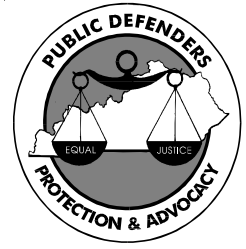


The Advocate



Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

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Governor Patton Receives KBA President's Special Service Award for Support of Public Defenders



Governor Paul Patton accepts the President's Special Service Award from KBA President Beverly Storm

KBA President-Elect Stephen B. Catron on Protecting Freedom



Stephen B. Catron

ALSO IN THIS ISSUE:

- **Death by Innocence: Wrongful Convictions in Capital Cases**
- **DPA Kentucky Innocence Project: Herman May and Michael Elliott**
- **Illegal, Racial and Other Discrimination in Jury Selection**
- **Legislature Enacts *Ex Parte* Procedure for Requesting Funds**

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

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

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

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FROM
THE
EDITOR...



Ed Monahan

We have another issue of significant news and analysis for criminal justice professionals. In addition to our regular informative columns, we feature the following:

KBA Recognizes Governor

It is significant that the KBA recognized Kentucky's Chief Executive for his decision to support Kentucky's statewide public defender program which assures Kentucky's indigent citizens with equal access to Kentucky's criminal justice system. KBA President Storm made the presentation.

Freedom's Protectors

Stephen Catron took over as KBA President in June 2002. He honored defendants by selecting and presenting the Professional and Excellence Award to our Public Advocate and by reminding us that we defenders are in the business of protecting the freedom that we so cherish in this country.

Innocent and Wrongfully Convicted

We report on 2 Kentucky citizens whose cases are being plead by DPA's *Innocence Project*. We also present a major analysis of wrongful capital convictions by Karen Miller-Potter.

Ex Parte

The 2002 General Assembly has now assured that a request for funds for experts and resources must be done *ex parte*, if asked for by the defense. This assures indigents a level playing field with non-indigent defendants.

Discrimination

Defenders know that there is improper discrimination in the use of peremptory challenges. Bruce Hackett sets out the law and practice of successfully demonstrating that illegal discrimination.

Ed Monahan, Editor

Governor Patton Recognized by Kentucky Bar Association for Support of Public Defenders

Governor Paul E. Patton has been awarded the President's Special Service Award by the Kentucky Bar Association. This award was presented at the KBA's Annual Convention Membership Luncheon by President Beverly Storm on June 13, 2002. The plaque presented to the Governor read: "In recognition of your leadership and support of increased funding for Kentucky public defenders and your commitment to increasing access to justice for all Kentuckians." Over 500 lawyers were in attendance at the luncheon. Thereafter, well over 100 lawyers attended a reception in the Governor's honor sponsored by the Department of Public Advocacy and the Commonwealth's Attorneys' Association.

Of the award, President Beverly Storm stated: "As we recognize the 30th Anniversary of the Department of Public Advocacy, it was especially appropriate to also recognize the role of Governor Patton in—at long last—providing the Department with increased resources to carry out its functions."

The Kentucky Bar Association is an agency of the Supreme Court of Kentucky. It is the unified professional and regulatory association of the Kentucky Legal profession. The KBA President selects the recipients of the Special Service Award based upon the person's dedication to the service of the citizens of the Commonwealth.

Funding Has Grown Under Governor Patton's Leadership

When Governor Patton became Governor in late 1995, funding for public defender services was approximately \$16 million. That funding has grown to over \$28 million by July of 2002. In his 2000 budget request, Governor Patton placed \$4 million extra General Fund dollars for the Department of Public Advocacy for FY01, and \$6 million for FY02. This represented a significant down payment on the \$11.7 million recognized by the *Blue Ribbon Group* as being necessary to bring Kentucky's indigent defense delivery system up to the national average. Governor Patton was very receptive to the recommendations of the *Blue Ribbon Group*, recognizing that the improvements recommended by that group were necessary for Kentucky to achieve the kind of public defender system that the public and court system deserved.

The Full-Time System Has Been Almost Completed

When Governor Patton began his term in 1995, 47 counties in Kentucky were covered by a full-time office. The Public Advocacy Commission had since 1990 a stated goal of covering all 120 counties with a full-time system. Public Advocate Ernie Lewis, appointed by Governor Patton in October 1996, made the completion of the full-time system a goal for his term.

Governor Patton adopted the goal of completing the full-time system. In 2000, Governor Patton placed \$10 million into his biennial budget request for the Department of Public Advocacy. This money was earmarked for expanding the full-time system by an additional 22 counties over the biennium. In his 2002 budget request, the Governor requested sufficient General Fund money to open 2 additional offices in Boone and Harrison Counties.

By January 2003, 112 counties in Kentucky will be covered by a full-time office. With offices opening in July 2003 in Boone and Harrison Counties, additional 5 counties can be covered. Legislation passed by the 2002 General Assembly may make it possible to cover the remaining 3 counties by July 2003, allowing this Governor to achieve his goal of coverage in all 120 counties prior to the end of his term.

Defender Salaries Have Increased Significantly

Entry level Public defenders were paid a little over \$23,000 at the start of Governor Patton's term. The *Blue Ribbon Group* found that Kentucky public defenders were the lowest paid public defenders in the nation. Turnover rates were as high as 50% in some of our offices.

Today, due to the work of Governor Patton, entry level public defenders are paid over \$34,000 annually. Entry level salaries were increased as a result of the Governor's budget presented to and passed by the 2000 General Assembly. Within the last month, entry level salaries for public defenders as well as other attorney in state government increased from \$33,425 to \$34,327.

Experienced public defenders have also seen significant salary increases. In July of 2000, defenders' salaries were increased 8%. In July of 2001, salaries were increased for experienced defenders another 9.6%.

Governor Patton has been a champion of reasonable salaries for public servants throughout his term. Nowhere has this been more evident than for public defenders.



Governor Patton accepts the President's Special Service Award from KBA President Beverly Storm

Governor Patton Has Left a Lasting Legacy

**Robert Ewald, Chair,
Public Advocacy Commission**

Governor Patton has improved significantly the public defender system in Kentucky. His legacy is summarized by Public Advocacy Chair Bob Ewald of Louisville, who stated: "Having been closely involved with the public defender program in Kentucky since its inception thirty years ago, I can say without reservation that no Governor during that time has done more than Governor Patton to insure that everyone accused of a crime in our Commonwealth is represented by competent counsel

throughout the proceeding. It has long been my goal to see an adequately funded statewide system of full-time defenders, for only then can we be confident that the tools are in place to insure a fair trial for every accused. Governor Patton has recognized the importance of this goal and acted courageously and wisely to help achieve it. Everyone interested in equal justice for all owes him a vote of thanks."

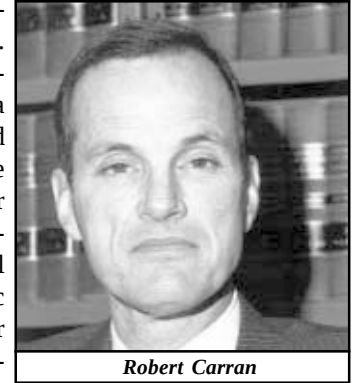


**Janie Miller, Secretary
Protection & Regulation Cabinet**

"One of the Governor's primary goals has been to increase the safety of the communities in Kentucky and his commitment to that cause can be seen in the passage of the Crime Bill in the 2000 General Assembly, and the emphasis he has placed on reducing domestic violence and child sexual abuse," said Janie Miller, Secretary of the Public Protection and Regulation Cabinet. "At the same time, the Governor recognizes that a fair system of

criminal justice includes a balance between the prosecution and defense. While supporting prosecutors, Gov. Patton has increased resources for indigent defense by working toward the completion of a full-time system and raising salaries for public defenders. He is truly deserving of KBA's Special Service Award."

Longtime Public Advocacy Commission Member Robert W. Carran commented on the significance of this recognition. "As a public defender, who also served for 20 years as the Director of the Kenton County Public Defender Office, I experienced on a first-hand 'down in the trenches' level the consequences of the Public Defender System's serious under funding. I remember many calendar quarters where I was able to pay public defenders in Kenton County no more than \$6.00 or \$7.00 per hour for their work. I know that many attempts were made prior to election of Governor Patton to obtain additional funding, but to a large extent were unsuccessful. I was honored to serve on the *Blue Ribbon Group*, and I am extremely grateful that Governor Patton was receptive to the recommendations of the *Blue Ribbon Group*. I personally thank the Governor for what he has done, and for his leadership." ■



Robert Carran

Ernie Lewis

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Great ability develops and reveals itself increasingly with every new assignment.

— Baltasar Gracian, *The Oracle*

Courageous Support

As co-chairman of the *Blue Ribbon Group* and on behalf of Co-Chair Secretary Robert Stephens, it is very gratifying to see that the work and time put into that effort was taken so seriously by Governor Patton. At that time, we realized that increasing funding for public defenders was not the most political expedient endeavor but it was the right thing to do if you are interested in addressing systemic problems. Governor Patton did that. I therefore commend the Kentucky Bar Association for its special recognition of Governor Patton for demonstrating such courage.

Michael D. Bowling, Co-Chairman
Blue Ribbon Group on Indigent Defense for the 21st Century



Michael D. Bowling

Criminal Justice System Improved

As a member of the *Blue Ribbon Group*, I certainly appreciate Governor Patton being receptive to our recommendations to improve the public defender system in Kentucky. With his commitment to improving indigent defense and placing significant funding increases in the budget, the criminal justice system in Kentucky is much better and all Kentuckians are better served. I appreciate the Governor's leadership on this issue.

Rep. Jeff Hoover
House Minority Floor Leader
Kentucky House of Representatives



Rep. Jeff Hoover

Defenders Protect Freedom and the Professionalism and Excellence Award

Remarks of Stephen B. Catron, President – Elect, Kentucky Bar Association at the Department of Public Advocacy Awards Dinner, June 11, 2002.

Defenders Protect Freedom

It is indeed an honor to be here as a representative of the Kentucky Bar Association. As president-elect I am new to the public speaking circuit. Choosing my words carefully, and reminded often of Mark Twain's statement that "the difference between the right word and the almost-right word is the difference between 'lightening' and 'lightening bug.'" It is truly the choice of the right word in this odd language of ours that presents the challenge. Please bear with me.

Some of us remember the days when the lawyers were routinely appointed to defend criminal defendants. The days when my suit shined more than my shoes. I will not bore you with details of my early, and only, criminal defense work. But I remember working hard. I remember worrying about the case a great deal more than my client. I remember being locked up and "forgotten" in the old Warren County Jail with my client. This on a hot summer Friday afternoon, because I was defending a gentleman who was charged with assaulting a deputy jailer and trying to escape. The jailers cut me no slack simply because I was appointed, and probably working for no fee. They did not care. Likewise it did not bother me a few days later when the contempt hearing was held for the deputy jailers for pulling that stunt.

My criminal defense work ended after that case (after a reasonably acceptable outcome, given our facts and a slightly difficult client). But it left me with a lasting memory about criminal defense work. How quickly the system jumps to conclusions, how cynical all of us can be when we read the newspaper stories and hear half, or less of the facts, of how our human nature desires to presume guilt.

Particularly in this difficult time, when all of us feel threatened by forces that we do not understand, by people we do not know, by a culture that seems foreign in so many ways. The challenge to the lawyers in this country has never been greater. The protection of our freedom through our Constitution is and will remain under Challenge. As Dr. Martin Luther King said "Freedom is never voluntarily given by the oppressor it must be demanded by the oppressed."

In our system, it is our obligation as lawyers to make these demands on behalf of the oppressed. Freedom is a fleeting concept, a word easily said, but a concept that seems to dissipate under challenge.

We are now challenged, your job has never been more difficult. Our task as lawyers to protect our constitutional rights, to preserve this delicate flower called freedom will never have been more unpopular, more criticized, and more needed than at any other time in our history.

That is why tonight is so significant for me. A night to honor all of you. All of the people who have dedicated their lives to the defense of the democracy. Not a defense through armed conflict, but a defense through exercise of your intellect. A defense only available through the sacred constitutional principals laid out by Jefferson, Adams, and by the genius of the drafters of the Declaration of Independence and the Constitution. A night to honor the Kentucky Public Defenders. To honor you who defend over 100,000 poor Kentuckians ever year.

You are literally the front line of our system...

Unpopular...yes

Criticized...yes

Underpaid and under funded...unfortunately yes

Important....a resounding yes...yes now more than ever.

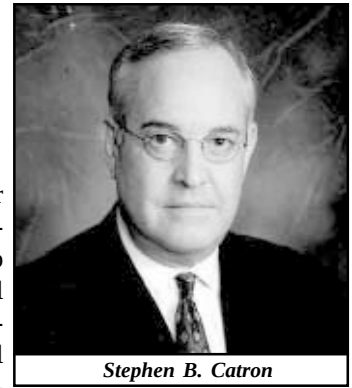
I can stand here and say nothing more than thank you.

P&E Award to Public Advocate

Now my real job of the evening. To present the professionalism and excellence award. An award to the person who best emulates professionalism and excellence in the Department of Public Advocacy. Best summarized by the 1998 criteria for the award, "being prepared and knowledgeable, being respectful and trustworthy, being supportive and collaborative." An award to the person who best exhibits the essential characteristics of professional excellence.

I reviewed a number of nominees, and found this task far more daunting than first expected when I was called by Debbie Garrison about presenting this award. I did my job, and culled through the stacks of paper. Studied your eloquent nominations and reached my decision. I will hasten to add that no one, except Debbie Garrison and her close confidants knew of my decision. This is an important disclosure. As you will hear in a moment.

Now for the award.



Stephen B. Catron

Continued on page 8

Continued from page 7

Ernie Lewis has been public advocate for the Commonwealth of Kentucky since 1996. He has literally been there, done that in a manner exemplary of this department and our profession. He has represented clients in capital cases. He is known nationally for his commitment of public advocacy, as an educator as a mentor.

Appointed by Governor Paul Patton after 19 years of service to the Department of Public Advocacy. Reappointed in 2000 for another 4 year term. His resume' speaks volumes on commitment to public service.

A 1969 graduate of Baylor University. A 1973 graduate of the Vanderbilt divinity school. A 1977 graduate of Washington University Law School. Ernie Lewis is the 2002 recipient of the Professionalism and Excellence Award, congratulations. ■



Ernie Lewis receiving the Professionalism and Excellence Award from KBA President-Elect Stephen Catron.

Justice Graves Remarks on Chief Justice Stephens

Editor's Note: Through the fault of the Editor, these remarks were omitted from the prior issue of The Advocate.

Justice Stephens was a brilliant and accomplished person whose life will have a profound influence on generations of lawyers.

Robert F. Stephens displayed an extraordinary sensitivity toward indigent defendants. I also greatly admired Robert F. Stephens' courage in standing up for his principles. He always went where the law and the facts took him, whether or not the destination was a popular one.

It is with deep gratitude that I thank Robert F. Stephens for his personal commitment to justice for all as well as his vision for a more just Kentucky. Working with Robert F. Stephens was an invaluable experience; he was a wonderful mentor, teacher and friend. ■

J. William Graves
Supreme Court of Kentucky

Remembering Dan Rowland

Dan Rowland, a contract attorney for DPA, passed away August 6, 2002. He was 61. Mr. Rowland, who was in private practice, was a former assistant commonwealth's attorney and assistant Floyd County attorney. He also was a former disc jockey at WMDJ radio station in Martin. He was born in Morgan County and graduated from Maytown High School in Floyd County. He received a bachelor's degree from Berea College and a law degree from the University of Kentucky. Surviving are a son, Tom Rowland of Lexington, and a brother, Cleaties "Howdy" Rowland of Blue River.

Kristi Gray, Paintsville's Directing Attorney, said, "He did numerous cases for the Pikeville and Paintsville offices, and was more generous and helpful than words can convey for our offices! Dan did contract cases for the Paintsville office since it opened, and graciously covered our courts whenever we were short-staffed. Dan was a talented trial attorney, and was a very generous and caring person. I worked with him when he was an assistant commonwealth attorney, and

then when he started handling our cases on contract. He never refused a case, no matter how complicated or time-consuming, and did not consider the financial reasons when agreeing to take cases. It will be a great loss for our office and for everyone who knew Dan. He was well respected by judges and other attorneys, and I have truly never known someone who was so willing to offer assistance to other attorneys."

John Rosenberg said of Dan, "Dan was one of the few attorneys who was welcoming and helpful when he first came to this area, despite the unpopularity of his cause, and Dan was just one of those people who was committed to a better justice system."

The Floyd County Bar Association is collecting donations for a memorial fund. Donations can be sent to:

John Rosenberg, APALRED
120 North Front Avenue
Prestonsburg, KY 41653. ■

Public Advocate Appoints New Trial Division Director



David Mejia

Public Advocate Ernie Lewis announced David S. Meija as the new Department of Public Advocacy (DPA) Trial Division Director. David began July 1, 2002.

David is a graduate of the University of Illinois and Chicago's Loyola University School of Law. Prior to coming to DPA, he was a solo practitioner in Chicago concentrating in criminal defense.

Prior to that solo practice, David worked in the Office of the Illinois State Attorney as a staff attorney with the Legal Assistant to the Attorney General at *Tuite, Mejia & Giacchetti*. He has argued cases in state and federal courts, 150 cases of state and federal appeals.

Upon the appointment of David to this defender leadership position, Public Advocate Ernie Lewis said, “I am delighted to bring someone of David Mejia’s caliber to the Department and to the Trial Division. David brings the professionalism of a long-term private practitioner, the savvy of an experienced trial lawyer, and the commitment of someone who began his career as a public defender and legal services lawyer.”

David replaces George Sornberger who served as Director from 1997-2001. George moved into a capital trial branch attorney position in Frankfort in January, 2002.

The Trial Division provides service to indigent individuals accused of crime and facing a hearing or a trial. The Trial Division Director directs six managers, including the Capital Trial Branch Manager, and the Northern, Bluegrass, Eastern, Central, Western and Jefferson Regions. The trial division handles 100,000 cases yearly with its attorneys handling an average of 435 cases, and consists of public defenders, investigators, alternative sentencing workers, clerks, paralegals, social workers and secretaries who support the effort in 26 full-time trial offices covering one or more counties. Each of the full-time offices contract with attorneys in private practice to

provide conflict representation. The Frankfort office has a statewide Capital Trial Branch whose experienced staff provide representation to persons facing the death penalty on the most difficult capital cases across the state. The trial offices by region are headquartered in the following cities:

Northern: LaGrange, Covington, Frankfort, Maysville, Ashland,

Bluegrass: Richmond, Somerset, Stanford, Stanton and Lexington;

Western: Paducah, Hopkinsville, Madisonville, Henderson and Murray;

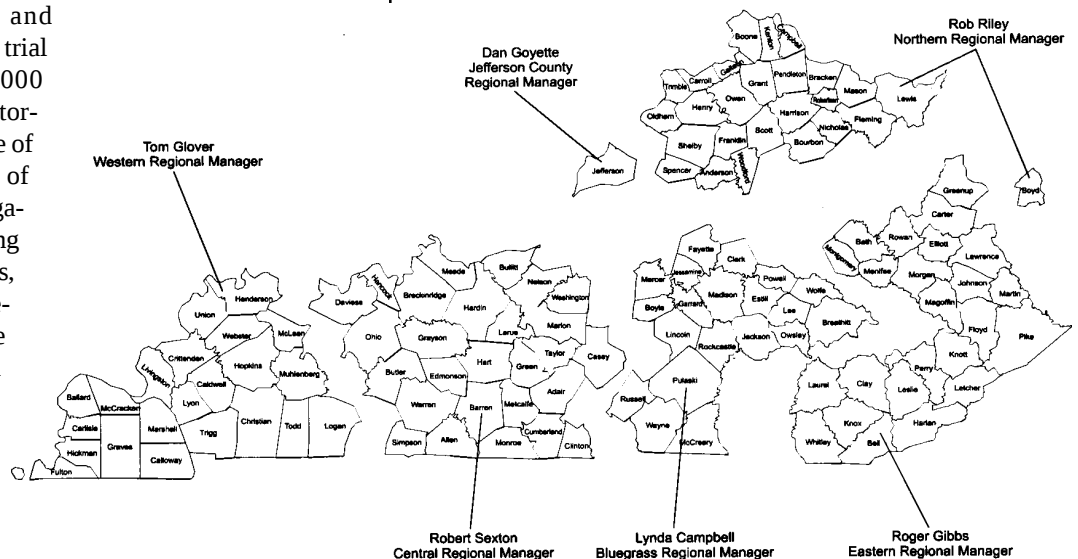
Eastern: Paintsville, Morehead, Hazard, Pikeville, London and Pineville;

Central: Bowling Green, Columbia, Elizabethtown, Owensboro;

Jefferson: Louisville.

