Md. 8/26/04).

3. *Doe v. Little Rock School District*, 380 F.3d 349 (8th Cir. 2004). Random, suspicionless searches of the persons and belongings of all high school students by the Little Rock, Arkansas school system has been declared unconstitutional by the Eighth Circuit. The Court noted that random drug testing of smaller groups had been justified in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), but that those cases had not found constitutional the random drug testing of all students.

4. *State v. Jestice*, 861 A.2d 1060 (Vt. 2004). The police seized the occupants of a car by putting his cruiser in a way that blocked the other car. "[W]hen a police cruiser completely blocks a motorist's car from leaving, courts generally find a seizure."

5. *State v. Smith*, 97 P.3d 567 (Mont. 2004). A teenager at a party has a reasonable expectation of privacy when in the host's bathroom but not in the rest of the house. Thus, when police entered into the house without a warrant based upon a noise complaint and entered into the bathroom and found evidence, the teenager in the bathroom had standing to challenge the entry.

6. *State v. Maginnis*, 150 S.W.3d 117 (Mo. Ct. App. 8/20/04). The police in this case stopped Maginnis for driving on I-70 3 miles over the speed limit. The police placed Maginnis in the patrol car and instead of checking out his license and registration, began to question him about his itinerary. When the passenger's answers to similar questions were inconsistent with the driver's, the officer asked for consent to search, which was refused. The officer had a dog sniff the outside of the car, and the dog alerted. The officer then searched and car and found drugs, paraphernalia, and a firearm. The Missouri Court of Appeals found the actions of the officer violative of the Fourth Amendment. The Court stated that "under the Fourth Amendment, it is not reasonable for the officer, in a routine traffic stop, to detain travelers for the purpose of interrogation on matters unrelated to the traffic violation, without at that point, having any reasonable articulable suspicion of illegal activities…We conclude that under the established standards of the Fourth Amendment, the officer's questions delayed the resolution of the traffic violation and impermissibly detained Maginnis beyond what was reasonable in view of the nature of the stop."

7. *Kellems v. State*, 816 N.E.2d 421 (Ind. Ct. App. 10/7/04). A tip about a drunk driver that is corroborated only by readily observable details, absent erratic driving, is not enough to constitute a reasonable suspicion.

8. *State v. Maddox*, 98 P.3d 1199 (Wash. 2004). When do the police have to go back to the magistrate and inform her that things have changed since the warrant was obtained? According to the Washington Supreme Court, this has to occur only when the new information would negate probable cause. Thus, the police did not have to tell the magistrate that the alleged trafficker had said to the informant that his supply had run out temporarily.

9. *United States v. Washington*, 387 F.3d 1060 (9th Cir. 2004). The police went to a hotel room where they suspected methamphetamine was being cooked. They had no warrant, so proceeded under a theory of "knock and talk." The defendant came into the hallway but the police would not permit him to close the door. The police repeatedly requested to search the hotel room. An occupant of the room was told to leave. The police entered the room when they interpreted a response as giving consent. Inside the room the defendant continued to deny his consent to search the room. After repeated questioning, he eventually admitted to having meth in a jacket and the police retrieved that. Eventually, he signed a consent to search form, and a weapon was found in the search resulting in an enhanced charge. The 9th Circuit held that this violated the Fourth Amendment in several ways. First, the officers violated *Terry* by the manner in which they stopped the defendant in the hallway of the hotel. The Court questioned

whether a *Terry* stop could ever occur in one's home. The police committed a second violation when they would not permit the defendant to close his door. A third violation occurred by the illegal entry, and finally another violation occurred when they moved the defendant's jacket. The Court rejected the government's assertion that the defendant had given consent. "[T]he suspect's desire to avoid suffering additional constitutional violations and/or a continuing unconstitutional detention…is what may prompt the suspect to avoid further confrontation by giving consent."

10. *State v. Randolph*, 278 Ga. 614 (Ga. 2004). Where there are two residents at home and one consents to a search of the property, the other can still decline, and any subsequent search is a violation of the Fourth Amendment. "Insasmuch as we are faced with a situation in which two persons have equal use and control of the premises to be searched, we conclude the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search."

