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ALTERNATIVE SANCTIONS

Judge Gregory M. Barlett

PROSECUTORIAL MISCONDUCT

Jerry J. Cox

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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...

Sentencing. One of the most important decisions of a judge is the sentencing of a defendant who has plead guilty or been found guilty. A judge I recently spoke to said sentencing was the hardest part of his job. Judges have many pressures on them and many opportunities. Judges have the pressure of a public that wants to remain safe from crime by that defendant and other criminals. Victims want some satisfaction and want to make sure others are not harmed as they were by that defendant and other criminals. At the same time, the community does not want to pay lots of money in taxes to lock up every criminal forever. It is not practical nor prudent to lock people up indefinately. The community wants to use its resources for other important matters to advance the public good. The individual citizen who has committed the crime deserves to be dealt with fairly and with the competing goals of punishment accounted for. Judges are the best professionals to mediate these understandably competing goods. Increasingly, the General Assembly has made available to Kentucky judges creative alternatives to incarceration. Judge Bartlett, a leading Kentucky jurist, helps us understand what these alternatives are and how judges can use them to effectively meet their professional responsibilities to the victim, the defendant and the community. Sentencing a criminal defendant to prison may be the easiest decision to make but it may not be the decision that is most in the long range interest of the public.

Prosecutorial Misconduct. Jerry Cox, a prominent Mt. Vernon criminal defense advocate, helps us understand the seriousness of prosecutorial misconduct. We all should take note as the people will only have confidence in our taking the life and liberty of a citizen if we do it fairly and reliably. Nothing less will do. When prosecutors practice a case unfairly, the public's confidence in the validity of our criminal process is lessened. Clients are hurt and victims are damaged. Criminal defense advocates have an important role in insuring that prosecutors do not practice unfairly.

The Sixth Circuit just recently held that Eugene Gall, Jr. was convicted and sentenced to death due, in part, to substantial prosecutorial misconduct. The prosecutorial wrongdoing portion of the opinion is reprinted in this issue. It is unfortunate that we live in a system that continues to convict and sentence people to prison and even death because of the substantial misconduct by prosecutors. The facts show that some prosecutors cross the line. Important reasons to have a vigorous defense Bar and an independent court system.

Juvenile Death Penalty. What sentence do Kentuckians think most appropriate for a person under 18 who commits an aggravated murder. We discuss a recent statewide poll's findings.

***Batson's* Alive and Well.** Kentucky is the land that spawned *Batson* and it is a state that has had few reversals due to that error. We report in this issue on one of those few reversals.

Annual Defender Conference and Awards. It is time to make nominations for DPA's Annual awards to be presented at the 2001 Annual Defender Conference in Lexington, Ky. Mark the date of our conference on your calendar for June 11-13, 2001. Our theme is Actual Innocence.

Ed Monahan

ALTERNATIVE SANCTIONS AND THE GOVERNOR'S CRIME BILL OF 1998 (HB 455) — ANOTHER ATTEMPT AT PROVIDING A FRAMEWORK FOR EFFICIENT AND EFFECTIVE SENTENCING

by Judge Gregory M. Bartlett

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In 1974, the Kentucky General Assembly revised, organized and updated the substantive criminal law of Kentucky by enacting the Kentucky Penal Code. (KRS Chapters 500 to 534; 1974 c 406, eff. 1-1-75) This new code brought clarity, consistency and fairness to the criminal law, first by defining offenses, and then by classifying them on a rational, equitable basis. In addition, the sentencing provisions of the new code were intended to give judges a flexible array of sanctions which, it was hoped, would be utilized by judges to achieve the goals of the criminal justice system: punishment, deterrence, neutralization and rehabilitation.[1]

Twenty-four years after the adoption of the Kentucky Penal Code, the General Assembly, in its 1998 session, again considered our criminal statutes and made a number of significant changes, particularly with regard to sentencing. These statutory amendments and additions were set forth in House Bill 455, commonly known as the Governor's Crime Bill (1998 c 660, eff. 7-15-98). By enacting this legislation, it was the General Assembly's clear intent to require longer terms of incarceration for violent offenders, while requiring judges to consider alternatives to incarceration for non-violent offenders who constitute the majority of individuals being sentenced by our criminal courts. This article will examine the more significant sentencing provisions of House Bill 455, particularly those authorizing alternative sanctions, and will discuss how these laws should be used by prosecutors, courts and corrections officials with the goal of being more effective and efficient in handling criminal offenders.

Before reviewing this recent legislation, it would be beneficial to reflect on the state of our penal system over the past twenty-five years, and to ask why changes were deemed necessary. Some rather alarming statistics, which will be examined later in this article, reveal a tremendous increase in the number of inmates in our state institutions over this time period, with a corresponding rise in the cost of operating our penal system. During this same period there was also dramatic growth in the number of individuals under the supervision of the Kentucky Department of Probation and Parole. These facts pose some interesting questions. Why are there now so many more individuals within our criminal justice system compared to the early seventies? Did the penal code fail to provide our courts, prosecutors and corrections officials with the tools necessary to deal with criminal offenders in an effective manner? Did the state provide the resources, such as programs and personnel, with which these tools could be employed? Did judges and prosecutors fail to take full advantage of the alternative sanctions at their disposal? Were there other factors at work which could explain the apparent failure of the sentencing policies espoused by the drafters of the 1974 penal code?

The Problems Of Our Penal System Prior To 1974

In 1972 the General Assembly adopted a resolution directing the Legislative Research Commission (hereafter LRC) to conduct an exhaustive study of the Kentucky Department of Corrections.[2]

In its report submitted in April of 1973, the LRC set out a number of facts and observations that are relevant to our consideration of current problems in the Kentucky penal system. For example, in 1972 there were approximately 3,000 inmates housed in five facilities operated by the Department of Corrections. *Id*. at p. 1. At the same time, there were about 3,500 offenders under the supervision of less than 100 probation and parole officers. *Id*. at pp. 1, 135. While these numbers seem modest by comparison to today's statistics, the two main penal institutions at Eddyville and LaGrange were well above capacity at that time. *Id*. at p. 10. The overcrowding in the institutions and the heavy caseload of the probation and parole officers were not merely security and workload problems, they were counterproductive to sound corrections policy.

The LRC found that the prison system was not effective in protecting society, preventing crime, or rehabilitating offenders. Although the stated goal of the Department of Corrections was to rehabilitate the offender, the LRC candidly observed that there was little treatment or rehabilitation occurring in the state's prisons. *Id*. at pp. 7, 12-13. The institutions were described as being brutal, inhumane environments where staffs were too few in number and insufficiently trained. As a result, proper security was lacking and treatment programs were inadequate. *Id*. Without adequate rehabilitation in prison, many offenders were committing new crimes upon their release into society. *Id.* at p. 3.

Moreover, there were far too many individuals sentenced to terms of imprisonment who properly should have been granted probation. The LRC observed that probation was "not widely or adequately used in Kentucky." *Id.* at pp. 138-

39. In fact, in 1970 only 32% of all persons convicted were placed on probation, although nationwide the number granted probation was in excess of 50%. *Id.* Even more troubling is the fact that so many inmates were first-time offenders. In 1966 over 50% of all inmates were serving time for their first felony conviction, and over 28% had no record whatsoever. *Id.*

This under-utilization of probation as an alternative to incarceration was not only inconsistent with good corrections policy, but was also bad economics. In 1972, over two-thirds of the Department of Corrections' budget was spent on its institutions, with most of those funds going to custody and maintenance. *Id.* at p. 13. Only a small percentage of the money given to the institutions was used for inmate treatment programs.[3] *Id.* Overall, the annual cost to house an inmate was approximately $2,300 compared to an average cost of less than $400 per year to supervise an offender on probation or parole. *Id.* at p. 133. In addition, the overcrowding of our facilities caused, in part, by the failure to implement alternatives to imprisonment, forced the state to confront the need to build more penal institutions at capital costs which were staggering, even in 1972 dollars.[4] *Id.* In short, the taxpayers were paying a heavy price to incarcerate offenders who could have been more economically and effectively handled on probation.

The LRC report contained several recommendations for improving our penal system. One suggestion was the development of community-based correctional facilities. *Id.* at p. 131. Use of such facilities would allow for probation supervision in the offender's own community, and would promote positive entry into that community by requiring the individual to have employment or be in school as a condition of probation. Indeed, the LRC cited meaningful employment of the offender as a key objective of such programs. The report also included a recommendation for the use of volunteers from the community to assist overburdened probation and parole officers in providing supervision and rehabilitative support to offenders. Such "Volunteers in Corrections" programs have been successful in other states, tapping the resources of citizens from within the community to help fight a community problem. *Id.* at pp. 153-56.[5]

Correctional Reforms in the 1972 Legislature

The need to change the way in which we were dealing with convicted offenders was not ignored by the legislature. In fact, while the LRC report was still in preparation, the 1972 General Assembly passed several laws pertaining to probation and parole.[6] One act authorized the establishment of community residential correctional centers, 1972 c 292, eff. 6-16-72, codified as KRS 439.580-.630. The stated purpose of this legislation was to facilitate the rehabilitation of the prisoner by allowing the individual to participate in educational training programs in the community, to receive treatment, and to work at paid employment. Although the provision for allowing felons to be hired by private employers has been ruled unconstitutional,[7] *Commonwealth v. Holmes*, Ky., 509 S.W.2d 258 (1974), this act led to the establishment of halfway houses and community-based treatment centers throughout the state.

Another law passed by the 1972 Assembly created a program for the conditional release of felons who had served their sentences, 1972 c 169, eff. 6-16-72, codified as KRS 439.265. Under this program, a felon would remain under the guidance of the Department of Corrections for the length of time equal to the accumulated good time which had allowed the prisoner to be released prior to serving the full term of the sentence. The rationale behind this law was the belief that a prisoner, though having served a sentence, should not be returned to the community without some supervision. By comparison, a parolee is released before serving out a sentence, but is placed under the control of a parole officer.

This conditional release program was officially abandoned by amendment to the enabling statute in the 1980 session of the General Assembly,[8] 1980 c 208 §10. One of the problems with conditional release was that it added to the supervision case loads of the parole officers. Additionally, the law allowed for the return to the already crowded penal institutions of individuals who, having served their time, would otherwise have been beyond the power of the Department of Corrections. Nevertheless, the concept of imposing a period of supervision upon a felon who has completed a sentence has been revived, with respect to sex offenders, as part of the 1998 Crime Bill, 1998 c 606 §25, codified as KRS 532.043.

A sentencing device which was adopted in 1972 and which remains a viable option to the courts today is "shock probation." KRS 439.265. As enacted, this law allows a defendant who has served a minimum of 30 but no more than 180 days in the custody of the Department of Corrections, to request the sentencing court to place him or her on probation. The significance of this procedure is that the sentencing judge retains jurisdiction over the offender and can grant probation after the individual has been "shocked" by a short period of commitment to the state penal system. Although shock probation certainly continues to be appropriate in certain cases, the number of persons placed on shock probation is relatively few.[9] The development of other sentencing alternatives, particularly the "split" sentence, has lessened the utility of this procedure.

The Kentucky Penal Code of 1974

The momentum for reform of the corrections system in Kentucky was carried over to the 1974 session of the General Assembly. The revision of our criminal law by the adoption of the Kentucky Penal Code included the statutory authority for and the endorsement of alternative sanctions.

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The drafters of the penal code expressed a preference for the use of alternatives to incarceration, such as probation, as a means to rehabilitate the criminal offender.[10] Rehabilitation was considered a more effective and economical approach to reducing crime in our society. *Id.* At that time, however, it was recognized that rehabilitation of offenders was not occurring, especially within the prison system, and that the state was spending too much money merely to confine individuals, many of whom should have been placed on probation and supervised in their own community. Given these circumstances, the enactment of the penal code in 1974 gave trial judges the ability to impose alternative sanctions, in lieu of imprisonment, in furtherance of a more enlightened approach to criminal sentencing.

The penal code expressly elevated probation and conditional discharge to the level of incarceration as an authorized disposition of the felony offender, LRC, Kentucky Penal Code, §3510, p. 360. Indeed, the code provided that, before imposing a sentence of imprisonment, the court **shall** consider the possibility of probation and conditional discharge.[11] *Id.*; 1974 c 406 §285. To this end, presentence procedures were amended requiring the court to order and give due consideration of a written report prepared by a probation officer, LRC, Kentucky Penal Code, §3425; 1974 c 406 §277. This presentence report was required to include, among other things, the defendant's history of criminality or delinquency, physical and mental condition, family background and ties, education and occupation. Finally, the policy in favor of alternative sanctions in lieu of incarceration is clearly evident by the code section which provided that, after considering the nature and circumstances of the crime, and the defendant's history, character and condition, the court **should** grant probation or conditional discharge, LRC, Kentucky Penal Code §3505; 1974 c 406 §285. The denial of probation was appropriate only when the court believed incarceration of the defendant was necessary for the protection of the public because there was a substantial risk that the defendant would commit another crime, the defendant would benefit by treatment in a correctional facility, or the granting of probation would unduly depreciate the seriousness of the crime. *Id.*

The conditions that could be imposed on a defendant while on probation were not substantially different under the penal code than under pre-existing law. The court continued to be able to customize the demands and restrictions of the probation program to suit the rehabilitative needs of the defendant. The list set forth in the statute was not intended to be exhaustive, and specifically included the right of the court, among other things, to require the defendant to work at suitable employment, support dependents and to make restitution to the victim, LRC, Kentucky Penal Code §3515; 1974 c 406 §287. One express condition added by the penal code allowed the sentencing court to compel the offender to submit to medical or psychiatric treatment, LRC, Kentucky Penal Code §3515(2)(e). This clearly is an important option in light of the large number of defendants who are drug or alcohol abusers.

One very important sentencing device which was made part of our sentencing statutes by the enactment of the penal code is the "split sentence" which enables a judge to sentence a defendant to a period of incarceration in the county jail as an additional condition of probation, LRC, Kentucky Penal Code §3515(4). When the penal code was adopted, the maximum period of incarceration under this section was six months. The Crime Bill of 1998 has increased this maximum to twelve months, 1998 c 406 §287 codified as KRS 533.030(7). By imposing a split sentence, the court can mete out some punishment or, like shock probation, give the offender a taste of the reality of incarceration, without relinquishing jurisdiction and control to the Department of Corrections. Moreover, the judge has considerable flexibility in the length and method of service of this limited term in jail. For example, an individual who is gainfully employed could be ordered to serve a determinate number of weekends or could be granted work release. Because it provides the court with the ability to combine a degree of punishment with a community-based probation program, the split sentence is a valuable tool in the hands of the judge when determining an appropriate, individualized sanction.

Legislation passed by the General Assembly in 1972 and 1974 was intended to reduce crime in Kentucky by reforming the methods used to treat offenders. It was hoped that, by reducing the number of inmates in our state institutions and by establishing community-based correctional facilities, more effective rehabilitative treatment could be provided, thereby reducing the risk that the individual would recidivate. There was also an expectation that, with fewer prisoners in state institutions and with a lower crime rate, there would be a corresponding decrease in the cost of operating our penal system. Unfortunately, recent statistics suggest that this legislation has not produced the anticipated results, at least not yet.

According to data compiled by the Department of Corrections, there were 14,305 inmates in Kentucky prison facilities in January of 1998.[12] In addition, as of November 1999 there were over 12,000 individuals on felony probation, and nearly 5,000 on parole.[13] Compare these numbers to those of 1972, when the prison population was about 3,000 and the probation and parole caseload approximately 3,500,[14] and it becomes clear that the legislative efforts to reform our penal system did not prevent a population explosion in our state's correctional system. Moreover, added to these ominous statistics, the Department of Corrections projected that there would be 16,829 felony prisoners by the end of the year 2000.[15]

The inmate population boom is probably due to a combination of factors at work within our society in general and within our criminal justice system in particular. It is certain

that the increase in the number of felony convicts is not simply due to a parallel increase in the number of Kentuckians since our population rose from approximately 3.2 million in 1970 to around 3.9 million in 1998.[16] Thus, while our state's population has grown by about 22% in the last three decades, the number of felons has multiplied by over 400%. A plausible explanation for the greater number of felony convictions would be the more vigorous enforcement of existing laws, especially those pertaining to controlled substances, and the passage of new laws which create new felony offenses out of what formerly had been misdemeanors. Examples of this trend include the flagrant non-support[17] and felony DUI statutes.[18] Similarly, laws meting out harsher penalties and denying probation and parole eligibility for violent offenders,[19] sex offenders[20] and persistent felony offenders,[21] combined with lower parole rates,[22] have resulted in the serving of longer sentences. Finally, the reluctance or refusal of some prosecutors and judges to use alternative sanctions must be cited as part of the cause for prison overpopulation. *See* LRC Report, "Kentucky Corrections: The Case For Reform," *supra*, at pp. 138-139.

Few, if any, would argue that violent offenders and sexual predators should not serve substantial terms of imprisonment in secure institutions. And the high and ever-increasing cost of maintaining these individuals in prison must be considered a necessary cost to society to protect its citizens. On the other hand, the expense of incarcerating the non-violent offenders in state facilities is open to debate, especially when there are alternatives available that may be more effective and at a substantially lower outlay of taxpayers' money. To illustrate the point, in 1998 it cost in excess of $18,000 per year to keep a prisoner in a maximum security institution and $9,600 per year to maintain a minimum security risk offender in the Class D program.[23] The average cost to the Department of Corrections to incarcerate a felon was $14,691. *Id.* This expense must be compared to the cost to supervise an offender on probation or parole which was less than $1,200. *Id.* And these figures do not include the capital cost of building new prisons or expanding existing facilities.

The Department of Corrections has recently estimated that at least one medium security prison will need to be constructed to meet the expected growth in prison population over the next several years.[24] In addition, a significant amount of money will be needed to maintain the aging physical plants at the existing prison sites. *Id.* at p. 44. It has been estimated that, at an average of $65,000 per bed, it would cost $130,000,000 to construct a new prison to house 2,000 inmates.[25] The economic analysis of the problem is straightforward. We can spend huge amounts of taxpayer money on new prison construction, or we can utilize alternative sanctions at much less expense, reserving the secured cells of the state institutions for the violent or incorrigible offenders.

Recent statistics indicate that a significant percentage of the inmate population in our prisons are serving time for non-violent offenses.[26] Overall, only 50% of all state prisoners were convicted of violent, sexual or weapons charges, while 21% were sentenced for drug crimes and 24% for property offenses. *Id.* A more compelling statistic in support of our need to examine the type of offender whom we are committing to the state prison system is the fact that the number of inmates serving time on drug charges has jumped 214% since 1989.[27] While many of these individuals have been convicted of trafficking in controlled substances, a crime which merits punitive measures, a convincing argument can be made that most of the inmates who are incarcerated for drug possession or other non-violent drug or alcohol related offenses should be receiving rehabilitative treatment in the community under supervision of a probation officer.

Governor Patton's Criminal Justice Response Team

In July of 1997, Governor Paul E. Patton appointed thirty individuals with diverse and extensive experience in the field of criminal justice to serve as the Governor's Criminal Justice Response Team.[28] The creation of this Response Team was said to be an acknowledgment that crime in Kentucky was exacting an unacceptable toll both in terms of taxpayer dollars and in human suffering. *Id.* at p. 1. Governor Patton requested this team to review Kentucky's criminal justice system and recommend changes which would promote greater public safety, increase public confidence in the system, reduce crime and the rate of recidivism, and improve victim's rights. *Id.*

The Criminal Justice Response Team presented its final report and recommendations to Governor Patton on December 1, 1997. This report, over 80 pages in length, contained 109 specific recommendations in ten different areas of our criminal justice system. The first recommendation called for the Governor to appoint a Kentucky Criminal Justice Council. *Id.* at pp. 7-10. The primary task of this Council would be to provide leadership and coordination for criminal justice concerns at the state level. Specifically, it was envisioned that the Council would administer and evaluate programs funded by federal grants; promote the development of new and innovative programs; provide technical assistance to local communities on criminal justice matters; and analyze the potential effect of proposed legislation. *Id.* Other recommendations made by the Response Team covered a variety of areas within the field of criminal justice including victim's rights and remedies; crime prevention programs; automation and technology; and law enforcement training and coordination.

With specific regard to corrections, the Response Team acknowledged the need for the construction of additional prison beds, but also urged the expansion of community-based confinement programs. *Id.* at pp. 40-42. Recognizing the importance of treatment as being necessary to reduce the rate of recidivism for both drug offenders and sex offenders, it pro-

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posed legislation requiring participation in treatment programs as a prerequisite for earning good time credit while in prison. *Id.* at pp. 43-44. In addition, prisoners released prior to serving their maximum sentences, due to good time credit, would remain on supervision and be required to enter aftercare treatment as a condition of their early release. *Id.* This proposal is similar to the conditional release program passed by the 1972 Legislature, and then later repealed.[29]

For purposes of this article, the most interesting proposals and comments from the report of the Criminal Response Team were those related to the penal code and sentencing. In calling for a comprehensive review of sentencing in Kentucky, the Team noted that the penal code's provisions on sentencing have "aged" enormously due mostly to changes in sentencing philosophy.[30] As a result, inequities and inconsistencies in the treatment of offenders have become common. *Id.* at p. 75-76.

The first recommendation which directly addressed criminal sentencing sought to replace "jury sentencing" with judge sentencing in accordance with a structured sentencing plan. *Id.* at pp. 73-75. The alleged problem with jury sentencing (and Kentucky is only one of five states that allows the jury to fix punishment) is that it results in disparate penalties for the same crime.[31] To resolve such inequities, the Team advocated the development of Structured Sentencing or Limited Sentencing Guidelines which would make sentencing rational, truthful and consistent, and would set priorities for our limited penal resources. *Id.* To this end, and with the goal of reforming current practices, it was recommended that a Sentencing Commission be established to conduct a full review of Kentucky's sentencing structure. *Id.*

The Response Team advanced other specific proposals for legislation such as adopting the penalty of life imprisonment without the possibility of parole and the creation of additional aggravating circumstances for which the death penalty could be sought. *Id.* at p. 75-76. These circumstances would be the murder of a witness in a criminal or civil proceeding, the murder of a child under 12 years of age, and premeditated or planned murder. *Id.* To provide greater protection to the public, an amendment to the parole eligibility statutes was offered by which violent offenders would be required to serve at least 85% of their sentences. *Id.* at p. 76. On the other hand, for appropriate non-violent offenders, alternatives to incarceration were suggested.

In calling for reform and the establishment of a Sentencing Commission, the Criminal Response Team noted that significant changes had occurred in our sentencing philosophy since the adoption of the Kentucky Penal Code in 1974. *Id.* at p. 76. Deterrence and incapacitation have replaced rehabilitation as the primary objective of sentencing. *Id.* at pp. 76-77. This change in philosophy, along with an increase in the use of enhanced penalties and more restrictions on the availability of alternatives, have almost certainly resulted in the current population explosion in our prison system, and with it the increased cost of operating our correctional system. *Id.* at pp. 77-78. The Criminal Response Team recommended that a sentencing commission consider reforms to our sentencing statutes as a necessary response to the problems created by our recent sentencing practices. *Id.* at pp. 79-80.

The Governor's Crime Bill of 1998 - HB 455

In April of 1998, several months after the Criminal Response Team filed its final report, the Kentucky Legislature enacted HB 455, commonly referred to as the Governor's Crime Bill, 1999 c 606, eff. 7-15-98. A number, but certainly not all, of the Response Team's recommendations were included in this legislation.[32] For example, a Crime Victim Bill of Rights was adopted, 1999 c 606, S39, codified as KRS 421.500-.575. as well as laws making full restitution an express condition of parole, probation, conditional discharge, or pre-trial diversion, 1999 c 606, §§45-49, codified as KRS 532.032-.033. The Crime Bill also established the Criminal Justice Council to advise and recommend to the Governor and the General Assembly policies and direction for long-range planning regarding all elements of the criminal justice system, 199 c 606, §§26-27, amending KRS 15A.030-.040. This Council, composed of representatives from all areas within the field of criminal law, is required to submit its report to the Governor and the Legislative Research commission at least six months prior to every regular session of the General Assembly. *Id.*

The Legislature also adopted revisions to the Juvenile Code, 1999 c 606, §§1-23, and passed laws combating criminal gang activity, 1999 c 606, §§82-84, codified as KRS 506.130-.150, and hate crimes, 1999 c 606, §§51, codified as KRS 532.031. It established procedures for assessing and classifying convicted sex offenders according to their risk to reoffend, with the level of risk assigned determining the extent and duration of the person's duty to register as a sex offender, 1999 c 606, §§138-154, KRS 17.500-.991. The Crime Bill also authorized mandatory testing as a condition of pretrial release for persons who have a history of substance or alcohol abuse, 1999 c 606, §32, amending KRS 431.520. Nevertheless, while these specific pieces of legislation are important, the amendments to the laws pertaining to sentencing and sentencing alternatives should have the greatest impact on our criminal justice system.

It is readily apparent that the General Assembly was implementing a policy of longer sentences for violent offenders and sex offenders, while at the same time seeking other more effective and less costly ways of handling the non-violent criminal. However, implicit in this dual approach to criminal sanctions is the willingness of judges and prosecutors to utilize alternative programs for those offenders who do not pose a threat to the safety of our community. Unless we are

willing to suffer continued and increased overcrowding of our prisons, and unless we are content to bear the ever-rising cost of operating our penal system, the longer mandatory sentences called for in HB 455 must be balanced with the use of appropriate alternative sanctions for the minimum risk offender.

The definition of "violent offender" was not changed by HB 455, but the consequences of being designated as a "violent offender" were made more severe. For example, violent offenders, as defined in the statutes, though not ineligible for probation, are not entitled to the same consideration for probation as other eligible offenders.[33] Additionally, after sentencing, violent offenders must serve much more time before being eligible for parole. For violent crimes committed after July 15, 1998, an offender who has received a life sentence must now serve a minimum of twenty years, 1999 c 606, §77, amending KRS 439.3401(2). Previously, a person serving a life sentence was eligible for parole after twelve years. Likewise, when a violent offender has been sentenced to a term of years, he or she must serve at least 85% of the sentence before being considered for parole, 1999 c 606, §77, amending KRS 439.3401(2). Moreover, violent offenders are no longer eligible for "good time" credit, but may receive credit for education or meritorious service, provided that such credit does not reduce the offender's term of imprisonment below 85% of the sentence,1999 c 606, §77, codified as KRS 439.3401(4).

The Legislature also amended the statutes which govern the maximum penalties for capital offenses and Class A felonies. As a result, the authorized sentence for a Class A felony is a term of not less than 20 years, nor more than 50 years, or a sentence of life imprisonment, 1999 c 606, §70, amending KRS 532.060(2). Likewise, the maximum sentence for a person found to be a persistent felony offender in the first degree, where the underlying charge is a Class A or Class B felony, is life imprisonment or a term not to exceed 50 years, 1999 c 606, §76, amending KRS 532.080(6). When multiple sentences are ordered to run consecutively, the maximum aggregate term that can be imposed is 70 years, 1999 c 606, §114, amending KRS 532.110(1)(c). For a capital offense, the sentence may be death; life imprisonment without benefit of probation or parole; life imprisonment without probation or parole eligibility for 25 years; life imprisonment; or a term not to exceed 50 years, 1999 c 606, §71, amending KRS 532.030(1).

The inclusion in the Crime Bill of the sentence of life without the possibility of probation or parole was the result of lobbying by victim's groups urging another alternative to the death penalty.[34] *Id.*

The amendment of the statutes which increased the minimum term that a violent offender must serve before parole eligibility has created an anomalous situation. For instance, a person convicted of a violent Class A felony and sentenced to serve 50 years would not, under the 85% rule, be eligible for parole until having served at least 42.5 years. Likewise, one who is sentenced to consecutive sentences totaling 70 years for violent offenses would have to serve 59.5 years before being considered for parole. On the other hand, a violent offender sentenced to a term of life imprisonment can be paroled after 20 years. Indeed, a person sentenced to life imprisonment without parole for 25 years upon conviction for aggravated murder would be eligible for parole before a person sentenced to 50 years for a violent crime.

Although the length of sentences for sex offenders was not increased on the front end, HB 455 included provisions which demonstrate the Legislature's intent to place greater restrictions on defendants who are convicted of sex crimes. 199 c 606, §§26-27, amending KRS 15A.030-.040. KRS 17.500-.991. Rather than receiving longer sentences, sexual offenders are required to complete a sex offender treatment program before being credited with good time or being eligible for parole.[35] A sex offender who fails to complete the sex offender treatment program must serve out the sentence without benefit of good time credit. *Id.*

As a further means to extend control over those convicted of sex crimes, the Legislature enacted a new statute which requires sex offenders to be sentenced to an additional three-year period of conditional discharge following release from incarceration or completion of parole, 1999 c 606, §25, codified as KRS 532.043. During the period of conditional discharge, the defendant is subject to supervision by the Division of Probation and Parole. *Id.* As with the former conditional release program, a person who commits a violation can be ordered to serve the balance of time remaining on the period of conditional discharge. *Id.* This law has stirred considerable controversy since, in effect, it adds three years to every applicable sentence. Thus, a Class D felony sentence of five years becomes an eight year sanction. Furthermore, it is not clear whether this period of conditional discharge can or must be added to a sentence that is probated, since the statute calls for the imposition of conditional discharge only upon release from incarceration or completion of parole. However, it seems that the better view would be that the three-year period of conditional discharge must be added to each sentence, regardless of whether probation is granted. A sentence that is probated is nevertheless a sentence and must be served if probation is revoked.

Alternative Sanctions for the Non-Violent Offender

The legislative will to remove violent offenders from society and to keep a tight rein on sexual offenders is obvious from a review of HB 455. It should also be clear that the Crime Bill directs those who are charged with the responsibility of recommending and imposing sentences to consider alternatives to incarceration whenever appropriate. Whether they were

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motivated by the need to contain the costs of our penal system or by the belief that other sanctions are more effective in combating crime, the members of the Legislature have provided prosecutors and judges with a variety of sentencing alternatives. HB 455 emphasizes the need to utilize programs that have been in the Penal Code and adds some new procedures.

Probation, including shock probation, has been a sentencing option for judges for many years, predating the adoption of the penal code in 1974.[36] It remains the primary alternative sanction for judges today, although legislation over the past 15 years has limited its availability for a number of specific offenses. When the Kentucky Penal Code was enacted 25 years ago, probation or conditional discharge was permitted in all cases, except where the death penalty was imposed. Since then, probation has been precluded for crimes involving the use of a deadly weapon, KRS 533.060(1), enacted in 1976. 1976 c 180.; for sex offenses against minors, KRS 532.045, enacted in 1984. 1984 c 382.; and for crimes committed while the offender is on parole, probation, shock probation or conditional discharge, KRS 533.060(2), enacted in 1976. 1976 c 180. The 1998 Crime Bill limited the consideration of probation for any violent felon as defined in KRS 439.3401 (1999 c 606, §73, amending KRS 533.010(2).[37], and added the prohibition against probation in any case where the defendant was wearing body armor while in possession of a firearm, 1999 c 606, §183, codified as KRS 533.065.

On the other hand, HB 455 authorizes the consideration of probation for both first degree and second degree persistent felony offenders when the crimes for which the defendants currently stand charged are non-violent Class D felonies, 1999 c 606, §76, amending KRS 532.080(5) and (7). This corrected an inconsistency that had existed whereby a person sentenced as a persistent felon in the first degree, upon conviction of a non-violent crime, was eligible for probation, but a person sentenced as a second degree persistent offender was ineligible. Furthermore, the Crime Bill provided that no violation of KRS 218A.500, the drug paraphernalia law, can be used as a conviction for purposes of the persistent felony offender statute, 1998 c 606 §§76; KRS 532.080(8).

In light of the clear intent of our lawmakers to incarcerate violent offenders for longer periods, and given the legislative narrowing of the availability of probation in recent years, the importance of the amendment to the probation statute in the Crime Bill can hardly be overstated. Simply put, if we are going to incarcerate those offenders who deserve to be confined in secure facilities, we must also be willing to implement other methods of dealing with the non-violent offenders. This is sound corrections policy and sound economics, reserving expensive prison cells for the dangerous offenders while attempting to reform or rehabilitate the non-violent offender in supervised, community-based programs.[38]

Although the revision of KRS 533.010 was lengthy, the significance of the changes is more in the attitude or approach to probation and other sentencing alternatives that courts are required to take. Prior to passage of HB 455, the statute provided that "the court shall consider the possibility" of probation, probation with an alternative sentencing plan, or conditional discharge. Then, after due consideration of the circumstances of the crime, and the history and character of the defendant, the court "should" sentence the defendant to such a program unless imprisonment is necessary for protection of the public. *See*, 1999 c 606, §73, amending KRS 533.010(2). Following the amendment by the Crime Bill, KRS 533.010 now states that the court **shall consider** (not just consider the **possibility** of) probation and **shall** (rather than should) grant probation or conditional discharge unless imprisonment is deemed to be necessary, KRS 533.010(2). These small changes in the wording of the statute demonstrate a commitment from the Legislature that alternative sanctions must be an integral part of the sentencing process.

The structure of the probation statute, as amended, also promotes the use of sentencing alternatives. Before a defendant, who is otherwise eligible for probation, can be sentenced to a term of imprisonment, the court must make several determinations. First, the judge **shall** grant probation or conditional discharge to a person who is not otherwise precluded by law from consideration, unless the court finds that imprisonment is necessary to protect the public. *Id.* In order to find that the public needs to be protected from any particular defendant, the court must determine that there is a substantial risk that the defendant will commit another crime; that the defendant is in need of treatment in a correctional facility; or that probation will unduly depreciate the seriousness of the defendant's crime. KRS 533.010(2).

In the event that, after considering the nature and circumstances of the crime, and the history and character of the defendant, the court deems probation to be inappropriate, it cannot simply sentence the defendant to prison. Rather, the court shall consider granting probation with an alternative sentencing plan unless it is of the opinion that imprisonment is necessary for the protection of the public. KRS 533.010(3). Under this section of the statute, the need to protect the public from the defendant must be based on a finding that: 1) there is a **likelihood** that the defendant will commit a Class C or Class D felony or there is a **substantial risk** that the defendant will commit a Class B or Class A felony; 2) the defendant is in need of treatment in a correctional institution; or, 3) probation will unduly depreciate the seriousness of the defendant's crime. *Id.*

In order to emphasize the obligation of the court to consider probation in any sentencing procedure where probation is available to the defendant, the statute requires the court to enter into the record written findings of fact and conclusions of law in support of its rulings. KRS 533.010(15). Thus, a judge must be able to articulate a basis for finding that

there is a "likelihood" or "substantial risk" that the defendant will commit a felony while on probation. In addition, to assure that there is a basis to find a "likelihood" to commit a Class C or Class D felony, the statute prohibits such a finding where the defendant has never been convicted of a felony in the past; has successfully completed probation more than ten years prior to the commission of the current crime; or has been released from incarceration for a prior offense more than ten years prior to the current offense. KRS 533.030(4). Nevertheless, the court may determine that the greater weight of the evidence indicates a likelihood that the defendant will commit a Class C or Class D felony. KRS 533.030(5).