In taking on this new leadership position David Meija said, “I am grateful to the Department of Public Advocacy, and in particular to Ernie Lewis and Ed Monahan, to be given this opportunity to continue to represent criminals accused through this outstanding office. As a state-wide public defender’s office, which must be recognized as unique among public defender’s offices nation-wide, Kentucky DPA is on the cutting edge. The promise and potential, for the delivery of the highest quality of legal representation, is truly exciting.”

DPA's other Directors are Rebecca DiLoreto, Post-Trial Division; Dave Norat, Law Operations; and Maureen Fitzgerald, Protection and Advocacy. ■



DPA Kentucky Innocence Project Has Two Innocence Claims in Court

Herman May

In the early morning hours of May 22, 1988, Herman May's life changed forever. A young woman, a student at the University of Kentucky, was raped and sodomized in the back yard of a friend's house in Frankfort at approximately 3:00 a.m. Just over a month later, while on vacation in California, the young victim picked the picture of Herman May from a photo lineup and identified him as her attacker. May was convicted in October of 1989 of rape and sodomy and sentenced to concurrent 20 year sentences.

May was one of the first prisoners to contact the Department of Public Advocacy's *Kentucky Innocence Project* (KIP) and request its help. A review of the questionnaire he submitted about specifics of his case raised a lot of red flags and his case was assigned a University of Kentucky law student for investigation. Almost immediately the red flags became glaring problems.

May's case involves some of the most common errors found in the wrongful conviction of innocent people. First, there was the identification issue. The initial description of the attacker was that he was thin, in his 20's, had long, stringy greasy dark brown hair and was wearing a blue cap. Two police officers testified about the description given within minutes of the attack. The investigating officer testified that the victim gave the same physical description at the hospital except noted that the attacker's hair was "chocolate brown." Herman May was 17 years old in May, 1988 and had bright red hair.

Once May was identified as a suspect, the investigating detective flew to California and showed the victim a photo lineup that included May's picture. The victim first picked out three pictures and began a process of elimination that led to her identifying May as her attacker.

At trial there was also testimony about similarities between hair found on the victim and Herman May's hair. The forensic specialist testified that "...it was as good of a match as I have ever had."

DPA

KIP's team of Marguerite Thomas, Gordon Rahn, Diana Queen, Chase College of Law Students Beth Albright and Debbie Davis and UK law student Chris Turner, however, continued to pursue the red flags. Based upon the victim's testimony at trial that she had not had consensual sex for several weeks prior to the rape, KIP requested the release of slides from the rape kit for DNA testing. The court granted the motion and

DNA tests excluded Herman May as the donor of the semen.

Amazingly, what should have led to the release of Herman May from prison led to a new revelation from the victim—she had consensual sex within a "couple of days" of the rape. As a result, the court ordered an additional battery of tests on other physical evidence and all of those test results were inconclusive. Still nothing matched Herman May.

On July 31st, the court ordered more testing. This time, mitochondrial testing of the hair will be done by a lab in New Orleans. While awaiting the results, the court plans to review tapes of the trial and is considering May's Motion for a New Trial. Results from the mitochondrial testing are expected within 4-6 weeks and Herman May's life is likely to change again.

Michael Elliott

Michael Elliott is a Chicago native who moved to Kentucky to live with his parents in 1991. Within a matter of weeks he had been arrested for the murder of a Laurel County businessman. Elliott was convicted in 1997 for the murder and sentenced to Life Without Parole for 25 years. Elliott's co-defendant was sentenced to death and died of a heart attack on death row at the Kentucky State Penitentiary.

Elliott was identified by two people—the victim's wife and the victim's neighbor. The victim's son, who arrived on the scene and gave chase to the men who killed his father, could not identify Elliott as one of the men he saw driving away. There was a great deal of conflict between the testimony of the neighbor and the son but still the neighbor's testimony was given a great deal of weight by the jury and the judge.

There was a substantial amount of evidence found at the co-defendant's home but there was not a single piece of physical evidence that could link Elliott to the crime. He was convicted primarily on the identification of the eyewitnesses.

The Department of Public Advocacy's *Kentucky Innocence Project* took on the case because Elliott's questionnaire indicated there might be some physical evidence that could be tested. UK College of Law student Alex Otto picked up the investigation from UK graduate Carrie Dixon (who is now an attorney for DPA) and found out in the police reports that samples were taken of a pool of blood that was found near the point of entry of the killers.

The blood was in a room in a different part of the house from where the victim was killed and the state's theory was that one of the killers had cut himself when he broke the glass out

of the door. KIP decided to pursue testing of the blood to determine if the blood could be matched with the victim, the co-defendant or Elliott. If the DNA profile does not match any of the three, then there is substantial evidence that someone other than Elliott broke the glass and the results could convince a judge or jury that Elliott was not at the crime scene as he has claimed for years.

Ms. Otto located the actual samples of blood at KSP Post 11 and KIP's team of Dennis Burke, Marguerite Thomas, Gordon Rahn and Alex Otto drafted and filed a motion requesting the evidence be preserved and the Commonwealth responded with a Motion to Destroy. The trial court denied Elliott's request and to everyone's horror granted the motion to destroy. Fortunately, the Kentucky Court of Appeals granted an emergency stay on the same day and later granted a Writ of Prohibition voiding the trial court's order to destroy.

Barry Scheck and the *Innocence Project* at Cardozo Law School in New York took a keen interest in the Elliott case and joined with DPA's KIP in filing a Section 1983 action in federal court seeking the preservation and release of the blood for testing. The action claimed that Elliott had a constitutional due process right to the testing and that Kentucky's recently adopted DNA legislation denied Elliott equal protection.

The federal court determined that it did, indeed, have jurisdiction over the matter but it held its decision in abeyance pending a state court ruling on a similar motion filed in Laurel Circuit Court with a hearing scheduled for August 26, 2002.



The Kentucky Innocence Project: Top, L-R: Gordon Rahn, Debbie Baris, Tom Williams, Steve Florian, Prof. Mark Stavsky Bottom, L-R: Alexandria LuSans-Otto, Marguerite Thomas, Diana Queen, Beth Albright

DPA's KIP continues to investigate 17 other cases and is currently reviewing another 70 requests for assistance for assignment to new students at Chase College of Law and the University of Kentucky College of Law. DPA's KIP staff are working closely with law professors and students to provide quality assistance to those incarcerated in Kentucky's prisons who have a legitimate claim of actual innocence. ■

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Illegal Discrimination In Jury Selection – It's Not Just Race and Gender Anymore

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INTRODUCTION

Not all that many years ago, a black American accused of a crime would gaze across the courtroom at the jury panel called to decide his case and look into the eyes of a group of white men, 12 of whom would decide if he should live or die. But society changed and so did the judicial system. Years later in more modern times, the accused black American on trial could look across the courtroom as jury selection began and see white men, black men, even white women and black women looking back at him. But when it came time for the lawyers to argue and the witnesses to testify, not much had changed. The 12 citizens seated in the jury box more often than not were all men, all white, and all qualified to sit in judgment of a fellow citizen. In 1986, the United States Supreme Court decided that something was wrong, and the Court created a way to address the problem.

When the United States Supreme Court decided *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and announced that a litigant's use of peremptory challenges could be called into question by an opposing party, many in the legal community, including some of the justices on the Court, predicted that the end of peremptory challenges was inevitable. But 16 years later, peremptory challenges are alive and well in all jurisdictions. *Batson* was decided on April 30, 1986. Since then, Kentucky appellate courts have issued 20 published opinions in which *Batson* issues are discussed. Nineteen of those opinions were in criminal cases, and the other was a medical malpractice case. Only 2 litigants prevailed on the *Batson* issue – the appellant in the medical malpractice case and the defendant in a 2000 case. In 3 of the criminal cases, the accused actually won on the *Batson* issue in the Court of Appeals, but the Supreme Court granted discretionary review in each case and reversed the Court of Appeals.

The recent criminal case in which the Kentucky Supreme Court found *Batson* error and reversed for a new trial was *Washington v. Commonwealth, Ky.*, 34 S.W.3d 376 (2000).¹ In that decision, the Kentucky Supreme Court set out some very valuable guidance for trial judges who are faced with *Batson* challenges. At the same time, the court sent a caution and warning to trial attorneys² that the reasons they give for striking particular jurors will be strictly scrutinized.

With the parties forewarned and with the prospect that more and more *Batson* challenges will be upheld at the trial level, the next round of *Batson* litigation may focus on the relief to be granted when challenges are upheld. Furthermore, the application of *Batson*'s principles beyond the realm of race and gender, to things like age and religion, is right around the corner.

I. IN GENERAL

Every trial attorney should be familiar with the following cases:

Swain v. Alabama,
380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)

Batson v. Kentucky,
476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)

Powers v. Ohio,
499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)

Edmonson v. Leesville Concrete Co.,
500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991)

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994)

Simmons v. Commonwealth, Ky.,
746 S.W.2d 393 (1988)

Commonwealth v. Snodgrass, Ky.,
831 S.W.2d 176 (1992)

Washington v. Commonwealth, Ky.,
34 S.W.3d 376 (2000)

II. MAKING THE CHALLENGE**A. Pretrial Preparation**

1. Initially, it is a good idea to find out if the proper procedure for summoning prospective jurors is being followed. See KRS Chapter 29A and Administrative Procedures of the Court of Justice, Part II, Jury Selection and Management [Ad. Proc. II Sections 1-33]. Note that many of the steps in the jury selection procedure involve personal attendance or approval by the chief circuit judge.³ Make sure that shortcuts have not been implemented that ignore the chief circuit judge's role and responsibility. See *Commonwealth v. Nelson, Ky.*, 841 S.W.2d 628 (1992). Furthermore, don't overlook the possibility of illegal discrimination at the grand jury selection stage. See *Campbell v. Louisiana*, 523 U.S. 397, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998).

2. Does the local system, by which prospective jurors are notified of service, are excused from service or are granted a delay of service, ultimately result in the elimination of a disparate number of the members of an identifiable group? While this factor alone may not be grounds for a successful challenge to the panel based on discrimination, it could become an important factor in a subsequent *Batson* challenge. Also, some courts that have discovered underrepresentation of identifiable groups on jury panels have fashioned remedies to correct the problems. Counsel must know if remedial actions have been taken, and if so, the remedial actions must be

scrutinized. For example, the United States District Court for the Eastern District of Michigan at Bay City determined that although African Americans made up 4.2% of the population in the Bay City area, only 3.45% of persons called for jury service were African Americans. To remedy this disparity, the court enacted jury selection procedure rules that removed from the jury panel every fifth juror who was categorized racially as "white" or "other." As a result, African American participation in jury service was increased. But the application of the rules also dramatically reduced jury service participation by Hispanic people (who fell in the "other" category). In *U.S. v. Ovalle*, 136 F.3d 1092 (1998), criminal defendants successfully challenged the discriminatory effect of the rules and were granted new trials.

3. Gather all the information that you can about how the prosecutor conducts voir dire and exercises strikes. If possible, find out what kind of "neutral" explanations the prosecutor has given in past cases when challenged. For example, does the prosecutor routinely state that the juror "had a scowl" or was "not paying attention?" Presumably, a prosecutor who keeps repeating the same, lame excuses over and over at each trial will lose credibility with the judge if you are able to point this out and back it up.

Remember, both the United States Supreme Court and the Kentucky Supreme Court have said that, when deciding a *Batson* issue, the trial judge's focus must necessarily be on the **credibility** of the prosecutor. See *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), and *Commonwealth v. Snodgrass, Ky.*, 831 S.W.2d 176, 179 (1992).

4. Create an efficient system for recording the race, gender, and physical appearance of each juror **AND** for noting each time that a juror says something, no matter what is said. The best way to keep track is with assistance, if possible – another attorney or a paralegal, administrative assistant, secretary, law clerk, investigator, etc. Also, for appellate purposes, don't be reluctant to state the obvious to make your record. When you and the judge and the prosecutor are discussing "Juror No. 122," all of you know that Juror No. 122 is an elderly black woman, but neither a trial transcript nor a videotape record will necessarily show these important details to an appellate court.

5. Formulate some voir dire questions that are designed to bring out feelings on race and gender. As an example of what you may find out, see what came to light during voir dire in *Gamble v. Commonwealth, Ky.*, 68 S.W.3d 367, 373 (2002). In some cases, questioning prospective jurors about possible racial bias or prejudice is constitutionally required. *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973); *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976); *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). It is the trial court's discretion (except in a capital case) whether to permit group or individual voir dire

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on the subject of race in a particular case. RCr 9.38. But see *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), where the court noted that jurors are very reluctant to admit bias or prejudice in the presence of other jurors.

B. Timeliness of the Challenge

1. A challenge to the entire panel must be made before the prospective jurors are questioned.

“A motion raising an irregularity in the selection or summons of the jurors or formation of the jury must precede the examination of the jurors.” RCr 9.34.

This is the time to point out to the court that the panel is “all white” or “only 2 of the 40 panel members are women,” suggesting that something is wrong with the selection process. Both federal and state government web sites are good quick sources for population demographics and statistical data that may help to prove your claim of under-representation.

2. A *Batson* challenge to the prosecutor’s strikes must be made before the jury is sworn and the other panel members are excused. Specifically:

“If there is a challenge to be made to the exercise of peremptories in this state, it should be made when the lists of strikes has been returned to the judge and before the jury has been accepted by the parties and sworn to try the case and before the remainder of the jurors have been discharged from service.” *Simmons v. Commonwealth*, Ky., 746 S.W.2d 393, 398 (1998). See also *Dillard v. Commonwealth*, Ky., 995 S.W.2d 366 (1999).

Make sure that you are on the record when this discussion takes place. Don’t ever decide that it is too late to bring up a *Batson* challenge. If defense counsel did not have a chance to make a *Batson* challenge before the panel members were excused and the jury was sworn, the challenge is still timely if it is made “as soon as [is] practically possible.” *Washington v. Commonwealth*, Ky., 34 S.W.3d 376, 378 (2000). See also *Gamble v. Commonwealth*, Ky., 68 S.W.3d 367 (2002).

III. SUBSTANCE OF THE CHALLENGE

Challenge the Prosecutor’s Improper Use of Peremptory Strikes on the Basis of:

A. Race

Batson specifically says that the defendant who is a member of an identifiable racial group may challenge exclusion of members of that group from the jury. *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), says that a white defendant may challenge the prosecutor’s striking of black jurors.

B. Gender

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), says that a litigant may challenge a party’s use of peremptories to strike jurors on the basis of gender.

C. Religion

In *Casarez v. State*, 913 S.W.2d 468 (Texas Ct.Crim.App. 1995), the court interpreted *J.E.B. v. Alabama ex rel. T.B.* to determine if the exercise of peremptory challenges on the basis of religion was improper. (The state used peremptory challenges on 2 Pentecostal jurors on the basis that members of that faith have trouble assessing punishment. The court found no *Batson* violation.) But see, *Davis v. Minnesota*, 511 U.S. 1115, 114 S.Ct. 2120, 128 L.Ed.2d 679 (1994), J. Thomas, dissenting from the denial of certiorari. (Prosecutor struck Jehovah’s Witness on the basis that Jehovah’s Witnesses are reluctant to exercise authority over other human beings). It seems that the United States Supreme Court was not ready in 1996 to confront the issue of illegal discrimination in jury selection on the basis of religion, but addressing the issue is inevitable. Based on state constitutional law, 2 courts have held that jurors may not be struck on the basis of religion. *Joseph v. State*, 636 So.2d 777, 780 (Fla. 3d. D.C.A. 1994) [Jewish jurors]; *People v. Kagan*, 101 Misc.2d 274, 420 N.Y.S.2d 987 (1979). See also *State v. Purcell*, 18 P.3d 113 (Ariz.App. Div. 1, 2001), joining California, Connecticut, and the 7th Circuit in extending *Batson* to strikes based upon religious affiliation.

D. Disabilities

Federal law recognizes that discrimination on the basis of mental or physical disability is unlawful. *The Americans with Disabilities Act of 1990*, 42 U.S.C. Sec. 12101 et seq. According to Ad. Proc. II Section 8, Subsection (3), “pursuant to the federal Americans With Disabilities Act of 1990, an individual with a disability shall not be disqualified [from jury service] solely by reason of the disability.” Therefore, a prosecutor cannot exercise a peremptory challenge on the basis of disability. See *New York v. Green*, 148 Misc.2d 666, 561 N.Y.S.2d. 130 (N.Y.Co.Ct. 1990) [Deafness is not a proper reason to strike a juror.]

E. National Origin/Language

In *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), the court found that Hispanic jurors are considered members of a racial group for *Batson* purposes. The issue turned on the bilingualism of the jurors. See also *United States v. Baggi*, 853 F.2d 89, 96 (2nd Cir. 1988) [Italian-Americans], and *Commonwealth v. Carleton*, 418 Mass. 773, 641 N.E.2d 1057 (Mass. 1994) [Irish-Americans].

F. Potential Grounds for Challenges in Kentucky

According to SCR 4.300, Kentucky Code of Judicial Conduct, Canon 3, Section B(6):

A judge shall require lawyers in proceedings before the judge to refrain from manifesting by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel, or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

This provision should supply additional grounds for illegal discrimination *Batson* challenges in the trial court. Also, if, for example, you have made a *Batson* challenge on the basis of the race of the excluded juror and the prosecutor insists that the reason for the challenge was the age, not the race, of the juror, you can use this Canon to argue that age is not a legitimate reason for the use of a peremptory strike. Note that the 6th Circuit has found that age (at least youthful age) is not an improper reason to strike a juror. See *U.S. v. Maxwell*, 160 F.3d 1071, 1075 (6th Cir. 1998), citing *Ford v. Seabold*, 841 F.2d 677, 682 (6th Cir. 1988), and other authorities. But in *Washington v. Commonwealth*, *supra*, the Kentucky Supreme Court said, "Certainly age was not a sufficient reason to strike a 43-year-old man." 34 S.W.3d at 379.

I. PRIMA FACIE CASE BY THE CHALLENGING PARTY

A. Procedure

Before the prosecutor is required to state race-neutral reasons for his or her strikes, the defendant must establish a *prima facie* case of discrimination.

1. In the past, prosecutors have been so anxious to give their reasons, that they did not wait for the court to rule on whether a *prima facie* case had been established. That appears to no longer be the case, as prosecutors and judges became more familiar with the proper procedures. Compare *Commonwealth v. Hardy*, Ky., 775 S.W.2d 919 (1989), with *Commonwealth v. Snodgrass*, Ky., 831 S.W.2d 176 (1992).

2. Defense counsel must articulate facts or demonstrate circumstances that suggest that the prosecutor has used peremptory challenges improperly. The party making a *Batson* challenge has the burden to point to facts and circumstances that "raise an inference" of discrimination. Offer your evidence or call your witnesses, if you have either.

B. Sheer numbers are not enough for a *prima facie* case

In *Commonwealth v. Hardy*, Ky., 775 S.W.2d 919, 920 (1989), the Supreme Court said: "*Batson* requires more than a simple numerical calculation. Numbers alone cannot form the only basis for a *prima facie* showing."

1. You must be prepared to say more than, "The prosecutor struck 4 of 5 African-Americans," but if that is all you have, don't hesitate to raise the issue. Note that in *Washington v. Commonwealth*, *supra*, the court entertained a *Batson* challenge where the prosecutor eliminated the only 2 African Americans on the jury panel. 34 S.W.3d at 377.

2. To counter the notion that "numbers alone" are not enough, see *People v. Turner*, 726 P.2d 102, 112 (Cal. 1986), and *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986), where the courts noted that the accused is entitled to relief where the prosecutor improperly exercised even one peremptory challenge.

3. While our highest court has said that "numbers alone" are not enough, it has not said what is enough or what, in addition to numbers, is required, except to say that the trial judge should consider all the "relevant circumstances." *Commonwealth v. Hardy*, Ky., 775 S.W.2d 919 (1989). See also *Wells v. Commonwealth*, Ky., 892 S.W.2d 299, 302 (1995), referring to the "facts and circumstances of the selection."

C. Doubts should be resolved in the accused's favor

If the trial court has any doubts about whether the complaining party has met the initial burden of showing a *prima facie* case, the court should resolve the doubt in favor of the complaining party. *Sampson v. State*, 542 So.2d 434 (Fla. App. 4 Dist. 1989).

D. Prosecutor's burden

Once you have met your burden to show a *prima facie* case of discrimination, the burden then shifts to the prosecutor to come forward with neutral explanations for its use of the peremptory challenges. That is, the government must present justifications which do not deny equal protection. See *U.S. v. Maxwell*, 160 F.3d 1071, 1074 (6th Cir. 1998). But, "[t]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995).