11. *State v. Granado*, 148 S.W.3d 309 (Mo. 2004). Where the police have told a motorist that he is free to leave, and thereafter stop him as he leaves to get into his car and hold him for a canine unit to search the car, any subsequent search violates the Fourth Amendment."[T]he basis for the reasonable suspicion must arise within the parameters of the stop itself; suspicions based upon answers to questions asked after the stop is completed are irrelevant to the determination of whether specific, articulable facts supported a reasonable suspicion of criminal activity and provided a justification for further questioning once the traffic stop was completed."

12. *State v. Nieves*, 383 Md. 573 (Md. 2004). A person who has been arrested for a minor traffic violation may not be strip-searched consistent with the Fourth Amendment unless there is a reasonable and articulable suspicion that the person has a weapon or contraband on his person.

13. *United States v. Escobar*, 76 Cr. L. 140 (8th Cir. 11/18/04). The police may not lie to someone in order to get him or her to consent to search their luggage. Here, luggage had been seized from a bus. The defendants were asked to consent to a search of their luggage and they initially declined. The police told them that a dog had alerted to the luggage, which was not true. The consent that followed was coerced by the lie and the subsequent search violated the Fourth Amendment.

14. *Alamo v. State*, 2004 WL 2633559, 2004 Fla. App. LEXIS 17816 (Fla. Dist. Ct. App. 2004). Consent to search does not necessarily apply to a second officer seeking to patdown a defendant shortly after the completion of the first patdown. Here, the second officer believed the patdown was done improperly. He did not obtain consent a second time, and this violated the Fourth Amendment. "It is unreasonable to conclude that Mr. Alamo's initial consent provided carte blanche authorization for future searches as long as each was only moments apart."

15. *State v. Maland*, 103 P.3d 430 (Idaho 2004). The police may not use *Terry* to enter a home of a suspect who has opened the door, and conduct a frisk. "If the police may not make a warrantless and nonconsensual entry into a suspect's residence in order to make a routine felony arrest, *Payton v. New York*, 445 U.S. 573 (198), they certainly may not do so in order to effectuate a *Terry* stop."

16. *State v. Rathbun*, 101 P.3d 119 (Wash. Ct. App. 2004). The police may not search a vehicle pursuant to an arrest when the defendant has fled and is eventually caught 40-to 60 feet away from the truck. The Court relied upon the recent case of *Thornton v. United States*, 125 S.Ct. 180 (2004), to say that the search incident to arrest exception depends upon the temporal and spatial relationship of the occupant of the vehicle and the vehicle at the time of the arrest.

17. *State v. Lamay*, 103 P.3d 448 (Idaho 2004). The search incident to arrest exception to the warrant requirement does not apply to the situation where a defendant is found near a backpack and told to go to another room where he is arrested. Thus, a search of the backpack, which occurred after the defendant left the room, was a violation of the Fourth Amendment. The Court rejected the argument that the *Belton* exception should be used to allow for the search in this case. "LaMay's backpack was in a hotel room and not a car at the time of the search. The proper test of the search of LaMay's backpack incident to arrest is that set forth in *Chimel*," referring to *Chimel v. California*, 395 U.S. 752 (1969).

18. *In re Search Warrants Issued on April 26, 2004*, 2004 WL 2973818, 2004 U.S. Dist. Lexis 25848 (US Dist. Crt. Md. 2004). The US District Court for the district of Maryland has ruled that a person has a right to see the affidavit in support of a search warrant after its execution and prior to being indicted. "Implicit in that language [of the Fourth Amendment] is the public's right to challenge both the reasonableness of the search and the degree to which the warrant was supported by probable cause. Without the right of access to the affidavit on which the search warrant was based, the search subject could *never* make such a challenge." ■

KENTUCKY CASE REVIEW

by Astrida Lemkins

Fulcher v. Commonwealth
Ky., 149 S.W.3d 363 (2004)

Affirming in Part, Reversing in Part, Vacating in Part, and Remanding in Part

Ricky Lee Fulcher was convicted on two counts of manufacturing methamphetamine, two counts of possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine, two counts of possession of drug paraphernalia and one count of possession of marijuana. The convictions were based on two separate indictments from two searches of Fulcher's residence and property. The first search occurred on July 24, 2001 which resulted in Fulcher's first indictment on charges of one count of possession of marijuana, one count of manufacturing methamphetamine, one count of possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine, and one count of possession of drug paraphernalia. The second indictment stemmed from a search of Fulcher's residence and property on August 3, 2001 which resulted in the other three charges. The indictments were joined for trial, but, for purposes of sentencing, the offenses occurring on August 3, 2001 were treated as subsequent offenses. Thus, the convictions for manufacturing methamphetamine and possession of anhydrous ammonia in an unapproved container were enhanced from Class B felonies to Class A felonies; and, the conviction of possession of drug paraphernalia was enhanced from a Class A misdemeanor to a Class D felony. Fulcher was sentenced to thirty years imprisonment. He appealed to the Kentucky Supreme Court as a matter of right.