While these provisions are intended to underscore the importance of giving due consideration to probation, ultimately the appropriate utilization of probation depends on the willingness of the judge to give serious consideration to sentencing alternatives. Because the trial courts are given considerable discretion in such matters *(Turner v. Commonwealth*, Ky., 914 S.W.2d 343 (1996); *Hughes v. Commonwealth*, Ky., 875 S.W.2d 99 (1994)), it would be relatively easy for judges to deny probation on the rather vague grounds that it would "unduly depreciate the seriousness of the defendant's crime." It is hoped that this will not happen and that this important sentencing tool will be properly employed.

Probation With Alternative Sentencing

Probation with alternative sentencing plan was added to the criminal code in 1990, 1990 c 497 §5, amending KRS 533.020. Although the statute did not specify the components of such a plan, it appears that community service was intended to be a possible element since the legislation establishing this probation program also authorized community service as an alternative to prison for felons. 1990 c 459, §§1, 2. Otherwise, the statute simply offered probation with alternative sentencing as another option for the court when imprisonment was not warranted but probation alone was not considered to be a sufficient sanction. The Crime Bill provides more specific elements for inclusion in an alternative sentencing program.

At the time of initial sentencing, or upon modification or revocation of previously granted probation, the court may order the defendant to be placed on probation and serve a sentence not to exceed twelve months either in jail, in a halfway house, or on home incarceration. KRS 533.010(6); 1998 c 606 §73(6). If sentenced to home incarceration, the defendant may be granted work release. *Id.* If sentenced to a jail term, the defendant may be given work release or ordered to perform community service. *Id.* In lieu of confinement, the court may order the defendant to a residential treatment program for alcohol or drug abuse, or to other counseling, treatment, or rehabilitation. *Id.* Since this last option does not specify that treatment must be as an in-patient, it would appear that confinement is not always required as part of an alternative sentencing plan.

The authorization of work release and home incarceration for felons constitutes a change in the law. Prior to the enactment of the Crime Bill only misdemeanants were eligible for these programs. KRS 439.179 (work release); KRS 532.200-.250 (home incarceration). Although home incarceration has been allowed as a form of pre-trial release since 1996, KRS 431.517., the statutes now permit the sentencing judge to order a term of imprisonment in the county jail be served on home incarceration, or that the prisoner be granted the privilege of work release. 199 c 606 §81, amending KRS 532.210. 1999 c 606 §73, amending KRS 533.010(6). These options only apply to felons serving time in the county jail under an alternative sentencing plan, since a defendant who is sentenced to prison is committed to the Department of Corrections and is beyond the jurisdiction of the circuit court. However, in one particular instance the trial judge retains the power to grant work release to a convicted felon who has not been sentenced to probation. During the period in which a defendant may file a motion for shock probation, the sentencing court may order the defendant held in the county jail and may allow work release. KRS 439.265(3)(a).

The statute also requires the court to impose additional conditions upon the defendant when granting probation with alternative sentencing. KRS 533.010(8); 199 c 606 §73(8). The conditions vary depending upon the type of sentencing plan ordered. A defendant sentenced to a halfway house must be working, pursuing an education, or enrolled in a full-time treatment program. *Id.* A person placed on home incarceration shall be employed, enter treatment if appropriate, and pay all or a part of the cost of home confinement. *Id.* When sentenced to a residential treatment program for drug or alcohol abuse, the defendant must undergo drug screening, participate in aftercare, and be on active, supervised probation for five years. *Id.* All offenders sentenced under an alternative plan must pay restitution and have no contact with their victims. *Id.*

The Split Sentence

A probated sentence combined with an order requiring the defendant to serve a period of incarceration in a county detention facility, commonly referred to as a "split sentence", has been part of our sentencing laws since the adoption of the penal code in 1974. 1974 c 406 §287, codified as KRS 533.030. The Crime Bill of 1998 increased from six months to twelve months the maximum sentence which can be imposed as a condition of probation. 1999 c 606 §49(6), amending KRS 533.030(6) and now codified in KRS 533.030(7). This gives the trial court additional flexibility in sentencing and should be an incentive to consider a plan of probation for those offenders who deserve a substantial punishment in addition to treatment or rehabilitation.

The "split sentence" allows the sentencing court to maintain control over the defendant, while not adding to the over-

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crowded prison population. However, opting to sentence offenders to long terms in local facilities could shift the problem of overcrowding to the county jails. As a means of compensating the counties for undertaking the burden of housing these prisoners, HB 455 included a provision which requires the Department of Corrections to reimburse the counties for the cost of incarceration. 1999 c 606 §115, codified as KRS 533.025. Previously, defendants who were serving a "split sentence" were considered county prisoners. That economic reality led some judges to forego probation at sentencing, preferring to commit the defendant to the custody and cost of the Department of Corrections with the intention of granting a motion for shock probation at a later date. Although the state will now be responsible for the cost of incarcerating these defendants, judges must be aware of the potential burden on local jails when using the "split sentence." This sentencing alternative is still a probation plan with incarceration as only one element, not the primary component.

Shock Probation

Shock probation, which was first enacted in 1972, KRS 439.265(3)(a); 1972 c 169., was included in the penal code of 1974, and continues to be a viable sentencing device. The Crime Bill made no changes to this statutory procedure. Pursuant to the statute, a defendant, who has been incarcerated for not less than 30 days nor more than 180 days, may file a motion with the circuit court requesting probation. KRS 439.265(3)(a). Defendants who are ineligible for probation at sentencing are likewise precluded from consideration for shock probation. KRS 439.265(4); KRS 533.060(1); KRS 532.045.

The theory behind shock probation is that the defendant may benefit from being "shocked" by a short stay in prison. Accordingly, shock probation ideally should be reserved for the offender, with a minimal criminal history, who has committed an offense which nevertheless is serious enough to warrant commitment to a state penal institution. Since most Class D felons are housed in county jails, shock probation is more suitable for Class C felons who must be transferred to state correctional facilities. With the ability to impose a split sentence of up to twelve months as a condition of probation, it is reasonable to expect that more judges will choose to probate defendants at the time of sentencing, rather than opting to consider shock probation at a later date. On the other hand, it can be argued that there is no substitute for the therapeutic effect of exposing a defendant to the inside of a state penal institution, even if only for a few months.

Pre-Release Probation

HB 455 added a completely new program for potential use by circuit court judges. This program, designated as pre-release probation, 1999 c 606 §119, codified as KRS 439.575., extends the sentencing court's power to release a convicted felon during the entire length of his or her sentence. Before this law was passed, the circuit court lost jurisdiction to the Department of Corrections after sentencing an offender to prison, except for the ability to grant a motion for shock probation filed within six months of the final judgment. It remains to be seen whether this expansion of the court's authority over state prisoners will be upheld as constitutional.[39] Indeed, the Kentucky Court of Appeals in a decision rendered on December 23, 1999 ruled that the pre-release probation statute is unconstitutional as impermissibly giving the courts parole power which is reserved to the Executive Branch. *Prater v. Com.*, 47 KLS 1, 9 (January 28, 2000). The opinion in that case was not final and not to be cited as authority as of the date that this article went to publication.

In order to be eligible for pre-release probation, the inmate must meet certain criteria established by administrative regulations promulgated by the Department of Corrections. KRS 439.575(2). An inmate is excluded from consideration if he or she has committed a crime in which a life was taken or a victim suffered serious physical injury; has an outstanding felony detainer; or has a major violation in the institution. Kentucky Department of Corrections, Policies and Procedures, No. 27-11-02, eff. 6-16-99. If otherwise eligible, the prisoner must then receive a favorable recommendation from the Department which is based, in part, upon a Pre-Release Risk Assessment Scale designed to predict the likelihood of the person's success if probated. *Id.* In addition to receiving a low risk score on the assessment, the inmate must be eligible for probation and have a home placement within the state. *Id.*

When a motion for pre-release probation is filed, the sentencing court may request that the Department of Corrections complete the risk assessment. However, it appears that the court has the discretion to overrule the motion without ordering an assessment since it retains the discretion to deny pre-release probation regardless of the Department's recommendation. Certainly, the court would not have to order an assessment if the inmate would be ineligible under the regulations.

If the court orders a pre-release assessment, it must be completed within 60 days of the order. *Id.* The assessment will then be forwarded to the District Supervisor for the Division of Probation and Parole if the inmate is in the Class D program, or to the Deputy Warden if the inmate is in a penal institution. *Id.* In order to make a recommendation to the court, the Deputy Warden or District Supervisor will review the assessment and the inmate's pre-sentence report, and may consider whether the prisoner has completed any specialized programs while in the institution. *Id.* A recommendation must be sent to the sentencing court within 30 days after completion of the assessment. *Id.*

Upon receipt of a favorable recommendation from the Department, the court may place the inmate on probation with such conditions and terms as it deems necessary, including

an order that the inmate remain in a halfway house. KRS 439.575(3)(4). Once pre-release probation is granted, the inmate is no longer considered a state prisoner, but is treated as a defendant on probation subject to the orders of the sentencing court and the supervision of the Division of Probation and Parole. KRS 439.575(5).

Pre-Trial Diversion

Pre-Trial diversion programs have been operated by the Kentucky Administrative Office of the Courts for many years.[40] Such programs are an important method of handling first-time misdemeanants in district court. In addition, a number of circuit courts have established felony diversion plans with the approval of the Kentucky Supreme Court.[41] HB 455 requires each judicial circuit to submit a plan for a pre-trial diversion program to the Supreme Court by December 1, 1999. 1999 c 606 §§86-92, codified as KRS 533.250-.262.

The statute prescribes the mandatory elements for each diversion program. In addition, RCr 8.04 governs the procedure for the implementation and termination of diversion agreements. A defendant who is charged with a Class D felony is eligible to participate provided that, within the ten years immediately preceding the current offense, he or she has not committed a felony; has not been on probation or parole; or has not been released from serving a felony sentence. KRS 533.250(1)(a). Furthermore, the defendant must not be charged with an offense for which probation, parole or conditional discharge would be prohibited under KRS 532.045. KRS 533.250(1)(b). Although not specifically mentioned in the statute, it has been recommended that diversion rules provide that any person charged with a felony offense involving driving under the influence should also be ineligible for diversion.[42] KRS 189A.010(8). Finally, no person can be eligible for pre-trial diversion more than once in any five-year period. KRS 533.250(1)(c).

An eligible defendant may make written application to the trial court and the Commonwealth's attorney for entry into the pre-trial diversion program. KRS 533.250(1)(d). Upon receipt of the application, the Commonwealth's attorney must check the defendant's criminal record to assure that the person is eligible, and conduct any other investigation that may be necessary to enable him or her to set proper conditions of diversion, or to make a decision whether to recommend the defendant's participation. KRS 533.252. The Commonwealth's attorney must also interview the victim or the victim's family, and explain to them the diversion program and the proposed conditions. *Id.* The results of this interview may be presented to the court for its consideration. *Id.* Since the victim is entitled to be present when the court rules on the application for diversion, it is the duty of the Commonwealth's attorney to notify the victim of the time and date of the hearing. *Id.*

The Commonwealth's attorney is required by statute to make a recommendation, favorable or unfavorable, on each application for diversion. KRS 533.250(2). The statute and rule further provide that the court may either approve or disapprove the diversion agreement. *Id.*; RCr 8.04(1). One version of the Crime Bill debated in the General Assembly would have made approval by the prosecutor a prerequisite to every grant of pre-trial diversion.[43] The law, as enacted, does not give veto power to the Commonwealth's attorney. However, some have expressed concern that, by allowing the court to grant diversion over the prosecutor's objection, the law is unconstitutional as a violation of the separation-of-powers doctrine.[44]

If pre-trial diversion is granted, the defendant must enter a guilty plea or an Alford plea. KRS 533.250(1)(e). The defendant will be ordered to complete a diversion plan under the supervision of the Division of Probation and Parole.[45] KRS 533.254. The terms and conditions for probation shall be applicable to diversion, including the defendant's obligation to make restitution. *Id.* If the defendant successfully completes the pre-trial diversion program, the charges will be dismissed with prejudice, and will not be considered as a criminal conviction. KRS 533.258; RCr 8.04(5). If the defendant fails to comply with the diversion agreement, the Commonwealth's attorney may apply to the court to have the diversion voided. KRS 533.256(1). The defendant has the right to a hearing on any motion to void the pre-trial diversion agreement, and the court shall use the same criteria as for revocation of probation in determining whether the diversion should be terminated. KRS 533.256(2). If it finds that the defendant has violated the terms of the agreement, the court must notify the prosecutor who then decides whether to proceed on the defendant's guilty plea. KRS 533.256(4).

Drug Courts

Although not specifically mentioned in the Penal Code, drug court programs exemplify the community-based treatment alternatives envisioned by those who have called for reform in our criminal justice system. In fact, the Governor's Criminal Response Team recommended that the use of drug courts should be expanded in the Commonwealth. Criminal Justice Response Team Report, p. 12. The statistics showing that drug offenses have increased by over 200% in the last ten years should be proof enough that we must focus on the abuse of controlled substances if we are going to reduce the crime rate in Kentucky.[46] Drug courts offer a direct approach to combating drug-related crime by addressing the cause of the criminal activity — the offender's addiction.

As of May, 1998, there were 275 drug courts in operation in 48 states, with another 155 programs in the planning stages.[47] In Kentucky, there are currently six adult drug courts conducting sessions, and at least eight more circuits are scheduled to begin operation in the near future.[48] In addition, there are five juvenile drug courts in existence in the state. *Id.* All of these drug court programs are operating under the auspices and support of the Administrative Office of the Courts.

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Drug court can be defined as a court-supervised intensive drug treatment program.[49] One of the key components of all drug court programs is the ongoing interaction of the judge with the participants. Indeed, participants must report directly to the judge on a regular basis, as often as once a week at first. Other components include intensive drug treatment, frequent drug screens, and graduated rewards or sanctions dispensed by the court. *Id.*

Within these general parameters, drug courts can vary from jurisdiction to jurisdiction. Except for certain restrictions imposed by federal law as a condition to receipt of federal funds, local drug courts can develop their own rules regarding eligibility. In some drug courts, participation is a condition of probation after sentencing. In others, drug court can be part of a diversion plan. In any event, drug court programs are generally designed to require the participants to report and be under varying degrees of supervision for approximately 18 to 24 months. Along with intensive treatment, participants are expected to maintain suitable employment, complete their education or job training, support their dependents, and pay any court-ordered fines, costs and restitution.

CONCLUSION

Twenty-five years ago, this author reviewed the sentencing provisions of the new penal code, and commented that the General Assembly had provided the tools to achieve a more just and effective system of criminal sentencing.[50] It was further said that it was the responsibility of the bar and the courts to use these sentencing tools skillfully and in the progressive spirit in which they were adopted. The drafters of the Kentucky Penal Code had hoped that by giving judges, prosecutors and corrections officials a range of flexible alternatives, effective and efficient sentencing of offenders could be achieved. Their goal was two-fold: to reduce crime by offering rehabilitative treatment to those for whom incarceration was not indicated and to manage wisely the limited resources of our penal system.

As we have seen, the objectives of our lawmakers in 1974 were not attained. There are over four times the number of inmates in our penal institutions compared to 25 years ago. Instead of five correctional facilities, the state now operates 15. Likewise, there are approximately 15,000 felony offenders under the supervision of the Division of Probation and Parole, compared to about 3,500 in 1972. Not surprisingly, the cost of keeping so many offenders in prison or under supervision has risen commensurately. And regardless of the cause for this inmate population explosion, whether due to the creation of new felony offenses, the enactment of laws prohibiting or restructuring probation and parole, the increase in the use of illegal drugs, or the failure to utilize available sentencing alternatives, the need to review and reform the sentencing portions of our Penal Code became evident by 1998. The Governor's Crime Bill is the latest attempt by the Legislature to improve the manner in which we deal with criminal offenses.

The alternative sanctions contained in the penal code, as amended by the Crime Bill, allow judges and prosecutors to consider a varied array of sentences that can be tailored to the circumstances of each crime and the character of each offender. The substance and spirit of HB 455 clearly expresses the mandate of the Legislature that those who are charged with administering our criminal justice system must consider and use alternatives to incarceration where appropriate. However, the statutes are not self-executing. If the goal of effective and efficient sentencing of offenders is to be reached, judges and prosecutors must use alternative sanctions and treatment programs. Moreover, the Legislature must fulfill its expressed commitment to the reform of the criminal justice system by providing the funds and personnel necessary for these programs to be successful. In order to accomplish the ultimate objective of reducing crime, the money saved by the utilization of alternative sanctions must be re-invested in community-based correctional programs.

END NOTES

1. See Kentucky Legislative Research Commission (hereafter LRC), Kentucky Penal Code §§ 3405-3625, Commentary, (Final Draft 1971). The term "flexibility" is repeatedly used by the drafters in describing the significance of the various sections of the penal code.
2. Kentucky Legislative Research Commission, "Kentucky Corrections: The Case For Reform," Research Report No. 102 (April, 1973), p.i.
3. By comparison, the Department of Corrections currently offers prison inmates a variety of rehabilitative options including academic, vocational and job training programs. *See*, Kentucky State Corrections Commission, Six Year Plan 1996-2002, 1999 Update.
4. It was estimated that the cost to build a new institution to house 1,000 men would range from $11,000,000 to as high as $20,000,000 in 1972. In that same year, the entire budget for the Department of Corrections was $10,050,000.
5. The National Judicial College in Reno, Nevada has established a Court Volunteer Services Division under the direction of Judge Keith J. Leenhouts, who established a very successful volunteer probation program in Royal Oak, Michigan. See, Court Volunteer Services Division of the National Judicial College, "Focusing on Adult Misdemeanants: Volunteers and Community Resources in Court Rehabilitative Services", Reno, Nevada, (April, 1997).
6. The 1972 General Assembly revamped the Parole Board

requiring appointees to have relevant experience. 1972 c §291, amending KRS 439.320. Release of misdemeanants for work, education or medical treatment was authorized. 1972 c 295, codified as KRS 439.179. Laws permitting probation and parole of persons jailed for misdemeanors were also enacted. 1972 c 290, amending KRS 439.550. 1972 c 294, codified as KRS 439.177.

7. The Court held that Section 253 of the Kentucky Constitution prohibited private employment of felony prisoners outside of the institutions. However, felons housed in county jails under the Class D felony program pursuant to KRS 532.100 can perform labor on public works projects.

8. The 1972 LRC report on the need for correctional reform noted a fear that this conditional release program could be rendered ineffective without adequate staffing of the Division of Probation and Parole. See, Kentucky LRC, "Kentucky Corrections: The Case For Reform", *supra*, at p. 152.

9. According to recent statistics from the Kentucky Department of Corrections, 830 individuals were discharged from custody under an order of shock probation during the period from July 1, 1998 until June 30, 1999. By comparison, there were over 10,500 people on felony probation and over 4,300 on parole during the same time period. Kentucky Department of Corrections, Information and Technology Branch, Internal Report, January 1999.

10. LRC, Kentucky Penal Code §3505, Commentary, p. 358; KRS 533.010, Commentary.

11. See, *Wyatt v. Ropke*, Ky., 407 S.W.2d 410 (1966), where a Writ of Prohibition was entered removing the trial judge in light of his announced refusal even to consider probation in that case under any circumstances. The appellate court noted that the judge's conduct was arbitrary and contrary to his obligation under his oath of office. See, also, *Jordan v. Commonwealth*, Ky., 371 S.W.2d 632 (1963), where the appellate court suggested that the trial court reconsider its refusal to grant probation.

12. Kentucky State Corrections Commission, Six Year Plan 1996-2002, 1999 Update; See, also, Kentucky Department of Corrections, Profile of Inmate Population 1998.

13. Department of Corrections, Community Services & Local Facilities, Division of Probation and Parole, Active Caseload Report, November 1999. The total caseload of the Division of Probation and Parole was over 19,000 when misdemeanants are included.

14. Kentucky Legislative Research Commission, "Kentucky Corrections: The Case For Reform," Research Report No. 102 (April, 1973), p.1, 135, *supra*.

15. Kentucky State Corrections Commission, Six Year Plan 1996-2002, 1997 Update. However, it should be noted that recent data from the Kentucky Department of Corrections reveals that the number of new commitments to the state correctional facilities decreased in 1999 for the first time in many years. On the other hand, the number of individuals under the supervision of the Division of Probation and Parole has continued to rise. It would appear that the sentencing alternatives called for by the Governor's Crime Bill may be taking effect as far as reducing the population in our prison system. However, the greater number of persons released on supervision has increased the workload of the Division of Probation and Parole. Thus, while the reduced prison population is a sign of progress towards correctional reform, to complete the process the Legislature will have to provide for adequate community-based programs. Kentucky Department of Corrections, Information & Technology Branch, Frankfort, Ky.

16. Eric Schneider, "Kentucky Informational Page" (visited 12/16/99) (http://www.Louisville.edu/easchno1/Kentucky/kypop/html).

17. Non-support of dependents was a Class A misdemeanor under the 1974 Penal Code. 1974 c 406 §261, codified as KRS 530.050. In 1976, that statute was amended to make flagrant non-support a Class D felony. 1976 c 361.

18. Driving under the influence, fourth offense or more within a five year period, became a Class D felony in 1991. KRS 189A.010; 1991 1st ex s. c 15 §12. The Crime Bill of 1998 makes driving under the influence, third offense within five years, a Class D felony when the driver has a BA of 0.18 or higher.

19. KRS 439.3401 was first enacted in 1986. It required a "violent offender" to serve a minimum of 50% of the sentence imposed before becoming eligible for parole. The statute was amended most recently in 1998 and now requires a "violent offender" to serve 85% of any sentence. 1998 c 606 §77. KRS 533.060 prohibits probation for persons convicted of Class A, B or C felonies when a weapon was used, or when the offense was committed while the defendant was on parole, probation or conditional discharge. In addition, the sentence for a crime committed while awaiting trial shall run consecutive to any sentence imposed for the pending charge. This law became effective in 1976. 1976 c 180 §2. KRS 439.3401, passed into law in 1986, defines "violent offender" to include a person convicted of rape in the first degree and sodomy in the first degree. In addition, this section requires violent offenders to serve fifty percent of their sentences before being eligible for parole.

20. KRS 532.045, which prohibits probation for certain sex crimes involving minors, was enacted in 1984. KRS 439.265, the shock probation statute, was amended in 1994 to prohibit persons convicted of certain sex crimes

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with minors from being probated in accordance with KRS 532.045.

21. KRS 532.080, the persistent felony sentencing law, was part of the 1974 Penal Code. 1974 c 406 §280. In 1976, the statute was amended to deny probation to persistent felons in the first or second degree, and to require persistent felons in the first degree to serve a minimum of ten years before being eligible for parole. 1976 c 180. In 1994, the statute was amended to allow *first degree* persistent felons to be probated if their current charge was a Class D felony. Ironically, a *second degree* persistent felon was still ineligible for probation, until the amendment of this statute by the 1998 Crime Bill. 1998 c 606 §76.

22. According to statistics from the Kentucky Parole Board, the percentage of inmates granted parole steadily declined from 39% in 1993-94 to 26% in 1997-98. The percentage of deferments rose during the same time period from 34% to 41%, and the percentage of inmates ordered to serve out their sentences increased from 27% to 33%. In fiscal year 1998-99, this trend showed signs of reversal, with a 31% rate of parole and a 35% rate for deferments. Serve outs were 34% in this period. The Advocate, Vol. 20, No. 2 (March 1998), p. 10; Kentucky Parole Board, Biennial Review 1994-96; FY Statistics for 1997-98, 1998-99.

23. Kentucky Department of Corrections, Cost to Incarcerate; Fiscal Year 1998.

24. Kentucky State Corrections Commission, Six Year Plan 1996-2002, 1999 Update, p. 43.

25. Governor's Criminal Justice Response Team, Final Report and Recommendations. Submitted to Paul E. Patton, Governor, Commonwealth of Kentucky on December 1, 1997. (hereafter Criminal Justice Response Team Report), p. 41.

26. Kentucky Department of Corrections, Profile of Inmate Population 1998, p. 1.

27. Kentucky Department of Corrections, Percentages Increase in New Felon Commitments by Crime Type. From FY 1989 to 1998.

28. Criminal Justice Response Team Report, p. viii.

29. 1980 c 208 §10. The 1972 LRC report on the need for correctional reform noted a fear that this conditional release program could be rendered ineffective without adequate staffing of the Division of Probation and Parole. See, Kentucky LRC, "Kentucky Corrections: The Case For Reform", *supra*, at p.152. 1998 c 606 §25, codified as KRS 532.043.

30. Criminal Justice Response Team Report, p. 76.

31. Criminal Justice Response Team Report, *supra*, p. 73.

32. For example, the Legislature did not enact the three additional aggravating factors which would allow the imposition of the death penalty. *See*, footnote 76, *supra*. Likewise, the Crime Bill did not include provisions for the establishment of sentencing guidelines or for judge sentencing. Criminal Justice Response Team Report, *supra*, pp. 73-80.

33. 1999 c 606, §73, amending KRS 533.010. As amended, KRS 533.010(2) provides that, except for violent felons as defined in KRS 439.3401 and for those offenders for whom probation is statutorily prohibited, the sentencing court shall consider and grant probation, conditional discharge, or probation with alternative sentencing plan unless imprisonment is necessary for the protection of the public. Thus, although many violent offenders will be ineligible for probation under specific statutes such as KRS 533.060 and KRS 532.045, violent felons as defined by statute are not otherwise prohibited from consideration for probation. The amendment to KRS 533.010 merely denies violent felons the right to have probation as the preferred sentence.

34. The Bill calling for the penalty of life without the possibility of probation and parole had been referred to as the "Briede Bill" named after Lesly Briede who was brutally murdered by Carlos Faulkner in 1992. Faulkner was sentenced to life imprisonment without possibility of parole for 25 years. The Courier-Journal, Louisville, Kentucky, (Wednesday, February 4, 1998).

35. 1999 c 606, §24, codified as KRS 197.045(4). This legislation had been known as the Sarah Hansen Act in memory of a Kentucky high school student who was kidnapped, raped and murdered in 1997. The Courier-Journal, Louisville, Kentucky, (Tuesday, March 3, 1998).

36. The statute authorizing shock probation was enacted in 1972. KRS 439.265, 1972 c 169. The Penal Code of 1974 repealed and replaced the former probation statute, KRS 439.270, which had been in effect since 1956.

37. *See*, endnote 32, *supra*.

38. The value of such community based programs was recognized by the 1992 Legislature when it enacted KRS 196.700-.735, providing for the creation of community corrections programs under the administration of the Kentucky State Corrections Commission. The stated purpose of this legislation was to promote community-based sanctions as an alternative to incarceration for certain felony offenders. The statute cites the need to reduce prison overcrowding while providing a more effective and efficient method of meeting the needs of victims, the community and the offender. The Legislature further provided for the award of financial grants to local community corrections boards for the implementation of alternative correctional programs.

39. See, *Commonwealth v. Williamson*, Ky., 492 S.W.2d 874 (1973) where the Court of Appeals rejected the argument that shock probation was an unconstitutional invasion or encroachment upon the executive power. In its opinion, the Court observed that the shock probation statute established the period of time, not unreasonably long, during which the trial court retains a limited control over its judgments in criminal cases. Since pre-release probation extends the authority of the trial court to grant release of a prisoner beyond the period of shock probation, and potentially for the entire length of the person's sentence, it could be argued that this statute goes beyond the constitutional limits approved in the *Williamson* case.

40. For example, in 1979, the Supreme Court approved local rules establishing diversion programs in Campbell and Kenton Counties.

41. Felony diversion has been authorized in the Campbell Circuit Court since at least 1995. Kentucky Supreme Court Order entered January 20, 1995.

42. The statewide Committee on Pre-Trial Diversion for Class D Felons has recommended that local felony diversion protocols prohibit diversion for persons charged with felony driving under the influence since those charges carry mandatory jail time. Although the statute does not expressly prohibit the imposition of some period of incarceration as part of a diversion plan, it would seem that denying diversion to a person charged with felony DUI is nevertheless sound policy since there is no reason to have a DUI conviction removed from the record of a person who has been convicted of that offense on multiple prior occasions.

43. The Courier-Journal, Louisville, Kentucky (Friday, March 27, 1998).

44. A committee composed of judges, prosecutors, and representatives of the defense bar, the Department of Corrections, and the Administrative Office of the Courts was appointed by the Supreme Court in October of 1998 to study pre-trial diversion. That committee proposed a protocol which could be used as a model by the circuit courts. The committee stated its belief that diversion absent approval of the prosecutor would be unconstitutional.

45. Prior diversion programs were administered by the Pre-Trial Services Division of the Administrative Office of the Courts.

46. Kentucky Department of Corrections, Profile of Inmate Population 1998, p. 1.

47. U.S. Department of Justice, Office of Justice Programs, Drug Courts Program Office, "Looking at a Decade of Drug Courts:" Drug Court Activity: Summary Information, May 1998.

48. Kentucky Administrative Office of the Courts, Drug Courts Program.

49. U.S. Department of Justice, Office of Justice Programs, Drug Courts Program Office, "Defining Drug Courts: The Key Components," January 1997.

50. Bartlett, "Authorized Disposition of Offenders Under the New Penal Code," 61 Ky L J 708 (1973). ■

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Fear less, hope more;
Whine less, breathe more;
Talk less, say more;
Hate less, love more;
And all good things are yours.

-Swedish Proverb

Fourscore and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

-Abraham Lincoln

PROSECUTORIAL MISCONDUCT: A Kentucky Primer

by Jerry J. Cox

Prosecutorial misconduct is an ongoing cancer, metastasized, stamped out here and there only to appear again and again with devastating effects on our citizens.

Is the system broken? Yes! In 1991 the Chair of the United States Senate Committee on the Judiciary asked Professor Leibman of the Columbia University School of Law to calculate the frequency of relief in habeas corpus cases. They report that during the study period, 1973-1995, fifty percent (50%) of capital cases were reversed on direct appeal in Kentucky. One hundred percent (100%) were reversed in the federal courts. That pattern continues with the recent decision in *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000) which will be discussed later in this article. The following is a substantial setting out of many cases within various classifications of prosecutorial misconduct.

A. Prosecuting Attorney's Duty

Lickliter v. Commonwealth, 60 S.W.2d 355 (Ky. 1933). Prosecuting Attorney's duty is to see that justice is done and nothing more.

Howerton v. Commonwealth, 112 S.W. 606 (Ky. 1908). Prosecuting attorney's should see that justice is fairly meted out and that accused is fairly dealt with. It is not a part of their duty to abuse the accused in the hearing of the jury.

Bailey v. Commonwealth, 237 S.W. 415 (Ky. 1922). The duty of a prosecuting attorney is not to persecute, but to prosecute, and he should endeavor to protect the innocent as well as prosecute the guilty, and should always be interested is seeing that the truth and the right shall prevail.

Bennett v. Commonwealth, 28 S.W. 2d 24 (Ky. 1930). Commonwealth Attorney's duty is to see that legal rights of accused as well as those of Commonwealth are protected.

See also, *Sanders v. Commonwealth*, 279 S.W.2d 23 (Ky. 1955)

ABA Rules of Professional Conduct

Rule 3.3 requires a lawyer to investigate the background of expert witnesses to avoid putting on perjurious testimony regarding their credentials. (*See* Comparison of the Kentucky and ABA Rules of Professional Conduct.)

Rule 3.8 requires that prosecutors disclose any exculpatory evidence they have uncovered including any evidence of fraud relating to expert's acts or knowledge. (*See* Comparison of the Kentucky and ABA Rules of Professional Conduct.)

Rule 5.3 says lawyers are barred from ratifying the unethical conduct of non-lawyers, including experts. *See* also Rule 8.3 and 8.4 (8.4 and 8.5 of the Kentucky Rules of Professional Conduct.)

B. Imputation of Police Knowledge to Prosecution

Information obtained by a law enforcement officer in the course of investigation must be attributed to the prosecutor for purposes of a *Brady* violation. *See United States v. Antone*, 603 F.2d 566, 569-70 (5th Cir. 1979). *See* also *Ballard v. Commonwealth*, 743 S.W.2d 21 (Ky. 1988); *Anderson v. Commonwealth*, 864 S.W.2d 909 (Ky. 1993); and *Mounce v. Commonwealth*, 795 S.W.2d 375 (Ky. 1990).

C. Investigation

1. Unreasonable Stops

United States v Huguenin, 154 F .3d 547 (6th Cir. 1998). Vehicle checkpoint was not operated to detect intoxicated drivers, but as pretext to stop drivers who had violated no traffic laws in order to question them in an attempt to gain reasonable suspicion to search cars for narcotics...checkpoint set up as trap for drivers attempting to exit prior to advertised checkpoint, did not effectively serve government purpose which outweighed it intrusiveness, and thus was unreasonable under Fourth Amendment.

City of Indianapolis v. Edmond, U.S. , S.Ct. ,148 L.E.2d 333 (2000) Federal Constitution's Fourth Amendment held violated by highway checkpoint program under which police, without individualized suspicion, stopped vehicles for primary purpose of discovering and interdicting illegal narcotics.

2. Polygraphs

Brown v. Commonwealth, 892 S.W.2d 289 (Ky. 1995). Any evidence flowing from an experience with a polygraph is inadmissible at trial. *See* also, *Bail v Commonwealth*, 612 S.W.2d 739 (Ky. 1981); *Stallings v. Commonwealth*, 556 S.W.2d 4 (Ky. 1977); and *Henderson v. Commonwealth*, 507 S.W.2d 454 (Ky. 1974).

Morgan v. Commonwealth, 809 S.W.2d 704 (Ky. 1991). Kentucky Supreme Court reversed a murder conviction of a man accused of killing his wife because a police officer testified at trial that an interrogation of the Defendant had taken place in a room containing a polygraph instrument. Because of the peculiar nature of polygraph examinations and their inherent propensity to influence juries, the mere mention of the taking of the polygraph examination even without disclosure of the result is sufficient error to warrant the reversal of any conviction obtained.

3. "Hiding Away" Defense Witness

Cash v. Commonwealth, 892 S.W.2d 292 (Ky. 1995). Prosecutor engaged in misconduct requiring reversal of murder conviction. After two prospective witnesses informed him that they had lied in grand jury testimony, prosecutor promised them that if they testified truthfully at trial there would be no perjury prosecution, subsequently kept promises to witness that he called, but repudiated promise as to witness he did not call but who was proposed as defense witness, causing that witness to decline to appear with result that Defendant lost opportunity to present exculpatory evidence. Prosecutor did not call witness to the stand, so defense counsel called witness. After prosecutor repudiated promise to witness, witness decided to invoke privilege against compulsory self-incrimination. Witness testified for the defense only through an avowal. Court held that "offer" to witness is analogous to "offer" to defendant, thus *Workman v. Commonwealth*, 580 S. W.2d 206 (Ky. 1979) and *Morton v. Commonwealth*, 817 S. W.2d 218 (Ky. 1991) apply. Whether the failure to uphold the promise is to the defendant or the witness, both violations rise to a level of prosecutorial misconduct which "breeds contempt for integrity and good faith" and "destroys the confidence of citizens in the operation of their government and invites them to disregard their obligations." Both violations deny the Defendant the opportunity to just resolution of their cases. In effect, the prosecutor prevented the witness from testifying about the events leading up to the shooting. The prosecutor used his power to prevent a witness who had additional evidence from testifying after originally promising her that all he wanted was truth and honesty from her.