According to *Batson*, the prosecutor cannot meet his burden by simply stating that the strike was not based on race. *Batson v. Commonwealth*, 476 U.S. at 98; *Stanford v. Commonwealth*, Ky., 793 S.W.2d 112, 114 (1990). In *U.S. v. Gibbs*, 182 F.3d 408, 438-39 (6th Cir. 1999), quoting *Batson*, the 6th Circuit said that the prosecutor's reason must be "clear and reasonably spe-

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cific.” Our Supreme Court in *Washington v. Commonwealth*, *supra*, quoted the same “clear and reasonably specific” language. 34 S.W.3d at 379. The court quoted from a Florida case to point out that the prosecutor’s proffered reasons must be neutral and reasonable and not a pretext before they can be found to be “clear and reasonably specific ... legitimate reasons.” 34 S.W.3d at 379. More recently, in *Gamble v. Commonwealth*, Ky., 68 S.W.3d 367, 371 (2002), the Court, once again quoting from a Florida case, reaffirmed that the trial judge may not simply accept the prosecutor’s proffered reasons at face value. In *Gibbs* the prosecutor said that he struck 2 African-Americans because as a result, 2 other more desirable juror, would sit on the jury. The 6th Circuit found this explanation to be inadequate under *Batson*.

V. THE BATSON HEARING

In Kentucky, the challenging party has a right to a hearing. Note that it is not the establishment of a *prima facie* case which triggers the right to a hearing. Once the *Batson* challenge is made, the hearing is mandatory. “*Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), requires that upon **timely** objection to peremptory challenges for alleged discrimination, the court shall hold a hearing to determine if a *prima facie* case of discrimination can be made.” [Emphasis in original]. *Simmons v. Commonwealth*, Ky., 746 S.W.2d 393, 397 (1988). Have the *Simmons* case ready for the trial judge’s review and, if it is to your advantage, insist on a full-blown evidentiary hearing before you even articulate the specific basis for the *Batson* challenge.

A. Full Hearing

The trial court must hold a “full hearing.” *McKinnon v. State*, 547 So.2d 1254 (Fla. App. 4 Dist. 1989).

B. Limitations on the Hearing

Be prepared to deal with *Commonwealth v. Snodgrass*, Ky., 831 S.W.2d 176 (1992), where the Court said that once the prosecutor gives “race neutral” explanations, the trial court may accept them at “face value,” depending on the demeanor and credibility of the prosecutor. The Court went on to say that neither the state nor federal constitution required further questioning of a juror to clear up the prosecutor’s suspicions about the juror as articulated in the “race neutral” explanation. The court did recognize that such a further inquiry could be helpful. Object to any limitations that the court places on your right to present relevant information at the hearing. Furthermore, the Kentucky Supreme Court’s latest pronouncement on the subject specifically tells trial judges that they are not to accept explanations at face value. *Gamble*, 68 S.W.3d at 371.

C. What Kind of Hearing?

1. Despite what *Snodgrass*, *supra*, suggests, you should insist on as extensive a hearing as you believe is necessary.

2. In Texas, the practice is that the prosecutors “take the stand” and “testify.” See *Keeton v. State*, 749 S.W.2d 861 (Tex. Crim. App. 1988); *Smith v. State*, 814 S.W.2d 858 (Tex. App. – Amarillo 1991). In *Ex Parte Lynne*, 543 So.2d 709, 712 (Ala. 1988), counsel was permitted to cross-examine opposing counsel.

3. If the prosecutor treats similarly-situated black jurors and white jurors differently, point this out to the court. “In the federal court system, it has been determined that a *Batson* violation occurs when a struck black juror is treated differently than prospective white jurors who have both disclosed similar circumstances. See generally, *United States v. Staples*, 30 F.3d 108 (10th Cir. 1994); *United States v. Guerra-Marez*, 928 F.2d 665 (5th Cir. 1991).” *Wells v. Commonwealth*, Ky., 892 S.W.2d 299, 303 (1995).

4. If the prosecutor claims that the strike is based upon nonverbal conduct of the panel member, insist that the nonverbal conduct be described by the prosecutor with particularity. See *Price v. Short*, 931 S.W.2d 677 (Tex. App.-Dallas 1996). This is important because “explanations which focus upon a venire person’s body language or demeanor must be closely scrutinized because they are subjective and can be easily used... as a pretext for excluding persons on the basis of race.” *Epps v. U.S.*, 683 A.2d 749, 753 (D.C.App. 1996), quoting *People v. Harris*, 129 Ill.2d 123, 176, 544 N.E.2d 357, 380, 135 Ill. Dec. 861, 884 (1989). In *Washington v. Commonwealth*, *supra*, the Court found the prosecutor’s claim that the juror was “inattentive” and “bored” was troubling where the prosecutor failed to ask the juror any questions during voir dire. 34 S.W.3d at 379.

5. If you want to recall a juror for questioning to impeach the prosecutor’s reason for a strike, to get around *Commonwealth v. Snodgrass*, *supra*, argue that since the burden is on you, due process requires that you be given an opportunity to present any relevant evidence. See *Green v. State*, 891 S.W.2d 340, 342 (Tex. App. - Beaumont 1995), where the court explained that the burden was on the appellant to make a *prima facie* case and the appellant “had the opportunity to call venireperson Brown to the stand and question him....” Citing *Camacho v. State*, 864 S.W.2d 524 (Tex. Crim. App. 1993), the Texas Court also pointed out that after the prosecutor states the apparently neutral explanation for a strike, the defense has the opportunity to make additional comments or present evidence to impeach or rebut the explanation. In *Mackintrush v. State*, 978 S.W.2d 293 (Ark. 1998), the Arkansas Supreme Court emphasized the importance of the opponent of a strike presenting additional evidence or argument after hearing the other party’s “racially neutral” explanation.

6. Since both the United States and Kentucky Supreme Courts are in agreement that the trial court's ruling will rest greatly on an evaluation of the prosecutor's credibility [See *Hernandez v. New York* and *Commonwealth v. Snodgrass*], presumably it would be entirely proper to attack that credibility with opinion, reputation or other impeaching evidence. KRE 607, 608.

7. In *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), the United States Supreme Court summarily reversed, in a per curiam order, the decision of the 8th Circuit Court of Appeals which granted habeas corpus relief based on a *Batson* issue. In the ruling below, the 8th Circuit had reversed the District Court based on the language in *Batson* and *Hernandez v. New York*, which requires that the prosecutor's race-neutral explanations be **related to the particular case to be tried**. *Elem v. Purkett*, 25 F.3d 679, 683-684 (8th Cir. 1994). The prosecutor in state court had said that he struck a particular black juror because he had long curly hair, a mustache and a goatee-type beard, without further explanation or a request for further explanation from the trial court. Hopefully, all that this summary action by the Supreme Court means is that it does not approve of circuit courts on habeas review making findings of intentional discrimination contrary to the findings of state trial courts, state courts of appeal and U.S. Districts Courts, which is what happened here.

D. The Trial Court's Ruling

1. As noted above, the trial court must, by necessity, focus on the credibility and demeanor of the prosecutor. The prosecutor's reasons cannot merely be accepted by the judge at face value. *Washington v. Commonwealth*, *supra*, 34 S.W.3d at 379, quoting *Wright v. State*, 586 So.2d. 1024, 1028 (Fla. 1991). See also *Gamble v. Commonwealth*, Ky., 68 S.W. 3d 367, 371 (2002).

2. Although *Batson* and *Powers* indicate that a constitutional violation would be found where the striking of a juror was based **solely** on the person's race, where the prosecutor infers that race was a **factor**, you should argue that a violation has occurred. See *Benavides v. American Chrome & Chemicals*, 893 S.W.2d 624, 627 (Tex. App. – Corpus Christi 1994), quoting the Texas Supreme Court in *Powers v. Palacios*, 813 S.W.2d 489, 491 (Tex. 1991): "We hold that equal protection is denied when race is a factor in counsel's exercise of a peremptory challenge to a prospective juror."

3. *State v. McGuire*, 892 S.W.2d 381, 384 (Mo. App. E.D. 1995), overruled on other grounds in *State v. Redman*, 916 S.W.2d 787 (Mo. 1996), offers some factors for the trial court to consider in evaluating the prosecutor's offered reasons for a peremptory strike: "To be sufficient the explanation need only be race-neutral, reasonably specific and clear, and related to the particular case to be tried."

4. Similarly, the Court of Appeals of Texas offered a "nonexclusive list of factors" for the trial judge, noting that the presence of any one of the factors "tends to show that the State's reasons are either an impermissible pretext or are not actually supported by the record."

"Those factors are:

1. The reason given for the peremptory challenge is not related to the facts of the case;
2. There was a lack of questioning to the challenged juror or a lack of meaningful questions;
3. Disparate treatment, *i.e.*, persons with the same or similar characteristics as the challenged juror were not struck;
4. Disparate examination of members of the venire, *i.e.*, questioning a challenged juror so as to evoke a certain response without asking the same question of other panel members; and
5. An explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically."

Smith v. State, 814 S.W.2d 858, 860-61 (Tex. App. – Amarillo 1991). See also *Washington v. Commonwealth*, *supra*, where the Supreme Court criticized the prosecutor's claim that the juror was "inattentive" and "bored," especially where the prosecutor directed no questions to the juror. 34 S.W.3d at 379.

5. The Missouri Court of Appeals also set out several factors for the trial judge to consider:

"Factors the trial court may consider when determining whether the reason is race-neutral include:

1. The existence of similarly-situated white jurors who the state did not strike;
2. The degree of relevance between the explanations and the case to be tried;
3. The prosecutor's statements or demeanor during voir dire;
4. The demeanor of the excluded venire persons;
5. The trial court's past experiences with the prosecutor; and

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6. Other objective factors bearing on the state's motive to discriminate on the basis of race.

[Citation omitted]. The state's failure to use all of its strikes against venire persons of a racial minority, or the presence of a racial minority on the defendant's jury, are relevant to whether race was the prosecutor's motive for making the challenged strikes. [Citation omitted]."

State v. Martin, 892 S.W.2d 348, 353 (Mo. App. W.D. 1995). [For a comprehensive treatment of *Batson* issues, see *State v. Davis*, 894 S.W.2d 703 (Mo. App. W.D. 1995)].

6. In the recent *Washington* decision, the Kentucky Supreme Court was critical of a prosecutor who used age as a neutral reason. Furthermore, the court had problems with prosecutors who rely on "hunches drawn from the juror's demeanor." Failing to examine a juror during voir dire or conducting a perfunctory examination are both signs that the prosecutor's reasons are pretextual or not supported by the record. Even a race-neutral reason such as the juror's previous service on a case that ended in acquittal is not good enough if it amounts to a "bare assertion" without details about the prior jury service. 34 S.W.3d at 379.

VI. RELIEF

A. Once the trial judge rules that the prosecutor has not sufficiently articulated "neutral" reasons for a peremptory challenge, what relief are you entitled to? You can be as creative as you want in this area.

B. Based upon the recent case of *Washington v. Commonwealth*, Ky., 34 S.W.3d 376 (2000), we now know that the proper relief on appeal for a successful *Batson* challenge is a new trial. Neither the Kentucky Supreme Court nor the United States Supreme Court has set out the proper remedy for a *Batson* violation at the trial level. *Batson* did not articulate a particular remedy, but the Court suggested that discharge of the entire panel or placing the improperly discharged jurors back on the panel may be in order. 476 U.S. at 99, fn. 24.

1. In *Simmons v. Commonwealth*, Ky., 746 S.W.2d 393, 397 (1988), the Court gave a clue about relief for a successful *Batson* challenge. The *Batson* challenge was not timely in *Simmons*, but the Court noted that the relief requested was a mistrial, and not a demand that the "alleged discriminatory challenges be disallowed." Discussing timeliness, the Court said, "If it were determined that the challenge of any juror was the result of discrimination, that challenge could have been disallowed and that juror would have remained on the panel." 746 S.W.2d at 398. Don't consider what the Court said in *Simmons* to be a limitation on the proper form of relief.

2. Any of the following would appear to be appropriate forms of relief:

- a. Mistrial.
- b. The entire venire is resealed. [See *State v. Franklin*, 456 S.E.2d 357 (S.C. 1995), and *United States v. Bentley-Smith*, 2 F.3d 1368 (5th Cir. 1993)].
- c. The jury panel is discharged and a new panel is assembled. *Brogden v. State*, 649 A.2d 1196 (Md.App. 1994); *Gilchrist v. State*, 627 A.2d 44 (Md.App. 1993).
- d. The prosecutor loses all peremptory challenges, all persons struck by the prosecutor are placed back on the panel, and the defense is given additional challenges equal to the number of challenges lost by the prosecutor.
- e. The improperly eliminated jurors are placed, not just back on the panel, but on the jury. [See *State v. Bennett*, 907 S.W.2d 374 (Mo.App. E.D. 1995)].
- f. All prosecution strikes are returned to the panel, and the defense is given an opportunity to redo its strikes.
- g. Any other relief that you can think of.

3. In *Ezell v. State*, 909 P.2d 68, 72 (Okla. Cr. 1995), the court noted that the majority of jurisdictions that have addressed the remedy for a *Batson/McCollum* violation have determined that the trial court should disallow the peremptory challenge and seat the challenged juror. But the court then adopted the "flexible" approach used in Texas and Massachusetts, which permits the trial court to choose to reinstate the challenged juror(s) or to seat an entirely new panel. But see *People v. Rodriguez*, 58 Cal. Rptr. 2d 108, 115 (Cal. App. 5 Dist. 1996), where the court determined that the proper remedy for a *Batson* violation was not to seat the challenged juror and to declare one of the prosecutor's challenges forfeited; the proper remedy is to strike the entire venire.

4. Keep in mind that if you are entitled to relief, it means that the prosecutor is guilty of illegal discrimination and there should be a significant behavior changing consequence. If the only relief that is granted when the prosecutor is guilty of illegal discrimination is loss of the improperly used peremptory, then it may be well worth it for the prosecutor to continue to discriminate and take the risk of getting caught. The punishment should fit the legal wrong doing.

VII. CHALLENGES TO YOUR USE OF PEREMPTORIES

A. In *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), the Court held that *Batson* applied to criminal defendants and "prohibited purposeful discrimination on the ground of race in the exercise of peremptory challenges." 120 L.Ed.2d at 51.

B. You should be prepared to defend the use of any of your peremptories if you are challenged by the prosecutor.

C. According to *McCullum*, *supra*, the same procedure applies to challenges of your strikes, that is, the prosecutor must demonstrate a *prima facie* case of discrimination, and if he or she is successful, the defense must articulate a neutral explanation for the peremptory challenges.

VIII. APPELLATE REVIEW

A. Standard

The standard for appellate review of a trial court ruling on a *Batson* challenge is whether the trial judge's ruling was "clearly erroneous" and whether there was an "abuse of discretion." *Wells v. Commonwealth*, Ky., 892 S.W.2d 299 (1995).

B. Trial Court's Findings

In *Commonwealth v. Snodgrass*, Ky., 831 S.W.2d 176 (1992), the Kentucky Supreme Court adopted the clearly erroneous standard from *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), in which the trial court's ultimate finding on the question of discriminatory intent is accorded great deference on appeal. *See also Wells v. Commonwealth*, *supra*, 892 S.W.2d at 299.

C. Remedy

1. The exclusion of even 1 member of the panel for racial reasons "invalidates the entire jury selection process and mandates reversal for a new trial. [citations omitted]." *Benavides v. American Chrome & Chemicals*, 893 S.W.2d 624 (Tex. App. – Corpus Christi 1994).

2. Where the trial court fails to make findings on the sufficiency of the prosecutor's explanations and fails to conduct an inquiry into the basis of each peremptory challenge, the remedy is not remand for a hearing, but reversal of the conviction for a retrial. *Cleveland v. State*, 888 S.W.2d 629, 632 (Ark. 1994).

3. Reversal and remand for a new trial is the remedy when the appellate court finds a *Batson* violation that the trial court did not find. *Washington v. Commonwealth*, Ky., 34 S.W.3d 376 (2000). But see *United States v. Hill*, 146 F.3d 337 (6th Cir. 1998), where the 6th Circuit remanded for further proceedings and specific findings by the trial court on a *Batson* issue.

4. A *Batson* error constitutes a "structural error," which is not subject to harmless error analysis. *United States v. McFerron*, 163 F.3d 952, 955-956 (6th Cir. 1998).

CONCLUSION

It is important to keep in mind that when you make a *Batson* challenge, you are, as a third party, asserting the rights of the excluded jurors to be free from illegal discrimination. *See Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411

(1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). While being an advocate for your client comes naturally to a criminal defense attorney, excellence in advocacy means using all of your knowledge, expertise and persuasive skills in what is a new but not entirely unfamiliar role: advocate for another citizen - the juror who is the victim of unfair treatment at the hands of his or her own government.

Endnotes

1. For an in-depth analysis of the *Washington* decision, see Richard Hoffman, "Limits on Prosecutor's Use of Peremptories," Department of Public Advocacy's *The Advocate*, Vol. 23, No. 2, March 2001.

2. In this article, and in the cases that discuss *Batson* challenges, the focus is on the trial attorney and on his or her reasons for striking certain jurors. This makes perfect sense when the lawyer involved is a prosecutor, but it is important to keep in mind that when we are talking about a criminal defendant or a party to civil litigation, it is the *defendant* or the *party*, and not the lawyer, who has the right to exercise peremptory challenges. *See Steele v. Commonwealth*, 33 KY. 84, 3 Dana 84, 85 (1835) ("The right of peremptory challenge is a personal privilege, and can only be exercised by the party himself, or in virtue of his authority.").

3. Recent (2002) amendments to KRS Chapter 29A appear to transfer to people who are not judges the chief circuit judge's power to disqualify jurors, to excuse them from service, or to postpone their service. These amendments would permit court clerks, deputy clerks, court administrators, or deputy court administrators to make the decisions on who cannot serve, who does not have to serve, or who can put off service to another time. The corresponding Administrative Procedures of the Court of Justice do not provide for the same delegation or transfer of the chief circuit judge's power. "Matters pertaining to jury selection and management are more inherently within the authority of the courts than the legislature, and any conflict between a rule and a statute must be resolved by following the rule rather than the statute. [Citations omitted]." *Samples v. Commonwealth*, Ky., 983 S.W.2d 151, 152-153 (1998).

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KENTUCKY CASES ADDRESSING BATSON ISSUES

Gamble v. Commonwealth, Ky., 68 S.W.3d 367 (2002)

Taylor v. Commonwealth, Ky., 63 S.W.3d 151 (2001)

Woodall v. Commonwealth, Ky., 63 S.W.3d 104 (2001)

Washington v. Commonwealth, Ky., 34 S.W.3d 376 (2000)

Graves v. Commonwealth, Ky., 17 S.W.3d 858 (2000)

Commonwealth v. Davis, Ky., 14 S.W.3d 9 (1999)

Dillard v. Commonwealth, Ky., 995 S.W.2d 366 (1999), *cert. den.*, *Dillard v. Kentucky*, 528 U.S. 1009, 120 S.Ct. 508, 145 L.Ed.2d 393 (1999)

Wiley v. Commonwealth, Ky.App., 978 S.W.2d 333 (1998)

Wells v. Commonwealth, Ky., 892 S.W.2d 299 (1995)

McGinnis v. Commonwealth, Ky., 875 S.W.2d 518 (1994),
overruled on other grounds, *Elliott v. Commonwealth, Ky.*, 976 S.W.3d 416 (1998)

Wilson v. Commonwealth, Ky., 836 S.W.2d 872 (1992),
overruled on other grounds, *St. Clair v. Roark*, 10 S.W.3d 482 (1999)

Commonwealth v. Snodgrass, Ky., 831 S.W.2d 176 (1992)

Washington v. Goodman, Ky., App., 830 S.W.2d 398 (1992)

Stark v. Commonwealth, Ky., 828 S.W.2d 603 (1991), overruled on other grounds,
Thomas v. Commonwealth, Ky., 931 S.W.2d 446 (1996)

Dunbar v. Commonwealth, Ky., 809 S.W.2d 852 (1991)

Sanders v. Commonwealth, Ky., 801 S.W.2d 665 (1990), *cert. den.*,
Sanders v. Kentucky, 502 U.S. 831, 112 S.Ct. 107, 116 L.Ed.2d 76 (1991)

Standford v. Commonwealth, Ky., 793 S.W.2d 112 (1990)

Commonwealth v. Hardy, Ky., 775 S.W.2d 919 (1989)
Hannan v. Commonwealth, Ky., App., 774 S.W.2d 462 (1989) *

Simmons v. Commonwealth, Ky., 746 S.W.2d 393 (1988), *cert. den.*,
Simmons v. Kentucky, 489 U.S. 1059, 109 S.Ct. 1328, 103 L.Ed.2d 596 (1989)

*This case, which said that *Batson* did not apply to gender discrimination, has obviously been superseded by *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). ■

Death by Innocence: Wrongful Convictions in Capital Cases

Abstract

In the post-*Furman* era, an extraordinarily high number of reversals have occurred in capital cases due to the innocence or probable innocence of the convicted defendant. This research reviews 88 reversals that occurred between 1973 and 2000. It explores the reasons for those reversals including: finding the culpable party, prosecutorial and police misconduct; perjury; new evidence; and ineffective assistance of counsel. The implications of this data as they relate to the operations of the criminal justice system and the credibility of that system are examined.