Fulcher raised a number of issues, to wit: 1) insufficient evidence to convict him either of manufacturing methamphetamine or possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine; 2) erroneous jury instructions on the offense of manufacturing methamphetamine that resulted in a denial of Fulcher's right to a unanimous verdict; 3) the proscription against double jeopardy was violated in two respects: a) the jury instructions on manufacturing methamphetamine and possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine caused Fulcher to be convicted twice of the same offense; and, b) the convictions of separate offenses occurring on July 24, 2001 and August 3, 2001 were premised on the same evidence; 4) the trial court erred when it permitted a witness to testify to prior misconduct by Fulcher in violation of RCr 7.26(1), KRE 401(b), and KRE 401(c); and, 5) the offenses occurring on August 3, 2001 were not subsequent offenses for purposes of the subsequent offense enhancement..

There was insufficient evidence to convict Fulcher of manufacturing methamphetamine under KRS 218A.1432(1)(b) because he did not possess *all* the ingredients or *all* the equipment necessary to manufacture methamphetamine; <u>however</u>, there was sufficient evidence to convict Fulcher under KRS 218A.1432 (1)(a), for the actual manufacture of methamphetamine. The court described in detail how methamphetamine is illegally manufactured by the ephedrine reduction method, also known as the "Nazi method." The court held that "the operation of the homemade generator that was separating the methamphetamine residue from the used coffee filters satisfied the 'processing' aspect" of the definition of "manufacture" found in the statute, as found on July 24, 2001. In regard to the evidence found on August 3, 2001 to support the charge of manufacturing methamphetamine, the court held that a glass container that tested positive for methamphetamine, and evidence that containers and bottles were still "smoking" when the police arrived, was enough to prove the actual manufacture of methamphetamine.

The evidence was sufficient to support a conviction of possessing anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine under both indictments. The court held that, in regard to the charge based on the evidence found on July 24, 2001 because the manufacturing process was "ongoing at the time of the search," coupled with the many other chemicals and equipment found close by, enough reasonable inference was created that Fulcher intended to use the anhydrous ammonia to manufacture methamphetamine. As to the evidence of anhydrous ammonia recovered on August 3, 2001, the court held that it was reasonable for a jury to believe that the substance found in a glass jar on the property was anhydrous ammonia.

The jury instructions in regard to the offense of manufacturing methamphetamine on July 24, 2001 and August 3, 2001 denied Fulcher of a unanimous verdict. The court held because the instructions were worded in the alternative, and both theories were not proven beyond a reasonable doubt, it was unknown under which theory the jury convicted Fulcher, thereby denying him a unanimous verdict. The court also held that the instructions were erroneous because they did not include the required mental state of "knowingly," which was highly prejudicial to the defendant; however, because Fulcher did not object to the in-

structions on the ground of the lack of a required mental state, the error was not preserved for appellate review.

Separate offenses may be charged for the same course of conduct when they are interrupted by the legal process. The court held that Fulcher's arrest on July 24, 2001 was a legal process that interrupted his continuing course of conduct on the charge of possession of drug paraphernalia even if it was the same paraphernalia. In regard to Fulcher's conviction for possessing anhydrous ammonia on August 3, 2001, the court held that the jury instruction on possession of anhydrous ammonia on August 3, 2001 "permitted a conviction based not only of the anhydrous ammonia found in the glass jar on that date but also on possession of the altered propane tank, despite the fact that the Kentucky State Police had previously disabled the tank for future use by puncturing it with bullet holes," precluding a second conviction for possessing anhydrous ammonia in that same tank.