CAUTION! *Gosser v. Commonwealth*, 31 S.W.3d 897 (Ky. 2000)

D. Discovery

1. Destruction of Evidence

Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988). Prosecutor's intentional erasing of tape-recorded statements of four witnesses, three of whom testified at trial against murder defendant, warranted reversal with directions to give instruction permitting jury to draw favorable inferences for defendant from destruction of the evidence. Prejudice is presumed where the prosecutor destroys evidence. Providing Defendant with summary of tapes made by prosecutor before he destroyed them would not satisfy defendant's discovery rights. It was error to permit the prosecutor to furnish his written version of the transcription of the tape-recorded statement to the jury to assist in listening to the tape. It is not within the discretion of the court to provide the jury with the prosecutor's version of the inaudible or indistinct portions of the tape. Further, the Commonwealth Attorney was in violation of his duties as an officer of the Court when he

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represented at oral argument that this was a transcript prepared by the trial court.

NOTE: Ask for the instruction, but don't waive objection.

NOTE: This case alone is a course on prosecutorial misconduct and could be cited to support many of the rubrics herein.

McGregor v. Hines, 995 S.W.2d 384 (Ky. 1999). A defendant's right to test possible exculpatory evidence is as fundamental to the assurance of due process as is his right to test inculpatory evidence, if not more so. It follows that any action on the part of the trial court or the Commonwealth which results in the destruction of possible exculpatory evidence before the defense has an opportunity to test it, would seriously undermine the defense and violate the defendant's right to due process and a fair trial. Holding concerns who has the right to test evidence. 1) Party with benign method should test first. 2) If both parties' methods destroy and it is exculpatory in nature (How do you know this in advance of testing?) let defense test first. 3) If neither destroy – sole discretion of court. 4) Under all above – must give notice to opponent and allow to be present.

2. Failure to Provide Discoverable Evidence

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment. NOTE: A must re-read!

Mathews v. Commonwealth, 997 S.W.2d 449 (Ky. 1999) held that defendant's failure to testify by avowal precluded appellate review of his claim that prosecution's alleged discovery violation prevented him from testifying.

James v. Commonwealth, 482 S.W.2d 92 (Ky. 1972). Commonwealth failed to file the defendant's request for bill of particulars, and failed to provide the Defendant with the reports of the chemist who analyzed the narcotic, and to have the opportunity for inspection by his own chemist. With respect to the bill of particulars, with the innovation of the abbreviated indictment, the defendant should be supplied freely with details of the charge against him to enable him to prepare his defense.

Finch v. Commonwealth, 429 S.W.2d 146 (Ky. 1967). With respect to the chemist's reports and the unavailability of the drug sample, a cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced.

United States v Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Prosecutor failed to disclose the victim's prior record to the defendant. In determining whether prosecutor's failure to disclose evidence to defense denied defendant fair trial, proper standard of materiality of undisclosed evidence is that if omitted evidence creates reasonable doubt of guilt that did not otherwise exist, constitutional error has been committed. Defendant should not have to satisfy severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal, **nor should trial judge order new trial every time he is unable to characterize non-disclosure as harmless under customary harmless error standard.** (emphasis added)

Williams v. Commonwealth, 569 S.W.2d 139 (Ky. 1978). Prosecutor failed to disclose evidence affecting the reliability of a prosecution witness whose testimony may have been determinative of the defendant's guilt at trial. The witness was unreliable because he apparently traded his testimony for leniency in his own criminal case. This was reversible error. NOTE: This occurs in all normal cases these days.

Silverburg v. Commonwealth, 587 S.W.2d 241 (Ky. 1979). The Commonwealth Attorney's list of proposed witnesses contained the names of persons who knew nothing of the incident as well as the names of persons who did know of the facts. The list did not contain the names of all persons who were used in the identification lineup. Additionally, the Commonwealth Attorney did not furnish a copy of the police identification lineup report until the first day of trial. On the second day of trial, a continuance was granted. The Defendant's investigative time was not reduced and although he charges that he was thereby prejudiced, he has not shown any prejudice. However, the criterion is not prejudice, it is purely and simply bad faith action on the part of the court or the Commonwealth's Attorney so as to afford the prosecution a more favorable opportunity to convict. The trial judge was not in error in failing to find such bad faith on the part of the Commonwealth's Attorney as would justify a holding of a violation of the protection clause of the Fifth Amendment (double jeopardy) in his subsequent retrial.

Rolli v. Commonwealth, 678 S.W.2d 800 (Ky. App.1984). The prosecution suppressed exculpatory evidence and failed to comply with RCr 7.24 and 7.26. The prosecution violated a pretrial discovery order. Reversed and remanded.

Eldred v. Commonwealth, 906 S.W.2d 694 (Ky. 1995). The defense sought the disclosure of psychiatric records relating to the credibility of key prosecution witnesses. *Id*. at 701-03. The Supreme Court of Kentucky explained that the prosecutor's duty of disclosure extends to records in the hands of his investigator **and other state agencies, even where the records are not in the prosecutor's immediate physical control.** (emphasis added)

Gall v. Parker, 231 F.3d 265 (6th Cir. 2000) Gall argued that a host of prosecutorial statements and tactics violated his constitutional rights. The alleged instances of misconduct include: the violation of Gall's right to remain silent by emphasizing his failure to testify; misrepresentation of evidence; prejudicial statements and actions depriving Gall a fair de-

termination of sanity; and a host of other actions that appealed to the passions and prejudices of the jury. Gall argued that these improprieties rendered the proceeding fundamentally unfair. Although Gall's counsel did not object to these infractions at trial, the United States Court of Appeals for the Sixth Circuit was not barred from hearing these claims. A habeas court only adheres to a state procedural bar when the last state court rendering a reasoned judgment on the matter has stated "clearly and expressly" that its judgment rests on that procedural bar. *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir.2000) (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 (1991)). In this case, the Kentucky Supreme Court addressed and rejected Gall's allegations of prosecutorial misconduct on their merits. *See, e.g., Gall I*, 607 S.W.2d at 110 ("To be mercifully brief, we do not find in this record any conduct by the prosecuting attorney that could be said to have been inconsistent with Gall's right to a fair trial."). This issue is therefore not barred from review. NOTE: The opinion in *Gall* spends 5 ½ pages discussing prosecutorial misconduct and this is a must read.

Moore v. Commonwealth, 634 S.W.2d 426 (Ky. 1982). The Supreme Court held that admission of testimony that chief defense witness had been convicted for three felonies in another state, one an axe murder, had escaped from jail, and was about to stand trial for murder, kidnapping and robbery was not only erroneous, but was also prejudicial to defendant and to his constitutional right to a fair trial since witness' testimony on behalf of defendant was the chief prop upon which the defendant's defense stood and the testimony solicited by the Commonwealth with respect to the witness' past crimes was not admissible for impeachment purposes nor for purpose of showing motive and bias and could have had only one effect on the jury's evaluation of the witness' testimony on behalf of the defendant.

E. Grand Jury

Commonwealth v. Baker, 11 S.W.3d 585 (Ky. App. 2000). Evidence supported finding that prosecutor knowingly or intentionally presented false information to grand jury and such false testimony prejudiced defendant by substantially influencing grand jury's decision to indict, and thus, trial court had authority to utilize its supervisory power to dismiss indictment charging defendant with second-degree assault based on prosecutorial misconduct in order to preserve integrity of grand jury proceeding; detective made materially false statement before grand jury and prosecutor misled grand jury by indicating defendant used an aluminum baseball bat to beat her children when there was no evidence to support belief that anything other than wooden stick was used. However, dismissal of indictment should not have been with prejudice.

Commonwealth v. Kirby, Rockcastle Circuit Court. In this case the grand jury voted a "no true bill." Without further proof, the Commonwealth Attorney berated the grand jury and compelled the return of an indictment. No record of the proceedings subsequent to the no true bill vote was made. In violation of law, the Commonwealth Attorney did not report anything other than the indictment. Affidavits from grand jurors and motion to quash were denied with the trial judge expressing disgust with grand jurors talking to lawyer (they thought they may have violated the law), obviously something neither the Commonwealth Attorney nor the trial judge could comprehend. Good for Kirby, bad for Commonwealth Attorney and Judge, Kirby was acquitted. End of story.

1. Inquiry During Cross-Examination

Stanford v. Commonwealth, 734 S.W.2d (Ky. 1987). Prosecutor's improper inquiry during cross-examination of defendant's stepfather in death penalty prosecution as to whether stepfather was aware that murder victim was mother of small child, in retaliation for stepfather's statement that Defendant was going to straighten out his life because he had a child, did not deny defendant fair trial, where trial court's admonition to jury to disregard information cured inflammatory nature of statement.

2. Community Values; References to Defendant's Wife, Expert's Opinion; Defense Counsel's Conduct; Voir Dire; Opening

Alexander v. Commonwealth, 862 S.W.2d 856 (Ky. 1993). The following did not rise to the level of prosecutorial misconduct: (1) the Commonwealth's comment in voir dire that the Commonwealth represented the community and defense counsel did not; (2) the Commonwealth's derogatory comments in opening concerning the defendant's wife; (3) the Commonwealth's comment in opening that the state's expert would give a diagnosis of sexual abuse; and (4) the Commonwealth's improper comments on jury instructions and defense counsel's actions. Appellate courts must focus on the overall fairness of the trial, and not the culpability of the prosecutor. *Slaughter v. Commonwealth*, 744 S. W.2d 407 (Ky. 1987).

United States v. Foster, 128 F.3d 949 (6th Cir. 1997) Prosecutor acted improperly in drug prosecution by informing counsel for witness who had testified before grand jury that if witness testified at trial his immunity would be revoked, and that prosecutor would then pursue charges against him. During the course of Williams' testimony, he consistently testified that Foster had not been involved in selling drugs. On Friday, September 8, 1995, Foster's attorney called Williams' lawyer and faxed him a copy of a subpoena for Williams and a witness fee check. Williams' attorney allegedly told Foster's counsel that an Assistant United States Attorney had warned him that Williams' grant of immunity would be revoked and Williams would be subject to prosecution if he testified on behalf of Foster. The government has admitted that it made it "clear to counsel for Williams…that the United States would pursue charges against Williams if he testified."

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3. Testimony

a. "Investigative Hearsay"

Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988). The extensive use of testimony from three police officers repeating what was told to them by persons whom they interviewed during the course of their investigation, offered under the guise of the so-called "investigative hearsay" exception to the hearsay rule was error. Prosecutors should, once and for all, abandon the term "investigative hearsay" as a misnomer. (Must (1) explain the action that was taken by officer, and (2) action by officer must be in issue).

Commonwealth v. Spaulding, 991 S.W.2d 651 (Ky. 1999). To establish prosecutorial misconduct for the Commonwealth's failure to correct perjured testimony at trial the defendant must show: (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false.

***Spaulding* citing *Giglio*:**

The Supreme Court of Kentucky has recently addressed this troubling issue by ruling entered as recently as July 8, 1999. *See Commonwealth v. Spaulding*, 991 S.W.2d 651(Ky. 1999) states as follows:

"We begin by noting that the deliberate introduction of perjured testimony by a prosecutor "is incompatible with the rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 108 (1972) (internal quotations marks omitted).

The same is true if a prosecutor, though not soliciting it, allows perjured testimony to go uncorrected. *Id.* When the perjured testimony could "in any reasonable likelihood have affected the judgment of the jury," the knowing use by the prosecutor of perjured testimony results in a denial of due process under the Fourteenth Amendment and a new trial is required.

There is no logical reason to limit a due process violation to state action defined as prosecutorial knowledge of perjured testimony or even false testimony by witnesses with some affiliation with a government agency. Such a rule elevates form over substance. It has long been axiomatic that due process requires us "to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166 (1941). It is simply intolerable in our view that under no circumstance will due process be violated if a state allows an innocent person to remain incarcerated on the basis of lies. A due process violation must of course have a state action component. We believe that Justice Douglas accurately articulated the appropriate definition that accords with the dictates of due process: a state's failure to act to cure a conviction founded on a credible recantation by an important and principal witness, exhibits sufficient state action to constitute a due process violation. *See Durley v. Mayo*, 351 U.S. 277, 290-91, 76 S.Ct. 806, 813-14, 100 L.Ed. 1178 (1956).

Because the harm to the Defendant resulting from nondisclosure in a "perjury case" is potentially twofold - not only does he not enjoy the advantage of being able to impugn the witness' credibility, he actually suffers the disadvantage that the witness' credibility is enhanced by the perjured testimony - in order to have his conviction set aside the defendant in such a case need only show that "the false testimony could in any reasonable likelihood have affected the judgment of the jury." *See Giglio*, 405 U.S. at 154, 92 S.Ct. At 766, quoting from *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Also *see Williams v. Commonwealth*, 569 S.W.2d 139 (Ky. 1978).

Brady protects an accused's right to due process to a fair trial. *Id.* at 87, 83 S.Ct. at 1197. In *Brady* the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilty or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* 373 U.S. at 87-91, 83 S.Ct. At 1197-98. *See Giglio v. United States*, 405 U.S. 150, 153-54, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Evidence is material if its suppression undermines confidence in the outcome of the trial. *Kyles v. Whitley*, 514 U.S. 4119, —, 115 S.Ct. 1555, 1566, 131 L.Ed. 2d 490 (1995).

b. Perjured Testimony Offered by Commonwealth

Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). The witness upon whose testimony the petitioner was convicted committed perjury and the prosecuting authorities had knowledge of that perjury, and suppressed impeaching evidence. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.

Alcorta v State of Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957). The only eyewitness to the shooting of petitioner's wife testified for the state. His testimony gave the jury the false impression that his relationship with the petitioner's wife was nothing more than a casual friendship. It was later discovered that the witness had sexual intercourse with petitioner's wife on five or six occasions within a relatively brief period prior to her death. It was also later discovered that the witness had informed the prosecutor of this information, and was told by the prosecutor not to volunteer any information about such intercourse. Additionally, the prosecutor never disclosed this information to petitioner. Under the principles set forth in *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed 791, and *Pyle v. State of Kansas*, 317

U.S.213, 63 S.Ct. 177, 87 L.Ed. 214, petitioner was denied due process of law.

Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). State's key witness in murder prosecution testified falsely that witness had received no promise of consideration in return from his testimony, though, in fact, Assistant State's Attorney had promised witness consideration, and did nothing to correct the false testimony. Petitioner was denied due process of law. A state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction. This principle, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness.

Commonwealth v. Spaulding, 991 S.W.2d 651 (Ky. 1999). To establish prosecutorial misconduct for the Commonwealth's failure to correct perjured testimony at trial; the defendant must show: (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false.

c. Bolstering

Nuchols v Commonwealth, 226 S.W.2d 796 (Ky. 1950). During cross-examination of the defendant's character witness, the prosecutor asked, "And the present charge is exposure of person testified to by four reputable witnesses, and you still say that his moral conduct is good?" This form of question improperly bolstered the credibility of the prosecuting witnesses. It was prejudicial for the prosecutor to testify himself in the form of a question.

d. Inquiry During Cross-Examination

Blackburn v. Commonwealth, 234 S.W.2d 178 (Ky. 1950). On cross-examination, the Commonwealth Attorney asked the witness if he had been convicted of a felony, and the witness replied that he had not. The Commonwealth Attorney then asked if he had not been convicted of the crime of desertion from the Army and if he had not served a sentence of eighteen months in a Federal Reformatory for that crime. The Court sustained the defendant's objection but overruled the motion to discharge the jury. Desertion from the Army is held in such loathsome regard, the mere asking of the question was so highly prejudicial that the court should have set aside the swearing of the jury and continue the case.

Rollyson v Commonwealth, 320 S.W.2d 800 (Ky. 1959). Despite the court's sustaining of the Defendant's objections, the prosecutor continued to make attempts to elicit testimony regarding whether the Defendant had previously been accused of rape. The persistent or repeated asking of improper questions in a criminal prosecution is prejudicial error.

Woodford v. Commonwealth, 376 S.W.2d 526 (Ky. 1964). Even though there was no evidence concerning the defendant being involved in a chase by the police, the prosecutor was permitted to cross-examine the Defendant concerning this issue. This was reversible error.

Coates v. Commonwealth 469 S.W.2d 346 (Ky. 1971). In possession of marijuana case, the prosecutor cross-examined the defendant as to whether he had been trafficking in narcotics while in the penitentiary. There was no evidence which would support this question, thus, a false issue was created by the prosecutor which was highly prejudicial and may have affected the jury's verdict.

Pace v. Commonwealth, 636 S.W.2d 887 (Ky. 1982). Prosecutor was permitted to examine the Defendant in such a way as to imply the existence of a factual predicate which was not supported by the evidence. Reversible error occurred. The question involved the time Pace left his home.

Cole v. Commonwealth, 686 S.W.2d 831 (Ky. App.1985). Despite the previous motion in limine regarding the Defendant's carrying of a gun and previously shooting another man, the prosecutor persistently questioned concerning these matters. The defendant was denied his right to a fair trial.

McClellan v. Commonwealth, 715 S.W.2d 464 (Ky. 1986). During cross-examination of a defense witness, the prosecutor presented that the Defendant was not remorseful or otherwise sorry about killing the wrong person. There was no evidence that had been presented that the Defendant ever stated that he killed the wrong person. Since the prosecutor's references were unsupported by the evidence, reversible error occurred.

Johnson v Commonwealth, 885 S.W.2d 951(Ky. 1994). In cross-examination of a truck driver for wanton murder in connection with a fatal automobile accident, the prosecutor questioned the defendant at length concerning the general propensity among coal truck drivers to run red lights. This was reversible error.

e. Motion to Dismiss Co-Defendant

Askew v. Commonwealth, 768 S.W.2d 51(Ky. 1989). Prosecutor's motion to dismiss case against one Co-Defendant, during trial, should be made outside the presence and hearing of the jury.

f. Overriding Court's Rulings

Commonwealth Attorney repeatedly asking a question to which an objection had been sustained was improper, contemptuous to the court and the trial judge should have summarily punished with a contempt citation. *Whitaker v. Commonwealth*, 234 S.W.2d 971 (Ky. 1950) and *McDaniel v. Commonwealth*, 127 S.W.2d 866 (Ky. 1939).

Perecinsky v. Commonwealth, 340 S.W.2d 233 (Ky. 1960). Witness improperly volunteered information that the witness

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knew had been ruled to be inadmissible. No admonition by the court could have undone the prejudice. The defendant was denied a fair trial by the misconduct of the witness.

Gill v. Commonwealth, 374 S.W.2d 848 (1964). Prosecutor persistently tried to cross-examine the defendant's character witness in *effort to* bring out incompetent evidence, despite the rulings of the judge that the questions were improper. This tactic jeopardizes a defendant's right to a fair and impartial trial.

Lee v. Commonwealth, 547 S.W.2d 792 (Ky. App. 1977). Trial court ruled that prior felony was inadmissible and there was prosecutorial misconduct when prosecutor cross-examined the defendant as to the prior felony.

Schaefer v. Commonwealth, 622 S.W.2d 218 (Ky. 1981). Although the Court ruled that the tape-recorded conversation between the defendant and another person would be excluded from evidence, the prosecution's witness made references to the tape recording. This unfairly corroborated the prosecution's case.

Maynard v. Commonwealth, 558 S.W.2d 628 (Ky. 1997). Prosecutor asked the Defendant if he had been convicted of a *felony even* though the Court had ordered that he not ask the question. This conduct was highly improper.

F. Argument

1. Minimization of Jury's Responsibility For Imposing Sentence Of Death

Clark v. Commonwealth, 833 S.W.2d 793 (Ky. 1991). Prosecutor improperly minimized jury's responsibility for imposing death sentence by arguing that the prosecutor's office infrequently seeks death penalty, that "this is an extraordinary case as envisioned by our legislature," and by advising jury to *recommend* death sentence to trial judge.

The prosecutor pursued a course tending to create an impression with the jury that they do not bear the responsibility of imposing the death sentence. It is reversible error to **minimize** the jury's sense of responsibility for determining the appropriateness of the death sentence. *Ward v. Commonwealth*, 695 S. W.2d 404 (Ky. 1985). The cumulative prejudicial impact of the prosecutor's actions in this case required reversal.

Bowling v. Commonwealth, 873 S.W.2d 175 (Ky. 1993). Prosecutor's comments during closing argument that legislature, not jury, imposed death penalty did not improperly **minimize** jury's responsibility for imposing death penalty; prosecution repeatedly reminded jurors that they had ultimate responsibility for imposing sentence.

Distinguished *Clark* on the basis that the prosecutor's comments were made during the penalty phase (in this case) rather than the guilt phase of *Clark*).

(Also, comment on the defendant's refusal to testify was an "indirect" reference and was "inadvertent," thus was not misconduct." We can't tell you what it (motive) is because only the man who pulled the trigger knows.")

2. Reference to Bible

Lucas v Commonwealth, 840 S.W.2d 212 (Ky. 1992). Statement by prosecutor, "The Ten Commandments don't say it's okay to kill a spouse abuser. It says Thou Shalt Not Kill." This statement was distinguished from the statement in *Lee v. Commonwealth*, 667 S.W.2d 671(Ky. 1984) (testimony was allowed by a minister "as to his study of biblical scriptures and his views that the bible teaches the death penalty for murder and other crimes."), in that this statement was intended to be a response to the defendant's sister's testimony explaining some of the defendant's conduct in view of Christian values. This did not exceed a reasonable latitude and comments were harmless. NOTE: Don't open the door or you will be trampled along with your client.

3. Comments During Arguments

Stasel v. Commonwealth, 278 S.W. 2d 272 (Ky. 1955). Comment during closing: "What do you think the good people in Hart County would think of you if you turned that man loose, with this woman getting up out of her chair and walking over and taking a hold of him and said, `This is the one that committed the crime on me."'

This statement transcended the broad latitude, which must be allowed counsel in presenting a case to the jury. It was tantamount to telling the jury, with the approval of the court, that if they declined to render a verdict of guilty, they would receive the public disapproval of the citizens of the community. In their zeal to vindicate the law, prosecuting attorneys should not allow the excitement of the case to lead them in their arguments to the jury beyond the domain of legitimate effort, even though an atrocious crime has been committed by someone.

The statement made by the Commonwealth's Attorney is very similar to the statements made in *Jackson v. Commonwealth*, 192 S. W.2d 480 (1946), *Goff v. Commonwealth*, 44 S. W.2d 306 (1931), and *King v. Commonwealth*, 70 S. W.2d 667 (1934). We reversed those cases on account of such statements, pointing out that it is never proper for an attorney representing the Commonwealth to make a remark in his argument which tends to cajole or to coerce a jury to reach a verdict which would meet with the public favor.

Timmons v. Commonwealth, 555 S.W.2d 234 (Ky. 1977). The legitimate scope of an argument to the jury is affected to some extent by the nature of the evidence. Outrageous

conduct warrants stronger words than might otherwise be justified.

Slaughter v. Commonwealth, 744 S.W.2d 407 (Ky. 1987). Conduct of prosecutor occurred during closing argument. He criticized defense counsel for presenting a "great octopus" defense, accused counsel of pulling a "scam," and questioned the sharpness of counsel.

The prosecutor may comment on tactics, evidence, and the falsity of defense position. A prosecutor can ask the jury not to "let the officer down." *Johnson v. Commonwealth*, 446 S. W.2d 561(Ky. 1969). A prosecutor may call on the jury to do its duty. *McPeak v. Commonwealth*, 213 S. W.2d 447 (Ky. 1948). A prosecutor may tell a jury that one way to stop a murderer is "for all of us to do our job…." *Wallen v. Commonwealth*, 657 S. W.2d 232 (Ky. 1983).

4. References About Defendant

Kincade v. Sparkman, 175 F.3d 44 (6th Cir. 1999) held that, in prosecution for one burglary, prosecutor's closing remarks telling the jury that the defendant had committed numerous other burglaries in the county, were prejudicial.

United States v. Francis, 170 F.3d 546 (6th Cir. 1999) (1) Prosecutor improperly elicited information about, and referred in argument to, plea agreements between government and two witnesses; (2) prosecutor improperly vouched for witness' credibility; (3) prosecutor engaged in improper bolstering of agent's testimony; (4) prosecutor engaged in improper attack on testifying defendant's credibility.

5. Comment On Defendant's Silence

Minor v. Black, 527 F.2d 1(6th Cir. 1975), cert. denied, 427 U.S. 904, 96 S.Ct. 3189, 49 Led. 2d 1198. On cross-examination of the Defendant and in closing argument the prosecutor presented that the Defendant failed to disclose his alibi defense after the commission of the alleged offense. This violated the Defendant's right of due process and privilege against self-incrimination.

Romans v. Commonwealth, 547 S.W.2d 128 (Ky. 1977). Prosecutor elicited from law enforcement officer, from Defendant on cross-examination that Defendant refused to make a statement after he had received Miranda warnings.

Prosecutor further commented on the defendant's failure to make a statement during closing. This was clearly error.

Rachel v. Bordenkircher, 590 F .2d 200 (6th Cir. 1978). Prosecutor commented on defendant's silence during closing. This was highly improper and in violation of the defendant's constitutional rights.

Eberhardt v. Bordenkircher, 605 F.2d 275 (6th Cir.1979). Prosecutor's remarks during closing along with gestures to the Defendant were a comment on the Defendant's refusal to testify. It is impermissible for prosecutors to present arguments to the jury calculated to create an inference of guilt based on the Defendant's election to remain silent.

Beavers v. Commonwealth, 612 S.W.2d 131 (Ky. 1980). Prosecutor told jury that the defendant's silence was an "admission of guilt." Reversed.

Holland v. Commonwealth, 703 S.W.2d 876 (Ky. 1986). The prosecutor made references to the defendants' failure to make a statement after the defendants were given their Miranda rights. Reversed.

Churchwell v. Commonwealth, 843 S.W.2d 336 (Ky. App.1993). The prosecutor's comment about the Defendant's silence came after the prosecution's case in chief and prior to the defendant's case. This comment was not harmless error.

6. Characterization of Defendant

Miller v. Commonwealth, 43 S.W.2d 687 (Ky. 1931). Prosecutor made numerous improper statements during closing argument. The defendant was not on trial for "bank wrecking," for "haven stolen the money of men, women, and children of the county and those who had labored on the hillsides for a lifetime." Instead the defendant was on trial for the offense of agreeing to the receipt of deposits after he knew that his bank was insolvent. This was improper and denied defendant a fair trial. NOTE: This is same prosecutor as in *Blackburn v. Commonwealth.*, 234 S.W.2d 178 (Ky. 1950).

King v. Commonwealth, 70 S.W.2d 667 (Ky. 1934). The prosecuting attorney, in closing argument, stated, "The Defendants are outlaws and murderers and the jury are not the right kind of men and were not good citizens of Wolfe County unless they imposed the highest penalty on the Defendants." This sort of argument is improper and has always been held to be so, where the prosecutor states to the jury that its members will be subjected to scorn or contempt if they fail to return the verdict sought by the prosecution.

Perdue v. Commonwealth, 916 S.W.2d 148 (Ky. 1995). During the penalty phase, there were improper statements concerning "murder for hire" activities by the defendant and questions asking when the defendant had gotten into the "murder for hire" business. Although defense counsel objected, and the trial court admonished the jury, the conduct of the Commonwealth was of such a character so as to require reversal.

Meland v. Commonwealth, 280 S.W.2d 145 (Ky. 1955). Prosecutor threatened against the jury that they will be considered in the same class as the defendant and held to scorn by the good citizens of the community should they acquit him. Reversed.

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Taulbee v. Commonwealth, 438 S.W.2d 777 (Ky. 1969). The prosecutor improperly appealed to local prejudice by stating, "If you want a Clark County lawyer to come over here to defend a Clark County thief who breaks into and steals from an Estill County place of business, then that is your own business, and if you want that you will find this thief here not guilty. Reversed.

7. Comment On Credibility

Faulkner v. Commonwealth, 423 S.W.2d 245 (Ky. 1968). During an objection during a homicide trial, the prosecutor stated, "That is just a cock and bull story they have fixed up." Later, the prosecuting attorney stated, "There is another windbag that won't tell the truth," referring to one of the defendant's witnesses. These statements constituted reversible error.

Term v. Commonwealth, 471 S.W.2d 730 (Ky. 1971). During armed robbery trial, prosecutor attacked the credibility of the defendant's alibi witness by showing her association with unsavory persons. For example, that three of the witness' associates were in jail, and then, during closing, stated, "I can tell you every one of them that I named that she knew are just rotten to the core." This improper attack and comments were reversible error.

8. Juror's "Duty" To Convict

Goff v. Commonwealth, 44 S.W.2d 306 (Ky. 1931). It is improper for the prosecutor to tell the jury that they violate their oath if they do not convict.

9. Reference To Matters Outside Of Evidence

Goff v. Commonwealth, 44 S.W.2d 306 (Ky. 1931). During closing argument of a murder trial, the prosecutor referred to the defendant's having paid a fee, and the defendant's ability to pay a fee. The defendant's being wealthy had no relation to the charge of murder and such comments were improper.

Whitaker v. Commonwealth, 183 S.W.2d 18 (Ky. 1944). During closing, the prosecutor made misstatements of fact, attacks on the Defendant and defense counsel, and improper references. The prosecutor must stay within the record and avoid abuse of the defendant and counsel.

Blackburn v. Commonwealth, 234 S.W.2d 178 (Ky. 1950). Prosecutor made numerous statements outside of the record, including derogatory statements about the defendant, and statements praising the victim. They were injected for no other purpose than to inflame the jury. Reversed.

Adams v. Commonwealth, 263 S.W.2d 103 (Ky. 1953). There were various improper statements drawn from outside of the record. The effect was calculated to produce a prejudicial result. Reversed due to misconduct of the prosecuting attorney.

May v. Commonwealth, 285 S.W.2d 160 (Ky. 1955). May was charged with assault and battery against the person of the Commonwealth Attorney. Case reversed for improper argument by Commonwealth which included three erroneous arguments: 1) "Why, every time a County Attorney or Commonwealth Attorney starts to look into some records for the welfare of the County…those juries will let them beat up on me…assault me…and encourage other incidents of like nature….This is a test case and if you get by with this one, there will be no investigations in this County…" 2) "There might be some others involved in this besides Mr. May, because the jury knows sometimes a man don't even have to pay his own fine….Somebody would pay his fine for him and be glad to." 3) "If you can assault the Commonwealth Attorney and get by with it by paying a little fine, why, in a little while you can assault a bigger official and get by with it."

Harrison v. Commonwealth, 368 S.W.2d 171 (Ky. 1963). In closing argument, the prosecutor stated, "The people of Jackson County know what sorrow drinking and bootlegging cause in Jackson County." And further stated, "Most of the murder cases that are tried are caused by liquor." "You have a right to use what knowledge you have in trying these cases." These references to extraneous matter were prejudicial to the Defendant.

Dennis v. Commonwealth, 526 S.W.2d 8 (Ky. 1975). Prosecutor argued to the jury that if they do not convict, they have no right to complain if they become victims of crime. Arguments must be limited to comments on the evidence and inferences that may be drawn from the evidence.

Stumbo v. Seabold, 704 F .2d 910 (6th Cir. 1983). Prosecutor argued outside of the record and used inflammatory characterization of the Defendant which tended to prejudice and inflame the jury. This deprived the Defendant of a fair trial and due process of law.

Ice v. Commonwealth, 667 S.W.2d 671 (Ky. 1984), cert. denied, 469 U.S. 860, 105 S.Ct. 192, 83 L.Ed. 2d 125. Prosecutor repeatedly and consistently misstated the doctor's testimony. This was reversible error.

Mack v. Commonwealth, 860 S.W.2d 275 (Ky. 1993). In closing the prosecutor stated, "We've only heard the tip of the iceberg. You didn't hear the full story in open court...." Defendant's objection was overruled and the prosecutor continued, "You've heard that portion that comes in through legal proceedings, and that's all. What happened in that house all the rest of the night? Do you think his needs stopped? Do you think he wasn't abusing somebody? The Defendant's objection and motion for mistrial were overruled. The Defendant was denied a fair trial.

Thompson v Commonwealth, 862 S.W.2d 871 (Ky. 1993). Prosecutor commented upon the Defendant's earlier murder conviction which was pending on appeal. This was reversible error.

Kincade v. Sparkman, 175 F.2d 444 (6th Cir. 1999). In prosecution for one burglary, prosecutor's closing remarks, telling jury that the Defendant had committed numerous other burglaries in the county, were prejudicial, warranting habeas relief in case in which the evidence against Defendant was not strong.

10. Misstatements of Law

Bennett v. Commonwealth, 46 S.W.2d 484 (Ky. 1982). The judge previously instructed the jury, regarding the voluntariness of the Defendant's confession, that they could reject the confession if they believed that it was not voluntarily given. The prosecutor argued, "Whenever an officer takes a slap at a prisoner, don't let the slap interfere with doing justice to the murderer who defied justice….Do you think a slap in the face, or a crack in the jaw with he fist, is a proper punishment for the damnable crime that he has committed?" An argument that discounts or nullifies the instructions transcends the limits of fair debate.

Ice v. Commonwealth, 667 S.W.2d 671 (Ky. 1984), cert. denied, 469 U.S.860, 105 S. Ct. 192, 83 L.Ed.2d 125. Prosecutor advised the jury that their sentence of death would only be a recommendation, thus, they would not be "killing" the Defendant. This was improper.

Dean v. Commonwealth, 777 S. W.2d 900 (Ky. 1989). Prosecutor advised jury that they had an obligation to the judge to impose the death penalty if they found an aggravating but not a mitigating factor. This error violated the Defendant's right to a fair trial pursuant to sections two and eleven of Kentucky's Constitution.

Mattingly v. Commonwealth, 878 S.W.2d 797 (Ky. App. 1994). Prosecutor stated that test for insanity was whether or not the Defendant could tell right from wrong. This was reversible error.

a. Jury Determines Penalty

Dean v. Commonwealth, 777 S.W.2d 900 (Ky. 1989). During closing, prosecutor repeatedly advised that their sentence was a "recommendation" and that the judge would "impose" the sentence. This diminished the jury's sentencing responsibility and had a cumulative prejudicial effect.

b. Minimization Of Jury's Responsibility For Imposing Sentence Of Death

Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988). It is constitutionally impermissible to minimize the responsibility of the jury in assessing the death penalty. The jury's responsibility must not be lessened by comments which convey the message that their decision is not the final one. Implying that ultimate responsibility would fall upon the trial judge, the governor, or the Supreme Court is error.