The always contentious debate over the use of capital punishment in the United States intensified recently due to a series of highly publicized releases of wrongfully convicted death row inmates. The conviction of the innocent by the criminal justice system is not uncommon. Research suggests that a minimum of one percent of all felony convictions are mistaken or wrongful convictions (Huff et al., 1996). Wrongful convictions can and do occur in homicide trials and innocent people in this country can and do receive death sentences. Lack of adequate legal representation, coerced or false confessions, testimony from jailhouse snitches, uncorroborated witnesses, prosecutorial and police misconduct; juror misinterpretation and misunderstanding of the law, and judicial error and prejudice can combine to result in wrongful convictions. The population examined herein are the lucky ones in a system of capital punishment that operates with little rationality. Eventually, they were all exonerated.

Methodology

The purpose of this research is to examine the demographic and circumstantial characteristics of the capital cases in which exoneration followed a wrongful conviction in the post-*Furman* era and to determine if any relationships exist between variables. Specifically, the questions of race and length of time prior to exoneration, state of conviction and execution rate, and the roles of criminal justice system functionaries will be examined. Data was obtained from the Death Penalty Information Center (DPIC) (<http://www.deathpenaltyinfo.org/>), a large clearinghouse of information regarding capital punishment, and vetted using newspaper articles and court decisions. Each case was reviewed to determine the race and gender of the exonerated person, the state of conviction, the length of time spent in prison prior to release, and the reason(s) for reversal by the courts. The reasons for reversal were coded as: prosecutorial misconduct, police misconduct, perjury, DNA, real killer found, lack of evidence, new evidence, ineffective assistance of counsel, death not a homicide, and another suspect.

Two of these variables were further examined. Prosecutorial misconduct was coded as being present and then described by the type of misconduct: withholding exculpatory evidence, subornation of perjury, and use of improper evidence. Police misconduct was coded as being present and then described as: investigative errors, perjury, forced witness to lie, fabricated evidence, and coerced confession. Perjury and real killer found were also examined to determine if the state's key witness was in fact the murderer.

Between January 1, 1972 and December 31, 2000, 92 people were exonerated after being sentenced to death. For the purposes of this research, all individuals convicted prior to the *Furman* decision were excluded, which resulted in the review of 88 cases. This was done to assure that all the death sentences resulted from statutes that have been deemed constitutional by the United States Supreme Court. The basic data analysis strategy was descriptive, using simple frequency distributions and cross-tabular analysis. The analysis presented herein is not intended to be a generalization of homicide trials and the errors inherent in those trials. It is an examination of the total population of cases of wrongful convictions and death sentences for the specified time period.

Findings

General Characteristics of Defendants. Each case was reviewed to determine the gender, race, state of conviction, and reason(s) for reversal. While gender was not significant to the review of this data, race was very significant, both in terms of overrepresentation of minorities and longer stays on death row. The exonerations examined for this research represent 22 states that have active death penalty systems, each having carried out an execution in the post-*Furman* era. The reasons for reversal were diverse, with perjury, police and prosecutorial misconduct, ineffective assistance of counsel all being represented. Perjury was the most common reason cited by review courts and 'death not a homicide' and 'another suspect' were the most infrequent.

Gender. Females commit far fewer homicides than males and are far less likely to receive death sentences (Morgan, 2000:270). According to Streib (1990:874) this gender bias in capital sentencing finds its roots in two areas. First, "the express provisions of the law," which refers to the idea that some statutory considerations may be applied differently on the basis of gender. For example, prior criminal history is a factor in charging decisions and females are less likely to have prior violent offenses which would decrease the likelihood of a death penalty trial. Second, "the implicit attitudes, either conscious or subconscious, of key actors involved in the criminal justice process." (p. 874) This relates to the

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perceptions of prosecutors, judges and juries that impact their decision-making regarding charging and sentencing of female defendants. There is much research that supports the notion that women are treated more benevolently in homicide cases and helps to explain the relative absence of women from this population (See Streib, 1990; Allen, 1987; Gillespie and Lopez, 1986; Mann, 1984; and Steffensmeier, 1980).

Historically, executions of female offenders have been rare. As of October 1, 2000 the death row population in this country was about 3,700 and only 53 were female. In the past one hundred years, only 44 women have been executed, including six in the post-*Furman* era (NAACP, 2000). In the history of the United States, women have accounted for about 2.7 % of all executions (Streib, 1998). It is not surprising then that of the population of innocents freed from death row, only 1.1% was female. Therefore, other than the overrepresentation of males in the population, gender was not significant to the review of this data.

Race. Race is an inescapable issue inherent in the death penalty debate and one that has received much scholarly attention. The research contends that patterns of death sentences and executions indicate unequivocally that the lives of whites are valued more than the lives of blacks (Baldus et al., 1990; Paternoster, 1991; Radelet, 1981). In all jurisdictions examined through scientific research, prosecutors are more likely to seek the death penalty when the victim is white than when the victim is black. When a white victim dies at the hands of a minority perpetrator, the prospects of a capital prosecution are high (Baldus et al., 1990). Post-*Furman* research shows that African-American charged with the murder of a white victim have about a 25% probability of receiving the death penalty, however, for whites who kill African-Americans the probability is negligible (Bowers and Pierce, 1980; Baldus, et al., 1990).

For example, Raymond Paternoster (1984) reviewed 300 capital murder trials in South Carolina. He found that prosecutors were 2 1/2 times more likely to seek death in cases involving white victims than those involving black victims. While the state sought the death penalty in 49.5% of cases involving black offenders and white victims, it sought the death penalty in only 11.3% of cases involving black offenders and black victims. According to Paternoster (1984), prosecutors sought death penalties against defendants charged with killing white victims in cases involving fewer aggravating factors. Specifically, in cases with white victims death was sought with only one aggravating felony while in cases involving black victims several aggravating felonies were necessary. This indicates that homicides against blacks had to be far more vicious and brutal in order to justify the death penalty. Paternoster concluded that "victim-based racial discrimination is evident in prosecutors' decisions to seek the death penalty" (Paternoster, 1984:471).

Other studies have replicated these findings. In a Georgia

study (Baldus, Wentworth, and Pulaski, 1990) that examined 594 homicide cases prosecutors sought the death penalty in 45% of cases with white victims, but only 15% of the cases involving black victims. The study further determined that death was sought in 58% of the cases with black defendants and white victims, but only 15% of the cases with black defendants and black victims. The bias also extended to juries, with death verdicts in 57% of cases involving white victims but only 42% of the cases with black victims. The researchers concluded that race had a "potent influence" on both the likelihood that the state would seek the death penalty and the likelihood that a jury would return a death verdict (Baldus, et al., 1990:185).

In this study race was a very compelling issue (see Table 1). Of the 88 cases, 51 (58%) were minorities, including 39 (44.3%) African-Americans, 37 (42%) Caucasians, 10 Hispanics (11.4%), one Native American (1.1%) and one other (1.1%). The presence of race as a distinguishing characteristic in cases of innocence is not surprising. Research consistently finds that race is a significant determinant in capital sentencing with prosecutors being more likely to seek death against a minority and juries being more likely to oblige (see Sorensen and Wallace, 1995a and b; Baldus et al., 1990; Keil and Vito, 1990; 1995 Paternoster, 1991; Vito and Keil, 1988; Radelet, 1981; Bowers and Pierce, 1980). It appears from this data that the actual guilt of a defendant is not an issue.

Table 1: Race of those Released from Death Row for Reasons of Innocence

Race	Frequency	Percent
African-American	41	44.3%
Caucasian	33	42.0%
Hispanic	10	11.4%
Native American	1	1.1%
Other	1	1.1%
Total	88	100.0%

The disproportionality of minorities in this population was not the extent of this issue. In examining the number of years between conviction and release, the mean for the entire population was 7.5 years (see Table 2). The mean for Caucasians was 6.24. The mean for minorities was 8.41, including: 8.33 for African-Americans and 8.50 for Hispanics. Minorities spent an average of two years longer awaiting release than non-minorities. Not only is the state more willing to send minorities to death row, it is also more reluctant to release them in the face of egregious error.

State of Conviction. 38 states have capital punishment statutes. 22 have exonerated and released a person from death row (see Table 3). The states with the highest numbers of releases since 1972 are: Florida, Illinois, Oklahoma, Texas,

Louisiana, and Georgia. Between 1972 and 2000, Florida has executed 51 men and women. It has exonerated and released 15 from death row, 11 were minorities. Illinois has executed 12 and released 13, 10 were minorities. Oklahoma has executed 38 and released 7, 3 were minorities. Texas has executed 242 and released 7, 4 were minorities. Louisiana has executed 26 and released 6, 4 were minorities. Georgia has executed 23 and released 6, 4 were minorities. This data indicates that states with the most active capital punishment systems are also the states with the highest numbers of innocents released from death row. These numbers are indicative of the nature of the capital punishment processes in those states. They appear to be designed to convict defendants and return death verdicts with little regard for due process or guilt.

Reasons for Reversal. Death penalty cases, like other felony prosecutions in the United States, are fraught with errors. The recent study by Liebman, Fagan and West (2000:i) reviewed all 4,578 state capital cases between 1973 and 1995 and found that "The overall rate of prejudicial error in the American capital punishment system was 68%." They report that courts found reversible error in "nearly 7 of every 10" capital cases (Liebman, Fagan and West, 2000:i). Numerous legal errors can prompt review courts to reverse convictions and sentences, unfortunately, innocence is not one of them. In *Herrera v Collins* (1998) the Supreme Court ruled that a lawfully convicted defendant could not bring his innocence claim to federal habeas court unless the claim was also accompanied by an independent constitutional violation. The cases reviewed herein were reversed on constitutional grounds that had little to do with innocence. The errors cited

Table 2: Years Between Conviction and Release, by Race

Years Between Conviction and Release	All Cases (N=88)	Caucasians Only (N=37)	African-Americans Only (N=39)	Hispanics Only (N=10)	Native Americans Only (N=1)	Others Only (N=1)
1	3 (3.4%)	1 (2.7%)	1 (2.6%)	1 (10.0%)	0 (0.0%)	0 (0.0%)
2	8 (9.1%)	6 (16.2%)	1 (2.6%)	1 (10.0%)	0 (0.0%)	0 (0.0%)
3	12 (13.6%)	6 (16.2%)	6 (15.4%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
4	3 (3.4%)	2 (5.4%)	0 (0.0%)	1 (10.0%)	0 (0.0%)	0 (0.0%)
5	8 (9.1%)	3 (8.1%)	5 (12.8%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
6	8 (9.1%)	4 (10.8%)	3 (7.7%)	1 (10.0%)	0 (0.0%)	0 (0.0%)
7	4 (4.5%)	2 (5.4%)	2 (5.1%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
8	8 (9.1%)	4 (10.8%)	3 (7.7%)	0 (0.0%)	0 (0.0%)	1 (100.0%)
9	4 (4.5%)	1 (2.7%)	2 (5.1%)	1 (10.0%)	0 (0.0%)	0 (0.0%)
10	8 (9.1%)	2 (5.4%)	4 (10.3%)	2 (20.0%)	0 (0.0%)	0 (0.0%)
11	4 (4.5%)	1 (2.7%)	1 (5.1%)	0 (0.0%)	1 (100.0%)	0 (0.0%)
12	2 (2.3%)	1 (2.7%)	1 (2.6%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
13	6 (6.8%)	3 (8.1%)	3 (7.7%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
14	4 (4.5%)	0 (0.0%)	2 (5.1%)	2 (20.0%)	0 (0.0%)	0 (0.0%)
15	2 (2.3%)	0 (0.0%)	1 (2.6%)	1 (10.0%)	0 (0.0%)	0 (0.0%)
16	3 (3.4%)	3 (3.4%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
17	3 (3.4%)	0 (0.0%)	1 (2.6%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
Total	88 (100.0%)	37 (100.0%)	37 (100.0%)	10 (100.0%)	1 (100.0%)	1 (100.0%)
Mean Years in Prison	7.50	6.24	8.33	8.50	11.00	8.00

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by review courts were as diverse as the facts of the cases themselves, and over half of the cases (47, or 53.4%) involved more than one serious and egregious error (see Table 4).

Prosecutorial Misconduct. Prosecutorial misconduct or unethical behavior is often guided by a desire to obtain conviction. The fact that it is rarely punished allows it to continue in courtrooms across the country (Gershman, 1986). Stanley Fisher (1989) characterizes prosecutors who are likely to engage in misconduct as working in environments where the highest charges are always sought, criminal law is broadly interpreted, and the focus is on conviction and the highest possible penalty. Prosecutorial misconduct is a common rea-

Table 3: Number of Innocent Inmates Released From Death Row by State

State	Frequency	Percent
Florida	16	18.2%
Illinois	13	14.8%
Oklahoma	7	8.0%
Texas	7	8.0%
Georgia	6	6.8%
Louisiana	6	6.8%
Arizona	4	4.5%
New Mexico	4	4.5%
North Carolina	3	3.4%
Pennsylvania	3	3.4%
South Carolina	3	3.4%
Alabama	2	2.3%
California	2	2.3%
Indiana	2	2.3%
Missouri	2	2.3%
Ohio	2	2.3%
Arkansas	1	1.1%
Maryland	1	1.1%
Mississippi	1	1.1%
Virginia	1	1.1%
Washington	1	1.1%
Total	88	100.0%

Table 4: Number of Reasons for Reversal

Number of Reasons	Frequency	Percent
1	41	46.6%
2	33	37.5%
3	11	12.5%
4	1	1.1%
5	2	2.3%
Total	88	100.0%

son for reversal and most frequently involves prosecutors failing to comply with rules of discovery and failing to provide exculpatory evidence (Liebman, et al. 2000). Prosecutors who engage in misconduct have absolute immunity from being sued, even if the misconduct is intentional (Albanese, 2001:258). The Supreme Court in *Imbler v. Pachtman* ruled that prosecutors risked "harassment by unfounded litigation" which would make it difficult for them to carry out their duties. While prosecutors may have protection regarding their actions inside the courtroom, the behavior of many during trial is inexcusable.

In this review, 27 (34%) cases involved 30 instances of prosecutorial misconduct (see Table 5). 14 (15.9%) cases involved withholding exculpatory evidence, 12 (13.6%) involved the subornation of perjury, and 4 (4.5%) involved the use of improper evidence (see Table 6). One of the most egregious cases of prosecutorial misconduct was directed at Shareef Cousin, a 16 year old African-American who was charged with murder and armed robbery of Michael Gerardi. Connie Babin, the victim's friend was the only eye witness and the state's case hinged on her testimony. She testified that she was "absolutely certain" of Cousin's culpability. Cousin maintained that he had been playing basketball on the night of the murder and had several witnesses who could testify to this. Unfortunately, they did not appear in court and Shareef was convicted and given a death sentence.

After the trial, the defense team received a videotape from an anonymous source. It contained Connie Babin's initial statement to the police in which she told investigators that she could not identify the assailant because it was dark in the alley and she had not been wearing her corrective lenses. Clearly, the prosecution had withheld exculpatory evidence, however, it was not the only form of misconduct in this case. Shareef's basketball teammates did appear at trial to testify regarding his alibi, but unbeknownst to the defense, were taken to the prosecutor's office to wait. The prosecutor claimed that he wanted the boys to be comfortable and it was too hot where they waited to testify. During subsequent questioning the Assistant District Attorney admitted that the trial took place in January, a cold time of year in New Orleans (Amnesty International, 1999b).

Table 5: Reasons for Reversal		
Reason for Reversal	Frequency	Percent*
Perjury	32	36.4%
Prosecutorial Misconduct	27	30.7%
Lack of Evidence	20	22.7%
Real Killer Found	16	18.2%
New Evidence	15	17.0%
Police Misconduct	14	15.9%
Ineffective Assistance of Counsel	11	12.5%
DNA	10	11.4%
Death Not a Homicide	3	3.4%
Another suspect	1	1.1%
Total	88	100%
* Totals will not add up to 100% because more than one reason occurred in 47 (53.4%) of the cases.		

Table 6: Dimensions of Prosecutorial Misconduct			
Type of Prosecutorial Misconduct	Frequency	Percent of all Cases of Prosecutorial Misconduct	Percent of all Cases
Withholding Exculpatory Evidence	14	51.9%	15.9%
Subornation of Perjury	12	44.4%	13.6%
Use of Improper Evidence	4	14.8%	4.5%

Table 7: Dimensions of Police Misconduct			
Type of Police Misconduct	Frequency	Percent of all Cases of Police Misconduct	Percent of all Cases
Police Errors in Investigation	5	35.7%	5.7%
Police Forced Witness to Lie	4	28.6%	4.5%
Police Perjury	2	14.3%	2.3%
Police Coerced Confession	2	14.3%	2.3%
Police Fabricated Evidence	1	7.1%	1.1%

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The presence of so many cases of prosecutors deliberately withholding exculpatory evidence and deliberately acquiescing to or encouraging perjury in capital cases is a stunning indictment of capital prosecutions in America. Whether a prosecutor engages in such malpractice because of his or her zeal for conviction, for political purposes, or simply out of malice, is of no issue. The numbers speak clearly of the lengths to which some prosecutors will go to gain conviction and the highest possible sentence.

Police Misconduct. According to Barker and Carter (1991) abuse of authority involves any action by a police officer “that tends to injure, insult, trespass upon human dignity...and/or violate an inherent legal right” of a citizen. In 14 cases (15.9%) police misuse of authority was cited by courts as a reason for reversal. Investigative errors were present in 5 (5.7%) cases, police perjury in 2 (2.3%), compelling a witness to lie in 4 (4.5%), fabricating evidence in 1 (1.1%), and coercing a confession in 2 (2.3%) (see Table 7). 9 (10.2%) times in the 88 cases, police officers were responsible for the introduction of perjurious or false evidence that resulted in the conviction of an innocent person. Such an assault on state veracity seriously questions the trustworthiness and reliability of the system of criminal justice.

Perjury. In their study of wrongful convictions in felony cases, Huff, Rattner and Sagarin (1996) found perjury by witnesses and criminal justice officials in 13.6 % of cases. It was the leading type of error contributing to wrongful convictions. Similarly, in this study, perjury was the most common reason for reversal. It occurred 32 times (36.4%) and was known by the prosecutor 12 (13.6%) times. In 5 cases (5.7%) the state’s main witness was in fact the one who had committed the homicide. While it is highly likely that perjury was present in other cases too, it was not one of the reasons for reversal as cited by the courts. Police officers directly committing perjury was present in only 2 (2.3%) cases. But, it is also likely that this occurred more frequently. According to Barker and Carter (1994) and Kappeler, Sluder, and Alpert (1998) police lying and perjury are common, accepted behaviors.

DNA Evidence. The use of DNA evidence to free innocent inmates has received much media attention in recent years. While compelling and offering hope to innocent inmates, it is not an option for everyone because it is often absent from homicide scenes. When it is present, mishandling evidence during the collection process often makes testing impossible and in some cases the physical evidence has been lost or destroyed. DNA evidence has played a small role in releasing innocent people from death row. In this population, exoneration by DNA evidence was present in only 10 (11.4%) cases (see Table 5). When DNA evidence is present it is not a magic bullet that instantaneously leads to exoneration, prosecutors often argue against testing and judges commonly comply. One primary reason for the failure to test is the expense involved and defendants rarely have access to the neces-

sary funds. Functionaries of the state are rarely anxious to allow the tests, as evidenced by the fact that of the 10 people exonerated through DNA evidence, 9 (90%) were on death row for more than 7 years.

The case of Frank Lee Smith of Florida is indicative of the problems faced by death row and other inmates seeking exoneration through DNA evidence. Smith, an African-American, was convicted and sentenced to death for the rape and murder of an 8 year old Broward County girl in 1985. DNA testing was sought by his defense attorneys and family but the state resisted. Smith avoided a lethal injection for 14 years, however, he did die of cancer on death row before DNA testing exonerated him. The prosecutor who argued against the tests was quoted later as saying “This doesn’t shake my belief in the death penalty. We’re in a system where guilty people go free, and sometimes innocent people are incarcerated” (O’Boye, S. 2000).