The trial court did not err when it allowed the testimony of a surprise witness. Even though the Commonwealth did not give 48 hours notice to the defense as required by RCr 7.26(1) and failed to comply with the notice requirement of KRE 404(c), the Commonwealth was justified in introducing evidence through the testimony of a witness, because the statement sought to be introduced through the witness was part of the public record of the case, mean that both the prosecutor and defense counsel could be charged with constructive knowledge of its existence. Further, the court held that the statement could be used to prove motive, under KRE 404(b). Even though the jury heard evidence of Fulcher's trafficking in methamphetamine through this witness, which the trial court ultimately ruled it should not have been permitted to hear, the Kentucky Supreme Court held that the trial court admonished the jury successfully. Thus, the surprise witness's testimony was admissible.

KRS 250.991(2) requires that a conviction can only be enhanced by a prior conviction, *i.e.*, the second offense must occur *after* conviction of the first offense. Because Fulcher was tried jointly for the offenses that occurred on July 24, 2001 and August 3, 2001, his convictions occurred simultaneously, not one after the other as required under KRS 250.991(2). Thus, the court held that Fulcher was entitled to new penalty phase trials with regard to his convictions for possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine and possession of drug paraphernalia; and, no subsequent offense penalty enhancement would be allowed. Further, if, upon retrial, Fulcher is convicted of the offense of Manufacturing Methamphetamine, the conviction based on the August 3, 2001 arrest shall not be subject to subsequent offense penalty enhancement.

Welch v. Commonwealth
Ky., 149 S.W.3d 407 (2004)

Reversing and Remanding

Christopher Welch was convicted on one count of sodomy and one count of sexual abuse in the first degree. He was sentenced to twenty years' imprisonment and appealed to the Kentucky Supreme Court as a matter of right. The charges stemmed from a statement made by Welch to a counselor while he was participating in a mandatory sex offender treatment program. Participation in juvenile sex offender treatment is not voluntary; participants are there by court order. As part of the treatment, sexual offenders are required to disclose all of their prior sexual misconduct. Welch was not given any *Miranda* warnings prior to his disclosure that he sodomized a 5 year old child approximately twenty times. He entered into a conditional plea, following the trial court's denial of his motion to suppress the statements he made to the counselors at the treatment facility. His reasons for suppression were: 1) the statements were obtained in violation of *Miranda*; 2) the statements were involuntary; and 3) the statements were privileged.

Counselors at the juvenile sex offender treatment program are state actors who should have given Welch his *Miranda* warnings before interrogating him. The court held that counselors at the sex offender treatment program were working on behalf of the state, and since Welch was attending a mandatory treatment program, he was in custody, thereby invoking Welch's rights under the Fifth Amendment to the United States Constitution and Section Eleven of the Kentucky Constitution.

Incriminatory statements made to police after *Miranda* warnings were given still were fruits of the poisonous tree and should have been suppressed. The court held that, because the incriminating statements made to police were obtained directly as a result of the statements Welch made to the counselors, they must be suppressed. The police had no other source from which to gain this information; thus, the statements must be suppressed.

Welch's incriminatory statements made to the counselors were involuntary because they were coerced by a state actor. The court held that Welch's statements made to police after he was given his *Miranda* warnings could not be used against Welch in any subsequent criminal trial.

Purcell v. Commonwealth
Ky., 149 S.W.3d 382 (2004)

Reversing and Remanding

Appellant Jerel Purcell photographed a nude male child under the age of 16, resulting in a conviction on one count of Promoting a Sexual Performance By A Minor. He was sen-

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tenced to 10 years imprisonment. His conviction was affirmed by the Court of Appeals and the Kentucky Supreme Court granted discretionary review.

Purcell was 45 years old at the time and the child, A.B., was 13 years old. The two males had taken Polaroid pictures of each other naked; however, they were not naked at the same time. No inappropriate touching had occurred. Purcell raised the following issues: 1) subsection (b) of KRS 531.300(4) (definition of "sexual conduct by a minor") is unconstitutionally vague and overbroad; 2) the jury instruction under which he was convicted denied Purcell his right to a unanimous verdict; and, 3) evidence of other crimes, wrongs and acts was improperly admitted against him.

KRS 531.300(4) is not void for vagueness but is facially overbroad and, thus unconstitutional, *but this does not require the court to invalidate the statute*. The court held that a limiting construction could be applied by defining "sexual conduct by a minor" as a "willful or intentional exhibition of the genitals" only when such exhibition is lewd. The court further held that, while Purcell's conduct could have been found to be lewd, the jury was not given the opportunity to find lewdness, thus, a new trial must be granted.