Tamme v. Commonwealth, 759 S. W.2d 51 (Ky. 1988). Considering the extreme importance of fair sentencing in a capital case, any actions by the prosecution which would tend to lessen in the minds of the jury their awesome responsibility should be given the highest scrutiny. By putting in the minds of the jurors that the trial judge may accept or reject the recommendation of death was reversible error.

11. Personal Opinion Of Guilt

Fitch v. Commonwealth, 103 S.W.2d 98 (1937). In closing, the prosecutor stated, "If I thought this man was innocent, you have seen what I have done in other cases, I would write on that indictment filed away or dismissed." This was highly prejudicial.

Gregory v. Commonwealth, 557 S.W.2d 439 (Ky. App. 1977). Prosecutor led the jury to believe that even the judge believed the defendant was guilty. This was reversible error.

12. Prior Felony Conviction

Graves v. Commonwealth, 528 S. W.2d 665 (Ky. 1975). Prosecutor argued far beyond the limited purpose for which the defendant's prior felony conviction had been admitted into evidence (*i.e.*, the defendant's credibility). Prosecutor argued that the jury should not turn a convicted felon loose so that he could commit another felony. This was reversible error.

Reason v. Commonwealth, 548 S.W.2d 835 (Ky. 1977). In closing argument, the prosecutor argued that the defendant's prior conviction called for increased punishment. This went far beyond the limited purpose of the evidence of a prior felony and prejudiced the defendants right to a fair trial - even though the court admonished the jury that the evidence should only go to the credibility of the witness.

13. Uncharged Misconduct

Nantz v. Commonwealth, 243 S.W.2d 1007 (Ky. 1951). The court permitted the prosecutor to make an argument that the defendant may have been guilty of other uncharged criminal conduct in addition to the offense for which he was charged. This was reversible error.

14. Eulogizing Victim

Morris v. Commonwealth, 766 S.W.2d 58 (Ky. 1989). Prosecutor repeatedly portrayed the victim as a "hero" and leader in the community. Although the prosecutor has some latitude, the identity of the victim should not be characterized in a manner that is emotional, condemnatory, accusative, or demanding of vindication. Our system of justice does not tolerate the implication that Defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy.

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15. Attack On Defense Counsel

Sanborn v. Commonwealth, 754 S.W.2d 534 (Ky. 1988). Prosecutor accused defense counsel of the "trick they pulled with that psychiatrist." At another point he commented to his adversary, "You tough, ain't you, Receveur." He also accused defense counsel of having "ruined" an exhibit, and when defense counsel protested the accusation, the prosecutor's assistant chimed in "That is a lie, Judge, which she has now told six (6) times."

The prosecutor's unrelenting attack on defense counsel throughout the trial was grossly improper. (The record failed to show misconduct on the part of defense counsel justifying this "assault" that occurred by the prosecutor). A prosecutor must not be permitted to make unfounded and inflammatory attacks on the opposing advocate. *United States v. Young,* 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed 2d 1 (1985).

G. Offers by Commonwealth

Adkins v. Commonwealth, 647 S.W.2d 502 (Ky. 1982). Fundamental fairness guaranteed by the Fourteenth Amendment makes it reversible error to permit the government to welsh on a plea bargain. *Workman v. Commonwealth,* 580 S.W.2d 206 (Ky. 1979); *Brock v. Sowders,* 610 S.W.2d 591 (Ky. 1980). However, where Defendant never personally accepted Commonwealth's offer of plea bargain, the offer was revocable by the Commonwealth at any time. *Commonwealth v. Brown,* 619 S.W.2d 699 (Ky. 1981).

H. Legal Analysis

The conduct must be of such an egregious nature as to deny the accused his constitutional rights of due process of law. *Donnelley v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed2d 431(1974).

The required analysis must focus on the overall fairness of the trial and not the culpability of the prosecutor. *Smith v. Phillips*, 455 U. S. 209, 102 S.Ct. 940, 71 L.Ed 28 (1982).

White v. Commonwealth 611 S.W.2d 529 (Ky. 1980). Closing arguments are clearly in the category of argument rather than evidence. Therefore, the prosecutor, as well as the defense attorney, should be given some latitude in this respect. An ambiguous remark should not be construed to have its most damaging meaning. *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Misconduct of the prosecutor must taint the impartiality of the proceedings. *Brown v. Commonwealth,* 49 S.W.2d 738 (Ky. 1969).

Dean v Commonwealth, 777 S.W.2d 900 (Ky. 1989). Prosecutor's "inflammatory" arguments did not violate the Defendant's right to a fundamentally fair trial as guaranteed by the due process provisions of our state and feral constitutions. Prosecutor's claims were calculated to ignite the collective sense of outrage of the jurors as citizens: "We pride ourselves as being law abiding people." Outrageous conduct warrants stronger words than might otherwise be justified. *Timmons v. Commonwealth,* 555 S.W.2d 234 (Ky. 1977). Recognizing broad latitude which must be allowed counsel in presenting a case to the jury, the conduct complained of must transcend legitimate argument.

Port v. Commonwealth, 906 S.W.2d 327 (Ky. 1995). Prosecutor's closing argument, in which a statement was cut off by Defendant's objection and a second statement was made that "second instruction says not guilty by reason of insanity, and we heard self-defense and we heard several different things. But the end result is all the same, he's not guilty" did not constitute prosecutorial misconduct since it was impossible for court to determine what prosecutor would have said had he completed first statement, and closing argument included several references to four possible verdicts in case.

Partin v. Commonwealth, 918 S. W.2d 219 (Ky. 1996). Prosecutorial misconduct during closing argument must rise to the level of "palpable error." RCr 10.26. A palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from error. This means, upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief. *Jackson v. Commonwealth,* 717 S. W.2d 511 (Ky. 1986).

The comment(s) of the Commonwealth Attorney must substantially affect the jury's verdict. Any consideration on appeal of alleged prosecutorial misconduct must center on the overall fairness of the entire trial. *Dean v. Commonwealth,* 844 S.W. 2d 417 (Ky. 1992). *Slaughter v. Commonwealth,* 744 S. W.2d 407 (Ky. 1987), *United States v. Yours,* 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1(1985). In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair. *Summitt v. Bordenkircher,* 608 F.2d 247 (6th Cir. 1979). The conduct of the prosecutor must be so prejudicial as to deprive the Defendant of a fundamentally fair trial. *Michigan v. Tucker,* 417 U.S.433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974); *McDonald v. Commonwealth,* 554 S.W.2d 84 (Ky. 1977).

Commonwealth v. Petrey, 945 S.W.2d 417 (Ky. 1997). Counsel is allowed considerable latitude during summation. And except in extraordinary circumstances, a proper ruling is merely to remind the jury that argument of counsel is not evidence and the jury is charged with the duty to recall the evidence. Even though appellee's counsel used the word "objection," his comment was ambivalent and contained no request for relief.

Davis v. Commonwealth, 967 S.W.2d 574 (Ky. 1998). A prosecutor, during closing argument, may comment on evidence, and may comment as to the falsity of a defense position.

Slaughter v. Commonwealth, 744 S. W.2d 407 (Ky. 1987). It is impermissible to characterize unreserved issues as "prosecutorial misconduct" for the purpose of raising them on appeal.

Alleged errors are not to be considered in a vacuum but must consider the Commonwealth's conduct in context and in light of the trial as a whole. The question is whether the cumulative effect of the Commonwealth's actions deprived the Defendant of a fair trial.

1. Reversal Not Barred By Double Jeopardy

Couch v. Commonwealth, 998 S.W.2d 469 (Ky. 1999). Retrial upon reversal due to prosecutorial misconduct is not barred by double jeopardy: "In short, reversal for trial error, as distinguished from evidentiary insufficiently, does not constitute a decision to the effect that the government has fair chance to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process, which is defective in some fundamental respect e. g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair re-adjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. *Hobbs v. Commonwealth*, 655 S. W.2d 472 (Ky. 1983).

2. In General

See *Timmons v. Commonwealth*, 555 S.W.2d 234 (Ky. 1977), where our Court made the following statement:

No one questions that under principles expressed in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 110 L.Ed2d 215 (1963), *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed2d 737 (1966) and *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed2d (1976), the withholding by the state of information which "creates a reasonable doubt that would not otherwise exist" is a denial of due process, regardless of good faith on the part of the governmental authorities responsible for the suppression."

3. Discovery

Boyle v. Million, 201 F.3d 711 (6th Cir. 2000) In *United States v. Carroll*, 26 F.3d 1380 (6th Cir.1994), we summarized our recent jurisprudence on the issue of prosecutorial misconduct in an effort to provide guidance for future cases and noted that, when addressing claims of prosecutorial misconduct, we first determine whether the challenged statements were indeed improper. *See United States v. Francis*, 170 F.3d 546, 549 (6th Cir.1999). Upon a finding of such impropriety, we then "look to see if they were flagrant and warrant reversal." *Id.* (citing *Carroll*, 26 F.3d at 1388). Flagrancy is determined by an examination of four factors: "1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of the evidence against the accused." *Id.* at 549-50.

United States v. Dakota, 188 F.3d 664 (6th Cir. 1999) First, the court determines whether the prosecutor's remarks were improper. *See United States v. Carroll*, 26 F.3d 1380, 1387 (6th Cir.1994). Improper conduct is then examined for flagrancy, considering four factors: (1) the degree to which the remarks would mislead the jury and prejudice the accused, including whether a cautionary instruction was given to the jury; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused. *See Id*. at 1384, 1389. If the conduct is found not to be flagrant, reversal is appropriate only when (1) the proof against the defendant was not overwhelming, (2) opposing counsel objected to the conduct, and (3) the district court failed to give a curative instruction. *See Id*. at 1380.

Johnson v. Bentley, 457 So. 2d 507 (Fla. App. 2 Disc. 1984). State's failure to preserve and produce discoverable evidence. Follows *U.S. v. Agurs*, 427 U.S.97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), due process rights are violated when the Defendant is denied the opportunity to examine the evidence in order to refute the state's expert testimony. This result is unaffected by the "mere possibility" argument that examination would have assisted the Defendant, and is also unaffected by the "balancing approach" to prejudice.

United States v. Coleman, 138 F.3d. 616 (6th Cir.1998). Improper investigative techniques are a basis for downward departure from the federal sentencing guidelines.

4. Preserve the Issue

Chumbler v. Commonwealth, 905 S.W.2d 488 (Ky. 1995). One of the most egregious instances of unpreserved prosecutorial misconduct came during the Commonwealth's closing argument. Defense theory of the case was that, because of the damage to Nelda and the possibility the bullet was deflected when going through a fence, the shot which killed Nelda did not come from the shed. During his closing argument, the prosecutor stated: "You can shoot that fence all day every day for the next week and you're going to go straight through it with a .270 at 24 yards ...I didn't take the jury out to the shooting range and have a little shooting. I went myself, so I know exactly what I'm talking about." The court did reverse on other grounds, but refused on this one.

Couch v. Hon. R. Cletus Maricle, 998 S.W.2d 469 (Ky. 1999) Petitioner was convicted of the murder of her husband but was subsequently granted a new trial on the grounds that the prosecution failed to disclose exculpatory evidence. Petitioner seeks the prohibition of her retrial on double jeop-

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ardy principles. In denying the writ, the Court held: Retrial upon reversal due to prosecutorial misconduct is not barred by double jeopardy.

I. Conclusion

Learn the types of errors that occur so you can make a timely objection and preserve the error. Sometimes, even this is not enough. *Gosser v. Commonwealth.*, 31 S.W.3d 897 (Ky. 2000).

J. Suggested Reading

Prosecutorial Misconduct, Law, Procedure, Forms, 2nd Edition, Lawless, Joseph F., Jr., Lexis Law Publishing 1999.

Performance Guidelines for Criminal Defense Representation, National Legal Aid and Defender Association, 1995.

Prosecutorial Misconduct, 2nd Edition, Gershman, Bennett L., West Group, 1999, 2000.

Acknowledgments. *It is necessary that I acknowledge a number of facts. First, the vast number of individuals who have contributed to this article. Next, I drew heavily from a presentation given at DPA's Litigation Practice Institute at Faubush, Ky., together with Katie Wood and to which she contributed enormous work. Lastly, but perhaps most importantly, I wish to thank each and every criminal defense lawyer who tried cases, appealed cases and investigated cases which uncovered the misconduct and then made the law.* ■

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Prosecutorial Misconduct in Gall Capital Case

The following is the portion of *Gall v. Parker*, 231 F.3d 265, 310-16 (6th Cir. 2000) that discusses prosecutorial misconduct:

F. Prosecutorial Misconduct

Gall argues that a host of prosecutorial statements and tactics violated his constitutional rights. The alleged instances of misconduct include: the violation of Gall's right to remain silent by emphasizing his failure to testify; misrepresentation of evidence; prejudicial statements and actions depriving Gall a fair determination of sanity;[22] and a host of other actions that appealed to the passions and prejudices of the jury. Gall argues that these improprieties rendered the proceeding fundamentally unfair.

Although Gall's counsel did not object to these infractions at trial, we are not barred from hearing these claims. A habeas court only adheres to a state procedural bar when the last state court rendering a reasoned judgment on the matter has stated "clearly and expressly" that its judgment rests on that procedural bar. *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir. 2000) (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 (1991)). In this case, the Kentucky Supreme Court addressed and rejected Gall's allegations of prosecutorial misconduct on their merits. *See, e.g.*, *Gall I*, 607 S.W.2d at 110 ("To be mercifully brief, we do not find in this record any conduct by the prosecuting attorney that could be said to have been inconsistent with Gall's right to a fair trial."). This issue is therefore not barred from review.

1. Fifth Amendment Claim

A defendant's Fifth Amendment right against self-incrimination protects him from several types of government misdeeds. First, once a defendant exercises his right to silence after being read his *Miranda* rights, that post-arrest silence cannot be used to his detriment at trial. *See Doyle v. Ohio*, 426 U.S. 610, 618 (1976); *United States v. Williams*, 665 F.2d 107, 109-10 (6th Cir. 1991). Second, the prosecution is forbidden from commenting on a defendant's decision not to testify at trial. *See Griffin v. California*, 380 U.S. 609, 615 (1965); *Rachel v. Bordenkircher*, 590 F.2d 200 (6th Cir. 1978). While direct comments about a decision to remain silent or not to testify are clearly prohibited, indirect comments require a more probing analysis. *See Lent v. Wells*, 861 F.2d 972, 975 (6th Cir. 1988). Such comments warrant reversal only when they are "manifestly intended by the prosecutor as a comment on the defendant's failure to testify or were of such a character that the jury would naturally and reasonably take them to be comments on the failure of the accused to testify." *Bagby v. Sowders*, 894 F.2d 792, 797-98 (6th Cir. 1990). A court should not find manifest intent from such comments if some other explanation for the prosecutor's remarks is equally

plausible. *See Lent*, 861 F.2d at 975. This occurs, for instance, when the comment is "a fair response to a claim made by defendant or his counsel." *United States v. Robinson*, 485 U.S. 25, 32 (1988).

Harmless error analysis applies to Fifth Amendment violations. This "extremely narrow" standard requires reversal only when the state can "demonstrate beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant." *Eberhardt v. Bordenkircher*, 605 F.2d 275, 278 (6th Cir. 1979).

Gall points to two occasions where the Commonwealth improperly referred to his silence at trial. First, an officer testified that Gall "wouldn't talk" after making several statements after his initial arrest. J.A. at 63. Second, the Commonwealth indirectly referred to Gall's silence when it stated to the jury: Gall "sits in this courtroom as you have heard the testimony and he has lied to his parents in every instance and told them he didn't do it. The man has not even acknowledged his wrong, his fault, his crime, he denies them. He denies them to this day." J.A. at 1635.

Despite Gall's contentions, we need not address the question of whether these statements contravened the Fifth Amendment because they comprised harmless error. As discussed *supra*, there was little dispute over whether Gall committed the crime; the heart of this trial was whether he was emotionally disturbed or legally insane when he did so. Because these references are not material to that issue, even if violative of his Fifth Amendment rights, they were harmless error.

2. The Closing Argument

In examining alleged prosecutorial misconduct on habeas review, this Court can only provide relief "if the relevant misstatements were so egregious as to render the entire trial fundamentally unfair to a degree tantamount to a due process violation." *Caldwell*, 181 F.3d at 736 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643-45 (1974)); *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986). In assessing whether the error amounts to a constitutional deprivation, the court must view the totality of the circumstances. *See Hayton v. Egeler*, 555 F.2d 599, 604 (6th Cir. 1977). We must first determine if the comments were improper. *See Boyle*, 201 F.3d at 717. We then must determine if the comments were sufficiently flagrant to warrant reversal by looking to four factors: 1) the likelihood that the remarks would mislead the jury or prejudice the accused; 2) whether the remarks were isolated or extensive; 3) whether the remarks were deliberately or accidentally presented to the jury; 4) whether other evidence against the defendant was substantial. *See id.*; *United States v. Carroll*, 26 F.3d 1380, 1385-87 (6th Cir. 1994). Because defense counsel did not object to almost any of the statements made, plain error analysis is required. *See Blandford*, 33 F.3d at 709; *United States v. Morrow*, 923 F.2d 427, 432 (1991).

a.

We agree that the Commonwealth's closing argument was laced with improper, prejudicial statements. First, prosecutors cannot make appeals to their own personal beliefs and opinions. *See Caldwell*, 181 F.3d at 737 (stating that a prosecutor cannot "express a personal opinion concerning the guilt of the defendant or the credibility of trial witnesses"); *Carroll*, 26 F.3d at 1387-88 (noting the impropriety of the government conveying "a conviction of personal belief regarding the witness's veracity"). Courts frown upon such statements for two reasons:

> such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

United States v. Young, 470 U.S. 1, 18 (1985); *see also Caldwell*, 181 F.3d at 737 (stating that personal appeals exceed "the legitimate advocate's role by improperly inviting the jurors to convict the defendants on a basis other than a neutral independent assessment of the record proof").

Despite this prohibition, throughout his closing argument the prosecutor improperly expressed his personal belief about crucial matters before the jury. For instance, the prosecutor declared in closing that he was "not [] convinced that [Gall] isn't just a mean, shrewd, criminal." J.A. at 1591. He again voiced his personal belief when he stated that "I think you can probably be skeptical of" the results of intelligence and psychiatric tests. J.A. at 1584. He echoed this tactic once again when he asked if Gall's explanation of schizophrenia "stretched" the jury's "powers of reasoning? It certainly does mine." J.A. at 1586. Similarly, he clearly expressed his personal belief about the credibility of key witnesses. Of Dr. Noelker, the doctor who had thoroughly examined Gall, the prosecutor stated that "I have known him for along time and I know he is [a fine man]." He then declared that Dr. Noelker was "a man of compassion" whose beliefs "slant[] his opinions which he gives [and] his conclusions that he draws." J.A. at 1583. "He is a man I believe who believes he is standing in . . . between Eugene and his ultimate destiny and I believe that weighs heavily on him. . . ." J.A. at 1583. He also stated that "I thought" aspects of Dr. Noelker's and Dr. Toppen's testimony were "really unusual, really unique." J.A. at 1581. Finally, the prosecutor summed up his assessment of Gall's psychiatric witnesses and evidence by stating:

> [Y]ou don't have to believe these guys. You know what it reminds me of? It reminds me of the three blind men who were taken out and they were asked to identify an elephant. One grabbed the trunk, one grabbed the tail, one grabbed the leg and you can imagine the bizarre opinions which they got back on how an elephant looked.

(J.A. at 1589.[23])

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Next, the Commonwealth mischaracterized crucial evidence and testimony pertaining to Gall's showing of EED and insanity. Misrepresenting facts in evidence can amount to substantial error because doing so "may profoundly impress a jury and may have a significant impact on the jury's deliberations." *Donnelly*, 416 U.S. at 646. This is particularly true in the case of prosecutorial misrepresentation because a jury generally has confidence that the prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty, whose interest "in a criminal prosecution is not that it shall win a case, but that justice will be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Nonetheless, the prosecution was particularly irresponsible when summarizing Dr. Noelker's testimony, which clearly lay at the heart of the case. For instance, he stated that Dr. Noelker "told" the jury that "remission [] means [Gall] is legally feigning," J.A. at 1585. In examining the record, we find that to be a distorted construction of a vital portion of Dr. Noelker's testimony. The prosecutor also suggested that Dr. Noelker merely thought it was "possible" that Gall suffered from EED, J.A. at 1589, when Dr. Noelker definitively stated that Gall suffered from such a disturbance. Indeed, as discussed *supra*, Dr. Noelker's statement that Gall was under EED was a crucial issue of the case, one which the Commonwealth had not otherwise rebutted. It was Dr. Chutkow, the state's own witness, who stated that it was possible that Gall was in a "state of exacerbation" the morning of the killing. Finally, in cross-examining Dr. Noelker, the prosecution on several occasions suggested that Dr. Chutkow disagreed with Dr. Noelker's conclusion that Gall was legally insane, J.A. at 1032-34, when Dr. Chutkow clearly stated both on direct examination and cross-examination that he could not challenge Dr. Noelker's conclusions because he did not have the wealth of data that Dr. Noelker had. J.A. at 320, 350-51.

These comments and misrepresentations comprised part of a broader strategy of improperly attacking Gall's insanity defense by criticizing the very use of the defense itself, rather than addressing its evidentiary merits head on. Courts have long castigated prosecutors when their efforts to rebut an insanity defense constitute no more than an attack on the rationale and purpose of the insanity defense itself. As the Supreme Court of Florida articulated:

> We believe that once the legislature has made the policy decision to accept insanity as a complete defense to a crime, it is not the responsibility of the prosecutor to place that issue before the jury in the form of repeated criticism of the defense in general. . . . To do so could only helplessly confuse the jury. The insanity defense is a policy question that has plagued courts, legislatures, and governments for decades. It is unnecessary to similarly plague [ ]juries.

Garron v. State, 528 So.2d 353, 357 (Fla. 1988). *See also, e.g.*, *People v. Wallace*, 408 N.W.2d 87, 91 (Mich. Ct. App. 1987) (finding reversible error because a prosecutor argued against the insanity defense generally); *State v. Percy*, 507 A.2d 955, 958 (Vt. 1986) (finding improper and prejudicial a prosecutor's comments that the insanity defense constituted a "mere attempt to escape justice"). Indeed, the Kentucky Supreme Court stated only months before the Gall trial that trials "must conform to the principle that insanity is a defense, and the defendant must be allowed to prove it in accordance with the accepted rules of evidence." *Jewell v. Commonwealth*, 549 S.W.2d 807, 812 (Ky. 1977), *overruled on other grounds by Payne v. Commonwealth*, 623 S.W.2d 867 (Ky. 1981). Courts also frown upon prosecutorial tactics that, in an effort to rebut a defendant's evidentiary showing of insanity, simply make "know-nothing appeals to ignorance" rather than present testimony countering the defendant's showing in an evidentiary rigorous way. *United States v. Brawner*, 471 F.2d 969, 1004 (D.C. Cir. 1972) (criticizing as improper prosecutorial comments disparaging an expert witness's tests showing mental disease as "just blots of ink").

In its closing, the Commonwealth used just such highly prejudicial tactics. Rather than attacking Gall's insanity evidence by pointing to counter-evidence that Gall was sane, the Commonwealth simply assaulted the very use of the defense. As he began addressing the issue, the prosecutor compared the insanity defense to other possible defenses. Other defenses, he emphasized, require "facts," but an insanity defense "is all contained in the skull of the defendant." J.A. at 1579.

> That is the last line of defense. That is like taking an M1 Rifle and lying in your back yard waiting for the Russians to come. When it is that bad folks, it is all over. . . . Now I want to review this cranial defense within the skull of the Defendant . . . .

J.A. at 1579-80. He later reminded the jury not to be "hoodwinked into the defense of insanity," J.A. at 1592. Further, his comments were peppered with the type of "know-nothing appeals to ignorance" that deprive defendants of their right to a fair consideration of their insanity defense. For instance, the Commonwealth mocked Dr. Noelker's use of a "House, Tree, Person Test" to show insanity as opposed to the Commonwealth's evidence of a "smoking gun." J.A. at 1591-92. He asked: "[i]sn't that a convenient time to go into a [schizophrenic state]?" J.A. at 1584. And, similar to the elephant analogy, he analogized Dr. Noelker's description of the long-term evolution of Gall's mental state to a simple hypothetical: "If my wife were pregnant eight years ago and she was pregnant one month now, does that mean she was pregnant in March? That is what Dr. Noelker is telling you." J.A. at 1585. At the same time, the prosecutor minimized the testimony of Drs. Noelker and Toppen that Gall could appear both calm and sane to an "untrained observer" even if examinations and tests revealed that he was insane or severely mentally ill: "He may look sane, but folks, he isn't. Now they are telling us folks, 'you can't look and judge for yourself.'" J.A. at 1581. He then argued to the jury that because Gall appeared intelligent at trial, he must be sane, and

must have been sane on April 4. The tone of these statements was similar to the rhetorical approach the prosecutor took in cross-examining Dr. Noelker and Dr. Toppen, in which he assaulted psychology as an inexact discipline where doctors, applying subjective standards "within themselves" can reach polar opposite conclusions in examining the same individual, J.A. at 984-88, 1221-23, and belittled the tests Dr. Noelker had used in diagnosing Gall. J.A. at 1024 ("Now here is a little one here that I think the jury ought to see. This is one of those little psychological tests.").

Finally, the prosecution's most egregious misconduct was warning that Gall would go free if found not guilty for reason of insanity. During his closing, the prosecution stated: "Now folks are we going to turn [Gall] loose on society by reason of insanity[?]" J.A. at 1588-89. Seconds later, he repeated: Gall "cannot escape the ends of justice by retreating within the safety of his own skull!" J.A. at 1589. At another point, the Commonwealth stated that if the jury were to believe Dr. Toppen's testimony, "then turn him loose." J.A. at 1581. These statements contravened several related rules of conduct. First, they once again detracted from a fair consideration of Gall's insanity defense by introducing the prospect that such a determination would lead inevitably to Gall's release. *See Guidroz v. Lynaugh*, 852 F.2d 832, 837-38 (5th Cir. 1988); *United States v. Jackson*, 542 F.2d 403, 411 (7th Cir. 1976); *United States v. Birrell*, 421 F.2d 665, 666-67 (9th Cir. 1970); *Evalt v. United States*, 359 F.2d 534, 546 (9th Cir. 1966); *United States v. Lane*, 725 F. Supp. 936, 942 (N.D. Ill. 1989). Second, the comments violated the cardinal rule that a prosecutor cannot make statements "calculated to incite the passions and prejudices of the jurors." *United States v. Solivan*, 937 F.2d 1146, 1151 (6th Cir. 1991); *see Stumbo v. Seabold*, 704 F.2d 910, 912 (6th Cir. 1983) (decrying prosecutorial misconduct which "prejudice[s] and inflame[s] the jury"). Eliciting the image of turning Gall loose on society by finding him insane is perhaps the paradigm example of such impropriety—calling on jurors' emotions and fears rather than "the evidence and law of the case." *United States v. Gainey*, 111 F.3d 834, 836 (11th Cir. 1997).

In sum, facing Gall's considerable evidence of insanity and EED, counsel for the Commonwealth chose not to rebut that evidence directly.[24] Instead, he expressed his personal belief as to the weakness and partiality of Gall's expert witnesses' testimony, and he mischaracterized crucial aspects of that testimony. He disparaged the very use of an insanity defense as the "last line of defense" and the "M1 Rifle"; he belittled the medical and psychological tools used to support such a defense; and he equated the doctors' testifying about Gall's condition to three blind men "asked to identify an elephant"—"you can imagine the bizarre opinions which they got back." J.A. at 1589. He then pleaded with the jury not to let Gall loose through the insanity defense. In addition to having no doubt that these tactics were improper, we find that they easily satisfy the criteria of "flagrancy" laid out in *Boyle*. They clearly misled the jury and prejudiced Gall's defense of insanity. The comments were not accidental or isolated, permeating the Commonwealth's closing argument as well as other portions of the trial. And they involved the central issue of the case. Moreover, as explained *infra*, the total strength of the evidence rebutting Gall's insanity defense was weak at best, not to mention improperly presented. After a close review of the record, we find that the Commonwealth's misconduct was sufficiently egregious to render the entire trial fundamentally unfair.

Finally, we respectfully disagree with the dissent's conclusion that this prosecutorial misconduct is acceptable when viewed "against the backdrop of the nature of the insanity defense in this case." The dissent explains that, given the strong circumstantial evidence tying Gall to the crime, as well as Gall's clear history of mental illness, the insanity defense was the central issue of the case. It is therefore understandable, the dissent explains, that "the prosecutor would bring out his heaviest artillery and direct it at the insanity defense." We no doubt agree that Gall's sanity was central to this trial, and we, no less than the dissent, would expect the prosecutor to bring out "heavy artillery" against that defense. We also agree that persuading the jury that there is a difference between a mental disease and legal insanity was a "legitimate goal." But because ours is a system of law, the arsenal available to a prosecutor to achieve that legitimate goal is limited to arguments rooted in properly introduced evidence and testimony rather than words and tactics designed to inflame passions, air unsubstantiated prosecutorial beliefs, and downplay the legitimacy of a legally recognized defense. Here, unfortunately, having failed to present an expert who had actually examined Gall to assess his sanity, the prosecutor's barrage against Gall's insanity defense comprised largely "foul blows" having little to do with cognizable facts or evidence. If we are to take at all seriously the Kentucky legislature's decision to provide insanity as a defense to murder, we can not countenance the prosecutor's highly improper methods to overcome that defense in this case.

NOTES

22. Examples Gall mentions include: failing to ask Dr. Chutkow to conduct a sanity exam on Gall and to provide him with the full information he needed to make such a determination; an inappropriate cross-examination of Dr. Noelker and improper closing argument; and informing the jurors that Gall would go free if found not guilty for reason of insanity.

23. We cannot accept the dissent's reasoning that these egregious comments were harmless because a jury would appreciate that a prosecutor had no special expertise in the field of mental illness. This reasoning not only would create a new and unjustifiable exception to what is otherwise clear misconduct, but it completely misunderstands the impropriety here. The prosecutor not only

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expressed his personal opinion casting doubt on the expert testimony, but he went so far as to assert that he had personal knowledge of the key expert witness in Gall's favor, and that based on *his* personal knowledge, the jury should doubt that expert's testimony. In other words, the prosecutor not only offered his opinion improperly, he bolstered that opinion by explicitly referring to his knowledge of the witness's character and motivations. This is precisely what the *Young* Court warned against when it cautioned that a prosecutor's expressing his personal beliefs suggests to the jury "that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant," and may therefore "induce the jury to trust the Government's judgment rather than its own view of the evidence." 470 U.S. at 18. Moreover, as explained *infra,* the gist of the prosecutor's argument was not that the jury should believe that he had special expertise regarding mental illness, but the inverse: that the jury should feel free not to take the medical/scientific evidence of insanity seriously because an insanity defense was simply an act of desperation by a guilty defendant. As he summarized, "When it is that bad folks, it is all over." J.A. at 1579-80. In short, he was calling on the jury to heed his expertise as a government prosecutor and simply dismiss the insanity defense out of hand.

24. Indeed, as discussed *infra*, no one examined Gall's mental condition on behalf of the Commonwealth to determine if he was sane on the day of the crime. Dr. Chutkow only examined Gall to see if he was competent to stand trial. This perhaps explains the prosecutor's need to resort to improper tactics in attacking Gall's insanity defense. ■

The whole art of teaching is only the art of awakening the natural curiosity of young minds for the purpose of satisfying it afterwards.

-Anatole France

Appellate Case Review

by Shannon Dupree

Commonwealth of Kentucky v. Blincoe, Ky. App. 2000 Ky. App. LEXIS 146 __S.W.3d__ (Ky. Ct. App.;12/01/00) (Not yet final)

On May 10, 1999, the Commonwealth appealed an interlocutory order entered by the trial court. On May 21st, the trial court issued an order stating that the case would be dismissed in sixty days if the Commonwealth did not proceed to trial. The Commonwealth did not appeal the May 21st order. The Commonwealth refused to try the case until the appeal of the interlocutory order was final. The trial court dismissed the criminal action without prejudice on August 5, 1999. The Commonwealth appealed the order of dismissal.

The Commonwealth argued that the trial court did not have jurisdiction to dismiss the case because an appeal of the interlocutory order was pending in the appellate court, and the pendency of that appeal transferred jurisdiction over the entire case from the circuit court to the appellate court. The Court of Appeals held that filing of an appeal of an interlocutory order in a criminal matter is permitted, but such a filing did not suspend the applicable time limits for the taking of other steps in the action. The appeal of the interlocutory order brought only one issue of a multi-faceted action before the appellate court, and that the trial court retained jurisdiction over everything except the specific single issue raised before the Court of Appeals.

KRS 22A.020(4) provides in part that the Commonwealth may appeal an adverse ruling of the Circuit Court, but that such appeal *shall not* suspend the proceedings in the case. Here, the trial court ruled that delaying the trial of Blincoe until after the appellate court issued a final ruling would suspend the proceedings. The Commonwealth argued that the term "proceedings" used in KRS 22A.020(4) should only refer to proceedings after attachment of jeopardy and that since Blincoe's trial had not begun at the time the appeal of the interlocutory order was taken, there was nothing to "suspend" while awaiting the appellate court determination. The Court of Appeals stated that pretrial proceedings could not be held in abeyance until a ruling was made on the interlocutory order. The Court noted that forcing Blincoe to wait for trial until the appellate courts rendered a final opinion on the appeal of the interlocutory order could delay the trial for months or years and that Blincoe would have to sit in jail or be out on bail with no determination of guilt or innocence being made.

Colwell v. Kentucky, Ky
Dashielle v. Kentucky, Ky
___S.W.3d__(Ky. 12/21/00)
2000 Ky. LEXIS 202
(Not yet final)

Colwell and Dashielle were each convicted of burglary in the second degree and theft by unlawful taking of property valued at more than $300. Colwell was also convicted of being a persistent felony offender in the second degree.

Colwell claimed the trial court erred in denying his motion for a continuance. The motion for continuance was based on the fact that the complaining witness was a member of the jury pool. However, the trial judge had previously excused the complaining witness, and this was the first case for that jury pool. The Court held that because the judge had made prior arrangements to insure that there would be no interaction between the complaining witness and other members of the jury pool, there was no possibility that the complaining witness' assignment to the jury pool could have tainted the other jurors or otherwise prejudiced Colwell's entitlement to a fair trial.

Dashielle claimed that the trial court error in denying his motion for separate trials. The motion for separate trials was based on grounds that he and Colwell had antagonistic defenses. The Court held that the fact of antagonistic defenses was more supportive of joinder than severance, and that if different defendants had conflicting versions of what took place and one was lying, it would be easier for the truth to be determined if all were required to be tried together.