Real Killer Found/Another Suspect. In 16 (18.2%) cases the actual offender was revealed and in 1 case (1.1%) another suspect was established (see Table 5). Confessions or evidence of the real offender eventually worked to free these men. One of the most astonishing was the case of Rolondo Cruz, who spent 10 years on death row in Illinois for the abduction, rape and murder of 8 year old Jeanine Nicarico. Cruz and Alejandro Hernandez (who is also included in this population) were framed by investigators who fabricated evidence and falsified a confession. Several years after Cruz and Hernandez were convicted, another man was arrested for a similar crime in a neighboring county. He confessed to the murder of Jeanine Nicarico and DNA evidence tied him to her death. In spite of compelling evidence of Cruz’s innocence, prosecutors continued to fight his release. The man who likely murdered Jeanine Nicarico still has not been charged with her murder. Several police officers and a prosecutor were indicted and tried for obstruction of justice, but were acquitted (Webb, 2000).

Lack of Evidence. In 20 (22.7 %) cases lack of evidence was the primary reason for release (see Table 5). In these cases, the state had prosecuted and convicted innocent men on so little evidence that the reviewing courts were compelled to dismiss the charges against the defendants. This issue speaks to the predisposition of jurors to convict, especially in capital cases. Studies consistently find that the jury process is tainted in such a way that seriously disadvantages the defendant and creates a presumptive guilty verdict. In capital cases, studies indicate that death qualifying a jury leads to a presumptive death decision in spite of evidence, instructions and law (Williams and McShane, 1990; Eisenberg and Wells, 1993; Haney, et al. 1994; Bowers, 1995; and Bowers, 1996).

New Evidence. New evidence indicating that the wrong person had been charged and convicted was a factor in 15 (17%) cases (see Table 5) . It was not possible to determine the nature of the new evidence from the data set. “New” evidence is a misnomer, the courts should refer to it as “redis-

covered" evidence as it is often related to ineffective assistance of counsel and prosecutorial misconduct. New evidence is sometimes found in the file of a prosecutor who failed to comply with discovery. It is sometimes found in a file belonging to a defense attorney who failed to introduce or investigate it and is often found in the trial transcript. While new evidence is a hope of innocent men and women on death row, time is rarely on their side. In the 15 cases reversed due to new evidence, 6 (40%) spent more than 7 years on death row. As compelling as new evidence may be it is difficult for defense attorneys to convince courts to review the case. The period of time a defendant has to supply new evidence after a conviction varies by jurisdiction, but the time period is short everywhere. 33 states have statutes of limitation of 6 months or less for introducing new evidence (Gottlieb, 2000).

Ineffective Assistance of Counsel. Historically, the criminal justice system discriminates by a factor of over 4-1 against defendants who must accept the services of public defenders and court-appointed counsel (Blumberg, 1967). In a more recent study of over 28,000 felony cases in Tennessee, Virginia, and Kentucky it was found that public defenders successfully compelled courts to drop charges or acquit defendants in 11.3% of cases. Private attorneys did so in 56% of their cases (Champion, 1989). Inadequate funds and resources to gather evidence, interview witnesses, and pursue scientific evidence handicap defendants in these cases. Similar problems plague the defendant all the way through the appeals process (Coyle et al., 1990; Smith, 1995).

Ineffective or inadequate assistance of counsel is endemic in death penalty cases. In this study ineffective assistance of counsel resulted in reversal 11 times (12.5%) (see Table 5). It is unlikely that defense attorney errors are intentional, but more likely the result of socioeconomic bias inherent in the system. Virtually all defendants in capital cases are poor and unable to afford private counsel. They are provided public defenders or court-appointed counsel who are often inexperienced and not well trained in capital litigation. In other words, defendants in the most complex of criminal cases, with the highest stakes imaginable are usually represented by counsel least equipped to handle these complexities. While public defenders and court appointed attorneys are not necessarily bad lawyers, they are certainly underpaid and overworked. The very low fees states offer in capital cases and the lack of state-supplied funds for investigation and expert testimony, inhibit the availability of poor defendants to be represented by more qualified attorneys and to gather the evidence necessary to gain acquittal.

In some cases the inadequacy of the attorney is egregious. The case of Ronald Williamson, sentenced to death in Oklahoma for the rape and murder of Deborah Carter was reversed in part due to ineffective assistance of counsel (ACLU, 2000). Mr. Williamson's defense attorney failed to investigate and present to the jury the fact that another man had confessed to the crime. The prosecutors dismissed charges when DNA cleared Mr. Williamson. In another case, Benjamin Harris was

represented in the trial of his life by an attorney who interviewed only 3 of 32 witnesses and spent a mere 2 hours consulting with Harris before trial. Harris' co-defendant was acquitted, he was sent to death row (DPIC, 2000; ACLU, 2000).

Death Not a Homicide. Ironically enough, in 3 (3.4%) cases the murder victim was not murdered (see Table 5). This incredible mistake was a result of errors made by forensic investigators and medical examiners. The lone female in this population was a victim of this incredible error. She had been convicted of killing her 9 month old baby. When Ms. Butler found her child not breathing and unresponsive she performed CPR and then drove him to the hospital. Police interrogated her and she was ultimately prosecuted, convicted and sentenced to death. The Mississippi Supreme Court ordered a retrial and Ms. Butler was acquitted. Further investigation had revealed that her baby died of either sudden infant death syndrome (SIDS) or cystic kidney disease (Amnesty International, 1999). It was not enough that this woman had to endure the loss of her child, but an overzealous prosecutor charged her with murder. A grand jury indicted her, a defense attorney failed to investigate the circumstances of the child's death, a jury convicted her and sentenced her to die and a judge allowed it all to happen. She spent 5 years on death row.

Discussion and Conclusion. A fair and impartial jury of peers is the heart of the criminal trial in the United States. Jurors are supposed to have an open mind about the defendant's culpability, listen to evidence presented and then determine a verdict based only on the evidence presented. They are supposed to understand that the state has the burden of proof and be able to understand and make their decisions on the basis of judicial instructions. Unfortunately, these things are not characteristic of the average capital jury. There are two primary areas of concern regarding juries in capital homicide cases, juror misunderstanding of law and instruction and the process of death qualifying jurors.

Research indicates that jurors' comprehension of sentencing instructions is limited and that these misunderstandings place the defendant at a disadvantage (Frank and Applegate, 1998). The primary reason the current capital punishment statutes are determined to be constitutional relates to the bifurcated trial process. The presentation of mitigation evidence during a penalty phase is statutory and jurors are required to consider it when determining punishment. Prior to deliberations in a penalty phase, the judge issues a series of instructions that the jurors are expected to understand and use as a guideline. Studies indicate that jurors misunderstand how the capital sentencing decision should be made, including a lack of understanding of mitigating and aggravating evidence and the judge's sentencing instructions (Bowers, 1996; Bowers 1995). For example, Haney and Lynch (1994) reviewed juror understanding of sentencing instructions in California and determined that jurors could not define the concepts of aggravation and mitigation. Jurors are equally unable to under-

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stand the sentencing significance of these factors as directed by the judge and by law in reaching their penalty verdicts (Haney and Lynch, 1994; and Bowers, 1996).

Another area of concern is the process of death qualifying juries. According to Goodman, Green, and Hsiao (1998), death qualified jurors consistently dismiss a wide range of mitigating factors or treat them as aggravators in their deliberations. They also report that jurors who favor the death penalty are more likely to infer criminal intent and premeditation into the defendant's actions. The process of death qualifying a jury is detrimental to the defendant. Research indicates that these juries are more conviction prone (Williams and McShane, 1990) and more likely to view a death verdict as mandatory upon finding a defendant guilty (Geimer and Amsterdam, 1987). These juries often begin to determine punishment prior to being exposed to the statutory guidelines (Bowers, 1996; Bowers, 1995).

The problems associated with the death penalty run deep, but those inherent in the jury process are especially deplorable. Unlike the police, prosecutors and judges involved in these cases, the jurors are selected. In capital homicide trials the voir dire process is more thorough and the officials have ample opportunity to recognize bias. A death qualified jury is viewed as a necessary part of the process, but is to the detriment of the defendant. It is highly likely that many of the individuals whose cases were reviewed for this study were affected by juries prone to conviction and to death verdicts. While the nature of the criminal justice system is one of "innocent until proven guilty," the nature of the jury system is the opposite. Juries in capital cases are inclined to convict anyone charged with murder, the fact that 88 people were wrongly sent to death row in a 28 year period is indicative of this. Attempts to ensure fairness in death penalty statutes will inevitably fail because juries misunderstand, misinterpret, and ignore those statutory requirements. The misunderstanding, misapplication, and circumvention of both statute and judicial instructions by juries are debilitating to a fair or just death penalty.

The data collected for this study paint a chilling portrait of capital prosecutions in the United States. As the last western industrialized nation to use the death penalty, the United States has a special and unique responsibility to go to extraordinary lengths to guarantee the integrity of capital trials. Proponents of capital punishment utilize the release of innocents from death rows to point to the successes of the system. They argue that the release of innocents from death row is proof that the system is working (see Wilson, 2000; Nevada Attorney General's Report, 2000; and Criminal Justice Legal Foundation, 2000). This is fundamentally flawed. The data reviewed for this study reflects the fact that errors are made by criminal justice officials and functionaries. Often, these "errors" take the form of flagrant disregard for the law and legal process, hardly supportive of the idea that the system works to protect defendants.

In 1972 the United States Supreme Court ruled that existing death penalty statutes were implemented in an arbitrary and capricious manner with great potential for racial discrimination (*Furman v. Georgia* 1972). Since that time, 38 states have revised their death penalty statutes in an attempt to reduce arbitrariness. A review of the research in the post-*Furman* era indicates that the death penalty as it is currently implemented is entirely arbitrary. In the post-*Furman* era defendants in capital cases continue to be charged and treated differently under the same penal codes for no logical reason (Berk, et al., 1993; Gross and Mauro, 1989; Paternoster, 1991). "...Being sentenced to death is the result of a process that may be no more rational than being struck by lightning" (Paternoster, 1991:183). The previous research on the death penalty in the post-*Furman* era indicates that the new statutes have not eliminated racial and other biases. This research not only reiterates the sentiment of those studies, but expands on them with the notion that the post-*Furman* statutes fail to protect innocent defendants from capital convictions and sentences of death.

The data presented herein clearly demonstrates that death penalty trials are designed to convict the defendant. These cases are marked by incompetent investigations and outright perjury on the part of witnesses and criminal justice system functionaries. Prosecutorial manipulation of evidence, jury ignorance and disregard of laws and statutes are a major part of achieving this goal. Capital cases in the American system of justice are designed to guarantee the conviction of the poor through ineffective representation of counsel and lack of investigatory resources. The facts presented by this data suggests compelling incompetence and corruption in the criminal justice system, to such a degree as to call the legitimacy of the entire system of American capital punishment into question.

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Confidential Request for Funds: 2002 General Assembly Recognizes that Lack of Money Does Not Mean Less Protection

Funds for experts and other resources have been provided for by the Kentucky Legislature when a defending attorney under KRS Chapter 31 is representing an indigent in a criminal proceeding and the expert or resources are reasonably necessary for the competent defense of the client. The General Assembly provides for this in capital and non-capital cases and at trial, appeal and in post-conviction. KRS 31.185 states that these resources are available to a public defender operating under the provisions of KRS Chapter 31.

Funds for experts and other resources lose much of their meaning if obtained at the expense of confidentiality. Fortunately, our Constitution, caselaw, and statutes increasingly recognize the need for requests for funds by indigents to be confidential without the prosecutor, public or media present. Without this confidential process, indigents are penalized by their poverty into prematurely revealing their defense strategies. With this confidential process, the attorney/client privilege is insured.

The 2002 General Assembly has recognized the importance of this right by explicitly providing for it by statute. Effective July 15, 2002, KRS 31.185(2) now reads: "The defending attorney may request to be heard *ex parte* and on the record with regard to using private facilities under subsection (1) of this section. If the defending attorney so requests, the court shall conduct the hearing *ex parte* and on the record."

The 2002 General Assembly added this provision despite the strong opposition to it by one Commonwealth Attorney. The Senate passed the bill 35-0 and the House passed the bill 91-0.

Non-Confidential Requests Create Constitutional Problems

A request for funds for experts or other resources must contain enough information to meet the *threshold showing* which is necessary to justify the fourteenth amendment right to the defense resources. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 1091, 1096, 84 L.Ed.2d 53 (1985). Almost necessarily, that *threshold showing* will contain privileged information about the defense which the prosecutor is either never entitled to discover or not entitled to discover at this early juncture of the proceedings.

A non-indigent criminal defendant selects and hires experts and investigators without knowledge of the prosecutor or court. In the civil arena, information about the retention of an expert by a party is not discoverable. See, e.g., *Newsome v. Lowe*, Ky.App., 699 S.W.2d 748 (1985). In order to obtain public funds for resources, indigents rightly have to present infor-

mation to a neutral judge who decides whether the requested assistance is reasonably necessary. But revealing that confidential information to the prosecution in a way that a non-indigent criminal defendant does not have to reveal it violates equal protection. Prosecutors do not reveal employment of their experts to the defense until required by the court.

Ex parte Have real public benefits as such proceedings increase the information available to the judge and increase the reliability of his or her decision. In assessing the request for public funds, the judge is entitled to the thoughts, reasoning and strategy of the defense, including matters within the attorney/client privilege, but the prosecutor is not entitled to that privileged information. Therefore, an *ex parte* proceeding has the pragmatic effect of allowing judges to obtain more information from the defense for the judge to make a decision since the proceeding is confidential. When a judge has more information, his or her decision is likely to be more reliable.

Kentucky's Practice and Authority

With rare exception, criminal defendants are not required to reveal their defense prior to trial. KRS 31.185(2) now explicitly recognizes the right to make requests for funds for resources *ex parte*. This is consistent with KRS 500.070(2) which states, "No court can require notice of a defense prior to trial time." A defendant cannot be required to reveal his defense by having to make his threshold showing in front of the prosecutor, public or media.

The vast majority of Kentucky judges have permitted counsel for indigent defendants to make requests for resources *ex parte* based on fairness, caselaw and common sense. However, a few judges have not permitted this process to proceed *ex parte*.

Ake Recognizes Requests Are Ex Parte

Ake, supra, makes the statement, "when the defendant is able to make an *ex parte* threshold showing to the trial court...." "The intention of the majority of the *Ake* Court that [the threshold showing] hearings be held *ex parte* is manifest...." *McGregor v. State*, 733 P.2d 416 (Okla.Ct.Crim. App. 1987).

Ake has been relied on by other courts to find that proceeding *ex parte* is constitutionally required. An "indigent defendant who requests that evidence supporting his motion for expert psychiatric assistance be presented in an *ex parte* hearing is constitutionally entitled to have such a hearing...." *State v. Ballard*, 428 S.E.2d 178, 179 (N.C. 1993). Preventing a defendant from proceeding *ex parte* improperly forces him to "jeop-

ardize his privilege against self-incrimination and his right to the effective assistance of counsel, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.” *Id.*

“Only in the relative freedom of a non-adversarial atmosphere can the defense drop inhibitions regarding its strategies and put before the trial court all available evidence of a need for psychiatric assistance. Only in such an atmosphere can the defendant’s privilege against self-incrimination and his right to the effective assistance of counsel not be subject to potential violation by the presence of the State.” *Id.* at 183.

Kentucky Caselaw: *Ex Parte* Process and the 5th & 6th Amendments

The Kentucky Supreme Court has held in an unpublished opinion that the *ex parte* process is required in a highly analogous situation.

In the extraordinary writ case of *Jacobs v. Caudill*, Ky., 94-SC-677-OA (Sept. 2, 1994) (unpublished) the Kentucky Supreme Court unanimously held that the hearing to “determine petitioner’s competency to voluntarily and intelligently waive any defenses or otherwise direct his defense....” had to be conducted in accord with the 5th and 6th amendments. “To avoid any possible violation of the petitioner’s constitutionally protected rights, it is mandated that when issues arise in said hearing involving petitioner’s attorney-client privilege, right against self-incrimination or his right to prepare and present a defense, said proceedings shall be conducted by the trial court *in camera* and *ex parte*, but on the record.” See *Jacobs v. Commonwealth*, Ky., 58SW 3d 435, 440 (2001)

No competent criminal defense attorney who practices his cases ethically would reveal any defense information prematurely, absent some strategic advantage.

In *McCracken County Fiscal Court v. Graves*, Ky., 885 S.W.2d 307 (1994) the Kentucky Supreme Court set out a very helpful principle: *Indigents are entitled to be represented to the same extent as monied defendants.*

The Court said, “We also take this opportunity to offer a bit of guidance to trial courts for the purpose of future determinations of what constitutes a reasonable and necessary indigent expense. In KRS 31.110(1)(a), it is stated that a needy defendant is entitled: To be represented by an attorney to the same extent as a person having his own counsel is so entitled. While this certainly cannot mean that an indigent defendant is entitled to have any and all defense-related services, scientific techniques, etc., that a defendant with unlimited resources could employ, we think it is a useful standard as a starting point. At a minimum, a service or facility the use of which is provided for by statute should be considered by a trial court, as a matter of law, to be ‘reasonable and necessary.’” *Id.* at 313.

There “is no need for an adversarial proceeding, that to allow

participation, or even presence, by the State would thwart the Supreme Court’s attempt to place indigent defendants, as nearly as possible, on a level of equality with non-indigent defendants.” *McGregor, supra*, at 416.

In other contexts, the Kentucky Supreme Court has recognized the necessity for courts to function *ex parte*. In *West v. Commonwealth*, Ky., 887 S.W.2d 338 (1994) the Court held that a trial judge has jurisdiction to enter an order pursuant to RCr 2.14(2) after an *ex parte* hearing appointing public defender to an indigent being questioned by police and ordering that the questioning be stopped so the defendant could consult with the attorney. “By virtue of its general jurisdiction, the circuit court frequently acts *ex parte* in criminal matters. A clear example of such an act is in the issuance of search warrants. RCr 13.10.” *Id.* at 341 n.1.

Prior to the Kentucky Legislature explicitly providing for an *ex parte* process, Kentucky courts faced *ex parte* issues in a number of different circumstances. The Court determined that it is not reversible error for a trial court to conduct an *ex parte* hearing on the issue of funds for experts. In *Baze v. Commonwealth*, Ky., 965 S.W.2d 817 (1997) the Court stated, “On cross-appeal, the *Commonwealth* argues that the trial judge committed error in allowing the defense counsel to proceed *ex parte* in requesting funds for experts. Although we believe it is prudent to discourage *ex parte* proceedings in a trial of this importance, we do not find reversible error in this case.” *Id.* at 826. In *Sanborn v. Commonwealth*, Ky., 975 S.W.2d 905, 909-910 (1998) the Court said, “There is no authority to support *ex parte* motions for hearings for expert funding in a RCr 11.42 proceeding.” *Ake v. Oklahoma...* is not a post-conviction case. The issue is that case related to the preparation of a trial defense and the right to access to psychiatric examination. It does not apply to every matter relating to the funding of experts for indigent defense at every stage in a criminal case. See *Baze...*” See also *Haight v. Commonwealth*, Ky., 41 SW 3d 436, 444-445 (2001); *Bowling v. Commonwealth*, Ky., ___ S.W.3d ___ (March 21, 2002). In *Dillingham v. Commonwealth*, Ky., 995 S.W.2d 377, 381 (1999) the trial judge was presented with a one sentence *ex parte* letter requesting appointment of an investigator by *pro se* defendants. The Court stated that such a letter “is not a substitute for a properly presented motion. Thus, the issue was never properly before the trial court and is not preserved for review.” The statutory change made by the 2002 Kentucky General Assembly now clarifies and modifies these Kentucky case rulings and dictum.

Ex Parte Provision Applies to Post-Conviction Proceedings

The KRS 31.185(2) change that now makes proceeding *ex parte* mandatory upon request is applicable to any criminal proceeding. It does not exclude RCr 11.42 proceedings. KRS 31.185(2) explicitly applies when a defending attorney makes the request. As provided in KRS 31.185(1), the request for funds process is applicable to any “defending attorney operating

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under the provisions of this chapter. . . .” A public defender representing an RCr 11.42 client is a defending attorney operating under the provisions of KRS Chapter 31.

While a defendant may not have a *constitutional* right to funds for experts and resources or to proceed *ex parte* in a post-conviction proceeding, in Kentucky a defendant does have a *statutory* right to such assistance and to proceed *ex parte* pursuant to KRS 31.185. To the extent that *Sanborn, supra*, and *Haight, supra*, hold that *ex parte* requests for experts are not authorized by KRS Chapter 31, the 2002 General Assembly’s changes to KRS 31.185 has effectively overruled those holdings.