Purcell was denied his right to a unanimous verdict. The court held that, because the jury instructions did not include the issue of whether the exhibition of the A.B.'s genitals was lewd, but did include alternate theories that were not supported by the evidence, Purcell was denied a unanimous verdict. The court provided a specimen instruction that would accurately frame the issues for the jury.

Prior bad acts should not have been admitted. During the trial, the Commonwealth played a tape made during the grand jury hearing where Purcell admitted telling A.B. about a boat that had overturned, spilling fishing equipment and the like into a reservoir, but Purcell denied telling A.B. to dive nude into the reservoir in order to retrieve the items. Purcell admitted telling another boy, J.P. about the boat. A.B. was not asked about this at trial, and J.P. did not testify. At trial, the Commonwealth asked Purcell whether he told the boat story to J.W., R.S., K.F., and M.M. in order to get them to remove their clothing. Purcell denied it. During rebuttal, the Commonwealth presented these four, now grown men, as witnesses. The defense objected to their testimony. The Commonwealth argued that their testimony was admissible under four potential theories: 1) to rebut factual assertions made by Purcell during his testimony; 2) to impeach Purcell under KRE 608; 3) to rebut evidence of Purcell's good character under KRE 404(a)(1); and 4) to prove motive under KRE 404(b)(1). The court held that the testimony of the four men was irrelevant to the offense charged, and that none of these four men presented testimony to rebut what happened at the reservoir. Further, the court reasserted that case law prohibits impeachment on collateral issues, and that, under the version of KRE 608 in effect at the time of this trial, credibility could be attacked only by evidence in the form of an opinion or reputation, not specific acts.

The trial court had admitted the rebuttal evidence because it believed that Purcell had "opened the door" by denying he had asked A.B. to dive nude into the reservoir for his own self interest "in A.B.'s sex." The Kentucky Supreme Court held that Purcell did not introduce inadmissible evidence and that it was the Commonwealth that "injected the homosexual voyeurism issue into the case."

As for whether the evidence of the four men was admissible as motive under KRE 404(b)(1), the court held that the probative value of the evidence was substantially outweighed by its prejudicial effect and should have been excluded.

Ragland v. Commonwealth
— S.W.3d ——, 2004 WL 2623926 Ky., 2004.
No. 2002-SC-0388-MR, 2003-SC-0084-TG.
Nov. 18, 2004

Reversing and Remanding

(Commonwealth's Rehearing Petition granted on 2/17/05, and supplemental briefing ordered)

In this highly publicized case, Shane Ragland, a University of Kentucky student, was convicted of murder for allegedly shooting and killing Trent DiGiuro, a University of Kentucky student-athlete, allegedly because DiGiuro had black-listed Ragland so that Ragland could not join his preferred fraternity. Ragland was sentenced to thirty years' imprisonment. He appealed to the Kentucky Supreme Court as a matter of right. The court overturned the conviction by a 4-3 margin. Justice Cooper wrote the opinion.

Ragland raised eight issues on appeal, including the following, which were addressed by the Kentucky Supreme Court: 1) failure of the trial court to declare a mistrial when the prosecutor commented on Ragland's failure to testify; 2) failure to suppress evidence obtained pursuant to search warrants; 3) failure to suppress evidence of statements made by Ragland during a custodial interrogation; 4) admission of hearsay statements made by the victim; 5) admission of ballistics evidence with respect to weapons other than the alleged murder weapon; 6) admission of expert testimony with respect to the results of comparative bullet lead analysis.

The prosecutor's remarks during closing argument violated Ragland's right against self-incrimination protected by the Fifth Amendment. During closing arguments the Commonwealth remarked that "the only person who knows where that shot was fired from exactly is the person sitting in that chair over there, (indicating the defendant), and he hasn't seen fit to tell us." The defense moved for a mistrial, and in