Dashielle further asserted that it was error for the trial court to deny his motion to suppress evidence that the truck the defendants used in the burglary had been reported stolen. Dashielle claimed the evidence was irrelevant other than to infer that he was a thief. The Court held that such evidence was admissible under KRE 404(b) to prove which defendant was responsible for the truck containing the stolen property.

Dashielle's final claim of error was that the trial judge refused to instruct the jury on the offense of criminal trespass in the third degree as a lesser included offense of burglary in the first degree. A person is guilty of burglary in the first degree when, "with the intent to commit a crime, he knowingly enters or remains unlawfully in a building…". KRS 511 020. A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises. KRS 511.080. In KRS 511.010(3) "premises" includes the term "building" as well as any real property. The Court held that the use of the word "premises" in KRS 511.080, which defines the crime of criminal trespass in the third degree, does not refer to the definition of "premises" contained in this Chapter at KRS 511.010(3), but rather refers only to land, not a building.

The Court held that if the lesser offense required proof of a fact not required to prove the greater offense, then the lesser offense was not included in the greater offense, but was simply a separate, uncharged offense. Here, to prove guilt of criminal trespass in the third degree, the Commonwealth was required to prove that the defendant entered upon the victim's unimproved land, and proof of that fact was not necessary to convict of any degree of burglary. Consequently, criminal trespass in the third degree was not a lesser included offense of burglary.

Commonwealth of Kentucky v. Blincoe
2000 Ky. App. LEXIS 154
__S.W.3d__ (Ky. Ct. App.;12/22/00)
(Not yet final)

The Commonwealth appealed an interlocutory order holding that it could not unilaterally offer testimonial immunity to a trial court witness. Blincoe was charged with shooting a victim who later died. One of the witnesses to the alleged incident, Linzy Harris, gave a statement to the police implicating himself in concealment of the charged offense. Harris was charged with that offense, but found incompetent to stand trial. Harris invoked his Fifth Amendment right to refuse to testify at Blincoe's trial.

The Commonwealth asserted that it offered Harris immunity from prosecution in exchange for his testimony. The trial court stated that in order for the Commonwealth to be bound by such an offer, Harris had to agree to the terms. The trial court found a difference between a mutual agreement and the unilateral decision made by the Commonwealth in this case (that if Harris testified, the Commonwealth would not use that testimony against Harris later). The trial court ruled that the Commonwealth lacked authority to unilaterally grant Harris testimonial immunity and therefore, Harris could not be compelled to testify. The Commonwealth asserted that its offer of immunity, even absent any agreement by Harris, enabled the prosecution to compel his testimony at trial. The Court held that in the absence of a statutory or constitutional authority so permitting, a prosecutor may not unilaterally grant immunity to a witness who is unwilling to testify at trial.

Newsome v. Commonwealth, Ky.App.
2001 Ky. App. LEXIS 3
___S.W.3d___(Ky. Ct. App. ; 1/5/01)
(Not yet final)

Counsel for appellant timely filed a notice of appeal from a Martin Circuit Court judgment on April 29, 1999. On December 3, 1999, the Court of Appeals entered an order giving appellant 20 days to show cause why the appeal should not be dismissed for failure to file a brief. Appellant's counsel did not respond. On January 12, 2000, the Court of Appeals dismissed the appeal and ordered appellant's counsel to certify to the Court within 20 days that appellant had been served

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a copy of the December 3, 1999 show cause order and the January 12, 2000 order. Counsel did not comply with this order. On March 14, 2000, the Court ordered counsel to show cause why he should not be sanctioned for failure to comply with the January 12, 2000 order. Again, counsel did not respond. On May 3, 2000, the Court ordered counsel to remit a sanction of $100.00 and provide the certification as requested in the January 12, 2000 order. Counsel did not remit the sanction of $100.00 or provide the certifications. On June 26, 2000, the Court of Appeals ordered counsel to appear before the Court on July 18, 2000 to show cause why he should not be held in contempt of court. Counsel did not appear. On August 1, 2000, the Court held counsel in contempt for failure to comply with the Court's orders of January 12, 2000, March 14, 2000, May 3, 2000 and June 26, 2000. The Court further ordered counsel to appear on September 12, 2000 and noted that failure to do so could result in a bench warrant for counsel's arrest. Counsel did not appear.

Power to punish for contempt is inherent in every court. The Court of Appeals is vested with the authority to take appropriate action for a party's failure to comply with the rules of the Court. Both the Court of Appeals and the Kentucky Supreme Court have defined contempt as "the willful disobedience of, or open disrespect for, the rules or orders of a court." Contempt of court can be civil or criminal in nature. Criminal contempt is conduct which amounts to an obstruction of justice and which tends to bring the court into disrepute. An attorney's failure to comply with a court order constituted criminal contempt because it was directed against the dignity and authority of the court.

Counsel finally appeared before the Court of Appeals on October 3, 2000. Counsel was held in contempt and the Court reported counsel's potential violations to the Kentucky Bar Association.

Commonwealth v. Hager
2001 Ky. LEXIS 12
___S.W.3d___(Ky. 1/25/01)
(Not yet final)

Certification of law. Hager killed Brown by stabbing him with a knife. Hager admitted the killing and claimed self-defense. He was indicted for murder, but the jury convicted him of fourth-degree assault. The Court granted certification to address how KRS 503.120(1), which defines "imperfect self-defense," applies to the offenses of second-degree manslaughter and reckless homicide.

A conviction of fourth-degree assault can only be obtained if the result of the assault is physical injury, not death. Further, a mistaken belief in the need to act in self-protection does not affect the privilege to act in self-protection unless the mistaken belief is so unreasonably held as to rise to the level of wantonness or recklessness with respect to the circumstance then being encountered by the defendant. Self-protection is premised upon a defendant's actual subjective belief in the need for the conduct constituting the justification and not on the objective reasonableness of that belief. A defendant may be mistaken in his belief and that mistaken belief may be so unreasonably held as to constitute wantonness or recklessness with respect to the circumstance then being encountered. If so, self-protection is unavailable as a defense to an offense having the mens rea element of wantonness, e.g., second-degree manslaughter, or recklessness, e.g., reckless homicide.

Murder or first-degree manslaughter is reduced to second-degree manslaughter by a wantonly held belief or to reckless homicide by a recklessly held belief. While a wantonly held belief in the need to act in self-protection is a defense to an offense having the mens rea element of intent, it supplies the element of wantonness necessary to convict of second-degree manslaughter; and while a recklessly held belief in the need to act in self-protection is a defense to an offense requiring either intent or wantonness, it supplies the element of recklessness necessary to convict of reckless homicide.

The Court noted that an act in self-protection committed under a wantonly held belief does not elevate an offense predicated on recklessness, e.g. reckless homicide, to a greater offense, e.g., second-degree manslaughter. The fact that the fatal conduct was committed under a wantonly held belief in the need provided no defense to a charge of either second-degree manslaughter or reckless homicide; the fact that the fatal conduct was committed under a recklessly held belief in the need therefor reduces a charge of second-degree manslaughter to reckless homicide, but provided no defense to a charge of reckless homicide.

Commonwealth of Kentucky v. Hayward
2001 Ky. LEXIS 4
___S.W.3d___(Ky. 1/25/01)
(Not yet final)

[The conduct from which the indictment in this case stemmed occurred in 1997 and was prosecuted under statutory provisions which have since been modified.]

Hayward was found to be in possession of pseudoephedrine as well as other chemicals and equipment used in the manufacture of methamphetamine. Hayward was convicted of trafficking in methamphetamine. The Court of Appeals reversed Hayward's conviction stating that insufficient evi-

dence existed to prove Hayward had engaged in trafficking in a controlled substance since none of the controlled substance (methamphetamine) was actually found in Hayward's residence. The Court of Appeals surmised that the non-controlled substance pseudoephedrine was not an immediate precursor of methamphetamine.
The legal definition of "immediate precursor" is "a substance which is the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail or limit manufacture." KRS 218A.010.

According to the expert testimony at Hayward's trial, of all the chemicals and reagents used in the manufacture of methamphetamine, only ephedrine or pseudoephedrine satisfied the definition of a precursor. The Supreme Court stated that possessing the primary precursor ephedrine or pseudoephedrine, along with all the other necessary chemicals for the manufacture of methamphetamine provided a legally sufficient basis for the jury to find that Hayward was trafficking in methamphetamine. The Supreme Court reversed the portion of the Court of Appeals opinion that held that ephedrine or pseudoephedrine is not an immediate precursor of methamphetamine.

Commonwealth of Kentucky v. Mitchell
2001 Ky. LEXIS 10
___S.W.3d___(Ky. 1/25/01)
(Not yet final)

Mitchell, his wife and three children were in an automobile on their way to a friend's house. The oldest child sat unrestrained in the front seat between her parents. The other two children rode in the back seat in baby seats which were not buckled and were not fastened to the automobile seat. A collision occurred and Mitchell and one of his infant daughters were thrown from the automobile. The infant daughter eventually died from her injuries. The Commonwealth obtained an indictment for second-degree manslaughter and the father was convicted of reckless homicide by a trial jury.

The Court of Appeals reversed the conviction, holding that the failure to secure a child to a child seat and to secure the child seat to the automobile seat was a violation of KRS 189.125, but that because the violation of the statute could not create tort negligence, it could not possibly constitute recklessness under a criminal statute.

The Supreme Court agreed with the Court of Appeals, holding that a violation of the Kentucky Seatbelt Statute (KRS 189.125) does not provide the mental state necessary for a reckless homicide conviction. The Commonwealth did not present any other evidence to support its position that the conduct of the father was reckless other than the failure to secure the infant in a proper child restraint system. This conduct, standing alone, without any other evidence of recklessness is not sufficient to constitute the standard of recklessness required by KRS 507.050, reckless homicide.

Evans v. Commonwealth of Kentucky
2001 Ky. LEXIS 8
___S.W.3d___(Ky. 1/25/01)
(Not yet final)

Evans was indicted pursuant to KRS 189A.010 for operating a motor vehicle while having an alcohol concentration of or greater than 0.10, or while under the influence of alcohol. This charge embraced two subsections of the DUI statute: KRS 189A.010(1)(a), the per se section, and KRS 189A.010(1)(b), the section based upon driving while under the influence of intoxicants. At trial, the language of the jury instruction mirrored the charge of the indictment. It authorized a finding of guilt if the jury found that Evans had operated a motor vehicle and that while doing so the alcohol concentration in his blood or breath was of or about 0.10; OR that he was under the influence of alcohol or any other substance which may impair one's driving ability. Evans was convicted of the offense.

Evans appealed to the Court of Appeals, contending that the prosecution should have been required to seek conviction based upon either his alcohol level or his behavior, but not both. Evans submitted that the jury instruction was improper because it set forth alternative means of commission of the offense yet did not require particular findings of elements for conviction under either basis of criminal liability.

The Supreme Court affirmed the Court of Appeals decision, stating that KRS 189A.010(1)(a) and (b) merely provide different means of committing the same violation. The subsections do not represent different elements of the offense, but alternative means of committing the same offense. The Court noted that while the alternative means did require different acts, the effect was the same and there was no prejudice so long as evidence was presented from which the jury could reasonably believe both of the subsections had been violated.

Ignatow v. Hon. Stephen Ryan;
Commonwealth of Kentucky
2001 Ky. LEXIS 11
___S.W.3d___(Ky. 1/25/01)
(Not yet final)

Ignatow was acquitted of the murder of his former girlfriend, Brenda Sue Schaefer, as well as all charges of kidnapping, sodomy, sexual abuse, robbery and tampering with evidence. Later, Ignatow confessed to murdering Schaefer and pled guilty to federal perjury charges. Ignatow received a 97-month federal prison sentence.

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In 1997, the Jefferson County Grand Jury indicted Ignatow on perjury charges and PFO II. The perjury charges arose from events that occurred prior to Ignatow's murder trial. Ignatow had received a threatening letter from a Dr. William Spalding, alleging that Ignatow was responsible for Schaefer's disappearance and threatening to have Ignatow killed if he did not reveal any information about Schaefer's disappearance. Dr. Spalding was brought to trial on terroristic threatening charges. During that trial, Ignatow testified under oath about his relationship with Schaefer and what an absolutely good and loving relationship it was. This testimony given by Ignatow at Dr. Spalding's trial was the basis for the Jefferson County perjury charges.

Ignatow sought to have the perjury and PFO II charges against him dismissed based upon principles of collateral estoppel. The trial court denied the motion, and Ignatow filed an original action in the Court of Appeals, seeking to prohibit enforcement of the trial court's order denying the motion to dismiss the indictment. The Court of Appeals denied Ignatow's request for a writ of prohibition. The Supreme Court affirmed, stating that the crucial inquiry in determining whether Ignatow's perjury trial may go forward is whether the murder trial required a determination inconsistent with any fact necessary to a conviction in the instant case. Here, that would be whether the murder trial jury must have decided against the Commonwealth on an issue that will be necessary to convict Ignatow in the perjury trial. The Supreme Court held that it did not and that the issue to be litigated in the perjury trial will be whether Appellant lied about the status of his relationship with Schaefer when he testified at Dr. Spalding's trial.

Myers v. Commonwealth of Kentucky
2001 Ky. LEXIS 7
___S.W.3d___(Ky. 1/25/01)
(Not yet final)

Myers entered into a plea agreement that provided Myers would plead guilty to an amended charge of manslaughter in the second degree with a ten year sentence; eight counts of wanton endangerment with five years on each count; DUI and attempting to elude the police with 30 days and 90 days respectively. Myers' total sentence would be twenty-five years. The plea agreement also stated that Myers waived the provisions of KRS 532.110(1)(c).

A *Boykin* hearing was held during which the trial judge determined that Myers' guilty pleas were voluntary. However, the trial court did not inquire into the voluntariness of Myers' waiver of the provisions of KRS 532.110 (1) (c).

Myers filed a motion pursuant to RCr 11.42 asserting that the twenty-five year sentence exceeded the maximum aggregate term permitted by KRS 532.110 (1) (c), and that his attorney provided ineffective assistance of counsel by advising him to agree to an illegal sentence.

KRS 532.110 (1) (c) provides that the "aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed…." The highest class of crime for which Myers was sentenced was manslaughter in the second degree, a Class C felony. The longest extended term authorized by KRS 532.080 for a Class C felony is twenty years. Thus, the maximum aggregate length of the consecutive terms to which Myers could be sentenced under KRS 532.110 (1) (c) was twenty years.

The Supreme Court addressed the issue of whether a defendant could waive the sentencing limitation in KRS 532.110 (1) (c) . The Supreme Court held that a defendant could validly waive the maximum aggregate sentence limitation in KRS 532.110 (1) (c) that otherwise would operate to his benefit, and remanded the case to the Jefferson Circuit Court for an evidentiary hearing on Appellant's RCr 11.42 motion. ■

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Supplemental Authority to Kentucky Supreme Court

When filing a motion to cite supplemental authority prior to an oral argument in the Kentucky Supreme Court with the cited case(s) attached, file an original and 9 copies so that each Justice will have a copy. If you do not attach copies of the cited cases, file an original and 4 copies.

6th Circuit Review

by Emily Holt

U.S. v. Gatewood
230 F.3d 186 (6th Cir. 10/10/00)(*en banc*)

Federal "Three Strikes" Statute Constitutional

After being found guilty of robbery and kidnapping, Gatewood was sentenced to life in prison under the federal "three strikes" statute, 18 U.S.C.S § 3559(c). He challenged the constitutionality of the statute. The original three-judge panel held the law was unconstitutional. In this opinion, the Sixth Circuit *en banc* upheld the statute's constitutionality.

Defendant can be Required to Prove Affirmative Defense by Clear and Convincing Evidence

A criminal defendant is required to prove the affirmative defense to the three strikes law by clear and convincing evidence. The defendant must prove that the prior felonies did not involve the use or threat of use of a firearm or a dangerous weapon and did not result in death or serious physical injury to a person.

The three-judge panel originally vacated Gatewood's sentence on a finding that the clear and convincing standard was unconstitutional. On rehearing *en banc*, the Court held that the clear and convincing standard was constitutional in this case because no fundamental constitutional right was at stake; defendants are merely proving a statutory defense. *Cooper v. Oklahoma*, 517 U.S. 348, 134 L.Ed.2d 498, 116 S.Ct. 1373 (1996). "[A] criminal defendant is not entitled to trial-like procedural protections at a sentencing hearing. . . The constitutional protections afforded defendants at a criminal trial are not available at sentencing proceedings." *U.S. v. Silverman*, 976 F.2d 1502, 1511 (6th Cir. 1992)(*en banc).*

"Recidivism Increasing the Maximum Penalty" is Exception to *Apprendi*

Gatewood's second challenge to the "three strikes" statute is essentially an *Apprendi* challenge. *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000). Are the prior convictions elements of the offense or are they sentencing factors? The Sixth Circuit held that under *Almendarez-Torres v. U.S.*, 523 U.S. 224, 140 L.Ed.2d 350, 118 S.Ct. 1219 (1998), Gatewood's challenge to the three strikes law must be rejected: "recidivism increasing the maximum penalty need not be so charged." It is interesting to note that the Court acknowledges that in light of *Apprendi*, *Almendarez-Torres* may have been incorrectly decided, but nevertheless holds "*Almendarez-Torres* remains the law."

Judge Merritt dissented. He argues that under *Apprendi* the penalty in a case such as this becomes "part of the trial and the government would be required to prove this element beyond a reasonable doubt." Thus *Cooper v. Oklahoma*, *supra*, would apply and the heightened clear and convincing standard would violate the defendant's due process rights. Further, Judge Merritt argues that while *Almendarez-Torres* is "technically" still the law, *Apprendi* has in fact altered the law and "proving the facts necessary for life imprisonment under § 3559 [the three strikes statute] requires significantly more effort than merely proving the existence of a previous conviction—the circumstance to which *Almendarez-Torres* was limited by the Court."

U.S. v. Quinn
230 F.3d 862 (6th Cir. 10/25/00)

Quinn appeals from convictions for various drug-trafficking and firearm-possession offenses.

Appellate Challenge to Court's Failure to Excuse Jurors for Cause: Must Allege Biased Juror Did Indeed Sit on Jury

A venireperson had worked with "undercover police" and had "several people put away" for various drug offenses. She was a witness in one federal drug case and a foreperson of the jury on another. The trial court refused to excuse this potential juror for cause. Quinn used a peremptory challenge to remove the juror. The Sixth Circuit would not consider the merits of this issue pursuant to *U.S. v. Martinez-Salazar*, 528 U.S. 304, 145 L.Ed.2d 792, 120 S.Ct. 774, 777 (2000). In that case, the U.S. Supreme Court held that when a venireperson should be removed for cause but is not, the defendant "has not been deprived of any rule-based or constitutional right" if he "elects to cure [the] error by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat." For this error to be preserved for appellate review, a biased juror must sit on the jury.

Testimony that Defendant Arrested in High Crime Area Admissible

Quinn challenged, pursuant to FRE 403, analogous to KRE 403, a police officer's testimony that the neighborhood where he was arrested was a "high drug-trafficking area." While noting "the relevance of the nature of the neighborhood is marginal," the Sixth Circuit held that the testimony was not improper.

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Barnes v. Elo
231 F.3d 1025 (6th Cir. 11/9/00)

Evidentiary Hearing Necessary to Prove Ineffective Assistance of Counsel

On the basis of eyewitness testimony, Barnes was convicted in Michigan state court of breaking and entering with intent to commit criminal sexual conduct, assault with intent to commit criminal sexual conduct, and felonious assault. A 12-year-old girl testified a man kissing her face awakened her. They struggled and he ran down the stairs and out the door. The girl's initial statement to police did not mention that the suspect had a limp but a later statement did. At the bench trial, the parties stipulated that Barnes suffered from post-polio syndrome and wears a leg brace. The federal district court denied Barnes' ineffective assistance of counsel claim for failure to call medical witnesses to testify to his physical condition without an evidentiary hearing.

The Sixth Circuit held it is unclear from the record whether or to what extent trial counsel investigated Barnes' medical condition and why he failed to call his treating physician Dr. Waring. "Absent an evidentiary hearing and clear finding of fact, it is impossible to determine whether trial counsel's failure to investigate and call Dr. Waring was sound trial strategy or was constitutionally deficient performance. Given Dr. Waring's ability to testify that Barnes was incapable of running as the complainant described, he certainly would have been an essential witness." (citations omitted). An evidentiary hearing is necessary to determine if trial counsel's failure to call Dr. Waring was an unreasonable application, *Williams v. Taylor*, 529 U.S. 362, 146 L.Ed.2d 389, 120 S.Ct. 1495 (2000), of *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

U.S. v. Page
232 F.3d 536 (6th Cir. 11/9/00)

Dismissal of Indictment or Suppression of Evidence Not Available Remedies for Vienna Convention Violation

Page, Powers, Linton, and Hill were convicted of various drug crimes arising from a conspiracy to distribute crack cocaine. Linton is a citizen of Barbados. He gave two statements to law enforcement officials. Before each statement he was informed of his *Miranda* rights but was never informed of his right to contact the Barbados consulate under Article 36 of the Vienna Convention. Linton argues the district court erred in failing to sanction the government for not complying with the provisions of the Vienna Convention by either granting his motion to dismiss or his motion to suppress.

Article 36(1)(b) of the Vienna Convention provides "if he so requests, the competent authorities of the receiving State [Tennessee] shall, without delay, inform the consular post of the sending State [Barbados] if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph." The Sixth Circuit joins the First, Ninth, and Eleventh Circuits in concluding "although some judicial remedies may exist, there is no right in a criminal proceeding to have evidence excluded or an indictment dismissed due to a violation of Article 36." This ruling is based on reasoning that a treaty is equivalent to a legislative act, and "as in the case of a statutory violation, the exclusionary rule is an inappropriate sanction, absent any underlying constitutional violations or rights, unless the treaty expressly provides for that remedy." Nothing in the Vienna Convention requires suppression of the evidence or dismissal of the indictment for Article 36 violations.

Further, the State Department's interpretation of the Vienna Convention comports with the Sixth Circuit's decision that suppression or dismissal of an indictment are not available remedies under Article 36.

***Apprendi* Violated When Judge, Not Jury, Determines Amount of Crack Attributable to Each Defendant and Term of Imprisonment is Increased**

The defendants were indicted on conspiracy to distribute and possess with the intent to distribute crack cocaine. The quantity of crack was not mentioned in the indictment nor did the jury make findings regarding quantity. Instead the district court judge found, by a preponderance of the evidence, the quantity of drugs for which each defendant was attributable.

21 U.S.C. § 841 provides that the amount of drugs is a factual determination that significantly impacts the sentence imposed. There is a maximum penalty of 20 years if the amount of crack cocaine is less than 5 grams. If the amount is five or more grams of crack cocaine but less than 50 grams, the maximum penalty is 40 years. If the amount of crack cocaine is 50 or more grams, there is a maximum penalty of life imprisonment. Each of these defendants was sentenced to a penalty higher than the baseline 20 years.

"Other than the fact of prior conviction, any fact that increases the penalty of a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348, 2362-63 (2000). Classification as a "sentencing factor" is irrelevant—"the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" 120 S.Ct. at 2365. *Apprendi* was violated in this case because the jury

did not make a factual determination, beyond a reasonable doubt, of the amount attributable to each defendant. "The jury merely found that defendants conspired to distribute and possess to distribute some undetermined amount of crack cocaine. . . the maximum sentence that may be imposed on this count is 20 years pursuant to § 841(b)(1)(C)."

***Apprendi* Errors Must be Preserved for Appellate Review**

Because the defendants failed to object to the *Apprendi* violation at trial, plain error analysis is applied on appellate review. The error must be clear and affect substantial rights. Even if these conditions are met, the Court can exercise discretion and notice the error only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. U.S.*, 520 U.S. 461, 466-467, 137 L.Ed.2d 718, 117 S.Ct. 1544 (1997). The Sixth Circuit determines that as to Linton, Hill and Powers, error was not prejudicial since without the error the sentences would have been the same as those imposed with the error. The Court notes if the error had been preserved, even if the sentences would have been the same on re-sentencing, it would have had to vacate the sentences and remand for re-sentencing. Because Page was only convicted of the conspiracy count, he was prejudiced; his sentence is vacated.

Gonzales v. Elo
233 F.3d 348 (6th Cir. 11/20/00)

No Procedural Default so as to Foreclose Federal Habeas Review When State "Rule of Finality" Not Enacted Until Three Years After Appeal Was Final

Gonzales' claim on federal habeas review is ineffective assistance of counsel. This issue was not raised in his original appeal to the Michigan Court of Appeals. Several years later, Gonzales filed a Motion for Relief from Judgment pursuant to Michigan Court Rule 6.500; one of the grounds was the ineffective assistance of counsel claim. While the procedural history of this motion is twisted, ultimately the Michigan Supreme Court denied this claim on the basis that Gonzales failed to raise the issue in his direct appeal and that he could not demonstrate cause and prejudice to ignore the default pursuant to Michigan Court Rule 6.508(D), "the state analog to federal exhaustion."

The Sixth Circuit applied the *Maupin* four-prong test, *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986), to determine whether Gonzales procedurally defaulted his claim by failing to raise it in state court or, alternatively, whether he can show cause and prejudice to excuse his procedural default. There is a state procedural rule applicable to Gonzales' claim, Michigan Court Rule 6.508(D), which was not adhered to by the petitioner and which is actually enforced by the Michigan state courts. Thus, the first and second factors are met.

The third factor is "whether the state procedural forfeiture is an 'adequate and independent' state ground on which the state can rely to foreclose review of a federal constitutional claim." The determination of whether this prong has been met is not clear. In *Rogers v. Howes*, 144 F.3d 990 (6th Cir. 1998), the Sixth Circuit found that because M.C.R. 6.508(D) (3) was not firmly established and regularly followed when petitioner was convicted it could not serve as an "adequate and independent" state ground foreclosing federal habeas review. In *Luberda v. Trippett*, 211 F.3d 1004, 1006 (6th Cir. 2000), the Circuit rejected a bright-line rule that M.C.R. 6.508(D) was inapplicable to prisoners convicted before the October 1, 1989 effective date; instead the Court held that "federal courts must decide on a case-by-case basis whether, during the period that a defendant may, if he wishes, tailor his appeal to avoid the consequences of a state procedural rule, the 'defendant. . . could. . . be deemed to have been apprised of the [rule's] existence."


Emily Holt

The Court framed the issue as "whether during the period of time that Petitioner may have tailored his appeal to include his claim for ineffective assistance of counsel based on his attorney's alleged failure to properly advise Petitioner of his right to testify, Petitioner could be deemed to have been apprised" of the rule's existence. The Court finds that Gonzales cannot be deemed to have been apprised of the rule's existence. He was convicted on April 5, 1984. His conviction was affirmed by the Michigan Court of Appeals on January 10, 1986. It is not until over three years later that M.C.R. 6.508(D)'s "mandate of finality" was enacted. Gonzales habeas claim is not barred.

Defendant Must Alert Trial Court of Desire to Testify or Post-Conviction Relief is Foreclosed

The Sixth Circuit ultimately decides that Gonzales' ineffective assistance of counsel claim for failure to adequately instruct on the right to testify is without merit. The magistrate relied on the trial attorney's testimony at the evidentiary hearing that he customarily advised his clients on the right to testify and that he could not recall ever refusing to allow a defendant to testify who desired to do so. The magistrate noted in his recommendations that although the trial attorney stated that he had no personal recollection of this colloquy with Gonzales, and Gonzales stated that he did recollect such a conversation, petitioner's "isolated certainty [is] inherently suspicious." The magistrate also emphasized the passage of time before Gonzales raised this claim.

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The Sixth Circuit affirms the magistrate's recommendations on the basis of *U.S. v. Webber*, 208 F.3d 545, 551 (6th Cir. 2000). In that case the Court held that "when a tactical decision is made not to have the defendant testify, the defendant's assent is presumed." The defendant must take affirmative action to notify the trial court if he or she desires to testify against counsel's advice: "[a] defendant who wants to testify can reject defense counsel's advice to the contrary by insisting on testifying, communicating with the trial court, or discharging counsel." *Id.* In this case, trial counsel testified at the evidentiary hearing that he advised Gonzales not to testify because he did not appear credible. Petitioner testified that trial counsel told him not to testify because he "looked too mean." The Court states that the reasoning is irrelevant, what matters is that the decision was based on trial strategy and there is nothing in the record to indicate that Gonzales indicated at trial that he disagreed with trial counsel.

Wolfe v. Brigano
232 F.3d 499 (6th Cir. 11/17/00)

The district court granted Wolfe's petition for habeas corpus relief on the basis that his sixth amendment right to a trial by impartial jury was violated when four biased jurors sat on the jury. The government appealed.

Preservation of Biased Juror Claims

Under Ohio law, Wolfe was entitled to four peremptory challenges and an unlimited number of challenges for cause. Wolfe challenged six potential jurors for cause. The district court granted only one of those challenges. Wolfe removed one of the other challenged jurors with a peremptory challenge, but used his remaining three peremptory challenges on potential jurors neither side had challenged.

In *U.S. v. Martinez-Salazar*, 528 U.S. 304, 145 L.Ed.2d 792, 120 S.Ct. 774 (2000), the Supreme Court held when a defendant objects to the trial court's denial of a for cause challenge, the defendant has 2 options: (1) he can remove the challenged juror with a peremptory challenge and forgo a sixth amendment challenge on appeal or (2) he can allow the juror to sit on the jury and appeal the trial court's refusal to remove the juror for cause. Four of the six challenged potential jurors sat on the jury. After the jury was empanelled, Wolfe filed a motion to dismiss based on the ground that the jury was biased. He renewed this motion at the conclusion of the trial. The Court holds that the sixth amendment claim is preserved.

Jurors' "Tentative" Promise of Impartiality Insufficient

The standard for reviewing whether the trial court erred in denying for cause challenges is "did a juror swear that he could set aside any opinion that he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed?" *Patton v. Yount*, 467 U.S. 1025, 1036, 81 L.Ed.2d 847, 104 S.Ct. 2885 (1984). Two of the jurors challenged for cause had relationships with the victim's family. The first juror had a business relationship with the family and "listened" to the victim's parents. He did not think he could be a fair and impartial juror. The second juror said she could be fair and impartial, but she and her spouse were "close friends" of the victim's parents. Her husband had even spoken with them about their theory of their son's death, and her husband related this information to her. She did tell defense counsel it would be "hard to say" whether this relationship would influence her as a juror. The third juror had read and heard news reports of the crime. She could not affirmatively state that she would put those aside and decide the close solely on the evidence presented. The final juror would not require the prosecution to prove its case beyond a reasonable doubt.

The Sixth Circuit ultimately finds that the *Patton* test was not met as to any of these four jurors. "From the record before us, it appears that the trial judge based his findings of impartiality exclusively upon each juror's tentative statements that they would try to decide this case on the evidence presented at trial. Such statements, without more, are insufficient. The sixth amendment guarantees Wolfe the right to a jury that will hear his case impartially, not one that tentatively promises to try. Failure to remove biased jurors taints the entire trial. . ."

In a concurring opinion, Circuit Judge Wellford expresses dismay over the trial judge's failure to recuse himself and refusal to grant a change of venue. This crime apparently occurred in a small rural county and was highly publicized. The trial judge had once represented the victim and associated with the victim's family. Judge Wellford urges the trial court to reconsider both the recusal and venue rulings upon retrial of Wolfe.

Bronaugh v. Ohio
2000 U.S. App. LEXIS 32187 (6th Cir. 12/19/00)

At issue is whether Bronaugh's habeas petition was timely filed pursuant to the one-year statute of limitations of 28 U.S.C. § 2244(d). The federal district court dismissed Bronaugh's petition as untimely but granted a certificate of appealability to the Sixth Circuit.

On May 3, 1995, Bronaugh was found guilty in Ohio state court of aggravated murder with a firearm specification. He was sentenced to life in prison. His conviction was affirmed by the Ohio Court of Appeals on April 24, 1996. Bronaugh's appellate counsel failed to make a timely appeal to the Supreme Court of Ohio because his appeal omitted a copy of the Court of Appeals opinion and the judgment being appealed, as required by Ohio Sup. Ct. R. III, § 1(D). The deadline for filing the appeal was June 10, 1996; on June 19,

1996, he filed a motion for a delayed appeal to the Ohio Supreme Court. On July 31, 1996, the Ohio Supreme Court denied his motion for delayed appeal. On April 7, 1997, pursuant to Ohio R. App. P. 26(B), Bronaugh filed in the Ohio Court of Appeals an application to reopen his direct appeal due to ineffective assistance of appellate counsel. On October 21, 1997, the Court of Appeals denied this motion as untimely, ruling that he did not show good cause for filing his application 90 days after journalization of that court's judgment as required by the rule. On December 2, 1997, Bronaugh appealed the denial of his Rule 26(B) application to the Ohio Supreme Court. The Ohio Supreme Court dismissed Bronaugh's appeal of the denial of his Rule 26(B) application on January 28, 1998.

On June 30, 1998, Bronaugh filed a habeas corpus petition in the U.S. District Court for the Northern District of Ohio. The petition was transferred to the Southern District on July 28, 1998. On November 4, 1998, Ohio filed a motion to dismiss the petition, and on December 8, 1998, the district court granted this state's motion.

Federal Rule of Civil Procedure 6(a) Applies to Computation of Time Under § 2244(d)

The AEDPA provides for a one-year statute of limitations that begins to run from the latest of 4 events, one of which is "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." § 2244(d)(1)(A). The statute of limitations is tolled by the amount of time "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." § 2244(d)(2). In *Isham v. Randle*, 226 F.3d 691, 694-695 (6th Cir. 2000), the Sixth Circuit held that the § 2244(d)(1)(A) statute of limitations does not begin to run until the time for filing a petition for writ of certiorari for direct review in the U.S. Supreme Court has expired. Sup. Ct. R. 13 provides that a defendant only has 90 days following the entry of judgment by the state court of last resort to petition for writ of certiorari.

In the case at bar, the last day which Bronaugh could appeal his conviction to the Ohio Supreme Court was June 10, 1996. On this day, appellate counsel filed an appeal with the clerk, but it was rejected for failure to comply with the rules of court. In *Burns v. Ohio*, 360 U.S. 252, 256-257, 3 L.Ed.2d 1209, 79 S.Ct. 1164 (1959), the U.S Supreme Court held when the clerk refused to file an appeal because of failure to comply with rules of court, that constituted a final judgment over which the Supreme Court had jurisdiction. The 90-day period in which petition for writ of certiorari would begun to run on June 11, 1996 and would have ended on September 9, 1996.

When does § 2244(d)'s one-year statute of limitations begin to run, September 9, 1996 or September 10, 1996? The Court applies Federal Rule of Civil Procedure 6(a)'s standards for computing periods of time to the statute of limitations. It provides "the day of the act, event, or default from which the designated period of time begins to run shall not be included." Thus Bronaugh's one-year statute of limitations began to run on September 10, 1996, and if nothing tolled the period of time the last day on which he could have filed his habeas petition was September 9, 1997. Bronaugh's petition was not filed until June 30, 1998.