Ex Parte Used in Many Other Contexts

Proceeding *ex parte* is commonly recognized as appropriate in other settings. Examples of Kentucky statutes, rules, and caselaw which permit or recognize proceeding *ex parte* follow:

- 1) **RCr 1.08:** addresses the service of motions, recognizes the *ex parte* nature of some motions by stating, “...every written motion other than one that may be heard *ex parte*...must be served upon each party.”
- 2) **CR 65.07(6) Interlocutory relief:** allows *ex parte* grant of emergency relief when a movant will suffer irreparable injury before a motion can be heard by a panel;
- 3) **CR 5.01 & RCr 1.08 Service:** exempts serving pleadings which may be heard *ex parte*;
- 4) **CR 6.04 Time for Motions:** serving written motions which may be heard *ex parte*;
- 5) **CR 53.05 Domestic Relations, Commissioners, Meetings:** allows proceeding to be conducted *ex parte* if a party fails to appear at the time and place appointed;
- 6) **CR 65.08(7):** Interlocutory relief pending appeal from final judgment;
- 7) **CR 76.38:** Reconsideration of appellate orders;
- 8) **CR 77.02(1):** Hearings outside judicial district;
- 9) **KRS 209.130(1):** *Ex parte* order for protection when “it appears probable that an adult will suffer immediate and irreparable physical injury or death if protective services are not immediately provided....”
- 10) **KRS 620.060(1):** *Ex parte* emergency custody order “when it appears to the court that there are reasonable grounds to believe, as supported by affidavit or by recorded sworn testimony, that the child is in danger of imminent death or serious physical injury or is being sexually abused and that the parents or other person exercising custodial control or supervision are unable or unwilling to protect the child.”

- 11) **KRS 645.120(3):** Emergency involuntary hospitalization of a child that as a result of mental illness needs immediate hospitalization for observation, diagnosis or treatment. This can occur by telephone.
- 12) ***West v. Commonwealth, Ky., 887 S.W.2d 338, 341 (1994).*** Circuit court can consider *ex parte* request for appointment of counsel under RCr 2.14. “By nature of its general jurisdiction, the circuit court frequently acts *ex parte* in criminal matters.” *Id.* at 341 n.1.
- 13) **KRPC 3.3(d) Candor toward the tribunal.** “In *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.”

The Federal Statute & Rule

Since 1964, the Criminal Justice Act, 18 U.S.C. 3006A(e)(1), has provided that requests by indigents for funds for resources be done *ex parte* if the defendant wants that confidential process.

That statute states, “Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application.”

The federal Anti-Drug Abuse Act’s provisions involving federal capital prosecutions provide for an *ex parte* hearing for funding of resources when there is a showing of a need for confidentiality: “No *ex parte* proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made part of the record available for appellate review.” 21 U.S.C. §848(q)(9).

Federal Rule of Criminal Procedure 17(b) allows applications for subpoenas by defendants unable to pay for their service be done *ex parte* to the court.” See *Holden v. United States*, 393 F.2d 276 (1st Cir. 1968). That rule states, “**Defendants Unable to Pay.** The court shall order at any time that a subpoena be issued for service on a named witness upon an *ex parte* application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense.”

Other Caselaw

An indigent defendant is entitled to ask for funds for expert help *ex parte* to avoid prejudicing the defendant by “forcing him to reveal his theory of the case in the presence of the district attorney.” *Brooks v. State*, 385 S.E.2d 81 (Ga. 1989). The “use of *ex parte* hearings...is a well-recognized technique available to any party” who is faced with the dilemma of being “forced to reveal secrets to the trial court and prosecution” in

order to support" a motion. *State v. Smart*, 299 S.E.2d 686, 688 (S.C. 1982).

"Where counsel for defendant objects to the presence of Government counsel at such a hearing, the failure to hold an *ex parte* hearing is prejudicial error." *Mason v. Arizona*, 504 F.2d 1345, 1352 n.7 (9th Cir. 1974). "The manifest purpose of requiring that the inquiry be *ex parte* is to insure that the defendant will not have to make a premature disclosure of his case." *Marshall v. United States*, 423 F.2d 1315 (10th Cir. 1970). See also *United States v. Sutton*, 464 F.2d 552 (5th Cir. 1972).

Standing of the Funding Authority

Under KRS 31.185(4) fiscal courts, all 120 counties now pay a fixed sum into a statewide indigent resources fund with the state paying anything above this fixed amount.

When the county fiscal courts had sole responsibility for these funds, the county clearly had standing to challenge the court's determination. After July 15, 1994, the effective date of the amendment to KRS 31.185, the only entity likely to have standing to challenge the authorization of funds or their amount is the Finance and Administration Cabinet since county fiscal courts must pay a fixed amount of money into the statewide special fund, and only the state has financial obligation if the fund is exhausted.

Presence of Attorney for Funding Authority

The ultimate funding authority, now the Commonwealth of Kentucky through the Finance and Administration Cabinet, is not legally entitled to be present at any *ex parte* hearing. See *Boyle County Fiscal Court v. Shewmaker*, Ky.App., 666 S.W.2d 759, 762-63 (1984).

The presence of counsel for the funding authority "would create unnecessary conflicts of interest; in any event, county counsel's presence cannot be permitted because such petitions are entitled to be confidential." *Corenevsky v. Superior Court*, 204 Cal.Rptr. 165, 172 (Cal. 1984) (In Bank). The funding authority's right to challenge the awarding or amount of funds is available after entry of the order.

Local Rules

For some time, Fayette County has had a local rule, Rule 7 (formerly Rule 8B), that requires *ex parte* hearings when indigents request funds for an expert or other resource. It reads:

"Rule 7. Requests For Funds For Expenses In Criminal Cases

A. Ex Parte Request For Funds. A defendant in a pending criminal proceeding, who is a needy person as defined by KRS Chapter 31, may apply *ex parte* to the Court, without notice to the Commonwealth's Attorney, for the payment of investigative, expert or other services necessary for an adequate defense.

B. Hearing. After reviewing the application, the Court may approve the application without a hearing or assign the application for a hearing. No persons other than the defendant, the defendant's attorney and Court personnel shall attend the hearing unless otherwise authorized by the court.

C. Sealing of Proceedings. The Clerk shall seal that portion of the record containing the application and the proceedings thereon including the record of the hearing and any order issued as a result thereof, except as otherwise authorized by the Court. The disclosure of the application or proceedings thereon may be punishable as a contempt of Court."

Jefferson County has had an *ex parte* provision in its local rules since 1999:

Rule 604 PRETRIAL HEARINGS

"B. Ex Parte Requests. Counsel for a person who is financially unable to pay for investigation, experts, the attendance of out-of-state witnesses, or other services reasonably necessary for the defense may request funds for those services in an *ex parte*, in camera application to the Judge and, upon such request, the Judge shall conduct the inquiry *ex parte* and in camera on the record and with the record sealed."

Public Accountability Assured

Accountability for the expenditure of public money for experts, investigators and other resources under KRS 31.185 is provided for by judicial scrutiny and approval of requests.

Conclusion: Lack of Money Does Not Mean Less Protection

Requesting funds for resources to insure a competent defense must be *ex parte* to make sure that obtaining appropriate funds is done without sacrificing confidential information. Indigents are entitled to the same confidential aid that monied defendants do not even have to seek. *Poverty should not be a penalty.* The 2002 Kentucky General Assembly has now explicitly assured that right. ■

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PLAIN VIEW . . .

United States v. Drayton et al.

June 17, 2002

122 S.Ct. 2105; ___ L.Ed.2d ___; ___ U.S. ___

Who takes buses these days? Is it safe to say that mostly poor people do? Does this question matter now that searching of passengers and their luggage in airports has become routine? How does 9/11 change the way we look at this case?

Drayton and Brown were traveling on a bus from Ft. Lauderdale, Fla. to Detroit, Michigan. They stopped in Tallahassee for refueling. The driver of the bus allowed three police officers to come onto the bus as the bus was reloading. The 3 officers set up their operation with one in front, one in back, and one moving down the aisle talking with passengers. The officers were armed and dressed in plain clothes, wearing badges. Officer Lang approached Drayton and Brown and asked if they had any luggage, and if so, whether he could "check it." Both said that a green bag was theirs, and they consented to a search that revealed no contraband. Lang followed with a request to "check your person." According to Officer Lang's testimony, this was due to its being warm and both defendants being dressed in "heavy jackets and baggy pants." It is noteworthy that this occurred in February, and both were headed to Detroit. Brown allowed the officer to check him; two hard objects were felt near his thigh area, objects "similar to drug packages detected on other occasions." Brown was arrested. The same scenario occurred with Drayton, who also allowed the search, and who also was discovered to have 2 hard objects in his thigh area. The objects were packages containing 483 grams of cocaine (Brown) and 295 grams of cocaine (Drayton) respectively.

Both were charged in federal court with conspiring to distribute cocaine and possession with intent to distribute. Their motion to suppress was denied. The 11th Circuit reversed, and the U.S. Supreme Court granted certiorari.

The Court reversed the 11th Circuit in a 6-3 opinion written by Justice Kennedy. The Court relied extensively upon its opinion in *Florida v. Bostick*, 111 S.Ct. 2382; 115 L.Ed.2d 389; 501 U.S. 429 (1991). There the Court had held that a bus encounter is not necessarily a seizure, and that this question should be resolved by asking "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." Using the *Bostick* standard, the Court held that the "police did not seize respondents when they boarded the bus and began questioning passengers." The Court noted that Officer Lang did not "brandish" a weapon, he made no intimidating movements, he left the aisle free, and he spoke in a "polite, quiet voice." "It is beyond question

that had this encounter occurred on the street, it would be constitutional. The fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure."

The Court declined Drayton's argument that because Brown had been arrested prior to his, that this changed the calculus. "The arrest of one person does not mean that everyone around him has been seized by police. If anything, Brown's arrest should have put Drayton on notice of the consequences of continuing the encounter by answering the officers' questions."

Finally, the Court rejected the argument that the police should have informed Drayton of his right not to consent. The Court relied upon *Ohio v. Robinette*, 117 S.Ct. 417; 136 L.Ed.2d 347; 519 U.S. 33 (1996). "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent." Relying upon the totality of the circumstances in the consent analysis, the Court plowed no new ground here.

Justice Souter was joined in dissent by Justices Stevens and Ginsburg. The dissent found the entire encounter far more intimidating than the majority sufficient to find that Drayton had been seized on the bus. "[T]he officer said the police were 'conducting bus interdiction,' in the course of which they 'would like...cooperation.'...The reasonable inference was that the 'interdiction' was not a consensual exercise, but one the police would carry out whatever the circumstances; that they would prefer 'cooperation' but would not let the lack of it stand in their way."

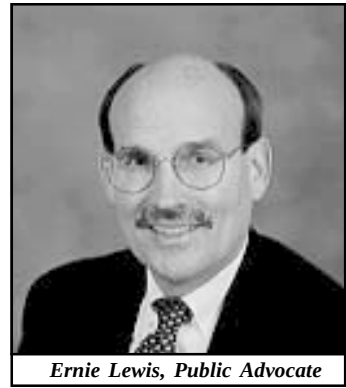
Board of Education of Independent School District No. 92 of Pottawatomie County, et al. v. Lindsay Earls et al.

June 27, 2002

122 S.Ct. 2559; ___ L.Ed.2d ___; ___ U.S. ___

This is another in a line of cases beginning with *New Jersey v. T.L.O.*, 105 S.Ct. 733; 83 L.Ed.2d 720; 469 U.S. 325 (1985) setting the parameters for searches of students in our nations' schools. This case can be classified as another "special needs" case.

The case began when the Board of Education in the city of Tecumseh, Oklahoma, established a policy requiring all students in middle school and high school participating in extra-



Ernie Lewis, Public Advocate

curricular activities to consent to drug testing during the activity, and to agree to random testing based upon a reasonable suspicion. Lindsay Earls and Daniel James and their parents challenged the policy by filing a suit based upon 42 U.S.C. § 1983, saying that the policy violated their Fourth Amendment rights.

After the United States District Court found against the plaintiffs, citing *Vernonia School Dist. 47J v. Acton*, 115 S.Ct. 2386; 132 L.Ed.2d 564; 515 U.S. 646 (1995), the Tenth Circuit reversed. The Tenth Circuit held that a school must demonstrate a drug problem in order to impose such a policy under the Fourth Amendment.

The United States Supreme Court, in another of this Term's 5-4 decisions, reversed the Tenth Circuit. Justice Thomas wrote the opinion for the majority. Much can be told by his preliminary approach: "[W]e must therefore review the School District's Policy for 'reasonableness,' which is the touchstone of the constitutionality of a governmental search... In the criminal context, reasonableness usually requires a showing of probable cause." However, because probable cause is more a creature of a "criminal investigation," neither probable cause nor a warrant is necessarily required to conduct a school search.

In order to conduct his reasonableness review, Justice Thomas engaged in the familiar balancing test between the private and public interest involved in the particular search. Significant to Justice Thomas is that a student has limited privacy interests, and the government stands in the capacity of *parens patriae*. "A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety."

Justice Thomas rejected the students' claim that they have greater privacy interests than the student athletes of *Vernonia*. "[S]tudents who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. Some of these clubs and activities require occasional off-campus travel and communal undress... We therefore conclude that the students affected by this Policy have a limited expectation of privacy."

In addition to a reduced privacy expectation, Justice Thomas next considered the "character of the intrusion." Justice Thomas noted that collecting a urine sample was the same as that in *Vernonia*, that the School District's policy required that test results were kept in a confidential file, and that the results were not turned over to law enforcement nor used in the imposition of discipline. When a student was found to have drugs in his or her urine, the student was limited in participation in the extracurricular activity. Only after 3 positive results is the student suspended from participation for at least 88 days or until the end of the year. Based upon the "minimally intrusive nature of the sample collection and the limited uses to which the test results are put," the Court

found that the character of the intrusion was not "significant."

The next part of Justice Thomas' analysis is the "nature and immediacy of the government's concerns and efficacy of the Policy in meeting them." The Court relied upon the situation existing at the time of *Vernonia*, and stated that "evidence suggests that it has only grown worse." The Court also looked at specific evidence of drug use at the Tecumseh schools, although not requiring evidence that the schools have an unusual problem with drugs. "Indeed, it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use."

The Court specifically rejects a requirement of individualized suspicion. Such an individualized suspicion would not be less intrusive, and it would "place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline." Unpopular groups might be targeted were such individualized suspicion to be required.

Finally, the Court found that the testing "is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use."

Justice Breyer wrote a separate concurring opinion. While agreeing with the majority, he wrote to emphasize the severity of the nation's drug problem, and the fact that something more than supply side interdiction was needed to deal with teenage drug use. He further relied upon the responsibility of schools in many instances to deal with far more than teaching fundamentals. He emphasized that students could avoid the intrusion by not participating in extra-curricular activities.

Justice O'Connor was joined in dissent by Justice Souter, reiterating her opposition to *Vernonia School Dist. 47J v. Acton*. In addition, these 2 dissenters joined Justice Stevens in Justice Ginsburg's opinion also in dissent. Her primary beef with the majority opinion is that the policy "targets for testing a student population least likely to be at risk from illicit drugs and their damaging effect."

Justice Ginsburg distinguishes this case from *Vernonia*. Extracurricular activities are far more part of the educational experience than student athletics. Student athletes require "communal undress" and "expose students to physical risks that schools have a duty to mitigate." Neither is present with extracurricular activities, and thus militate against the school policy applying the *Vernonia* conditions to the Tecumseh schools. Justice Ginsburg rejected the School District's attempt to equate the safety concerns between student athletes and those participating in extracurricular activities. "Notwithstanding nightmarish images of out-of-control flatware,

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livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree.”

Justice Ginsburg closes noting that a school at its core teaches its students about constitutional rights. “When custodial duties are not ascendant, however, schools’ tutelary obligations to their students require them to ‘teach by example’ by avoiding symbolic measures that diminish constitutional protections. ‘That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.’”

Kirk v. Louisiana

June 24, 2002

122 S.Ct. 2458; ___ L.Ed.2d ___; ___ U.S. ___

The police received an anonymous tip that drugs were being sold from Kirk’s apartment. Observations bore that out. Rather than obtaining a warrant, however, the officers knocked on the door, arrested Kirk, searched him, and found a vial of cocaine in his underwear, and contraband in plain view in his apartment. A warrant application was pending at the time of the arrest. Kirk filed a motion to suppress, which was denied by the trial court. The Louisiana Court of Appeals affirmed, holding that because there was probable cause to arrest Kirk, no warrant was needed. The Court did not address whether exigent circumstances existed at the time of the arrest.

The United States Supreme Court granted *cert.* and reversed in a *per curiam* decision. Relying on *Payton v. New York*, 100 S.Ct. 1371; 63 L.Ed.2d 639; 445 U.S. 573 (1980), the Court held that the warrantless search and arrest violated the Fourth Amendment. “As *Payton* makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.” The case was remanded back to the Court of Appeals of Louisiana for consideration of whether there were exigent circumstances in the case sufficient to justify a warrantless entry into Kirk’s apartment.

Thacker v. Commonwealth

2002 WL 1343476

Ky. App.; June 21, 2002

(Not Yet Final)

Many of you are familiar with the KASPER system of electronic prescription-monitoring maintained by the Cabinet for Health Services. It is described as “a history of the subject’s prescription activity within Kentucky since January 1999...[it] consists of an electronic repository of records for each controlled substance dispensed in Kentucky. The records in-

clude the names of the prescriber, the dispenser, and the patient; the type and amount of medication; and the date of dispensing.” On April 27, 2000, Thacker was arrested by the Lexington-Fayette Police. The arresting officer found 5 different prescription drugs. A detective investigated, and a “KASPER” report was requested. The report indicated that Thacker had obtained overlapping prescriptions from different doctors for the same medications. The police verified the KASPER report with the pharmacies and the doctors. The detective then testified before the grand jury to what he had learned.

Thacker challenged the use of his “KASPER-derived information” in his investigation and testimony before the grand jury, asserting that it violated KRS 218A.202’s confidentiality provisions and the Fourth Amendment.

The Court of Appeals, in a decision by Judge Knopf and joined by Judges Buckingham and Schroder, affirmed the trial court’s decision denying the motion to suppress. The Court agreed that the use of an individual’s medical data is protected by the Fourth Amendment and Section Ten. The use of pharmacy records was viewed as “not as clear.” “Pharmacy records have long been subject to police inspection, so the expectation of privacy in them is lessened.”

The Court did not rely upon this possible distinction, however. Rather, the Court relied upon an exception to the warrant requirement for “administrative searches in furtherance of the State’s regulation of industries that pose large risks to the public’s health, safety, or welfare.” Under this exception, (1) administrative searches may be undertaken so long as “the state has a substantial interest in regulating the particular industry, (2) the regulation providing for the search reasonably serves to advance that interest, and (3) the regulation informs participants in the industry that searches will be made and places appropriate restraints upon the discretion of the inspecting officers.”

The Court found that this case met all three requirements. “Kentucky clearly has a substantial interest in regulating the sale and distribution of drugs and in attempting to trace their movement through the channels of commerce.” “[T]he prescription monitoring system, with its substantial safeguards against inappropriate disclosure of data, reasonably advances that interest.” Finally, “the statute makes clear to practitioners and patients that the data is subject to limited police inspection, and the requirement that officers articulate to the Cabinet bona fide suspicions that the individual about whom they are inquiring has violated a provision of KRS Chapter 218A appropriately restrains their discretion.” Finally, the Court rejected the allegation that the detective had violated the confidentiality provisions of KRS 218A.202(6).

United States v. Martin

289 F.3d 392 (6th Cir. 2002)

Two Covington police officers were patrolling an area known for prostitution when they saw someone known for prostitu-

tion signal to a person in a car, enter the car, and drive off. The officers pulled over the car, driven by Martin, and began to interrogate the woman, Wagoner, and Martin. They obtained consent to search Wagoner, found a condom, and arrested her on misdemeanor loitering for prostitution charges. The officer then searched the passenger compartment of the automobile and found a .25 caliber pistol under the rear passenger floor-mat. Once they identified Martin as a convicted felon, he was charged with the federal offense of being a felon in possession of a firearm. The defendant filed a motion to suppress and it was sustained by the U.S. District Court. The government appealed.

In a decision by the Sixth Circuit written by Judge Edmunds, the Court reversed, finding that “the district court erred in finding that the officers lacked reasonable suspicion to justify the stop of Martin’s car and in finding that the officers lacked probable cause to arrest Wagoner.”