the alternative, an admonition of the jury. The prosecutor argued that he was referring to Ragland's statement to police where Ragland denied guilt and, according to the Commonwealth, was asked from where the shot was fired, and Ragland did not see fit to tell the police. The problem with this allegation was, however, that there was no basis for it. The police never asked Ragland from where the shot was fired when they interrogated him. Thus, the Kentucky Supreme Court held that the prosecutor's comment could have only referred to Ragland's failure to testify, and was thus "intentional and flagrant." The court cited to *Barnes v. Commonwealth*, Ky., 91 S.W.3d 564 (2002), where the court held that reversal for prosecutorial misconduct in a closing argument occurs when there is either flagrant misconduct, or when each of the following conditions are met: 1) proof of defendant's guilt is not overwhelming; 2) defense counsel objected; and 3) the trial court failed to cure the error with a sufficient admonishment to the jury. In Ragland's case, the court held that the prosecutorial misconduct satisfied the three factors, and that the misconduct was flagrant. Thus, the case could be reversed on either basis.

The search warrants were supported by an affidavit that was reliable. Ragland argued that the evidence found during the execution of the federal search warrants should have been suppressed because: 1) the affidavit supporting the search warrants was insufficient to establish probable cause; and; 2) the warrants were obtained by deliberate falsehoods and a reckless disregard for the truth. Ragland argued that the information in the affidavit was "stale" but the Kentucky Supreme Court held that, while some of the information in the affidavit was arguably "stale," it was corroborated by other evidence. Further, the court held that the "staleness test" did not apply to evidence pertaining to Ragland's continuing possession of a .243 caliber rifle at his mother's residence, which the court held, "could be more accurately categorized as a 'secure operational base' than a 'mere criminal forum of convenience.'" The court further held that the trial court's finding that no evidence in the affidavit was false or misleading was supported by substantial evidence.

Ragland's *Miranda* warnings were adequate. Ragland argued that the statements he made to police at the July 14, 2000 interrogation should have been suppressed because: 1) he received inadequate *Miranda* warnings; 2) he never waived any of his *Miranda*; and 3) he asserted his right to counsel.

The Kentucky Supreme Court held that, even though part of the warnings were not recorded, this was explained satisfactorily during the suppression hearing; and, that *Miranda* did not require a "talismanic incantation" to adequately advise a suspect. Even though Ragland's response to the inquiry of whether he understood his rights is unintelligible, he nodded his head affirmatively, and that was enough to waive his *Miranda* rights. Further, the court held that Ragland's request for counsel initially was not "unambiguous and unequivocal." Thus the fact that the police continued questioning him was not a violation of Ragland's Fifth Amendment rights.

Statements of victim to third party were admissible. Ragland told a fellow fraternity pledge and dormitory roommate named Blanford that he had slept with a female student whose picture was on a calendar that hung in their dorm room. The female in question was the girlfriend of a senior member of the fraternity. Soon after, the senior member of the fraternity confronted Ragland about the statement and Ragland was subsequently "blackballed" from the fraternity. Sometime later, Ragland confronted Blanford and DiGiuro as they walked across campus. When Ragland accused Blanford of tattling to the senior fraternity member, DiGiuro stepped in and said he was the one who told on Ragland. The court held that this was not hearsay because it was not offered for the truth of DiGiuro's statement, but rather, to show only that DiGiuro had made the statement. A second statement that the court held was admissible involved DiGiuro telling Blanford that he was going to call Ragland. This statement was admitted as an exception to the hearsay rule, under the state-of-mind exception because it was a statement of future intent.

Evidence of ballistics testing was properly admitted. A ballistics expert testified that test bullets were similar to the bullet found in DiGiuro's body. However, because of the fragmentation of the bullet found in DiGiuro, the expert could not be sure the shot was fired from Ragland's rifle. Between 1988-2000, 1,418 rifles the same as Ragland's were made. The police found and tested three of them and found that the bullet that killed DiGiuro could not have come from any of these guns. Ragland argued that this testimony was irrelevant and highly prejudicial, under KRE 403. The court held that the evidence was relevant to show that the bullet could not have come from just any of the 1,418 rifles manufactured, thus providing additional circumstantial evidence against Ragland.

Comparative bullet lead analysis was scientifically reliable evidence. The Kentucky Supreme Court held that there was substantial evidence to support the trial court's ruling that the methodology used to determine the metallurgical composition of lead bullets, and the expert's reasoning that two bullets with indistinguishable metallurgical components came from the same batch, were both scientifically reliable.