Application to Reopen Direct Appeal Part of Direct Review Process and Tolls § 2244(d) Statute of Limitations Without Regard to Whether Properly Filed

Does Bronaugh's Rule 26(B) application to reopen his direct appeal toll § 2244(d)'s statute of limitations? If the Rule 26(B) application is a form of post-conviction or collateral review and if it was "properly filed" it would toll the statute of limitations. § 2244(d)(2). If the 26(B) application is considered to be part of the direct review process however, the application would not have to have been properly filed. The Sixth Circuit relies on *White v. Schotten*, 201 F.3d 743 (6th Cir. 2000), to conclude that Rule 26(B) applications to reopen the direct appeal are part of the direct appeal process. The Court expressly holds that the § 2244(d) statute of limitations is only **tolled** during the period of the time the Rule 26(B) application is pending; the Court expressly rejects a holding that the statute of limitations does not begin to run until the state courts have considered the motion.

Bronaugh's 1-year period of limitations did not begin to run until September 10, 1996. On April 7, 1997, Bronaugh filed his Rule 26(B) application to reopen his direct appeal. The 209 days between those 2 dates counts towards the statute of limitations. On January 28, 1998, the Ohio courts dismissed his appeal. Thus, on January 29, 1998, the one-year period of limitations began to run again. Bronaugh filed his petition on June 20, 1998. A total of 153 days passed between January 29, and June 20. Ultimately only 362 (209 + 153) days passed between the completion of direct review and the filing of the federal petition for habeas corpus relief. This meets the 1-year (or 365-day) § 2244(d) statute of limitations. The district court's determination that the petition was untimely is reversed.

White v. McAninch
2000 U.S. App. LEXIS 33361 (6th Cir. 12/21/00)

White was indicted on rape charges for "engaging in sexual conduct with Juanita Adkins who was not his spouse and was less than thirteen years of age." The victim turned thirteen on August 15, 1987. Any acts on or after that date would have been inadmissible. Further, the state narrowed its case only to acts of oral sex. Any incidents involving sexual conduct other than oral sex were inadmissible.

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At trial, the prosecutor asked the victim whether she and the defendant ever engaged in sexual conduct other than that alleged in the indictment. Trial counsel did not object. The victim then testified she had sexual intercourse with White shortly before he was indicted. This would have been after she had turned thirteen and involved intercourse, not oral sex. On cross-examination, trial counsel asked many questions about the sexual intercourse incident. Great detail was elicited. Subsequently other witnesses testified about the sexual intercourse on direct examination, without objection, and on cross-examination. The other witnesses' testimony corroborated the victim's story. At the close of the prosecution's case, the prosecutor observed "if anyone made a big thing about the May incident [the uncharged incident involving sexual intercourse] it was McCrae [trial counsel] in his interminable cross-examination on the issue."

Trial counsel further elicited great detail about this uncharged act of intercourse during the defense case. He spent a great amount of time talking about the incident during closing argument and failed to request a limiting instruction. Trial counsel stated at the evidentiary hearing that his theory of the case was that the victim and her mother lied about the allegations in the indictment as well as the uncharged act of sexual intercourse to keep White from leaving them for another woman. (However at trial both the victim and her mother testified that they were not aware the defendant was seeing another woman or planning on leaving them.) Counsel's alternative theory of the case was that the victim and her mother wanted White to be sent to jail so they could take his money and leave town.

Deference Accorded to Trial Counsel "Strategy" Depends Upon Pretrial Investigation

The Sixth Circuit observes that "strategy" is "'not a blanket justification for conduct which otherwise amounts to ineffective assistance of counsel'. . . The determination as to whether trial counsel's strategy amounts to ineffective assistance of counsel should be made with respect to the thoroughness of the pretrial investigation that counsel conducted. The more thorough the investigation, the more deference the trial strategy receives, while strategic decisions made after incomplete investigations receive less."

In this case, there is no indication that trial counsel was even aware of this uncharged act of sexual intercourse prior to trial. Little to no pretrial investigation was conducted. Counsel filed no formal discovery requests and there is no indication that his informal meetings with the assistant prosecutor (who was not the prosecutor handling this case) resulted in disclosure about the uncharged act. Trial counsel failed to review prior to trial videotapes of police interviews with the victim or the child services caseworker. Both the victim and the caseworker discussed the uncharged act in these interviews and review of the tapes would have put trial counsel on notice.

The Sixth Circuit determines that trial counsel's "woefully inadequate trial preparation renders it highly implausible that he developed his theory that the victim was lying about the uncharged act" and the incidents of oral sex prior to trial. His "strategy" was more than likely developed at trial. Furthermore since trial counsel had no evidence refuting the allegations of the uncharged act, his decision to pursue this "strategy" was manifestly unreasonable and falls outside the range of professionally competent assistance. *Strickland v. Washington*, 466 U.S. 668, 690, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). It was further incompetent that no limiting instruction was requested.

***Strickland* Prejudice Prong Met When Little Evidence of Defendant's Guilt Yet Conviction Results Because of Trial Counsel's Incompetence**

The Sixth Circuit ultimately concludes that both prongs of the *Strickland* test have been met. White was prejudiced by trial counsel's performance. Testimony about the uncharged act because it corroborated the indictment's allegation of sexual activity between White and his step-daughter. Further "[t]he circumstances detailing the uncharged act also painted White as an immoral and despicable character." The Court stressed the fact that there was not much corroborating evidence about the oral sex encounters—the crimes for which defendant was actually indicted—and the defendant's "confession" to the police was far from reliable. Further the trial court's instructions may have led the jury to believe that they were to consider the uncharged act of sexual intercourse (specifically the trial court told the jury that "sexual conduct" included "vaginal intercourse"). There is reasonable probability that but for trial counsel's performance, White would have been found not guilty. The district court's grant of habeas relief is affirmed. ■

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PLAIN VIEW . . .

by Ernie Lewis, Public Advocate

City of Indianapolis v. Edmond

The United States Supreme Court has issued a significant opinion on the question of the "constitutionality of a highway checkpoint program whose primary purpose is the discovery and interdiction of illegal narcotics." By a 6-3 decision, in an opinion written by Justice O'Connor, the Court has held that, as opposed to seizures for the purposes of combating drunk driving or illegal immigration, roadblocks conducted for the purpose of discovering and seizing illegal drugs is a violation of the Fourth Amendment.

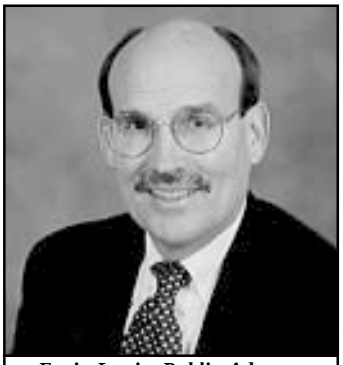
The challenged searches occurred during 1998. The City of Indianapolis conducted 6 roadblocks in which motorists were stopped for 3-5 minutes. Searches were only conducted when reasonable suspicion developed. A predetermined number of cars were stopped. The officer had no discretion regarding the scope of the stop until reasonable suspicion developed. A narcotics-detection dog did a walk-around of all the cars that were stopped. 9% of those persons stopped ended up being arrested.

The Court relied upon the fact that they had "never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion…. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment."

The Court rejected several arguments by the City trying to bring the facts more in line with *Michigan Dept. of State v. Sitz*, 496 U.S. 444 (1990). The Court was not responsive to the argument that narcotics checkpoints differ little from DUI checkpoints and immigration checkpoints. The Court further rejected the argument that the "severe and intractable nature of the drug problem" justified a suspicionless checkpoint. The Court rejected also a highway safety concern and the argument that this checkpoint is no different than the anti-smuggling checkpoints of some immigration cases.

The Court was quite concerned about the implications of such searches. "Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life."

The Court limited the reach of the decision. It reaffirmed the right of government to conduct sobriety checkpoints, and immigration related checkpoints. It reiterated the holding in *Whren v. United States*, 529 U.S. 334 (2000), saying that despite the Court's having looked into the programmatic purpose of the checkpoint, this did not allow the lower courts to scrutinize the subjective intent of police officers.



Ernie Lewis, Public Advocate

Justices Rehnquist, Thomas, and Scalia (in part) dissented. The dissenters relied upon the fact that narcotics checkpoints had legitimate purposes unrelated to searching for evidence of a crime—serving as both sobriety checkpoints and checking on the registration status of the drivers. The dissenters would have relied upon that fact, and *Whren*, to say that the narcotics checkpoints were constitutional. "These stops effectively serve the State's legitimate interests; they are executed in a regularized and neutral manner; and they only minimally intrude upon the privacy of the motorists. They should therefore be constitutional." The dissenters were also concerned over litigation that would result in looking into the purpose of checkpoints.

Justice Thomas wrote an intriguingly short dissent. He stated that he doubted whether *Sitz* and *Martinez-Fuerte* had been correctly decided. "I rather doubt that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing."

SHORT VIEW . . .

1. From *New of the Weird*, thanks to Will Hilyerd for sending: "In August, Davidson, N.C., police officer Scott Searcy asked to search a woman's car for drugs, giving as his legally required basis ("reasonable suspicion") solely the fact that on the front seat was a copy of the weekly newspaper *Creative Loafing*, whose cover story on local drug enforcement was illustrated by a photo of a marijuana plant. Said Assistant Chief Butch Parker, "(Searcy) thinks he had a reasonable suspicion, and we do, too." (The woman consented to the search, and nothing illegal was found.)

2. The 9th Circuit has decided an important issue left open by the Supreme Court. In *Anderson v. Calderon*, 68 Cr. L. 178 (9th Cir. 11/17/00), the Court held that a confession obtained in a capital case in violation of the 48-hour rule

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of *Gerstein v. Pugh*, 420 U.S. 103 (1975) and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) was admissible. The Court made it clear that the delay of 3 days over a weekend from the seizure of the person until the conducting of probable cause determination at arraignment was unreasonable and in violation of the Fourth Amendment. The Court also held that the appropriate remedy is suppression. ""T]he appropriate remedy for a *Mclaughlin* violation is the exclusion of the evidence in question—if it was 'fruit of the poisonous tree.'" However, using the factors of *Brown v. Illinois*, 422 U.S. 590 (1975), including the giving of *Miranda* warnings, the proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the misconduct by the official, the Court held that the confession was not the fruit of the poisonous tree and declined to suppress the confession. Significantly, the Court relied upon the petitioner's own explanation for his confession: he confessed because of an agreement he had with people who assisted in his escape that he would clear the people who had become suspects if he were ever arrested. Also significantly, a psychiatric interview which had also occurred during the 3-day delay was viewed differently. "The deputies took advantage of and exploited the delayed arraignment to generate this evidence, and we conclude that the causal link between the detention and the evidence required to invoke the exclusionary rule does exist." However, this did not result in the grant of the writ due its being viewed as not contributing to the verdict.

3. *United States v. Oaxaca*, 68 Cr. L. 180 (9th Cir. 11/15/00). The police who have probable cause to arrest a suspect must have a warrant if they want to make the arrest when the suspect is inside his garage. The Court rejected the government's argument that by leaving the door of the garage open the suspect was inviting the public to enter. The Court also rejected the government's *United States v. Santana*, 427 U.S. 38 (1976) argument that the police could arrest the suspect because he was at the threshold of the protected area.

4. *State v. Gerschoffer*, 68 Cr. L. 205 (Ind. Ct. App., 11/28/00). Under the Indiana Constitution, the police may not conduct sobriety checkpoints. Rejecting *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), the Court held that probable cause or individualized suspicion is required prior to a stopping at a sobriety checkpoint.

5. *State v. Elison*, 68 Cr. L. 206 (Mont., 11/16/00). There is no "automobile exception" to the warrant requirement under the Montana Constitution, and thus a search of a vehicle for which there was probable cause was illegal. "[A] warrantless search of an automobile requires the existence of probable cause as well as a generally applicable exception to the warrant requirement such as a plain view search, a search incident to arrest, or exigent circumstances."

6. *United States v. Osage*, 688 Cr. L. 281 (10th Cir. 12/15/00). The Tenth Circuit has held that a police officer that has consent to search an area may not destroy a container during the search. Thus, when an officer opened a can of tamales finding methamphetamine there, he did so illegally despite the defendant's consent. Further, the Court stated that silence during the destruction of the can should not be construed as consent.

7. *State v. James*, 68 Cr. L. 283 (La. 12/8/00). An officer who made a legitimate *Terry* stop went too far when he seized a film canister and opened it, finding cocaine. The Louisiana Court relied upon both *Bond v. United States*, 529 U.S. 334 (2000) and *Minnesota v. Dickerson*, 508 U.S. 366 (1993) in saying that because a film canister has many purposes, it was not immediately apparent as contraband, and thus the seizing and opening of it were illegal. ■

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I am only one; but still I am one. I cannot do everything, but still I can do something; I will not refuse to do something I can do.

-Helen Keller

CAPITAL CASE REVIEW

by Julia K. Pearson

The two United States Supreme Court cases discussed below have more application for those professionals doing post-conviction work. While the Sixth Circuit cases also focus more on post-conviction issues, both have educational value for trial professionals.

United States Supreme Court

***Glover v. United States*, United States Court of Appeals For the 2nd Circuit , 2001 U.S. App. Lexis 860**

Majority: Kennedy (writing) for a unanimous court

Glover was convicted of labor racketeering, money laundering and tax evasion and the federal Probation Office recommended that his convictions be grouped together under a federal Sentencing Guidelines provision which allows for the grouping of counts with "substantially the same harm." The US Attorney objected on the grounds that the money laundering count could not be grouped. After a hearing in which Glover's counsel did not present written or extensive oral arguments to the contrary, the district court agreed with the government. Glover's sentence was increased two levels, or between 6 and 21 months. Glover's trial attorneys were his appellate attorneys also. They did not include the grouping issue in his appellate briefs. After argument, but before the opinion came down, the Seventh Circuit ruled that in some circumstances, grouping of money laundering offenses was proper.

After Glover's direct appeal was affirmed, he filed a pro se motion to correct his sentence under 28 U.S.C. §2255, arguing that counsels' failure to assert the grouping issue was ineffective assistance of counsel, and arguing that he was prejudiced by the increase in the amount of time he would have to serve. The District Court denied the motion, stating that such an increase was not significant enough to amount to prejudice under the *Strickland v. Washington*, 466 U.S. 668 (1984) standard. The Seventh Circuit affirmed, using the same reasoning.

In *Williams v. Taylor*, 120 S.Ct. 1495 (2000), the Supreme Court held that *Lockhart v. Fretwell*, 506 U.S. 364 (1993), did not supplant or modify *Strickland v. Washington*, 466 U.S. 668 (1984), and was to be applied on its limited facts. Since the Seventh Circuit decided Glover's appeal before the Supreme Court made its Williams ruling, a focus of the opinion was naturally on the analysis used by the Seventh Circuit and found that although *Lockhart* held that in some circumstances, a mere difference in outcome would not amount to *Strickland* prejudice, such is not the case for Glover: a prejudice analysis must be performed when ineffective assistance of counsel deprives a defendant of a substantive or procedural right to which he is entitled. Supreme Court caselaw has long held that the Sixth Amendment is implicated when a defendant is subject to any amount of jail time for a crime with which he has been charged. *Glover*, slip op. at *11, citing *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Scott v. Illinois*, 440 U.S. 367 (1979). Moreover, the Seventh Circuit did not engage in well-reasoned analysis. While the amount by which a person's sentence is increased can be a factor in an ineffective assistance of counsel determination, it cannot be used as a measure of prejudice because there is no means of dividing that increase which is prejudicial and that which is not. *Glover*, slip. op. at *12.

***Artuz v. Bennett*, 121 S.Ct. 361 (2000)**

Majority: Scalia (writing) for a unanimous court

The Supreme Court held that a post-conviction action is "properly filed" "when it is delivered to, or accepted by, the appropriate court officer for placement into the official record", which means that such a pleading must comport with the "rules governing filings", such as the form of the document, time limits, the requisite fees and other such rules. *Id*., at 363. In Kentucky, those rules are found at CR 3.02 (fees), where applicable, and CRs 10 and 11. Counsel filing actions under RCr 11.42 are also advised to read the Kentucky Supreme Court's opinion in *Bowling et al. v. Commonwealth*, Ky., 926 S.W.2d 667 (1996) (Circuit Court does not have jurisdiction over post-conviction claims until a Motion under RCr 11.42 has been filed).

After the Anti-Terrorism and Effective Death Penalty Act (AEDPA) was signed into law in 1996, many questions regarding the Congressional definitions of provisions of the act appeared. In this case, the Supreme Court answered one of those questions: whether a state post-conviction pleading which contains procedurally barred issues is "properly filed" within the meaning of the AEDPA.

After Bennett was convicted of numerous crimes, he filed a state post-conviction pleading in the New York courts, and was denied relief in 1991. In 1995, he filed a Motion to Vacate the Judgment, which the trial court denied on November 30 of that year. Bennett claimed that, despite several written requests, he had never received a copy of the order denying his motion. In February 1998, he filed a habeas petition, which was dismissed by a judge in the Eastern District of New York as being untimely because it was filed more than one year after the AEDPA became effective. *Artuz*, 121 S.Ct. at 362-363. Among other issues, the Second Circuit stated that Bennett's habeas petition was "properly filed" within the meaning of the AEDPA because it complies with those rules governing

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properly filed state post-conviction actions under state law.

The State of New York contended, to both the Second Circuit and the Supreme Court, that a petition for state post-conviction relief cannot be properly filed unless it complies with state procedural bar requirements which could bar consideration of some or all of the petition.

The state's contention that a properly filed petition is that which comports with the rules regarding procedurally defaulted claims is erroneous. An "application" is the vehicle by which claims are presented; only "claims" or issues within that application can be procedurally defaulted. *Id*., at 364, citing *Coleman v. Thompson*, 501 U.S. 722 (1991) and *Wainwright v. Sykes*, 433 U.S. 72 (1977).

Sixth Circuit Court of Appeals

Abdur'Rahman v. Bell, 226 F.3d 696 (6th Cir. 2000)

Majority: Siler (writing), Batchelder (concurrence)
Minority: Cole (concur and dissent)

In this habeas case filed before the AEDPA became law, the Sixth Circuit reversed the district court's grant of a new sentencing phase and affirmed the decision that guilt phase ineffective assistance of counsel did not occur. The majority declined to determine whether, in light of (*Michael Wayne) Williams v. Taylor*, 120 S.Ct. 1479 (2000), the AEDPA removed a federal district judge's inherent ability to order an evidentiary hearing. This case is analyzed because of the discussion in the majority and dissenting opinions regarding whether, in the face of much aggravating evidence, including a murder committed while in federal prison, any mitigation would be helpful to the defendant.

The continuing lesson from this case is to give a complete picture of the client's life, linking the events of his/her life with his/her crime and violence. What is only a dissent in this case could become a majority opinion with the persuasion of just one more judge.

Abdur'Rahman was convicted of murder, assault with intent to commit murder and armed robbery in 1986. He was sentenced to death for the murder and two consecutive life terms for the other crimes. At trial, Abdur'Rahman argued that he committed the crimes because he was under the influence of a group called the Southeastern Gospel Ministry. In fact, another member of the SEGM, Allen Boyd, for whom he worked at the Baptist Publishing Board, was alleged to have furnished the shotgun used to threaten the victims and gave assistance after the offense. After Abdur'Rahman was indicted, Boyd asked an attorney, Neal McAlpin, to represent him.

However, McAlpin, discovering that Boyd would be paying his fees and that he may have had a role in the incident, declined representation, based upon the conflict of interest created. An associate of Boyd's then asked another attorney, Lionel Barrett, to represent Abdur'Rahman. Barrett agreed to do so, for the fee of $15,000, $5,000 of which was paid to him soon after his agreement. No other money was forthcoming. Barrett admitted at a post-conviction hearing that he had decided when he received the retainer not to do any work on the case until he received the rest of his fee. *Abdur'Rahman*, 226 F.3d 696, 700 (6th Cir. 2000). Virtually no mitigation evidence was presented in a case where the aggravation was great.

In state post-conviction, the trial court indeed found that counsel failed to investigate his client's background and mental history, but that no prejudice resulted because the mitigation was both helpful and harmful and the amount of aggravation would have far outbalanced any mitigation presented. The federal district court held an evidentiary hearing and later, partially granted the writ, based on ineffective assistance of counsel at the penalty phase. *Abdur'Rahman v. Bell*, 999 F.Supp. 1073 (M.D. Tenn. 1998).

On appeal to the Sixth Circuit, the state of Tennessee argued that the district court did not follow correct procedure in its presumption of the correctness of the state court findings of fact analysis because it did not provide a statement of its reasons for doing so. *Abdur'Rahman*, 226 F.3d at 701, citing *Sumner v. Mata*, 449 U.S. 539 (1981) and *Mitchell v. Rees*, 114 F.3d 571 (6th Cir. 1997) and 28 U.S.C. §2254(d) (repealed). The panel agreed with the state's argument and found that the presumption of correctness should have been applied to the state findings.

As to prejudice as a result of counsel's failure to do anything, the Tennessee trial and appellate courts thought that use of Abdur'Rahman's long history of violent behavior and anti-social personality disorders in a mitigation case would not have been good trial strategy at any phase of the trial. Abdur'Rahman argued, under *Lockett v. Ohio*, 438 U.S. 604 (1978), and *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), that the conclusion was erroneous. The panel agreed with the state's arguments and decisions and also found that the new evidence presented at the evidentiary hearing did not contradict the state fact-findings, but rather, supplemented them.

Heinous, Atrocious or Cruel Aggravator

The jury was instructed that it could find an aggravator if it found that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind, which the trial court then defined for the jury. *Abdur'Rahman*, 990 F.Supp. 985, 987. The panel found that any error present in the instruction was harmless because it did not have a sub-

stantial and injurious effect or influence on the verdict. Since Tennessee requires that jurors weigh aggravation against mitigation, normally, a new sentencing calculus would have to be performed. *Abdur'Rahman*, 226 F.3d at 711, citing *Coe v. Bell*, 161 F.3d 320, 334 (6th Cir. 1998). Amazingly, the court's analysis focuses on the lack of mitigation presented at trial as the reason reweighing did not have to take place, because "even if the heinous, atrocious or cruel aggravator is removed from the calculus, there is no mitigating evidence to weigh against the remaining. . .aggravators." *Id*.

Jury Unanimity on Mitigation

The panel also took up the question of whether the penalty phase instructions led the jurors to believe they had to be unanimous in finding mitigation. Abdur'Rahman argued that the proximity of the words "unanimous" and "mitigating circumstances" could have led the jury to such a conclusion. As in the *Gall* opinion decided on October 31, 2000, the panel found no error in the instructions. "No statement [in the penalty phase instructions] can be said to require unanimity as to the presence of a mitigating factor." *Id*., 712.

Guilt Phase Ineffective Assistance

Abdur'Rahman argued that because of counsel's conflict of interest, he did not have to show prejudice from his counsel's ineffective assistance. The panel found that while *Cuyler v. Sullivan*, 446 U.S. 335 (1980), did state as much, Abdur'Rahman had not made the requisite showing that counsel "actively represent[ed] competing interests." *Id.*, at 714, citing *Cuyler*, at 350.

Dissent

Judge Cole's dissent focused on how counsel's failure to investigate resulted in a breakdown of the adversarial process for Abdur'Rahman: counsel failed to ask the court to find his client indigent or for funds for investigation or an independent mental health expert; failed to investigate the nature of Abdur'Rahman's prior convictions, including the murder; failed to contact and present family members who were willing and able to testify; failed to investigate any mental health, school, military or prison records.

In response to the assertion that defense counsel nevertheless made a reasonable decision not to present the evidence, Judge Cole reminded the majority that no "strategic decision" is reasonable when it is made in the face of no investigation and reasonable choices made therefrom. "*Id*., at 720, quoting *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). It is important to continue debunking the state when it raises this defense in post-conviction actions.

Judge Cole also criticized the majority's statement that Abdur'Rahman was not prejudiced by counsel's failure to prepare for the penalty phase because he could not show that the outcome would more than likely have been different. The correct standard is whether there is a "reasonable probability" that, with all the evidence before it, a jury or an appellate court performing its reweighing function, would have found that balancing aggravation and mitigation resulted in a sentence of less than death.

Such could not occur here: "essentially no mitigating evidence" was presented to the jury**.** Only Abdur'Rahman and his wife testified at the penalty phase. Their testimony focused on the circumstances of the crime and none of the following: his life, horrific abuse at the hands of his stepfather and mental health problems (including post-traumatic stress disorder, possible schizoid personality, paranoia), the administration of anti-psychotic medications while in prison, and three different professionals' diagnosis of possible borderline personality disorder. In addition, Abdur'Rahman's wife could have testified that her husband had conversations with non-existent people, banged his head against the wall and believed that she would give birth to the next Messiah.

Furthermore, the majority overlooked the fact that the jury already knew about much of Abdur'Rahman's violence and criminal convictions, which could not have been used as additional aggravation. In short, the jury was not presented with a complete picture of who Abu-Ali Abdur'Rahman was.

***Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000) (*en banc*)**

Remand: Merritt (writing), Martin, Moore, Daughtrey, Cole, Clay, Gilman
No remand: Siler (writing), Nelson, Ryan, Boggs, Norris, Suhrheinrich, Batchelder

Phillip Workman was days away from execution in 2000 when the Sixth Circuit took his case for *en banc* consideration. In this opinion, which affirmed the 3-judge panel's opinion on a 7-7 tie, the Court examined Workman's motion to recall the Court's mandate and remand for further proceedings in the district court regarding two items of newly discovered evidence. Emphasizing its role not as fact-finder, but as "neutral magistrates", seven members of the Court found that because both claims presented issues of material fact, remand was required. *Id*., at 338. The same judges have provided impetus for raising an issue not often discussed or raised: fraud on the court.

In *In re King*, 190 F.3d 479 (6th Cir. 1999), the Sixth Circuit had held that once a motion to file a second or successive habeas petition had been denied, no party could seek further review, including *en banc*, of that decision. The seven members of the Court who believed remand was necessary found *King* inapplicable, because the issues were different. The issue in

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this case was the motion to recall the mandate, which is procedurally different from a motion to file a second or successive petition.

The Court focused on one factor in *Calderon v. Thompson*, 523 U.S. 538 (1998), in which the Supreme Court found that federal courts of appeals have an inherent power to recall their mandates: that of a fraud on the court, which "call[s] into question the very legitimacy of the judgment." *Workman*, 227 F.3d at 334, citing *Calderon*, at 557 (emphasis removed). The elements of a fraud on the court include "conduct: 1) on the part of an officer of the court; 2) directed to the judicial machinery itself; 3) that is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; 4) that is a positive averment or a concealment when one is under a duty to disclose; 5) that deceives the court." *Id*., at 336, citing *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993).

The issue in this case came from two pieces of evidence: 1) a recantation and 2) an x-ray.

The sole eyewitness testified he saw the entire altercation between Workman and a group of Memphis police officers and had seen Workman shoot the dead officer. He told successor counsel a different story: that he was hiding in his car and, while he saw Workman and the officers struggling, he was hiding in his car and was unable to see exactly what happened or who shot the officer. He also said he was under the influence that night. Those statements agreed with the statement he had given the police on the night of the incident. The witness explained the difference in his testimony and the two similar statements by saying that the police had "corrected" him, threatened him with arrest and possible death if he did not testify.

The medical examiner's office had taken an x-ray of the officer's body during the autopsy, which showed that the bullet which passed through his body did not fragment. The evidence was not produced at trial. In successor proceedings, a copy of the x-ray was finally given to counsel. After examining the x-ray, an expert hired by Workman found that the wound was more consistent with the .38 caliber ammunition carried by the police than with the .45 hollow-point bullets Workman had.

Dissent

An equal number of judges found that although the x-ray may be considered "newly" discovered", it added nothing new to the case. They also believed the recantation had been dealt with in the original petition.

The x-ray had not been subpoenaed for the trial, but for the evidentiary hearing held on the habeas petition. Furthermore, affidavits presented by an expert in early 2000 appeared to contradict not only themselves but also other evidence. In short, the only "new" addition to the evidence adduced through earlier proceedings was that the bullet did not fragment in the victim's body. The dissent found that if a fraud on the court had been committed, it was by the medical examiner's office in Memphis, not by the prosecution.

Comment On The Dissent's Analysis

It must be noted that the Supreme Court has held that prosecutors must "learn of any favorable evidence known to the others acting on the government's behalf...." *Kyles*, 514 U.S. at 437. Certainly, agents for the government include a local or county medical examiner's office. Apparently, at least the seven judges who believed a hearing was necessary found that even agents of the government were included in the criteria for finding a fraud on the court. The dissent address the *Brady* claim by saying only that because Workman had not included the claim in his *en banc*, brief, he must have seen that the issue was precluded. Workman has a Petition for Certiorari pending. ■

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Each of us really understands in others only the feelings he is capable of producing himself.

-Andre Gide, 1921

Searching for Mary Jane: Can Testing for Marijuana Establish Impairment? (Part Two: Looking in the Lab)

by Brian Scott West

(Last issue's district court column discussed the Horizontal Gaze Nystagmus field sobriety test and its ability – or inability – to establish that a motorist was operating a vehicle while under the influence of marijuana. This issue continues with a critical look at the use of laboratory urine testing to establish the same thing, and briefly discusses the potential impact of "second hand smoke" and what impact being "high" on marijuana actually has on driving ability. The article continues the outline sequence began in Part One by starting the headings with Roman Numeral II, and starting the endnotes with no.9.)

II. Looking for Mary Jane in the Lab: Testing for Marijuana in the Urine

In the last issue of *The Advocate* there was a reprint of a uniform offense citation wherein a Kentucky State Police trooper opined that a motorist had "failed" the horizontal gaze nystagmus test (notwithstanding the fact that marijuana does not cause nystagmus. Also on the citation was a notation that a urine test was taken (but not a breathalyzer or blood test). Presumably, the purpose of requesting the test was to confirm the presence of marijuana in the urine.

If the officer requesting the test merely wants to determine whether the motorist is or has been a user of marijuana, and if so, argue that it is more likely that a marijuana user would "smoke and drive," then a positive urine test may have relevance in a court proceeding (although such relevance may be substantially outweighed by the danger of undue prejudice to the case). However, if the officer is presuming that the *mere presence* of marijuana in the urine *proves* that a motorist was driving under the influence, then the officer is having a pipe dream. The presence of marijuana in the urine cannot prove that someone is under the influence of marijuana at any particular time – it can only establish that the subject has used marijuana at some time in the recent past. Neither can a positive urine test establish how much marijuana has been consumed, or how many times marijuana has been used.

Yet, in many prosecutions a positive-for-marijuana urine sample is considered the acid test for determining whether a defendant was guilty of DUI in a particular instance. To persuade otherwise – whether it is a judge at a suppression hearing or a jury at trial – the defense counsel must know the science behind urine testing and how to communicate it briefly and succinctly.

A. What Happens when Marijuana is Smoked?

Marijuana's active ingredient is tetrahydrocannabinol (THC), and is the substance which causes the euphoria or "high" when marijuana is smoked. When a marijuana cigarette, or "joint" is smoked, the intoxicating effects usually begin immediately, within two to three minutes, peak within ten to twenty minutes after smoking, and have a total duration of about ninety minutes to two hours.[9] At high doses, symptoms persist for three to four hours. *Id.* How long THC stays in the body depends mostly on the user and mode of use, but generally, half of the THC that comes from smoking pot passes out of the body within a day.[10] The other half stays connected to blood proteins, enters cells, or moves into fat before leaving the body for good. *Id.*

Like most drugs (alcohol and amphetamines being notable exceptions), THC does not appear in the urine as an active ingredient, but rather appears as "metabolites," what is left after the drug has metabolized into the body.[11] How long THC metabolites can remain in the urine varies widely according to different sources. An internet question and answer site sponsored by Columbia University which responds to inquiries about drugs and alcohol states that THC generally remains in the urine for one month. *See* n. 10, *supra*. An article entitled "Detecting Marijuana Through Urine Testing," located on the internet at the Schaffer Library of Drug Policy, *see* citation at n. 9, *supra.*, separates into four categories the time it takes the body to "cleanse itself" from detectable urine traces: For a single use, three days; for moderate use (four times a week), five days; for heavy use (daily), ten days; and for chronic heavy use, twenty-one to thirty days. *Id.* Kevin B. Zeese, in his *Drug Testing Legal Manual: Guidelines and Alternatives*, *see* n. 11, *supra*, states that metabolites of marijuana are detectable in chronic users for an average of 31 days, with a range of 4 to 77 days, and in occasional users for an average of 13 days with a range of 3 to 29 days. *Id.* at p. 3.

Because of this wide range for detection of metabolites, it is impossible to determine accurately when a particular individual smoked or ingested marijuana, or how much. All that can be ascertained is that a particular person, sometime in the recent past, inhaled or ingested marijuana. While this may be enough to establish a probation or parole violation, it is in-

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sufficient to prove impairment at a particular time. Moreover, it is not only the range of duration that makes it impossible to pinpoint when a person smoked marijuana; the simple fact that THC is measured in metabolites – a waste product – makes the urine sample useless for proving impairment at a particular time.

B. Why Metabolites Cannot Prove Impairment

There are many authorities, including some case law, which clearly state that the presence of metabolites in the urine cannot prove impairment at any particular time. While most of these authorities are concerned with drug testing of employees in the work place for safety reasons, one Kentucky case which addresses the issue does so in the context of wanton murder and first degree assault where the wanton conduct was alleged to be operating a motor vehicle while under the influence of drugs and alcohol.

1. Treatises and Articles

According to Zeese's *Drug Testing Legal Manual*, a treatise available in hard copy and on the internet, "the greatest shortcoming of urine tests to determine recent use of illicit drugs is their inability to determine when the drug was taken and their inability to distinguish among intoxication, under-the-influence, or impairment." *Id.* at p. 1. Reprinting the findings of the *Report of the Maine Commission to Examine Chemical Testing of Employees*, Pp. 20-21 (Dec. 31, 1986), which advocated a total ban on the use of urine tests in employment, Zeese explains why urine tests are not able to show impairment at the time a test is taken:

> Most of the popular urinalysis testing methods actually do not analyze the urine to determine the presence of the substance of abuse. Rather, they measure the presence of a metabolite of that substance…It is difficult to accurately relate the level of drug metabolites in the urine to impairment since individual metabolic rates differ, and the substance levels in urine can be affected by many different factors.
>
> Even if a testing method…were to test for the presence of the actual drug (assuming some of the substance remains unmetabolized by the body), it would be impossible to correlate the presence of the drug itself to actual impairment at that time. This is again due to the fact that different persons metabolize substances at different rates….
>
> The only standard of impairment generally accepted at present is the 0.10 percent blood alcohol concentration level; note that this standard is set upon *blood* concentration levels. Due to the possible variations inherent in urine testing, it is extremely difficult, and perhaps impossible, to establish any presumptive level of impairment based on a urine test.