First, the Court held that the officers had a reasonable suspicion sufficient to justify the stopping of the car. The Court utilized the border search case of *United States v. Arvizu*, 122 S.Ct. 744; 151 L.Ed.2d 740; 534 U.S. 266 (2002) in its analysis. “*Arvizu* made clear that courts must not view factors upon which police officers rely to create reasonable suspicion in isolation. Rather, *Arvizu* stressed that courts must consider all of the officers’ observations, and not discard those that may seem insignificant or troubling when viewed standing alone.” “The officers testified that they believed that Wagoner was engaged in the offense of loitering for prostitution because: (1) her dress and attire were typical of prostitutes; (2) she was in an area known for prostitution activity; (3) they recognized her as a woman who had been convicted of prostitution crimes in the past; and (4) she waved in a manner that they identified as being characteristic of a prostitute’s means of soliciting customers. This Court finds that the combination of [sic] the above observations, when considered from the perspective of officers with specialized training and familiarity with the behavior of prostitutes, provide reasonable suspicion to justify a stop.”

The Court next held that because there was probable cause to arrest Wagoner, the officers were within their rights to search Martin’s car under *New York v. Belton*, 101 S.Ct. 2860; 69 L.Ed.2d 768; 453 U.S. 454 (1981). The Court considered the same factors going to reasonable suspicion in combination with Martin’s and Wagoner’s contradictory answers to interrogation, and the finding of a condom on Wagoner’s person, as sufficient to justify the arrest of Wagoner. The Court disregarded the fact that under Kentucky law, the officer could only arrest Wagoner for a misdemeanor committed in the presence of the officer.

Judge Martin dissented. “While I credit the officers’ experience and expertise, I do not believe that their interpretation of the wave, combined with the nature of the neighborhood, their belief about Wagoner’s prior arrest and Wagoner’s failure to carry a purse, justified their stop of Wagoner. The

underlying facts simply leave too much to speculation about whether Wagoner was engaged in loitering for prostitution purposes in this particular instance.”

SHORT VIEW . . .

1. *Commonwealth v. Seng*, Mass., 766 N.E.2d 492 (4/23/02). There are limits to what the police may do during an inventory search in a jail. In this case, the Court held that reading the numbers off bankcards exceeded the scope of a jail inventory search and thus could not be used in evidence. The Court stated that upon the inventory of the contents of the wallet, the police should have obtained a search warrant in order to look at the numbers on the bankcard.
2. *State v. Hawkins*, Ind. Ct. App., 766 N.E.2d 749 (4/23/02). When a person has been stopped lawfully for a traffic violation, and an experienced police officer smells marijuana coming from the car, there is probable cause to search the car.
3. *United States v. Clemons*, D.D.C., 201 F.Supp.2d 142 (5/14/02). The defendant was stopped after police officers saw him driving with two flat tires. A passenger fled. The officers told the defendant to stay in the car while the passenger was caught. Thereafter the police removed him from the car and put him on the ground in handcuffs. They asked him about the ownership of the car and about two handguns found under the front seat. No warnings under *Miranda* were given. The D.C. Court held that the statements given to the officers had to be suppressed because this *Terry* stop was custodial. “[D]etention without probable cause may still be permissible for Fourth Amendment purposes, while at the same time creating a ‘custodial situation’ under *Miranda* because a reasonable person so detained would feel that he has been deprived of his ‘freedom of action in [a] significant way,’ or that he was ‘completely at the mercy of the police.’ . . . *Berkemer*, 468 U.S. at 435, 438.”
4. *United States v. Davis*, 290 F.3d 1239 (10th Cir. 5/16/02). There are no special search rules in domestic violence cases, according to the Tenth Circuit. Here, where the police answered a domestic violence call and were met by an intoxicated man at the front door who gave misinformation and then went back into the house, the police violated his Fourth Amendment rights when they followed him without a warrant into the house. Significantly, both the defendant and the alleged victim of domestic violence declined to consent to a search of the house. The Court did not find the existence of exigent circumstances in this case.
5. *People v. Willis*, Cal., 120 Cal. Rep. 2d 105 (6/3/02). The police heard that a defendant was selling drugs from his hotel room. The officer checked with a “parole book” at the police station, which indicated that the defendant

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was on parole. A parole officer verified that the defendant was on parole. The police officer and the parole officer went to the hotel room, where the defendant produced a certificate showing that he had come off parole. The officers searched the hotel room anyway and found drugs. The California Supreme Court held that the search was illegal and could not be saved by the good faith exception to the exclusionary rule. The Court held that both the parole officer and the clerk in the Department of Corrections were part of the law enforcement team, and thus this case is distinguishable from *Pennsylvania Board of Probation and Parole v. Scott*, 118 S.Ct. 2014; 141 L.Ed.2d 344; 524 U.S. 357 (1998) and *Evans v. Arizona*, 115 S.Ct. 1185; 131 L.Ed.2d 34; 514 U.S. 1 (1995). The parole officer "bears little resemblance to the neutral and detached judicial officers and court clerks in *Leon* and *Evans*....Unlike those actors, Mora is an adjunct to the law enforcement team when she, as a peace officer under California law, conducts or participates in a search, and the threat of exclusion can be expected to alter her behavior."

6. *State v. Troxell*, Tenn., 2002 WL 1058200 (Not yet final) (5/28/02). The giving of consent to search for weapons after a routine traffic stop did not extend to the inspection of the gas tank of a vehicle or the undercarriage, according to the Tennessee Supreme Court.
7. *Corbin v. State*, Tex.Crim. App., 2002 WL 1174569 (Not yet final) (6/5/02). The Texas Court of Criminal Appeals has held that the police may not stop a motorist who is driving below the speed limit and crosses the centerline one time under a theory of community caretaking. Thus, cocaine found taped to the driver's back after stopping the car had to be suppressed. The Court looked at the officer's subjective motivation in stopping the driver, notwithstanding *Whren*. "Although it certainly would be reasonable for a police officer to stop an individual who appears to be falling asleep while driving, the level of distress exhibited here does not reflect such an individual."
8. *State v. Wiegand*, Minn., 645 N.W.2d 125 (6/13/02). The Minnesota Supreme Court has held that before the po-

lice can bring a dog to sniff the exterior of a car during a routine traffic stop they must have a reasonable suspicion that the car has contraband in it. The Court acknowledged that many courts have divided on this issue, reading *United States v. Place*, 103 S.Ct. 2637; 77 L.Ed.2d 110; 462 U.S. 696 (1983) different ways. The Court stated that a "dog sniff around a motor vehicle stopped only for a routine equipment violation is intrusive to some degree. A dog sniff detects something that the public generally cannot detect...and something that, in this case, was purposefully hidden from view. Given that there is some intrusion into privacy interests by a dog sniff, we hold that an officer cannot conduct a narcotics-detection dog sniff around a motor vehicle stopped for a routine equipment violation without some level of suspicion of illegal activity."

9. *Keenom v. State*, Ark., 2002 WL 1339890 (Not yet final) (6/20/02). A "knock and talk" can turn into a seizure for Fourth Amendment purposes, according to the Arkansas Supreme Court. Here, the police went to the defendant's trailer after receiving information that the defendant was attempting to buy methamphetamine precursors at Wal-Mart. The defendant refused a request to allow for a search, he was not allowed to go inside and put on warmer clothing, and at one point asked the officers to leave for awhile, which was refused. "[H]e was not allowed to go inside to retrieve some clothing. Similarly, his request that the officers leave and come back in ten minutes was ignored. Instead, these officers continued to question him while he stood in the weather, partially clothed, under the glare of the headlights of the officers' cars. This persistence by the officers would strongly convey to a reasonable person the officers' intention not to desist."

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Challenges are what make life interesting; overcoming them is what makes life meaningful.

-Joshua J. Marine

KENTUCKY CASELAW REVIEW

Ruben Rios Salinas v. Commonwealth,
Ky., __ S.W.3d __ (06/13/02)
(Reversing and remanding)
(Petition for rehearing pending)

Ruben Salinas, a man of Mexican heritage, was charged with the kidnapping and intentional murder of A. L. Nuckolls. At trial, testimony revealed that Nuckolls drove away from his home in his 1988 red Pontiac after telling his wife that he was going to the pharmacy to pick up a prescription. He never returned. Nuckolls' wife and girlfriend both received threatening telephone calls and notes requesting a ransom to save Nuckolls' life. Salinas testified that he killed Nuckolls in self-defense after Nuckolls came to his residence demanding money. Salinas also admitted loading Nuckolls' body into the trunk of the Pontiac and parking the car on the property of Anne and Guy Gautier, with their permission. Finally, Salinas admitted that he was the source of the ransom notes and threatening telephone calls, which were made to steer suspicion away from him. Ultimately, the jury convicted Salinas of kidnapping and murder. He received a sentence of life without the benefit of probation or parole.

“Flow chart” purporting to identify members of a criminal organization constituted inadmissible hearsay. At trial, the Commonwealth presented the testimony of a detective who was investigating Nuckolls for narcotics trafficking, gun smuggling and counterfeiting. The detective testified that he recruited a confidential informant who claimed to have been involved in Nuckolls' illegal activities. The detective explained that he asked the informant if he had any information that might be helpful in solving Nuckolls' murder and that the informant sent him a handwritten “flow chart” purporting to identify members of a narcotics and smuggling organization known as the “Old Bluegrass Conspiracy.” The informant did not testify at trial and the detective admitted that he had no personal knowledge as to the accuracy of the chart. Nevertheless, over Salinas' objection, the “flow chart” was admitted at trial and the detective described the contents of the chart in detail. On appeal, Salinas argued that it was error to admit the “flow chart” into evidence as it was inadmissible hearsay. The Supreme Court agreed, noting that while the chart did not mention Salinas by name, it referred to an individual as “the Mexican hitter,” and Salinas was the only person of Mexican heritage charged with murder. In addition, the chart mentioned Nuckolls and the Gautiers by name. The chart connected Salinas to Nuckolls and connected Nuckolls to the Gautiers. The Court noted that Salinas was prejudiced by the admission because the obvious implication was that Salinas was involved with Nuckolls and the Gautiers in a major criminal operation. The Court reasoned that it would only take a small leap of inference to conclude that Salinas was a professional killer who had not killed an acquaintance

in self-defense, but who had kidnapped and “hit” (murdered) a criminal associate for the purpose of monetary reward.

Aggravating circumstance: murder during the course of kidnapping. The Supreme Court also found error in the penalty phase instructions because the instructions permitted the jury to impose the death penalty on the kidnapping conviction if the jury found that the “victim was not released alive.” The Court noted that while this element enhances kidnapping to a capital offense, the factor the jury must find to impose any aggravated sentence is that the victim was murdered during the course of the kidnapping.

As to Salinas' other claims of error, the Court found the indictment sufficient despite its failure to specify whether the murder was intentional or wanton or whether the kidnapping was for ransom or reward. The Court opined that the indictment was sufficient to place Salinas on notice of the charges.

The Court reaffirmed that there is no Eighth Amendment violation when the death penalty is sought for the murder of a kidnapping victim. Also, death qualification of prospective jurors does not violate a defendant's constitutional right to a fair and impartial jury.

In addition, the Court found that the trial court's failure to admonish the jury properly prior to each recess was harmless error, if any, where Salinas did not show any instance in which any member of the jury conducted himself of herself contrary to the mandate of the admonition.

Finally, the Court found that there was sufficient evidence to send the kidnapping charge to the jury because the jury was not obliged to believe Salinas' version of events and kidnapping can be proven by circumstantial evidence. *Meredith v. Commonwealth*, Ky., 959 S.W.2d 87, 90 (1997).

Justice Wintersheimer dissented without opinion.

Earl O'Neal Manns v. Commonwealth,
Ky., __ S.W.3d __ (06/13/02)
(Reversing and remanding)

In March of 1997, Manns, then age 18, shot and killed Bashawn Wilson during an argument over a computer game. During his jury trial, the prosecution used Manns' 1994 juvenile adjudication for first-degree wanton endangerment in both the guilt and penalty phase pursuant to KRS 532.055(2)(a)(6). Manns was ultimately convicted of first-degree manslaughter and sentenced to 17 years in prison. The Court of Appeals affirmed his conviction. The Supreme Court granted discretionary review to decide whether it was error to admit evidence at trial of Manns' 1994 juvenile adjudication for first-degree wanton endangerment.

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Prior juvenile adjudications admissible in penalty phase for sentencing purposes, but not in guilt or penalty phase for impeachment purposes. The Supreme Court noted that KRS 532.055 (truth-in-sentencing) was enacted to provide jurors with information about a defendant's past criminal record, and other matters, that would be relevant to sentencing. As per a 1996 amendment, KRS 532.055(2)(a) subsection (6) permits the Commonwealth to introduce a defendant's prior juvenile adjudications of guilt (if equivalent to a felony) for impeachment purposes in the guilt phase and in the penalty phase. The Court held that the 1996 amendment adding subsection (6) violated the separation of powers doctrine. *Commonwealth v. Reneer*, Ky., 734 S.W.2d 794 (1987). However, the Court, under the principle of comity, declined to strike down the statute as unconstitutional and upheld the part of the amendment that permits the introduction of the juvenile adjudication during the penalty phase for sentencing purposes.

The Court declined to extend comity to the provision that permits use of prior juvenile adjudications for impeachment purposes during either phase. The Court found that this provision violated Section 51 of the Kentucky Constitution, which requires that the subject of a statutory provision be expressed in the title of the statute. In addition, the Court found that subsection (6) does not override KRE 609(a), which provides that impeachment can only be achieved with evidence of a felony criminal conviction. "On the basis of case law, statute, and the history of KRE 609, it is clear that there was never an intent that a juvenile adjudication would equate to a felony criminal conviction for purposes of the rule [KRE 609(a)]." Accordingly, the Court reversed and remanded Manns' case for a new trial "at which the records of Appellant's prior juvenile adjudication shall be admissible only during the penalty phase, if there is one, and shall not be admissible during either phase for the purposes of impeachment."

Justice Wintersheimer dissented. In his view, KRE 609 and KRS 532.055(2)(a)(6) are not in conflict and KRS 532.055(2)(a)(6) should be granted comity.

**Wayne M. Miller v. Commonwealth, Ky., __ S.W.3d __
(06/13/02)
(Reversing and remanding)**

Following a jury trial, Miller was convicted of 150 counts of first-degree rape (25 Class A felonies, 125 Class B felonies), 75 counts of first-degree sodomy (13 Class A felonies, 62 Class B felonies), and one count of intimidating a witness. He was sentenced to a total of 70 years in prison. The convictions were the result of an alleged three-year sexual relationship with his biological daughter, A.M. On appeal, Miller challenged the admission of three handwritten letters on hearsay grounds, the admission of evidence of the habits of others, and the sufficiency of the evidence.

Handwritten letters contained inadmissible hearsay. At trial, the prosecution produced three handwritten letters written by A.M. (Commonwealth's Exhibits 1, 2, and 3). Exhibit 1 was a note between A.M. and her friend, Shonda. Exhibit 2 was a letter from A.M. to Shonda. Exhibit 3 was a letter from A.M. to her school counselor. The letters suggested that A.M. may have had sexual relations with two other boys, but also contained potentially incriminating references to her father, Miller. The Court held that all three documents were inadmissible hearsay. The Court found that the statements attributed to A.M. in all of the documents were not inconsistent with her trial testimony, nor did they pertain to any identification procedure. KRE 801A(a)(1) and (3). Also, the letters were not admitted as prior consistent statements to rebut a claim of recent fabrication or improper motive because they did not refute Miller's allegation that A.M.'s mother influenced her to bring charges. KRE 801A(a)(2). In fact, the statements were introduced in the prosecution's case-in-chief, not in rebuttal, and defense counsel did not even cross-examine A.M., much less suggest that her testimony was recently fabricated or improperly influenced or motivated. Finally, the Court found that under no theory could Exhibit 1 have been properly admitted without deleting all of the statements attributed to Shonda. Shonda's statements clearly implied that she knew Miller was sexually abusing A.M. However, Shonda did not testify at trial, nor could she have testified to such improper hearsay and opinion evidence. Miller was prejudiced because Shonda's hearsay and opinion evidence was inserted into the jury's deliberations without being subject to cross-examination.

Detective's testimony about her observations of the habits of sexually abused children should have been excluded as irrelevant. Over defense objection, a detective testified at trial that delayed reporting often occurs in child sexual abuse cases. The Supreme Court held that such testimony should have been excluded as irrelevant. "[A] party cannot introduce evidence of the habit of a class of individuals either to prove that another member of the class acted the same way under similar circumstances or to prove that the person was a member of that class because he/she acted the same way under similar circumstances."

Sufficiency of the evidence/erroneous instructions. The indictment charged Miller with 166 counts of first-degree rape either "with a child under the age of 12" (Class A felony), or "by force or threat of force after her 12th birthday" (Class B felony), and with 166 counts of first-degree sodomy either "with a child under the age of 12" or "by force or threat of force after her 12th birthday (Class B felony)." The Court held that the jury instructions denied Miller his right to a unanimous verdict with respect to his rape and sodomy convictions. The Court observed that it had previously held that a "combination" instruction permitting a conviction of the same offense under either of two alternate theories does not deprive a defendant of his right to a unanimous verdict if there is evidence to support a conviction under either theory.

Johnson v. Commonwealth, Ky., 12 S.W.3d 258, 265-66 (1999). However, the Court found that the “combination” instructions in Miller’s case did not describe two alternative theories by which the same offense could be committed, but described offenses of two different classes. Under the instructions, the jury could find Miller guilty of first-degree rape and first-degree sodomy either based upon A.M.’s age or evidence of forcible compulsion. The Court concluded that under no construction of A.M.’s testimony could the jury have found Miller guilty of 225 Class A felonies, because there was insufficient evidence to support more than 30 Class A felony convictions, and insufficient evidence of forcible compulsion to support any Class B felony convictions.

Finally, the Court reaffirmed that the Commonwealth need not prove the precise dates of every count of the indictment in a child sexual abuse case. However, the Court noted that “mere mathematical extrapolation of a described offense based on such vague testimony as ‘almost every other weekend,’ ‘about ten weeks per year,’ or ‘every other time’ will not support convictions of separate offenses.” The Court ruled that upon retrial, Miller would be entitled to directed verdicts of acquittal with respect to those counts unsupported by sufficient evidence to distinguish them as separate offenses.

Justice Wintersheimer dissented. In his view, the admission of the letters was not error, the testimony concerning delay in reporting of child sexual abuse was not error, and the instructions were not erroneous.

***James L. Morrow v. Commonwealth,*
Ky., __ S.W.3d __ (06/13/02)
(Affirming)**

A jury found Morrow guilty of first-degree trafficking in a controlled substance in violation of KRS 218A.1412. After the guilt phase verdict, Morrow waived jury sentencing. Pursuant to an agreement he negotiated with the Commonwealth, Morrow entered conditional guilty pleas which admitted that he was subject to penalty enhancement as both a KRS 218A.1412 “second or subsequent” offender and a second-degree persistent felony offender under KRS 532.080(5). In accordance with the agreement, the trial court sentenced Morrow to 30 years in prison.

Penalty enhancement under KRS Chapter 218A and KRS 532.080(5) proper. On appeal, Morrow argued that *Gray v. Commonwealth*, Ky., 979 S.W.2d 454 (1998) held that his underlying trafficking offense could be enhanced under either KRS Chapter 218A or KRS 532.080(5), but not both, because his two prior felony trafficking convictions stemmed from the same indictment and a single final judgment. Morrow therefore contended that his underlying Class C felony could be enhanced for sentencing purposes only to a Class B felony with a permissible range of between 10 and 20 years imprisonment. After reconsideration of *Gray*, the Supreme Court concluded that “*Gray* both misinterpreted the primary authority upon which it relied and overlooked the separate pro-

visions governing and policies underlying KRS Chapter 218A ‘second or subsequent’ enhancement.” After finding that the General Assembly had different purposes for the two enhancement provisions, the Court overruled *Gray* and held that a defendant with two prior convictions for first-degree trafficking in a controlled substance who is again convicted under that section can be sentenced within the penalty range for Class A felonies regardless of whether the sentences for the prior convictions were ordered to run concurrently within the same judgment.

Justice Stumbo dissented. Justice Stumbo was of the opinion that *Gray* was correctly decided and should not be overturned.

***Patricia Hearn and James Hearn v. Commonwealth,*
Ky., __ S.W.3d __ (06/13/02)
(Affirming)**

Post-judgment interest may be added to principal amount of restitution under KRS 533.030(3). James and Patricia Hearn pled guilty to twelve counts of theft by failure to make required disposition of property and one count of theft by deception. The Hearn family admitted to having converted to their own use more than \$300,000 that had been entrusted to Patricia as a deputy superintendent of the Jefferson County schools. The trial court sentenced each to 10 years in prison but probated the sentences. One of the conditions of probation was that the Hearn family pay restitution to the Jefferson County Public Education Foundation. The trial court found that \$322,485 was owed in restitution, with an additional \$10,000 added for accounting fees incurred by the Foundation. The Commonwealth requested that the defendants be ordered to pay interest in addition to the principal amount owed. The trial court denied the request, finding that there was no criminal statute providing for interest on restitution. The prosecution appealed from the order denying the motion and the Court of Appeals reversed and remanded for additional proceedings. The Supreme Court accepted discretionary review.