Justice Keller wrote the dissent, joined by Justices Graves and Wintersheimer. Justice Keller opined that the prosecutor did not go over the line in his closing statement, that any error was harmless because the "twenty-nine words in dispute" had no effect on the jury's verdict because the jury would have found Ragland guilty even if the words in question had not been uttered. ■

PRACTICE CORNER
LITIGATION TIPS & COMMENTS

"Practice Corner" is brought to you by the staff in DPA's Post Trial Services Branch. Post-trial defenders are in a position to see patterns of practice across the state. In this column, their goals are to report on trends and to share helpful ideas they come across.

(1) When you mount a *Batson* challenge, can your prosecutor back up the race-neutral reasons that are offered for his or her peremptory strikes?

Several of our post-trial attorneys have noted a pattern in the way many *Batson* challenges are litigated. Defense counsel makes her *Batson* challenge. The prosecutor then offers a race-neutral reason for striking the juror in question. Quite often, the prosecutor's reason is based upon facts nowhere in the record. (For example: "I prosecuted her second cousin." Or, "The bailiff said he isn't playing with a full deck." Or, "The juror's nephew is appealing his criminal conviction and we don't think this juror has a good attitude about the justice system because of his nephew's case.")

Almost uniformly, nobody would have asked the juror himself anything about the matter during *voir dire*.

Now, what should happen next? What often happens is . . . nothing. The judge says, "That's a race-neutral reason.", and the defense lets the matter drop.

Our post-trial litigators urge trial counsel to go ahead and work the issue to its logical conclusion: Insist on an evidentiary hearing which involves the venireperson. Even a prosecutor with clean hands might have been mistaken about the identity and/or relationships of this individual. And a prosecutor whose hands are not so clean will be held duly accountable.

(2) KRS 532.045(7) purports to dictate which portions of the trial court record may be reviewed by an appellate court in sex offender cases.

When our appellate lawyers review a record on appeal, they often discover that portions are sealed. In order for them to look at those portions, they must engage in appellate court motion practice, which is not always successful. At the Court of Appeals level, the results can vary from panel to panel among the judges.

One obstacle in sex cases is KRS 197.440, which states: "The comprehensive sex offender presentence evaluation shall be filed under seal and *shall not be made a part of the court record subject to review in appellate proceedings* and shall not be made available to the public," (emphasis supplied).

Such a purported limit on what a reviewing court may review seems to implicate, at the very least, our constitutional guarantees of due process and the separation of powers. For example, preventing a criminal appellant from using that part of the record, when he wants to demonstrate an abuse of discretion in the level of sentence meted out to him, is a due process violation.

When our appellate lawyers move for permission to view sealed records in such a case, they will be on sounder footing if counsel has made these constitutional arguments at the trial level.

(3) You lost your instruction argument. Now, make the most of it!

Here's an idea for making the best of a bad situation. If the judge rejects your proposed jury instruction on grounds that the language you want is covered adequately by the standard instructions, (or whatever instructions the court is giving), then you should be free to argue your point to the jury in the same language you proposed for the written instruction. After all, the judge has said that these concepts, that you wanted the jury to know, are included in the instructions as given. By arguing your preferred language to the jurors, you at least give them a perspective that resolves questions about the written instruction in your favor.

(4) Would you like to subpoena witnesses to a grand jury?

RCr 5.06, concerning the attendance of witnesses before a grand jury, states that subpoenas will issue "upon request of the foreperson of the grand jury or of the attorney for the Commonwealth". Obviously, the defense is omitted from the list of those privileged to obtain grand jury subpoenas.

But, effective January 1, a new sentence has been added to the rule: "RCr 7.02 shall apply to grand jury subpoenas." David Niehaus, veteran appellate lawyer at the Louisville-Jefferson County Public Defender's Office, posited recently that this reference to RCr 7.02 may mean the defense can subpoena witnesses and records to a grand jury proceeding.

Practice Corner is always looking for good tips. If you have a practice tip to share, please send it to the Department of Public Advocacy, Post-Trial Services Division, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601. ■

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Thoughts to Contemplate

If a man does not keep pace with his companions, perhaps it is because he hears a different drummer.

-Henry David Thoreau, 1854

People only see what they are prepared to see.

-Ralph Waldo Emerson, 1863

Without a struggle, there can be no progress.

-Frederick Douglass

It is important that man dreams, but it is perhaps equally important that he can laugh at his own dreams.

- Lin Yutang