The American Civil Liberties Union, which publishes the article "Drug Testing: A Bad Investment,"[12] states:

> Whether or not drug use impacts on workplace performance, drug testing is a poor solution because *drug tests do not measure impairment.* Rather than looking for drugs, drug tests look for drug metabolites – by products that are excreted from the body days or even weeks after a drug was ingested. As a result, drug tests mainly identify drug users who may have used a drug on the weekend, as they might use alcohol, and who are not under the influence of a drug while at work or when tested. *Id.* at p. 9.

An hour's work on the internet will yield literally dozens of sources which agree with Zeese and the ACLU. I have not found a single document which argues that the presence of metabolites in the urine can pinpoint the usage of marijuana to any particular time.

2. Case Law

The courts have not been blind to the science of drug testing for metabolites either, but have readily acknowledged the inability of metabolites to prove impairment when a proper record has been preserved.

In *Jones v. McKenzie*, 628 F. Supp. 1500 (D. D.C. 1986), a federal district court found "arbitrary and capricious" the decision of a school system to terminate a bus driver because the driver had tested positive for marijuana metabolites, in spite of the fact that the school system's rules clearly prohibited detrimental conduct on or off school premises that may affect one's work performance. Relying upon the manufacturer of a urine test kit's directions, and admissions made by the school system, the court found that "metabolites may be retained in an individual's system for days and weeks," *Id.* at 1503, and that a positive urine test "does not evidence either use or being under the influence while on school premises in violation of [the school's policy.]" *Id.* at 1505.

In *Bush v. Commonwealth*, Ky., 839 S.W.2d 550 (1992), the Kentucky Supreme Court *almost* reached the issue of whether it was error to attempt to use a positive urine test for marijuana and amphetamines to prove the necessary wanton conduct in a wanton murder and first degree assault case. In that case the Defendant had been involved in a motor vehicle crash which

killed the driver of another vehicle and injured four others in the two cars. The prosecution's evidence consisted of a blood test showing a blood-alcohol concentration (BAC) of .13% and a urine test which showed traces of marijuana and amphetamines. Both of these tests were loudly touted by the prosecution en route to obtaining convictions for the indicted offenses.

On appeal, the Defendant asserted that the urine test should have been excluded from the trial as irrelevant evidence as the Commonwealth had failed to show that the drugs were present in amounts sufficient to impair driving ability, or that they were present in his blood at the time of the accident. The defendant's contentions were based upon the testimony of a chemist called by the Commonwealth who stated that he could not say that the drugs were present in sufficient quantities to impair, and that in any event, because the drugs had passed from the blood to the urine, the date and time of ingestion could not be calculated. *Id.* at 555.

The Supreme Court, after reversing the case on other grounds, stopped short of saying that the introduction of the urine test results were even harmless error, and stated instead that, due to the presence of a BAC of .13%, *if* it was error to admit the test, it was harmless. However, on remand, the Court instructed the prosecution in a retrial not to argue to the jury that the Defendant was under the influence of marijuana and amphetamines "if to say so goes beyond a reasonable inference from the evidence." *Id.* at 558.

A partial dissent written by Justice Leibson and joined by Justice Combs and Chief Justice Stephens (joining in the urinalysis portion only) disagreed that the error in admitting the results of the urine test was harmless, but was both irrelevant and inflammatory, and should have been excluded. The passage concerning the urinalysis is worth quoting in its entirety:

> The police chemist admitted that no drugs were found in the appellant's blood and that the urine levels of amphetamine and marijuana were unreliable as they relate to impairment. He could not give any opinion as to when the amphetamines or marijuana were ingested, and stated their presence in the urine and not in the blood means that it had passed from the blood system into the urine, meaning there was no way to determine if there was any impairment when the accident occurred.
>
> This last fact is the key fact. The evidence failed the test of relevance because there was nothing to infer that the presence of marijuana that the presence of marijuana and amphetamine as found in the urine made the ultimate fact at issue, whether appellant was driving under the influence, any more or less probable. Certainly we have not reached the sorry state of affairs where prior use of marijuana and amphetamines, unrelated to the accident, should be considered evidence to prove wanton conduct on the occasion of the accident.
>
> Assuming there is some slight reason for making an argument to the contrary, considering the inflammatory effect on the listener of evidence suggesting drug abuse, the unduly prejudicial and inflammatory nature of the evidence so far outweighs probative value that for the trial court to permit such evidence is an abuse of discretion.

Justice Leibson also stated that a BAC of .13% — while evidence of intoxication – is not so extreme that testimony suggesting the motorist used other drugs could not possibly have affected the outcome of the case.

Curiously, the majority opinion was also written by Justice Leibson, and was joined by Justices Lambert, Stephens, and Combs, the last two of which had also joined Leibson's partial dissent. Had any other justice also joined in the discussion regarding the urinalysis, Justice Leibson's partial dissent would have been part of the majority opinion.

It is unknown what a majority in this 4-3 decision would have decided had there been no involvement of alcohol in this case. Certainly, the fact that the case was already being reversed on other grounds – with instructions on retrial not to characterize the defendant as being under the influence of drugs – lessened the importance of the issue of whether the urinalysis evidence was too prejudicial, if not mooting the issue entirely. Had the *only* evidence of driving under the influence been the presence of drug metabolites in the urine, the error, assuming the Court would have found error, would not have been harmless, and the issue of relevance versus prejudice would have been squarely decided, not avoided.

As it stands, we will have to wait for a Kentucky Supreme Court decision on the issue of whether a positive urine test for drugs is irrelevant, or if relevant, is so unduly prejudicial and inflammatory that its probative value is substantially outweighed by the prejudice.

C. What does a Negative Urine Test for Marijuana Mean?

For sake of completeness and intellectual honesty to a discussion of the issue of urine tests for drugs, the question must be addressed of "what probative value, if any, does a

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negative urine test for drugs have?" By implication, if metabolites in the urine indicate that marijuana has already been metabolized out of the blood stream, doesn't a *lack* of metabolites indicate that the drug has *not* metabolized out of the blood, providing, of course, there is proof of ingestion of an intoxicating amount of marijuana shortly before administering the test? The answer is "yes," and is one of the reasons the ACLU discredits urine testing as a method of detecting drug abuse in the workplace. As pointed out in the ACLU publication, precisely *because* it takes several hours for drug metabolites to appear in urine, drug tests may *miss* drug users who are under the influence of drugs at the time the test is given. *Id.* Zeese, in his *Drug Testing Legal Manual* agrees, and states that if an individual has ingested a drug only very recently, he will test negative because the drug has not yet been metabolized and reached his urinary system, but he will at the same time be very much impaired by the drug." *See* n. 11, *supra*, at p. 2.

Theoretically, then, if a police officer pulls over a motorist driving erratically, and then smells marijuana smoke, a negative urine test would be more probative of marijuana impairment that would a positive one. At least then the officer could place the marijuana ingestion at a time within the last few hours, and with the other evidence possibly persuade a jury that the driver must have been impaired while driving erratically.

Practically, however, a prosecutor may be reluctant to use a negative test to prove impairment, especially if there is an abundance of other independent evidence which demonstrates impairment. A person who *never* uses pot will also have a negative test (unless he has inhaled marijuana smoke second hand, as discussed below). Thus, for a jury or judge to believe that a negative urine test is indicative of drug impairment, there will have to be evidence which establishes beyond a reasonable doubt that the defendant was ingesting marijuana, and absent a confession or eye-witness testimony of recent pot use, this evidence is hard to develop:

"Smelling" pot from the window of a vehicle does not necessarily indicate recent pot-smoking, or even that it was the driver who did the smoking: marijuana smoke (and for that matter, tobacco smoke) smells stale even when fresh and can linger on clothing or cloth fabric in an automobile for days. Isn't this why hotel rooms have non-smoking rooms, because the odor from one tenant's cigarette can bother new tenants for days to come?

Finding a spent roach, not still warm to the touch, is evidence only that marijuana was smoked in the car at some time, but not necessarily recently.

As argued in part one of this article, the horizontal gaze nystagmus test is inapplicable to discovering marijuana use. Testimony that a motorist crossed a center-line isn't a reliable litmus test that someone's mental faculties or physical coordination is impaired. People cross center-lines all the time.

In summary, in order to overcome the natural presumption that a negative urine test for marijuana means that the defendant did not ingest it, the prosecution would have to put on such powerful evidence of marijuana ingestion that it would not even need the inference of a negative test in the first place. Nevertheless, defense counsel need to be aware of the potential inference that can be drawn from a negative urine test, lest an attempt to use the negative test backfires on cross-examination by the Commonwealth, who could argue that the negative result is consistent with recent use of marijuana.

III. The "Second Hand Smoke" Excuse

What about the client-driver who insists that he never smokes the stuff, he was just in the car with some others who did, and any positive urine test has to be the result of his passively inhaling the smoke of others? I have heard this explanation before, and admittedly have had great reluctance to urge this defense in front of the judge or prosecutor. Notwithstanding the prevalence of second hand smoke tobacco lawsuits, and the plethora of available medical literature which supports the notion that prolonged exposure to the smoke of others can cause ill health effects, I have never bought into the notion that a short term exposure to marijuana can show up in a urine test.

Well, that shows how much I know. An anonymous inquirer to the internet site on alcohol, nicotine and other drugs sponsored by Columbia University's Health Education Program, *see* cite at *supra* n. 10, asked the question whether second hand smoke would "show up in pee tests?" The question was purportedly from a military person who had attended a party where his friends had all been smoking pot, and then afterwards was notified that he was to report for a random drug screen. His question yielded the following response on March 20, 1998:

> [S]econd-hand marijuana smoke – buzz producing, or not – can show up on urine tests, but it will only produce a positive result in the first day or so after breathing in the smoke. And, by the way, that smoke would have to be so thick that it would irritate the eyes of both smokers and passive smoke breathers.

To cast that response in the light most favorable to the defense attorney and his client, it is possible that a non-buzz producing amount of marijuana can show up in the urine test, even if it makes one's eyes red (which is another sign that police officers use when attempting to determine if someone is high on marijuana.)

Further support for the "second hand smoke" excuse can be found in *Jones v. McKenzie, supra,* where the court relied upon the affidavit of a witness which described the limitations of the EMIT Cannabinoid Urine Assay manufactured by the Syva Company. The Court found that "the test does not indicate with respect to marijuana whether the ingredient was ingested by active use or as a result of passive inhalation in the presence of others who were smoking marijuana." *Jones, supra* at 1503. So far, this writer has been unable to obtain a copy of the EMIT user's manual or instructions for using the test to determine whether the manufacturer makes any comments about second hand inhalation of smoke. Even more interesting, though, would be the protocols and procedures, if any, used by the actual laboratory in a given case, which describe the limitations of a urine test and the conclusions which can be made from a particular result.

The driver who knowingly and voluntarily allows others in his car to light up a joint may not be able to insulate himself from criminal responsibility in the event he gets high on the smoke and gets caught driving while impaired. Nevertheless, if the defendant is faced with having to explain away a positive urine test, after being pulled over in a smoke-filled car, a judge or jury may be more forgiving if it thinks that the positive is the result of bystander smoke rather than a counter-culture lifestyle. This would be especially true if there is an expert available to testify that bystander smoke can cause "red-eye" without producing a buzz or otherwise impairing the driver.

IV. How does Marijuana Affect Driving Performance?

Until now, it has been assumed that the client's defense was that he was not impaired by or high on marijuana while driving, and the tests used by the authorities proved only that he had ingested marijuana – either intentionally or through second hand – at a time previous to his operation of a vehicle. But what about the situation where a client freely admits to you (and worse, has already admitted to the police) that he had a "slight buzz going on while driving, but not enough to affect my driving?" Is the case sunk? Do you just close your briefcase, admit responsibility, and focus your attention on trying to mitigate the damage?

Not necessarily. If you have the right jury and have the right set of facts, your client might be able to admit having a buzz and still be found not guilty. Assume for instance that your client was stopped because he had a broken taillight or expired tags (but not because he was weaving all over the road, or had just crashed into another vehicle). The police officer checks his license, and, smelling the odor of pot in the air, converts the case from a minor traffic violation to a potential DUI case. Your client admits that he had just smoked half of one joint, but he barely got a buzz and it hadn't affected his driving.

If this were an alcohol DUI case, your client might have a chance at persuading a jury that he had a buzz, but wasn't legally under the influence. Certainly, the jury will know that in an alcohol case drinking a beer or two will not necessarily cause someone to be drunk, or cause them to be under the influence. It is fairly common knowledge now that the legal limit for intoxication in Kentucky is 0.08% BAC, and that this was changed from 0.10% last year. People are aware that having a breathalyzer result equal to 0.08% or over amounts to driving under the influence. What might be less known are the presumptions in case of BAC's under the legal limit. Under the law, if there is a BAC of less than 0.05%, this results in a presumption that the defendant was not under the influence of alcohol. KRS 189A.010(2)(a). If there is a BAC of 0.05% or greater, but less than the legal limit, there is no presumption of driving under the influence one way or the other, and it is merely a factor to be considered with other evidence in determining the guilt or innocence of the defendant. KRS 189A.010(2)(b).

Many jurors are receptive to an argument that a driver having a BAC less than the legal limit was not under the influence and ought to be acquitted. Is there a way to correlate marijuana use with alcohol use in such a way that a jury could be persuaded that it is possible to smoke some pot in an amount which does not rise to level of being under the influence? There are no statutory presumptions based on differing levels of drug use, and most jurors will not have personal experience with marijuana upon which to rely in deciding whether its possible to have a buzz without being under the influence.

You need an expert, one who can introduce and explain the impact of the 1993 study entitled "Marijuana and Actual Driving Performance," conducted by Hindrik W.J. Robbe and James F. O'Hanlon, and sponsored by the United States Department of Transportation National Highway Traffic Safety Administration.[13] After a whopping introductory disclaimer by the Department of Transportation, the report begins with an a brief abstract that concludes with the following statement:

> This program of research has shown that marijuana, when taken alone, produces a moderate degree of driving impairment which is related to the consumed THC does. The impairment manifests itself mainly in the ability to maintain a steady lateral position on the road, but its magnitude is not exceptional in comparison with changes produced by many medicinal drugs and alcohol. Drivers under the influence of marijuana retain insight in their performance and will compensate where they can, for example, by slowing down or increasing effort. **As a consequence, THC's adverse effects on driving performance appear relatively small.** [Emphasis added.]

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The Executive Summary of the Report summarizes the results of three independent tests conducted by the authors. The first driving study was conducted on a highway closed to other traffic. Twenty-four subjects were required to smoke as many cigarettes as they could, continuously for fifteen minutes. Of the twenty-four subjects, six smoked one cigarette, thirteen smoked two, and four smoked three. The average amount of THC consumed, after adjustment for body weight, was calculated to be 308 mcg/kg of body weight. *Id.* at p. 3.

The test consisted of performing a road tracking test, maintaining a constant speed while keeping a steady lateral position between the delineated boundaries of the traffic lane. (Safety was ensured by the presence of an instructor inside the vehicle behind the wheel of redundant vehicular controls.) The primary dependent variable was the standard deviation of lateral position (SDLP), a universal standard in drug and alcohol influence tests which has been shown to be both highly reliable and very sensitive to the influence of drugs and alcohol. *Id.*

> After calculating the results of the test, Robbe and O'Hanlon concluded that:
>
> It appeared that THC's effects on SDLP were equivalent to those associated with BAC's in the range of 0.03-0.07%. Other driving performance measures were not significantly affected by THC. *Id.* at p. 4.

There, at last, is the correlation between smoking a couple of joints of marijuana and drinking alcohol. According to this study, subjects who smoked marijuana continuously for fifteen minutes had driving performances which correlate to those of driver's who had blood-alcohol concentrations below the legal limit, even as revised by the legislature last year.

The other two tests demonstrated similar results. Constraints of page limits and time do not allow this article to go into detail about them. However, the Executive Summary of the report concludes with the following:

> Marijuana's effects on driving performance were compared to those of many other drugs. It was concluded that THC's effects after doses up to 300 mcg/kg never exceed alcohol's at BAC's of 0.08%, and were in no way unusual compared to many medicinal drugs**….Evidence from the present and previous studies strongly suggests that alcohol encourages risky driving whereas THC encourages greater caution, at least in experiments.** [Emphasis added.] *Id.* at p. 7.

Put that in your pipe and smoke it! After all is said and done, at least one government sponsored study shows that casual smoking of marijuana as described in the study not only does not rise to the level of legal intoxication, when compared to illegal BAC's, but actually causes a driver to be more cautious, rather than take more risks. This report is worth a look, especially if you have time and resources to hire and expert who can explain all three of the tests, and relate it to the amount of marijuana your client has claimed to ingest, or is accused of ingesting.

V. Conclusion

In summary, looking for marijuana on the roadside or in the laboratory does little to answer the question whether a motorist was driving under the influence of marijuana at any particular time. The HGN does not work for marijuana, and the urine test cannot prove that a person has ingested a particular amount at a particular. Sometimes, it cannot prove even whether the person smoked the pot, or passively inhaled it while in the company of others. The urine test can only prove that a person has ingested pot in some way, in some amount, at some time in the past. While this may be enough to arouse the ire of a jury, it ought not to be considered probative of whether a person was under the influence.

Prosecutors and police officers who are certain that a motorist was driving under the influence should concentrate on proving the case by the defendant's conduct and actions, admissions, if any, and the testimony given by others. Judges should endeavor to make sure that trials are conducted using evidence, and not speculation derived from a "failed" field sobriety or lab test, which does not actually prove what it is purported to prove.

Finally, even when the evidence does prove that a person was "smoking and driving," the defense counsel should explore the possible defense that the driver was not legally under the influence, and his driving was not impaired, similar to the motorist who drinks one or two beers but is not legally under the influence of alcohol. While not every juror will be receptive to this defense, maybe some will, especially if the jury has the aid of a defense expert to help explain the effects of marijuana on driving.

If it appears that Parts One and Two of this article contain little legal insight or strategy suggestions, and rather seems to be nothing more than one long string cite of authorities on marijuana testing, then the article has achieved its intended purpose. How the defense lawyer might use this information in court could take up a whole issue in the advocate, and maybe none of the suggestions contained therein would be as good as the ones that the reader could come up with on his or her own. This writer has attempted to arm defense counsels with information to support an evidentiary suppression motion, to prepare effective cross-examination of police officers or lab technicians, to persuade a jury, or even a prosecutor, or to support a motion for funds for an expert for the defense. The defense lawyer must decide which way to best employ the available information,

given the circumstances and courtroom environment in which he or she practices.

VI. Acknowledgments

As noted in the article, every attempt has been made to select credible but persuasive sources, which can be easily found, copied and included in a motion to suppress or motion for expert funds. Where possible, the internet has been used, as most persons now have easier access to a computer than to a library which contains some of the publications mentioned. For that reason, the pagination of an article on the internet may differ substantially from the pagination of a hard copy, which I do not have for most of my sources.

As for the endnotes, I have listed the websites that contain these articles in as "user-friendly" a manner as possible. (When I graduated from law school, the *Harvard Law Journal Uniform System of Citation* was in its 14th edition, and did not contain protocols for citing to the internet.)

The idea for the urine testing part of the article originated from several colleagues who over the past year have persuaded me that the practice of using urinalysis to prove DUI is pervasive across the Commonwealth, not just in the region where I practice from, and from my copy of an extremely well written brief filed in an eastern Kentucky court in 1996 by Kathleen Franks, an assistant public advocate. Some of the sources cited in this article were footnoted in that brief.

The section on the "second-hand smoke" excuse arose out of research done in response to an inquiry of a colleague, assistant public advocate Bill Nesmith. Without his inquiry, I would not have expanded the research I was doing to include that issue.

Finally, thanks to Jeff Sherr, District Column editor, for his good judgment and editing of this article.

ENDNOTES

9. "Factors Influencing Psychopharmacological Effect, " from Marijuana: A Signal of Misunderstanding: The Technical Papers of the First Report of the National Commission on Marijuana & Drug Abuse, (Wash. D.C. , U.S. Govt. Printing Office, 1972). This information was extracted via the internet from the Schaffer Library of Drug Policy, located at www.druglibrary.org, at p. 2 of the article cited in this footnote. However, I have seen a brief filed in a district court case which cites a printed version of the same U.S. Govt. Printing Office document which lists the information as appearing at the document's Appendix, Vol. 1, pp. 20, 33, 38.

10. From "Go Ask Alice! Alcohol, Nicotine, & Other Drugs," an internet question and answer site sponsored by Columbia University's Health Education Program, located at www.goaskalice.columbia.edu © 1998.

11. *Drug Testing Legal Manual: Guidelines and Alternatives*, Sect. 3.02 "Persistence of Metabolites" published by Clark Boardman Company, Ltd., New York, NY, and available on the internet at www.commonlink.com/~olsen/DPF/DRUGTEST/zeese.html. Printed copies of the entire Drug Testing Legal Manual are available, but all cites in this article are to the internet version of the manual contained at the referenced address.

12. September, 1999, available at www.aclu.org, or through ACLU Publications, P.O. Box 759, Swedesboro, NJ 08085 at a cost of $2.00 per copy.

13. The abstract and executive summary, from which all quotes in this article originate, can be found at the Schaffer Library of Drug Policy, *supra* n. 25. ■

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It is easier to go to Mars or to the Moon than it is to penatrate one's own being.

-Carl Gustav Jung, 1956

Juvenile Supervised Placement Revocation Hearings: Negotiating and Litigating to a Better Process

by Gail Robinson

KRS 635.100, which permits the Kentucky Department of Juvenile Justice (DJJ) to conduct administrative hearings to revoke a juvenile's "supervised placement," has been in existence for many years but was infrequently used prior to 1998. Before April 15, 1998, DJJ had statutory authority to revoke supervised placement only for those juveniles who had been placed in a residential treatment facility. In the 1998 legislative session, DJJ requested statutory amendments which permit revocation of "supervised placement" for juveniles who have never been placed outside their homes. Additionally, DJJ proposed and the legislature enacted a statutory amendment which exempts these hearings from the Administrative Procedures Act.

In about May 1998, DJJ began holding these hearings more regularly. While KRS 635.100(4) provides that juveniles are entitled to be represented by counsel, DJJ initially simply advised juveniles in the letter concerning possible revocation of the right to retain counsel. Not surprisingly, few juveniles were represented by counsel at their hearings. Eventually, Juvenile Post Dispositional Branch (JPDB) attorneys filed four original actions in Franklin Circuit Court on behalf of juveniles who had been revoked without counsel challenging the absence of counsel and other problems with the process. In November 1998, Judge William Graham entered an order requiring that DJJ provide juveniles access to counsel for these hearings but did not address the other arguments concerning defects in the process. DJJ agreed to send each of the petitioners back to the community, and no further litigation took place at that point.

Beginning December 1, 1998, DJJ started notifying by fax or e-mail counsel of record, if any, as well as the Juvenile Branch at the Frankfort DPA Office of any supervised placement revocation hearings. Gail Robinson, manager of DPA's Juvenile PostDispositional Branch has acted as the coordinator concerning representation by counsel and dissemination of information. Generally, trial counsel have represented juveniles who were facing revocation in the community or in detention centers located in a county of commitment covered by the office while JPDB attorneys represented juveniles facing revocation hearings at detention centers outside the county of commitment.

JPDB attorneys then filed another original action in Franklin Circuit Court challenging the absence of a separate administrative regulation on the topic of supervised placement revocation and the absence of guidance for hearing officers and participants in the process on such issues as standard of proof, the ability to subpoena witnesses, a method of appeal, etc. On February 9, 2000, Judge William Graham accepted many of those arguments, finding that DJJ had not complied with the laws requiring enactment of administrative regulations and that the lack of guidance in DJJ's policy created a "procedural due process defect in the revocation hearings." He concluded that the unlimited discretion afforded non-lawyer hearing officers "is an arbitrary and absolute power forbidden by the Kentucky and United States Constitutions, Ky. Const. § 2: U.S. Const., Amend XIV." The decision in *L.M. vs. Kelly* was certified as a class action, and each juvenile who had been revoked under the old policy and was still placed outside the community had the option of a new hearing.

Meanwhile, there had been extensive discussions and negotiations with DJJ about the flaws in the process as outlined in the old policy and DJJ had agreed to implement a regulation containing more detailed requirements for the process. DJJ promulgated an emergency regulations, 505 KAR 1:090E, effective December 14, 1999. This regulation, which was formally approved June 12, 2000, improved the process significantly. This article will discuss the regulation and the relevant statute, KRS 635.100.

KRS 635.100

KRS 635.100 specifies what takes place when a juvenile who has been placed on supervised placement after commitment to DJJ violates the terms and conditions of that supervised placement.

1. A juvenile committed to DJJ may be returned to the active custody of DJJ if the juvenile:
   a. escapes from a DJJ treatment facility or program. 635.100(1);
   b. violates the terms and conditions of supervised placement. 635.100(2).

2. A preliminary hearing to determine probable cause is to be held by a person designated by DJJ within five (5) days of the juvenile being detained:
   a. the child is entitled to be heard at this hearing. 635.100(3);
   b. the child is entitled to be represented by counsel at the hearing. 635.100(3).

3. If the child is returned to the active custody of DJJ:
   a. A final hearing is to be held within ten (10) working days of the preliminary hearing. 635.100(4);

b. the hearing is to be conducted by a hearing officer designated by DJJ. 635.100(4);
c. the child is again entitled to be heard and to be represented by counsel. 635.100(4).

4. The hearings are exempt from the requirements of KRS Chapter 13B (the Administrative Procedures Act). 635.100(5).

5. Effective July 14, 2000, DJJ is required to enact an administrative regulation to implement the requirements of the statute (which has already been done) and permitted to issue subpoenas to compel attendance of witnesses.

505 KAR 1:090

Procedures for the preliminary and final hearings are specified in 505 KAR 1:090. The regulation provides:

1. "Safety concern" is defined as behavior that places the juvenile or community at risk for physical injury.
2. "Commissioner's warrant" is defined as a document issued by DJJ directing that a juvenile be taken into custody pursuant to KRS 635.100.
3. If a youth requires immediate placement because of a safety concern, the juvenile services worker (JSW) shall prepare and forward a violation report and statement requesting issuance of a Commissioner's warrant to his district supervisor.
4. If the supervisor agrees with the request, he forwards it to the regional manager who, if in agreement, issues a Commissioner's warrant and forwards the request to revoke to the Division of Program Services.
5. Upon receiving notice that a juvenile has been taken into custody, Program Services shall:
   a. schedule the probable cause hearing within 5 days, excluding weekends and holidays, of the youth being taken into custody unless the youth or counsel request a continuance;
   b. notify the youth and his parents or custodians in writing of the specific conditions of supervised placement alleged to have been violated;
   c. notify the youth and his parents or custodians of their right to be represented by counsel and notify the youth, family, and JSW of the time and location of the hearing;
   d. forward a copy of the notification letter to the last attorney of record and to the DPA;
   e. conduct the hearing.

6. The probable cause hearing shall:
   a. be limited to a determination as to whether there is probable cause to believe that any conditions were violated, which may be proven by hearsay, and whether there is a safety concern;
   b. be limited to the presence of the youth, parents or custodians, legal counsel, DJJ personnel and witnesses as necessary;
   c. be conducted informally, and be mechanically recorded.

7. At the probable cause hearing, the juvenile has the right to:
   a. testify or refuse to testify;
   b. examine and cross-examine witnesses;
   c. present evidence to negate a probable cause finding.

8. At the conclusion of the probable cause hearing, the hearing officer shall:
   a. summarize the allegations and evidence and decide whether there is probable cause to believe the juvenile has violated a condition of supervised placement **and** whether there is probable cause to believe a safety concern exists that requires the juvenile to remain in custody.
   b. if such probable cause has been established, notify the juvenile service regional manager or designee and Program Services which will assign a hearing officer to conduct the final hearing within 10 working days of the probable cause hearing.

9. If probable cause is not established, the JSW shall make arrangements for the youth to continue on supervised placement in the community.

10. If immediate placement of the youth is not required as a result of safety concerns:
   a. the JSW shall forward a report and revocation hearing request to his supervisor;
   b. if the request is approved up the chain of command, Program Services shall assign a hearing officer;
   c. There is no probable cause hearing if the youth is not detained prior to the hearing.

11. The final hearing shall:
   a. be conducted by the hearing officer appointed by DJJ;
   b. be mechanically recorded;

12. The hearing officer shall:
   a. administer the oath and take testimony;
   b. notify DJJ staff to provide revocation documents to the juvenile's attorney within 5 working days of any request;
   c. allow all parties to establish pertinent facts, evidence and circumstances relative to the allegations, to bring witnesses, to question or refute any testimony or evidence and to confront and cross-examine witnesses;

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d. decide, based on a preponderance of the evidence, whether the juvenile violated one or more supervised placement terms;
e. submit written findings of fact and recommendations to the regional division director and the juvenile's attorney within three (3) working days.

13. The JSW or supervisor is responsible for presenting the case for revocation. The worker shall provide copies of documentation to be entered into evidence and shall be prepared to offer a recommendation concerning appropriate treatment or sanctions.

14. If the hearing officer determines that a violation has occurred, the regional division director makes the final decision regarding the results of the revocation hearing, including either placement outside the community or remaining on supervised placement with revised conditions to be prepared by the JSW.

15. The regional division director shall send a letter by certified mail to the juvenile, parents/custodians and attorney within five working days of receipt of the hearing officer's recommendation.

16. If the juvenile is revoked, Classification decides where to place him. If he has remained in custody, he is to be placed "to the extent possible" within ten days excluding weekends and holidays.

17. A juvenile may appeal the decision to revoke to DJJ's Commissioner within ten days. The appeal may be no longer than two written pages. The Commissioner or his designee shall issue a decision within five days and the decision "shall not be appealable on the merits. "

New Developments and Issues To Keep In Mind Regarding Supervised Placement Hearings

1. As of May 2000, DJJ has contracted with private attorneys to represent youth who are facing supervised placement revocation hearings at DJJ's detention centers: Breathitt, Campbell and McCracken. DJJ is also contracting with private attorneys to act as hearing officers for some of the hearings for detained juveniles. DJJ nonlawyer staff, including Bob Pelzer, Bill Trigg and Jeff Rogers, also currently serve as hearing officers.

2. Juveniles may be picked up pursuant to a "Commissioner's warrant" and placed in detention with simply the approval of a division director on request of the local DJJ worker. There is no requirement for a sworn affidavit or warrant which may violate the Fourth and Fourteenth Amendments to the U.S. Constitution and Sections 2 and 10 of the Kentucky Constitution. Detention is sometimes requested for juveniles who are not a threat to the community, and there is no review by the juvenile court.

Gail Robinson

3. KRS 635.100 provides that juveniles taken into custody pursuant to Commissioner's warrants may be held in DJJ "facilities, programs or contract facilities." Counsel may want to litigate whether a detention center, particularly one not operated by DJJ, is such a facility.

4. DJJ has declined to hold hearings for confined juveniles in the county of commitment and juveniles are often lodged in detention centers and other placements distant from the county of commitment where trial counsel is located. JPDB is responsible for providing counsel for those juveniles whose hearings are conducted outside the county of commitment and who are not represented by DJJ contract counsel. Because of the short time lines and the locations of detention centers, this is sometimes impossible. If no lawyer is present for the scheduled hearing, the DJJ hearing officer may advise the juvenile that, if he or she desires counsel, he will remain in detention for an indefinite period in order that counsel may be obtained. In those circumstances, juveniles may "waive" counsel. Counsel for juveniles have urged that the appropriate remedy if counsel is unavailable at the initial hearing is discharge of the juvenile.

5. Now that the regulation allows the hearing officer to release a juvenile found not to be a safety concern at the conclusion of the probable cause hearing, the hearing is a real opportunity to negotiate release and a possible favorable resolution of the case.

6. There have been successful appeals to the Commissioner, particularly when the division director has decided that the juvenile should be placed in spite of a recommendation by the hearing officer to the contrary.

7. While the regulation precludes any appeal "on the merits," constitutional defects in the process can certainly be challenged through original action in Franklin Circuit Court or elsewhere. *Pritchett vs. Marshall*, Ky., 375 S.W.3d 253, 257-258 (1963). Additionally, in this Commonwealth, any decision by an administrative agency is reviewable if not supported by substantial evidence or if the agency has acted arbitrarily. *Commonwealth of Kentucky, Transportation Cabinet Department of Vehicle Regulation vs. Cornell*, Ky., 796 S.W.2d 591 (1990).

Moreover, Section 115 of the Kentucky Constitution guarantees an appeal of right to a court.

8. Juveniles committed to DJJ and detained pending placement must be placed within 35 days. KRS 635.060(3). 505 KAR 1:090 provides for placement within 10 days of the revocation decision "to the extent possible." A juvenile detained longer than 35 days from the initial detention before being placed would have a strong claim that he was entitled to release.

Concluding, the supervised placement revocation process which exists now is much better for juvenile clients and their attorneys than the one in effect a couple of years ago. Litigation and negotiation with DJJ brought about this improved process.

We hope this is helpful. Feel free to contact me or anyone else in the JPDB if you have questions about any of these issues. Good luck! ■

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A moment's insight is sometimes worth a life's experience.

- Oliver Wendell Holmes, 1860

Kentucky Department of Public Advocacy Library

PATHFINDER ON: **FORENSIC SCIENCES**

The following is a listing of the library's resources relating to the physical aspects of forensic sciences. The library also has many publications dealing with forensic mental issues. Please contact one of the librarians for help in locating books on mental evaluations.

BROWSING AREAS:

The DPA uses the Library of Congress classification system. In general, books relating to forensic issues can be found in several areas. These are 1) books relating to general investigation techniques (HV 8073 - HV 8079), 2) books relating to the use of scientific evidence (KF 8961) and 3) books discussing various medical descriptions of forensics (RA 1057 - RA 1121).

BOOK LIST:

Books owned by DPA may be checked out by individuals in any field office, persons outside of DPA wishing to borrow DPA owned books may be allowed to do so on a case-by-case basis. DPA employees wishing to borrow a book owned by another field office, will need to contact that field office directly.

- *Advanced Forensic Criminal Defense Investigations*. By Grace Elting Castle. (Tucson, AZ: Lawyers & Judges Pub. Co.), [1999]. **Located in the Trial Division Director's Office.**

- *Beyond the Crime Lab: The New Science of Investigation*. By Jon Zonderman. (New York, NY: John Wiley & Sons), [1990]. **HV 8073 .Z66 1990**

- *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial*. By Edward F. Connors. (Washington, DC: U.S. Dept. of Justice, Office of Justice Programs, National Institute of Justice), [1996]. **RA 1057.55 .C66 1996 **** Currently listed as missing ******

- *Crime Scene Search and Physical Evidence Handbook.* By Richard H. Fox, and Carl L. Cunningham. (Washington, DC: U.S. Dept. of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice), [1974]. **Available in the Stanton and Richmond trial offices.**

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- *Crimes of Violence*. By F. Lee Bailey and Henry B. Rothblatt. (Rochester, NY: Lawyers Co-operative Publishing), [1973-]. **KF 9304 .B3**

- *Criminal Investigation and Physical Evidence Handbook*. 2d ed. Wisconsin Crime Laboratory Bureau. [Madison, WI [1973]. **HV 8073 .C69 1973**

- *Criminal Investigation Handbook: Strategy, Law, and Science.* By Thomas P. Mauriello, and Barton L. Ingraham (New York: Matthew Bender), [1990-]. **KF 9619 .I54 1990**

- *Death Investigation: The Basics.* By Brad Randall. (Tucson, AZ: Galen Press), [1997]. **Located in the Trial Division Director's office.**

- *DNA in the Courtroom: A Trial Watcher's Guide*. By Howard Coleman and Teresa Aulinskas. (Seattle, Wash., USA: GeneLex Corp), [1994]. **KF 9666.5 .C65 1994**

- *Evaluation of Forensic DNA Evidence, The.* (Washington, D.C.: National Academy Press), [1996]. **RA 1057.5 .E94 1996**

- *FBI Laboratory, The: An Investigation Into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases*. ([Washington, DC]: United States, Dept. of Justice, Office of the Inspector General), [1997]. **HV 8141 .U534 OVERSIZE**

- *Flight Characteristics and Stain Patterns of Human Blood*. By Herbert Leon MacDonell. ([Washington, DC]: National Institute of Law Enforcement and Criminal Justice), [1971]. **RA 1061 .M32**

- *Forensic Pathology in Criminal Cases*. 2nd Ed. By Michael A. Graham, and Randy Hanzlick. (Charlottesville, VA: Lexis Law Publishing), [2000]. **RA 1063.4 .G73 2000**

- *Forensic Pathology*. By David J. Williams. (New York, NY: Churchill Livingstone), [1996]. **Located in the Trial Division Director's office.**

- *Forensic Pathology*. By Dominick J. DiMaio and Vincent J. M. DiMaio. (Boca Raton, FL: CRC Press), [1993]. **RA 1063.4 .D5 1993 **** Currently Listed as Missing ******

- *Forensic Sciences: Law / Science, Civil / Criminal*. By Cyril H. Wecht. (New York, NY: Matthew Bender), [1981-]. 5 volumes. **KF 8961 .F67 1981. Also available in Stanford, Paducah, Pikeville, Richmond, Somerset, Morehead, London, and Hazard.**

- *Forensic Services Directory*. 1992 edition. (Fair Lawn, NJ: Forensic Services Directory, Inc), [1980-]. **KF 195 .E96 F67 1992**

- *Fundamentals of Criminal Investigation*. Rev. 5th Ed. By Charles E. O'Hara and Gregory L. O'Hara. (Springfield, IL: C.C. Thomas), [1988]. **HV 8073 .O39 1988 **** Currently listed as missing ******

- *Future of Forensic DNA Testing, The: Predictions of the Research and Development Working Group.* (Washington, D.C: U.S. Department of Justice, Office of Justice Programs, National Institute of Justice), [2000]. **KF 9666 .5 .F87 2000**

- *Gunshot Wounds: Practical Aspects of Firearms, Ballistics, and Forensic Techniques.* 2nd Ed. By Vincent J. M. DiMaio. (Boca Raton: CRC Press), [1999]. **RA 1121 .D56 1999 **** Currently Listed as Missing ******

- *International Symposium on Human Identification: Proceedings for the International Symposium on Human Identification, 1989: Data Acquisition and Statistical Analysis for DNA Laboratories.* (Madison, WI: Promega Corp), [1989]. **RA 1057.55 .I58 1989**

- *Interpretation of Bloodstain Evidence at Crime Scenes*. 2nd Ed. By Stuart H. James, and William G. Eckert. (Boca Raton: CRC Press), [1999]. **RA 1061 .E2 1999**

- *Introduction to Forensic DNA Analysis, An*. By Keith Inman and Norah Rudin. (Boca Raton: CRC Press), [1997]. **RA 1057.55 .I56 1997**

- *Introduction to Forensic Sciences*. 2nd Ed. By William G. Eckert. (Boca Raton, FL: CRC Press), [1997]. 2 copies available. **HV 8073 .I57 1997**

- *Investigation and Preparation of Criminal Cases*. 2nd Ed. By F. Lee Bailey and Henry B. Rothblatt (Rochester, NY: Lawyers Co-operative Pub. Co), [1985]. **KF 9655 .B3 1985 ***Updating service ceased in 1993 ******

- *Investigation and Prosecution of Arson, The*. By John F Decker and Bruce L. Ottley. (Charlottesville, VA: Lexis Law Publishing), [1999]. **KF 9377 .D43 1999**

- *Legislative Guidelines for DNA Databases*. (Washington, DC: U.S. Dept. of Justice, Federal Bureau of Investigation), [1991]. **RA 1057.55 .L44 1991**

- *The Methods of Attacking Scientific Evidence.* 3rd Ed. By Edward J. Imwinkelried. (Charlottesville, VA: Lexis Law Pub), [1997]. **KF 8961 .I45 1997**

- *Microscopy of Hairs: A Practical Guide and Manual*. By John W. Hicks. (Washington, DC: Federal Bureau of Investigation, FBI Laboratory), [1977]. **RA 1061 .H63 1977**

- *Modern Scientific Evidence: The Law and Science of Expert Testimony*. By David L. Faigman. (St. Paul, MN: West Pub. Co), [1997]. **KF 8961 .M63 1997**

- *National Guidelines for Death Investigation*. (Washington, DC: U.S. Dept. of Justice, Office of Justice Programs, National Institute of Justice), [1997]. **RA 1063.4 .N37 1997**

- *New York's DNA Data Bank and Commission on Forensic Science*. By George H Barber and Mira Gur-Arie (New York, NY: Matthew Bender), [1994]. **Copies available in the Richmond, Morehead and London field offices.**

- *Personal Identification from Human Remains*. By Spencer Lee Rogers. (Springfield, IL: Charles C. Thomas), [1987]. **GN 69.8 .R64 1987**

- *Physical Evidence Handbook*. By the Kentucky State Police. Forensic Laboratories Section. ([Frankfort, KY]: Kentucky State Police), [1998]. **Located on the Kentucky Shelf, Frankfort main office.**

- *Physical Evidence in Forensic Science*. By Henry C. Lee, and Howard A. Harris. (Tucson, AZ: Lawyers & Judges Pub. Co), [2000]. **Located in the Trial Division Director's Office.**

- *Postconviction DNA Testing: Recommendations for Handling Requests*. (Washington, DC: U.S. Dept. of Justice, Office of Justice Programs, National Institute of Justice), [1999]. **RA 1057.55 .P67 1999**

- *Practical Fire and Arson Investigation*. 2nd Ed. By David R. Redsicker, and John J. O'Connor. (Boca Raton: CRC Press), [1997]. **HV 8079 .A7 O27 1997**

- *Practical Homicide Investigation: Tactics, Procedures, and Forensic Techniques*. 3rd Ed. By Vernon J. Gebert. (Boca Raton, FL: CRC Press), [1996]. **HV 8079 .H6 G4 1996. Also available in Elizabethtown.**

- *Reference Manual on Scientific Evidence*. 2nd ed. (Washington, DC: Federal Judicial Center), [2000]. **KF 8961 .R44 2000**

- *Scientific Evidence in Civil and Criminal Cases*. 4th Ed. By Andre A. Moenssens. (Westbury, N.Y: Foundation Press), [1995]. **KF 8961 .S39 1995**

- *Scientific Evidence*. 3rd Ed. By Paul C. Giannelli, and Edward J. Imwinkelried. (Charlottesville, VA: Lexis Law Publishing), [1999]. **KF 8961 .G53 1999**

- *Sexual Assault / Abuse: A Hospital, Community Protocol for Forensic and Medical Examination*. (Frankfort, KY: Office of the Attorney General), [1992]. **Located in the La Grange trial office.**

- *Spitz and Fisher's Medicolegal Investigation of Death: Guidelines for the Application of Pathology to Crime Investigation*. 3rd Ed. By Russell S. Fisher. (Springfield, IL: C.C. Thomas), [1993]. **Located in the Paducah field office. **** Currently Listed as Missing ******

PERIODICALS:

Journal of Forensic Science
Sex Offender Law Report

DPA TRAINING VIDEOS:

Videos may be accessed by criminal defense advocates by contacting either of the DPA librarians. As originals do not circulate, the librarians will arrange for the tape to be copied. DPA offices and divisions will be charged for the cost of the tape (billed directly to the office or division account). Others will be asked to reimburse the cost of the tape and the cost of shipping. An index to the training video and handout libraries will soon be available on the library section of the DPA Intranet.

- "100% Error in Testing?" By G. Simpson; "Basics of Forensic Blood Testing." By Richard Jensen; "Basics of Medical Blood Testing." By Patrick Demers; "Chemical Testing System". Michael Hlastala, G. Simpson, Patrick Demers & Richard Jenson. (1989). **Tape V-265.**

- "Ballistics." (0:45) By Jack Benton & Pat Donley; "Preparing to Cross-Examine State Forensic Experts." (1:00) By Roger Dodd; "Demonstration of Cross-Examination of State Hair Expert." (1:00) By Roger Dodd. Accompanied by H-327. (1986). **Tape V-225.**

- "Breaking the Blood Test. (DWI)" By Thomas Schoppert. (1991). **Tape V-304**.

- "Consistent with the Child's Story: Medical Evidence in Sex Abuse Cases." By Dr. Robert Fay (2000). **Tape V-955.**

- "Controlling State Forensic Expert Witnesses" (1:00) By Roger Dodd; "Pharmacology." (1:00) By Eljorn Nelson; "Blood and Semen." (1:30) By Brian Wraxall & Kevin McNally. (1986). **Tape V-226.**

- "Crime Scenes and Blood Spatter." By Lawrence Renner. (1996). **Tapes V-649 & V-650**.

- "DNA." By Lucy Davis. (1992). **Tape V-369**

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- "DNA: Discovery, Experts, and Hearings." By Jim Cox & Melissa Hall. Accompanied by H-492. (1996). **Tape V-644.**
- "Drug Analysis" (1:15) By Pat Donley & Jack Benton. (1986). **Tape V-224 (section d)**.
- "Effectively Challenging Breath, Blood, Urine Tests in DUI Cases." By Jerry Cox. Accompanied by H-497. (1996). **Tape V-612.**
- "Fingerprint Machine and Expertise of Fingerprinting." By Jim Evans. (1989). **Tape V-275.**
- "Forensic Serology and Attacking the State Lab Expert." (1:47) . By Brian Wraxall & Kevin McNally. Accompanied by H-175, H-176, H-414. (1982). **Tape V-70.**
- "Forensics in the Courtroom—*O. J. Simpson vs. the State of California*." (1996.) **Tape V-598.**
- "Introduction to Forensic Medicine and Pathology." By Dr. Gregory J. Davis. (1999). **Tape V-929.**
- "Kentucky State Police Central Forensic Lab." By Ed Dance. Accompanied by H-626. (1995). **Tape V-555.**
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- "Lifting Fingerprints and Plaster Casting." By Joe Howard. Accompanied by H-509. (1996**). Tape V-642.**
- "Medicolegal Death Investigations in Kentucky." By David Jones; "Kentucky State Police AFIS" (fingerprints). By Terry Osborne. Accompanied by H-622. (1995). **Tape V-552.**
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- "Thematic Motion Practice-DNA." By John Palombi and Jim Cox. (1999). **Tape V-907.**
- "Weird Science: Debunking DNA with Daubert." By Jim Cox, Brenda Poppelwell & John Palombi. (1998). **Tape V-859.**

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- "A.F.I.S.: Automated Fingerprint Identification System." 6 p. Accompanies Tape V-552. (Professional Support Staff Training: 1995). **Handout H-622.**
- "DNA for Dummies." 54 p. By Kevin Curran. (23rd Annual Public Defender Conference: 1995). **Handout H-137**.
- "DNA: Discovery, Experts, and Hearings." 64 p. By Jim Cox & Melissa Hall. Accompanies Tape V-644. (24th Annual Public Defender Conference: 1996). **Handout H-492.**
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- "Fingerprints and AFIS (Automated Fingerprint Identification System)." 5 p. By Jim Evans. Accompanies Tape V-275. (17th Annual DPA Seminar: 1989). **Handout H-172.**
- "Forensic Laboratories Section (directory)." 7 p. By the Kentucky State Police. (1986). **Handout H-173.**
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- "Merlin and Solomon: Lessons From the Law's Formative Encounters with Forensic Identification Science" 73 p. By Michael J. Saks. Originally published: 49(3) *Hastings Law Journal* 1069 (April 1998). Accompanies Tape V-953. **Handout H-725.**

- "New Developments in Forensic Evidence: Fingerprint Evidence." 52 p. By Kathleen Stilling & Edward Imwinkleried. Accompanies Tape V-275. (17th Annual DPA Seminar: 1989). **Handout H-273.**

- "Physical Evidence Handbook." (3rd ed.). 63 p. By David Hauber & John Stokes. Published by the Ky. State Police Forensic Laboratories. Originally published: 1994. Accompanies TapeV-555. (Professional Support Staff Training: 1995.) **Handout H-626.**

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- "Serology." 2 p. By Larry Ayers. Accompanies Tape V-368. (20th Annual Public Defender Conference: 1992.). **Handout H-618.**

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Limits on Prosecutor's Use of Preemptories

by Richard Hoffman

In *Washington v. Commonwealth*, Ky., ___ S.W. 3d ___ (8-24-2000) 2000 Ky. LEXIS 154 (not yet final), the Kentucky Supreme Court breathed new life into *Batson* claims. In essence, the *Washington* Court made clear that the party exercising supposedly race-neutral peremptory challenges must be able to point to articulable facts to support the challenge or risk having the *Batson* motion sustained. In particular, the Court in *Washington* was unimpressed by the Commonwealth's assertion that the challenged juror "appeared bored and inattentive" when the Commonwealth failed to direct a single question at the challenged juror, and was unable to support its contention that this particular juror had previously served on a jury that had returned an acquittal until several weeks later in response to a motion for a new trial.

In *Washington*, of the thirty-one venirepersons selected, two, Robert Newberry and Keisha Redding, were African-Americans. Following *voir dire* and the exercise of peremptory challenges, the trial court immediately swore the jury in and effectively prevented trial counsel from making a timely *Batson* motion. After the jury had been sworn in, defense counsel, at the first available opportunity, made his *Batson* motion. Defense counsel made the *Batson* motion because the racial composition of the jury revealed that neither of the African-American venirepersons had been selected to try the case.

During *voir dire* examination, Ms. Redding had stated that she had served on a jury previously and would be unable to convict anyone else. Defense counsel, and rightfully so, did not challenge this exercise of a peremptory strike. With respect to Mr. Newberry, the Commonwealth flatly denied exercising a peremptory challenge on him and stated that he must have been a victim of the random draw. Thereafter, the trial court released the non-selected members of the jury pool.

Within a matter of minutes after the non-selected members of the jury pool had been released, the clerk informed the trial court that the Commonwealth had indeed exercised a peremptory challenge on Mr. Newberry. At the ensuing bench conference, the Commonwealth, again, denied exercising a peremptory challenge on Mr. Newberry and persisted in the denial until he was shown the strike sheet. Upon being shown the strike sheet, the prosecutor exclaimed, "Oh, my God"; but, after regaining his composure, the prosecutor had the temerity to begin advancing reasons for the strike.

The prosecutor first cited the 43 year old Mr. Newberry's youth as the reason for the strike. Next, the prosecutor stated that Mr. Newberry "appeared bored and inattentive" during *voir dire*. Finally, the prosecutor noted that Mr. Newberry had served on a prior jury that had returned a verdict of acquittal. After each supposedly race-neutral reason, the trial court scowled, "That's not good enough." Faced with an angry trial court that was in a mood to reprimand, the prosecutor meekly offered to bring Mr. Newberry back, place him on the jury, and let the defense attorney strike any of the other jurors at his pleasure in an attempt to ameliorate the situation.

The trial court immediately called for a recess and asked the bailiff to round up the jury panel that had been dismissed. When it became apparent the these prospective jurors were not going to be found, the trial court again demanded to hear the prosecutor's reasons for striking Mr. Newberry. This time the trial court noted that it had observed Mr. Newberry during *voir dire* and he had appeared "somewhat inattentive." With this observation in mind, the trial court reversed its earlier position and found juror inattention to be a race-neutral reason for Mr. Newberry's exclusion from the jury.

On appeal, the Kentucky Supreme Court observed at the outset that, "Given the prosecutor's initial denial, followed by his obvious surprise at the fact he had struck Mr. Newberry, subsequent explanations for the strike were disingenuous." Slip Opinion at 5. Nevertheless, the Supreme Court examined each of the reasons proffered by the Commonwealth.

The *Washington* Court gave short shrift to the Commonwealth's claim that Mr. Newberry's age was a race-neutral reason stating, "Certainly age was not a sufficient reason to strike a 43-year-old man." Slip Opinion at 5. Of much greater concern to the Court was the Commonwealth's assertion that Mr. Newberry appeared bored during *voir dire*, but did nothing to test this assumption. In this vein, the Court noted, "...we are concerned by the assertion that Mr. Newberry appeared inattentive or bored, in light of the fact that no questions were directed toward him during *voir dire*." Slip Opinion at 5.

The Court citing Florida cases further stated:

> Although [the prosecutor] is entitled to draw reasonable inferences, we are troubled by such complete reliance on bare hunches drawn from the juror's demeanor. *Parker v. State*, 464 S.E.2d 910, 912 (1995); *see also Wright*, *supra* at 1028. (Factors tending to show that asserted reason for peremptory challenge is either unsupported by the record or pretextual include failure to examine a juror or perfunctory examination.)

Slip Opinion at 5.

As to the prosecutor's third explanation, that being that Mr. Newberry sat on a previous jury that returned a verdict of acquittal, the Court acknowledged that this could be a valid

race-neutral explanation. However, in *Washington*, the Commonwealth did absolutely nothing to support this contention at the time of the trial. In the words of the Supreme Court, "Had the prosecutor based the peremptory challenge on a legally sufficient reason, it is hard to understand why he was unable to articulate it earlier." Slip Opinion at 6.

In *Washington*, our Supreme Court has clearly announced that while the exercise of a peremptory challenge may be based on reasonable inferences, inarticulable or disingenuous reasons for the exercise of peremptory challenges will not be tolerated where *Batson* is implicated. Equally clear is the fact that the side exercising the strike had better be prepared to demonstrate that the challenge is something more than a pretext to get rid of a juror who is in a disfavored class. Our Supreme Court is showing an inclination to end the invidious practice of denying classes of people their right to serve on a jury based on thinly veiled pretextual reasons.

While our Supreme Court has not, as yet, gone to the same lengths as other states to prevent the systematic exclusion of classes of people from jury service, the opinion in *Washington* shows that the Court is not insensitive to these archaic practices. It is clear that we as members of the Kentucky Bar must do more to bring issues which are now well settled in other jurisdictions to the attention of our appellate courts. For far too long we have allowed *Batson* and its progeny to lie dormant, and in doing so, have denied our clients of their equal protection rights.

Courts in other jurisdictions have routinely rejected explanations for peremptory challenges which at first glance appear to be race-neutral. Included in this class of strikes are peremptory challenges based on age, employment/occupation, marital status/family, demeanor, neighborhood, and relation to persons who have been charged with crimes. For example, in *Richmond v. State*, 590 So.2d 384 (Ala.Ct.App. 1991), age and marital status as reasons for the strike were deemed to be inherently unreliable; *Williams v. State*, 548 So.2d 501 (Ala.Ct.App.1988) ("an assumption that all college counselors or persons connected with mental health agencies or organizations are less interested in punishing people for drug violations...is implausible"); *People v. Sims*, 618 N.E.2d 1083 (Ill.App. 1993) (reversed where, *inter alia*, juror was struck for being an unwed mother); *Commonwealth v. Carleton*, 629 N.E.2d 321 (Mass.App. 1994) (striking Roman Catholic veniremembers on basis of demeanor and allegedly limited education violated state law); *United States v. Bishop*, 959 F.2d 823 (9th Cir. 1992) (rejecting explanation that juror struck because he lived in a violent poverty-stricken community and might be inured to violence; residence used as "a surrogate for racial stereotypes"); *Colbert v. State*, 801 S.W.2d 643 (Ark. 1990) (where prosecutor said he struck one veniremember because she was related to a man he had prosecuted, and another because her children had been involved in court actions, but no *voir dire* was addressed to either juror on these subjects).

In a proper case, each of the above examples could theoretically be a legitimate reason for a peremptory challenge. However, in many of the examples, as was the case in *Washington*, the party exercising the strike did not ask appropriate questions during *voir dire* to support the "hunch" or provide support, record or otherwise, for the strike. Thus, in *Washington*, it would appear that our Supreme Court has recognized that a bare assertion of an ostensibly race-neutral explanation for the exercise of a peremptory challenge directed at a class of people will not suffice. Furthermore, where the striking party bases the strike on information not in the record, the opposing side must be provided with that information. *State v. Knighten*, 669 So.2d 950 (La.App. 4 Cir. 1992).

As noted above, defense counsel in *Washington* technically did not make a timely *Batson* objection. Under the facts of *Washington*, the Supreme Court excused the noncompliance with established state procedure because the trial court immediately swore the jury in following the return of the strike sheets affording the defense no opportunity to make his motion. In Kentucky, a *Batson* motion must be made before the swearing of the jury **and** the discharge of the remainder of the panel to be timely. *Simmons v. Commonwealth*, Ky., 746 S.W.2d 393 (1988).

Once a motion is made it becomes necessary to establish a *prima facie* case of purposeful discrimination unless the court directs the proponent of the strikes to give explanations or the proponent volunteers explanations. *Miesner v. State*, 665 So.2d 978 (Ala.Ct.App. 1995) and *Taylor v. State*, 666 So.2d 36 (Ala.Ct.App. 1994). The determination of whether a *prima facie* case exists is made on a case by case basis. Where every member of a cognizable group is the subject of one party's peremptory challenges a *prima facie* case is clearly established. Beyond this, as a rule of thumb, one might determine if a lesser percentage of a protected class is on the jury than on the venire as to establish the *prima facie* case. *Ex parte Howard*, 659 So.2d 3 (Ala. 1994). Even if a greater percentage of the protected class is on the jury than the venire, it is still possible to make out a prima facie case where there is a lack of meaningful questioning of the challenged jurors or disparate questioning of the protected and unprotected classes of jurors. *Ex parte Bird & Warner*, 594 So.2d 676 (Ala. 1991). Another way to establish a *prima facie* case regardless of the composition of the jury is to show that the striking side struck a member of the protected class but not the unprotected class even though members of the two classes share the same characteristics. *State v. Gill*, 460 S.E.2d 412 (S..C. App. 1995). For instance, age was considered a suspect reason where a white woman one year younger than an African-American venireperson sat on the jury. *Freeman v. State*, 651 So.2d 576 (Ala.Cr.App. 1994).

Assuming a *prima facie* case is established, the proponent of the strike is then required to offer a ra-neutral explanation

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for the strike. The trial court, after assessing both parties' arguments determines whether the proponent of the strike exercised purposeful racial discrimination. *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). The evaluation of the proffered reasons lies "peculiarly within a trial judges province." *Commonwealth v. Snodgrass*, Ky., 831 S.W.2d 176, 179 (1992).

Batson on its face applies to African-Americans. However, subsequent opinions flowing from *Batson* have afforded protections to other cognizable groups of people. In *J.E.B. v. Alabama*, 511 U.S. 127 (1994), the Equal Protection Clause forbids striking prospective jurors on the basis of gender; *Wisher v. State*, 611 So.2d 1175 (Ala.Cr.App. 1992), held that *Batson* applies to striking of Asian-Americans; *State v. Allen*, 616 So.2d 452 (Fla. 1993), held that *Batson* protects potential jurors from being excluded from the jury solely on the basis of ethnicity; *White Consolidated Industries, Inc. v. American Liberty Insurance Co*., 617 So.2d 657 (Ala. 1993), *Batson* applies to the striking of white venirepersons; and *Drowdy v. State*, 644 So.2d 593 (Fla.App.2Dist. 1995), prosecutions systematic exclusion of men from the jury violated the defendant's constitutional rights. Virtually any cognizable group can be used to establish a *prima facie* case of discrimination against a protected class of people. ■

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Section 11,
Kentucky Constitution (1891)
In all criminal prosecutions, the accused
has the right to be heard by himself and counsel…

Sixth Amendment,
United States Constitution (1791)
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SHOULD JUVENILES BE EXECUTED?

In 1997, the ABA House of Delegates passed by a 280-119 vote a call for a moratorium on executions in this country until jurisdictions implement policies to insure that death penalty cases are administered fairly, impartially, and in accordance with due process to minimize the risk that innocent persons may be executed. The ABA called the administration of justice in capital cases in American a "haphazard maze of unfair practices with no internal consistency." The ABA moratorium call was based upon 5 significant areas, one of which was the execution of people less than 18 years of age. There are presently 2 persons on Kentucky's death row who were juveniles at the time of their crimes.

Courts reverse most juvenile death sentences. Between January 1973 and June 2000, there have been 196 juvenile death sentences. Of those 196, 74 are still under the sentence of death, 17 or 9% have been executed, and 105 or 54% have been reversed on appeal. Of the 196, 110 have been finally resolved as the remainder are still in litigation. Of those 110, 97 or 86% have been reversed. See Victor Streib, *The Juvenile Death Penalty Today; Death Sentences and Executioners for Juvenile Crime, January 1, 1973-June 30, 2000* (2000) found at http://www.law.onu.edu/faculty/streib/juvdeath.htm. This is a very high reversal rate in the criminal justice system, and indicates that there are either many serious errors in these trials or that death is not an appropriate sentence for these offenders.

Kentuckians do not support death for juveniles. An overwhelming number of Kentuckians believe that juveniles should not be executed. Recently, 79.5% of those polled in the state who gave an answer said that the most appropriate punishment for a juvenile convicted of an aggravated murder in Kentucky was a sentence other than death. There are 15.5% of Kentuckians who believe that death is the most appropriate penalty for a juvenile who is convicted of an aggravated murder. There were 4.9% who responded they didn't know. *The Spring 2000 Kentucky Survey* which surveyed 1,070 noninstitutionalized Kentuckians 18 years of age or older from May 18 – June 26, 2000 and was conducted by the University of Kentucky Survey Research Center, asked the following question and had the following answers:

If a 16 or 17 year-old is convicted of aggravated murder, which of the following punishments do you personally think is MOST appropriate:

The death penalty……15.5
Life in prison without the possibility of parole forever ……23.1
Life in prison without the possibility of parole for 25 years ……17.8
Life in prison without the possibility of parole for 20 years, or……15.3
20 to 50 years in prison without the possibility of parole until at least 85% of the sentence is served……23.3
None of the above (volunteered)...……...4.9

The margin of error of the poll is approximately $\pm$ 3% at the 95 % confidence level. Households were selected using random-digit dialing, a procedure giving every residential telephone line in Kentucky an equal probability of being called.

Death is out of context for juveniles. The people of Kentucky's opinion on his is consistent with the fact that the death penalty for juveniles is contrary to the rationale for other laws limiting the rights of children due to their immaturity, such as the rights to vote, to contract, to write a will, to possess alcohol and tobacco, to drive, etc. Juvenile murders are not a significant problem in Kentucky. The death penalty is seldom used against children. When the death penalty is used, reversals have occurred in 86% of the cases. The death penalty for juveniles is only used in 23 states. 63% of juveniles on death row are black or Latino. All 40 children executed in the US for the crimes of rape or attempted rape were black. Four of the 6 children executed in Kentucky history have been black.

There is a racial aspect to death for juveniles. One of the two currently on Kentucky's death row who were juveniles when sentenced is black. Of the 361 juveniles executed in our nation since 1642, 75% were black. 100% of the 50 children executed in the U.S. for the crimes of rape or attempted rape were black and all but one victim was white. Two thirds of children now on death row in the United States are black, Latino or Asian. Four of six or 67% of children executed in Kentucky history have been black:

NAME	RACE	COUNTY	CRIME	DATE EXECUTED	AGE
1. Silas Williams	B	Woodford	Murder	1913	16
2. Frank Carson	W	Nelson	Murder	1933	17
3. Burnett Sexton	W	Perry	Murder	1943	17
4. William Gray	B	Fayette	Murder	1943	17
5. Carl Fox	B	Campbell	Rape	1945	17
6. Arthur Jones	B	Mason	Murder	1946	16

State's Juvenile Justice System Improved: Consent Decree Ends

United States Attorney General Janet Reno joined Governor Paul Patton today in a ceremony that ends the state's Juvenile justice consent decree, which was established with the Department of Justice in December 1995 to improve juvenile confinement in state-operated treatment facilities.

"I am proud to be apart of this initiative here today and to pledge my continual support for juvenile services in this state," Governor Patton said. "Just because the consent decree ends today does not mean this administration's commitment to juvenile justice is finished. On the contrary; our departure from the consent decree today will help us move forward at a greater pace."

The consent decree was created after federal officials determined that conditions of juvenile confinement at Kentucky's state-operated residential treatment facilities violated the statutory and constitutional rights of juveniles. Kentucky voluntarily entered into the consent decree to improve conditions of juveniles.

"The beauty of our system is that it gives a departmental-level focus on one of the toughest issues that faces every county in this state and every state in this nation," Justice Cabinet Secretary Robert F. Stephens said. "And many people think the problem of juvenile crime is literally unsolvable, but over the last several years, this focus has helped to measurably decrease juvenile crime in Kentucky by giving each juvenile the tools and the inspiration needed to turn his or her life in the right direction."

The consent decree called for Kentucky to establish a department that would work to improve conditions of juvenile confinement in state-operated residential treatment facilities. The state developed the Department of Juvenile Justice, and over the past five years, it, under the leadership of Commissioner Ralph E. Kelly, Ed.D., has worked diligently to implement provisions of the consent decree.
These provisions include creating a pre-service training academy for direct care juvenile justice staff; an internal investigations unit and a board-certified physician to guide the provision of medical services in facilities.

"The department's successes in transforming Kentucky's juvenile justice system from a system in need of massive reform to a system that now stands among the best in the nation would have been impossible if not for the vision of Governor Patton, the support of the General Assembly, and the dedication of our staff," Kelly said.

Public Advocate Ernie Lewis said, "I want to congratulate Governor Patton, Secretary Stephens and Dr. Kelly on this huge accomplishment. In distinct contrast to other states, these Kentucky leaders have taken the consent decree, endorsed it and used it to create an outstanding Department of Juvenile Justice. Our Commonwealth, and in particular our children, are the stronger for it." ■

Violence as a way of achieving racial justice is both impractical and immoral. It is impractical because it is a descending spiral ending in destruction for all. The old law of an eye for an eye leaves everyone blind. It is immoral because it seeks to humiliate the opponent rather than win his understanding; it seeks to annihilate rather than convert. Violence is immoral because it thrives on hatred rather than love. It destroys community and makes brotherhood impossible. It leaves society in monologue rather than dialogue. Violence ends by defeating itself. It creates bitterness in the survivors and brutality in the destroyers.

Dr. Martin Luther King, Jr.

PRACTICE CORNER

LITIGATION TIPS & COMMENTS COLLECTED BY MISTY DUGGER

Attorneys Should try to present evidence of Parole Statistics DURING the Penalty Phase of Trial

The 1998 amendments to KRS 532.055(2)(b) and the case of *Abbott v. Commonwealth*, Ky., 822 S.W.2d 417 (1992) seem to be in conflict regarding the admissibility of parole statistics during the penalty phase. In a concurring opinion to the unpublished case of *McKinley v. Commonwealth*, (Ky., 1998-SC-1027-MR, rendered January 26, 2001), Justice Keller expressed an "open mind" on the question of whether the 1988 amendment has now opened the door to allow this evidence to be admitted. Justices Graves and Justice Stumbo joined in Justice Keller's opinion. Trial attorneys are encouraged to make efforts to enter into evidence the Parole Board's annual report, containing its statistics for the past year, and seek to cross-examine the parole officers who testify at the penalty phase about these statistics. **Be sure to preserve the issue by putting on an avowal.** These challenges may lead to the Court overruling *Abbott* or at least make the prosecutor in your case think twice about telling the jury your client will only serve a small percentage of his sentence.

~ Steve Mirkin, Directing Attorney, Elizabethtown

A Conditional Guilty Plea Must be Preserved on the Record for Appellate Review

RCr Rule 8.09 governs conditional guilty pleas and states in part, "With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion." To properly preserve a conditional plea the attorney must **submit in writing the conditions of the plea and the specific trial or pretrial motion that should be preserved for appellate review.** Similarly, RCr 9.78 requires a trial court ruling on a defendant's suppression motion to "enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. " The trial attorney must insure that the trial record includes written documentation reserving the defendant's right to enter a conditional plea and written factual findings by the trial court supporting the ruling. Otherwise, the appellate courts may not find that the conditional plea was properly preserved for review.

~ Rebecca DiLoreto
Post Trials Division Director, Frankfort

Avowal Testimony by the Witness, not the Attorney, is Necessary to Preserve Error

In *Partin v. Commonwealth*, Ky., 918 S.W.2d 219, 223 (1996), the Kentucky Supreme Court explained that **trial attorneys must offer avowal testimony from the witness himself or herself in order to preserve such an issue for appellate review**: "A review of the record discloses that appellant did not request that an examination be conducted outside the presence of the jury and offer the testimony by avowal under RCr 9.52. As stated in *Cain v. Commonwealth*, Ky., 554 S.W.2d 369 (1977), "without an avowal to show what a witness would have said an appellate court has no basis for determining whether an error in excluding his proffered testimony was prejudicial." Counsel's version of the evidence is not enough. A reviewing court must have the words of the witness. As a result, we find this issue has not been preserved."


Misty Dugger

More recently, the Court has refused to review these unpreserved issues under the palpable error standard when the witness's own testimony is not taken by avowal. In *Commonwealth v. Ferrell*, Ky., 17 S.W.3d 520 (2000), the Court specifically noted the trial attorneys duty under KRE 103 and RCr Rule 9.52 to properly preserve avowal testimony for appellate review. The Court went on to note, "Ferrell's argument that this Court should evaluate this issue pursuant to RCr 10.26 9palpable error) if we determine his failure to offer an avowal renders it unpreserved only magnifies the problem. Not only would we have to find prejudice, but we'd have to determine without knowing Ferrell's answer to his counsel's question, that "manifest injustice has resulted from" the trial court's ruling which did not permit Ferrell to answer." *Id*. at 525, n 11.

~ John Palombi, Misty Dugger,
Appellate Branch, Frankfort

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~ John Palombi, Randy Wheeler

Practice Corner needs your tips, too.
If you have a practice tip, courtroom observation, or comment to share with other public defenders, please send it to Misty Dugger, Assistant Public Advocate, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to Mdugger@mail.pa.state.ky.us. ■

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