On appeal, the Hearn family argued that there is no express authority in KRS 533.030(3) for the imposition of interest. The Hearn family maintained that the legislature must have intended to exclude interest under KRS 533.030(3) because it expressly imposed interest on restitution in the Medicaid fraud statute, KRS 205.8467(1)(a).

The Court rejected the Hearn family’s argument. The Court noted that KRS 533.030(3) provides that the “restitution shall be ordered in the full amount of the damages....” Applying KRS 446.080 (the rule that all statutes must be liberally construed with a view to carry out the intent of the legislature), the Court reasoned that if restitution was to be considered full, it must include post-judgment interest in most cases. The Court stated, “In this case, the amount of the restitution judgment and the period allowed for repayment means that the Jefferson County Public Education Foundation will suffer a substantial decrease in the value of its property and the loss of the

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use of the funds unless interest is permitted." The Court reasoned that the Medicaid fraud statute was distinguishable because the damages under that statute can only be pecuniary.

Finally, the Court rejected the Hearn's claim that the imposition of interest on restitution awards has far-reaching, negative implications. Instead, the Court found that allowing interest on restitution serves judicial economy and the traditional notions of fair play and substantial justice. Since victims already have the right to seek interest on restitution in a civil action, by allowing interest on restitution, the interests of judicial economy and substantial justice for victims would be enhanced because victims would not have to spend additional time and funds seeking an appropriate civil remedy.

Justice Johnstone, joined by Justice Stumbo, dissented. Justice Johnstone argued that the majority opinion ignored principles of common law and long-standing rules of statutory construction. Under the rule of lenity, courts are bound to construe criminal statutes narrowly, and give the accused the benefit of any ambiguities. Because the General Assembly did not specifically provide for interest, under the basic rules of statutory construction, no interest can be assessed. ■

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6th Circuit Review

Macias v. Makowski

291 F.3d 447 (6th Cir. 5/24/02)

Prosecutorial Misconduct: Misstatements of Fact

Macias was convicted by a Michigan jury of assault with intent to commit murder and unlawfully possessing a firearm after shooting at a car parked at a gas station. Macias' defense at trial was that he was not at the gas station, but was at home watching TV. Seven witnesses identified Macias as the shooter. On direct appeal, the Michigan Court of Appeals reversed Macias' conviction, holding that it was not harmless error for the government to have attacked the credibility of one of Macias' alibi witnesses, Brenda Ruelas, through misstating of the evidence. The government appealed, and the Michigan Supreme Court reversed the Court of Appeals. Macias filed a petition for writ of habeas corpus in federal district court. The district court denied the petition, and the Court of Appeals affirms.

At issue is whether the prosecutor's false statement during closing argument that Ms. Ruelas had not come forward until the day of trial constitutes prosecutorial misconduct. The 6th Circuit uses a 2-part test to determine whether the prosecutor's remarks or actions violate a defendant's due process right. *U.S. v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001). First, it must be determined whether the remarks or conduct were improper. If so, the 4-factor test from *U.S. v. Carroll*, 26 F.3d 1380, 1385 (6th Cir. 1994), is applied to determine if "the impropriety was flagrant" and violated a defendant's due process rights. The four factors to be considered are as follows: (1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks

were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong. *Carter* at 783.

Harmless Error Where 7 Eyewitnesses

The Court first notes that the prosecutor's actions were improper. The prosecutor stated in closing argument that Ms. Ruelas had not come forward until the day of trial although this was false. As to the *Carroll* factors, the prosecutor did make prejudicial, misleading statements. However, these statements were isolated in that they occurred during rebuttal closing argument. Because the prosecutor knew that Ruelas had at least come forward 2 months before trial (from the defense's filed notice of alibi witnesses) the remarks were deliberate misstatements of fact. However, the state's case against Macias was very strong in that 7 witnesses identified him as the shooter, and 3 of these witnesses actually knew Macias before the shooting. The 6th Circuit ultimately holds that, while it might have reversed if it were reviewing the case on direct appeal, it will not grant the petition for writ of habeas corpus when it is only determining whether the Michigan Supreme Court unreasonably applied federal law.

Fitzgerald v. Withrow

292 F.3d 500 (6th Cir. 6/6/02)

Validity of Waiver of Right to Jury Trial Where Change of Judge

In this case, the Court of Appeals reverses the district court's grant of Fitzgerald's petition for writ of habeas corpus.



Emily Holt

Fitzgerald and Romallis Colvin were indicted for the kidnapping of Leroy Huckleberry. They were tried jointly. Fitzgerald waived his right to a jury trial. During the process of jury selection for Colvin, the presiding judge, Judge Baxter, fell ill and Judge Townsend announced he would be presiding over the trial. Fitzgerald then requested a jury trial, and Townsend denied that request. He found Fitzgerald guilty of kidnapping and sentenced him to life imprisonment. On direct appeal, his convictions were affirmed. The district court, however, found that Fitzgerald's sixth amendment right to a trial by jury was violated by Judge Townsend's actions.

The issue before the 6th Circuit is whether Fitzgerald waived his Sixth Amendment right to a jury trial to the extent that permitted Judge Townsend to conduct a bench trial. The Court first notes that a trial court does not have to grant a defendant's request for a bench trial. *U.S. v. Martin*, 704 F.2d 267, 271 (6th Cir. 1983). However, a defendant is entitled, under the sixth amendment, to a jury trial. Under Michigan law, a defendant can waive that right, but the state must also consent to a bench trial. The waiver by the defendant must be "knowing, voluntary, and intelligent." *U.S. v. Sammons*, 918 F.2d 592, 596 (6th Cir. 1990). The Court focuses on what waiver was made in this case, *i.e.* did Fitzgerald waive all of his right to a jury trial?

What Did Defendant Agree to Waive?

In the case at bar, the written waiver signed by Fitzgerald stated, "I, having had opportunity to consult with counsel, do hereby in open Court voluntarily waive and relinquish my right to a trial by jury and elect to be tried **by a judge of the above named Court**, in which this cause is pending." (emphasis added). In the Court of Appeals' own words, this case is "eerily similar" to a prior 6th Circuit case, *Sinistaj v. Burt*, 66 F.3d 804 (6th Cir. 1995). In *Sinistaj*, the exact same issue was present with the exact same judges, and the 6th Circuit held that because the waiver was not judge specific, and because the defendant was not led to believe the waiver only applied to a trial before Judge Baxter, the 6th amendment right to a jury trial was not violated. In the present case, Judge Baxter also did not lead Fitzgerald to believe she would personally try the case.

Vincent v. Jones
292 F.3d 506 (6th Cir. 6/6/02)

Double Jeopardy Violation Where Court Directs Verdict and Then Changes Mind

Vincent was charged with first-degree murder along with 2 co-defendants. The victim was shot during an altercation between 2 groups of high schoolers. At the close of the prosecution's case, all defendants moved for a directed verdict on the charge of first-degree murder. The trial court stated that "there's not been shown premeditation or planning" and granted the motion. A docket order reflects this. However, the court told the prosecutor he could reargue the

issue the next day. When he did so, the court stated that he had "granted a motion but had not directed a verdict" and advised that he was going to reconsider the matter.

At the close of the defense's case, the trial court announced he was going to allow the jury to consider first-degree murder and Vincent was convicted of that crime. On appeal, the Michigan Court of Appeals reversed his conviction, but the Michigan Supreme Court reversed the Court of Appeals. On federal habeas review, the 6th Circuit holds that Vincent's double jeopardy right was violated and grant the petition for writ of habeas corpus.

The question of whether a ruling is an "acquittal" is determined by whether there has been a "resolution. . . of some or all of the factual elements of the offense charged." *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). In this case, it was clear and unambiguous that a directed verdict motion for first-degree murder was granted at the close of the prosecution's case. This was a resolution of the factual elements of that offense, specifically that there was no premeditation or planning. Thus, jeopardy attached. That decision could not be reversed later at trial. Vincent's prosecution for first-degree murder violates the double jeopardy clause.

Cook v. Stegall
2002 WL 1400527 (6th Cir. 7/1/02)

One-Year Grace Period Under AEDPA Statute of Limitations Reasonable

This case involves examination of the AEDPA statute of limitations relevant to the filing of *pro se* petitions for writ of habeas corpus. In this case the 6th Circuit makes 3 important findings. First, the Court reaffirms that the one-year grace period for filing of petitions for those prisoners whose convictions were final before the effective date of AEDPA is reasonable and appropriate.

"Mail Box Rule" Inapplicable to *Pro Se* Petitions Filed by Third-Party Intermediaries

Second, the Court holds that the "mailbox rule" is inapplicable to situations where a prisoner has given a petition to a third-party intermediary for filing. Under the "mailbox rule," a petition is deemed filed when the prisoner gives the petition to the prison for filing in federal court. *Houston v. Lack*, 487 U.S. 266, 273 (1988). In this case, Cook gave the petition to a daughter for her filing; if the Court did apply the "mailbox" rule to his case, the petition would be timely filed. The Court declines to do so, however, as it would allow prisoners to easily "circumvent statutes of limitations."

Equitable Tolling Inappropriate Where Prisoner Waited 12 Years to File Petition

Finally, the Court declines to equitably toll the statute of limitations in Mr. Cook's case. There are five factors to weigh

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in deciding whether to apply equitable tolling to a specific case: (1) lack of notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) reasonableness in remaining ignorant of the legal requirement for filing the claim. *Dunlap v. U.S.*, 250 F.3d 1000 (6th Cir. 2001). In this case Mr. Cook's lack of diligence in pursuing his claim—he waited 12 years—outweighs any factors in his favor.

Anthony v. DeWitt

2002 WL 1489611 (6th Cir. 7/15/02)

At issue in this case is whether the admission of testimony of 2 witnesses who recounted statements made by an out-of-court declarant violated the 6th amendment confrontation clause. Anthony was charged and convicted of aggravated murder for the death of Patricia Smith. At trial, Mary Payne, who was present at the shooting, testified to 2 hearsay statements made by Rommell Knox, Anthony's co-defendant. She testified that Knox asked her to knock on the victim's door so that Anthony could talk to her about dropping criminal charges she had filed against Knox; she said that Knox said she had to do it because Smith would not open the door to a black man. She also told the jury that Knox threatened her life if she told anyone what happened that night. Knox's wife, Regina Knox, also testified at trial. She was not present at the crime scene but told the jury that Knox came home and told her that he and some other people (who he was going to pay) went to Smith's apartment and Anthony shot Ms. Smith.

Statements Not Hearsay When Offered to Show Why Individual Did Something

The Court first finds that Payne's testimony about statements made to her by Knox were not hearsay because it was not offered to prove the truth of the matter asserted. Rather, they were offered to explain Payne's actions as a participant in the murder and her inaction in not going to the police to report the crime.

Statements to Wife About Crime Bear Sufficient Indicia of Reliability

The Court further finds that Ms. Knox's testimony as to statements made to her by Mr. Knox were admissible as they bore sufficient indicia of reliability. The Court applies the *Dutton* test in reaching this conclusion. This involves the consideration of 4 factors:

(1) whether the hearsay statement contained an express assertion of past fact, (2) whether the declarant had personal knowledge of the fact asserted, (3) whether the possibility that the statement was based upon a faulty recollection is remote in the extreme, and (4) whether the circumstances surrounding the statement make it likely that the declarant fabricated the assertion of fact. *Dutton v. Evans*, 400 U.S. 74, 88-89 (1970). Knox made express assertions of past fact and

he had personal knowledge of the facts asserted. The statements were made to Ms. Knox shortly after the murder occurred. Finally, it is unlikely that Knox made up the facts as he made them to his wife and they were against his penal interest. The Court notes that it is not troubled by the fact that the facts strongly implicate Anthony because Knox was not making the statement to authorities, but to his wife. If the statement were made to authorities, the Court observes, there might be more reason to be concerned with the fourth factor as Knox gained no legal benefit from telling his wife that Anthony shot Smith.

Rockwell v. Yukins

2002 WL 1558672 (6th Cir. 7/17/02)

This is the second time the 6th Circuit has considered this case. In 2000, the Court vacated the district court's grant of writ of habeas corpus because the district court had reviewed a "mixed petition" of exhausted and unexhausted claims. On remand, the unexhausted claim was dismissed and the district court again granted the writ. In this decision, the Court considers the merits of Ms. Rockwell's claim: whether the trial court erred in excluding evidence of sexual abuse of her and her children at Ms. Rockwell's trial for murder of her husband.

"Unreasonable" Application of Supreme Court Law Does Not Mean "Incorrect" or "Erroneous" Application

Ms. Rockwell contends that the affirmance of her conviction by the state appellate courts involved an unreasonable application of Supreme Court law. The 6th Circuit emphasizes that "unreasonable" is different from "incorrect" or "erroneous," and that the standard is objective unreasonableness. *Williams v. Taylor*, 529 U.S. 362, 409-412 (2000).

Right to Present a Defense Is Not an Unlimited Right

The Court concludes that the state court's decision that the probative value of evidence of Mr. Rockwell's abuse of his sons was outweighed by the danger of unfair prejudice may or may not be erroneous, but that it was not unreasonable. Ms. Rockwell wanted to introduce evidence of the alleged abuse to bolster her defense theory that she did not really want her sons to kill their father, but that she only acted like she wanted to as "therapy" for them. The concern with the admission of such evidence is that it may be used to acquit Rockwell, not because of her lack of participation in the crime, but because Mr. Rockwell deserved to be killed.

The right to present a defense "is not an unlimited right to present evidence without regard to reasonable evidentiary restrictions." There are "other legitimate interests in the criminal trial process." *U.S. v. Scheffer*, 523 U.S. 303, 308 (1998). In the case at bar, Ms. Rockwell's right to present a defense would have been violated if the court had excluded any evidence about the circumstances under which she discussed killing Mr. Rockwell with her sons.

Strong Dissent by Judge Clay

Judge Clay strongly dissents. He believes that the evidence of sex abuse was at the core of the “talk therapy” defense. This is because only that evidence gave the defense credibility.

Leslie v. Randle

2002 WL 1592735 (6th Cir. 7/22/02)

Meaning of “In Custody” Requirement of § 2254

Leslie plead guilty in 1986 to charges of rape and felonious assault in Ohio state court. In 1997, the Ohio sexual predator statute was amended. The trial court adjudicated Leslie as a sexual predator. Leslie claims that the statute is unconstitutional as applied to him. The 6th Circuit holds that Leslie’s petition for writ of habeas corpus must be denied as he fails to meet the “in custody” requirement of 28 U.S.C. § 2254.

Leslie specifically argues that application of the Ohio sexual predator statute to him violates the ex post facto, double jeopardy, equal protection, and due process clauses of the U.S. Constitution. The statute in question provides for retroactive application of the law to prisoners “convicted of or pleaded guilty to a sexually oriented offense prior to January 1, 1997.” Ohio Rev. Code § 2950.09(C). The revised statute differs significantly from the previous law in its classification, registration, and community notification provisions. It provides for classification of an offender as a “sexually oriented offender,” “habitual sex offender,” or a “sexual predator.” Depending on the classification, different registration and community notification requirements apply. As a sexual predator, Mr. Leslie will be subject to the strictest registration and community notification requirements.

“The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty.” *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973). The habeas petitioner must also be “in custody” under the conviction or sentence under attack at the time his petition is filed.” *Maleng v. Cook*, 490 U.S. 488, 490-491 (1989). Collateral consequences of a conviction—the ability to vote, hold office, serve as juror—do not satisfy the “in custody” requirement. *Id.*, 491-492.

**Sex Offender Registration/Notification
Requirements Involves “Collateral Consequences”-
“In Custody” Requirement Is Not Met**

The 9th Circuit Court of Appeals has held classification, notification, and registration requirements are collateral consequences of conviction, not a restraint on liberty. *McNab v. Kok*, 170 F.3d 1246 (9th Cir. 1999). Specifically that Circuit notes that a restraint on liberty usually involves limiting of a habeas petitioner’s movement. Leslie’s movement is not limited by these requirements; they apply regardless of where

he is. *Williamson v. Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998). The 6th Circuit joins the 9th Circuit and holds that habeas review is not the appropriate venue to consider this constitutional claim as the “in custody” requirement of § 2254 cannot be met.

**Concurrence by Judge Clay:
Try Challenge in a § 1983 Action**

Judge Clay concurs, but notes that the holding in this case does not address the actual constitutional claims pertaining to sex offender registration, classification, and notification. The Court is foreclosed from considering them as Leslie does not meet the threshold “in custody” requirement of § 2254. Clay points out that Leslie can bring a constitutional challenge under 42 U.S.C. § 1983.

Other 6th Circuit Highlights:

- Attorneys who routinely handle methamphetamine cases may want to review *U.S. v. Walls*, 293 F.3d 959 (6th Cir. 6/12/02) to see how the federal courts deal with such cases.
- In *Tesmer et al. v. Granholm et al.*, 2002 WL 1409926 (6th Cir. 7/2/02), the Court holds that under Michigan and federal law, indigent defendants who plead guilty in state court are not entitled to appointed counsel for the purpose of filing motions for leave to appeal. “The state has a fundamental interest in the finality of guilty pleas, and by entering a plea a defendant has voluntarily acknowledged that he does not dispute the factual basis of the state’s case against him.” (citations omitted) The Court notes that a defendant can always enter into a conditional guilty plea and be guaranteed appointment of an appellate attorney.
- Although the Court ultimately concludes that it is harmless error, it finds that a district court erred when it joined a firearm charge with crack cocaine charges. See *U.S. v. Chavis*, 2002 WL 1592611 (6th Cir. 7/22/02), for thoughtful analysis on the law of joinder. ■

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CAPITAL CASE REVIEW

SUPREME COURT OF KENTUCKY

***Sanders v. Commonwealth*,
Ky., — S.W.3d — (rendered June 13, 2002)**

Majority: Wintersheimer (writing), Lambert, Johnstone,
Cooper, Graves

Minority: Stumbo (writing), Keller

Undisclosed Flenning Report

The sole issue at trial was whether David Sanders was insane when he committed two murders. KCPC psychiatrist Dr. Candace Walker testified as the prosecution's rebuttal witness. She also testified to the "team approach" KCPC undertook when evaluating patients.

Dr. Frank Flenning was one of the KCPC team evaluating Sanders. His report indicated psychosis and gave evidence of the stressors which may have caused Sanders' break from reality. Nevertheless, the prosecution did not violate its duty under *Brady* because Dr. Flenning's report "[d]id not support the defense of insanity." Trial counsel had Dr. Walker's report, which summarized "the interview with Dr. Flenning." *Sanders v. Commonwealth*, slip op. at 3. Interestingly, Dr. Walker's report and testimony did not mention Dr. Flenning's report and differing view as to Sanders' mental health.

Trial counsel was not ineffective for failing to call Dr. Flenning as a witness. Flenning's testimony would only have reinforced for the jury the number of times Sanders had changed his story.

Failure to Move for Defense Funds to Assist in Presenting Insanity Defense

Trial counsel was not ineffective for failing to move for funds for an expert witness, or for failing to move to withdraw once he realized Sanders was indigent and that funds would be needed. At trial, clinical psychologist, Dr. Stuart Cooke, testified, free of charge, for Sanders. Counsel cross-examined Dr. Walker about the differences between her opinion and Dr. Cooke.¹

Penalty Phase Issues

Sanders' issue regarding additional family members, friends and clergy who were available to testify was rejected because Sanders had not set forth the testimony additional witnesses could have offered. *Sanders*, slip op. at 13. *But see Fraser v. Commonwealth*, Ky., 59 S.W.3d 448, 456 (2001) (in order to dismiss post-conviction motion, record must **conclusively disprove**, not **conclusively prove** allegations); first emphasis in original; second emphasis added.)

A trial counsel's decision whether to call family witnesses is "a strategic one which will not be second-guessed by hindsight." *Sanders*, slip op. at 13. *But see Strickland v. Washington*, 446 U.S. 664, 690-691 (1984) ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."); *Glenn v. Tate*, 71 F.2d 1204, 1207 n.1 (6th Cir. 1995) (when counsel fails to present evidence to the jury because he has never taken the time to develop it, his failures cannot be excused as the product of a reasoned strategy.); citations omitted.)

Failure to Ask for Continuance for Evaluation

Sanders argued that counsel was ineffective in his failure to ask for a continuance to allow for a more thorough investigation. The Court rejected this argument: "the psychologist had adequate time to interview and test Sanders, as well as to consider the entire matter." *Sanders*, slip op. at 15. Interestingly, at trial, the prosecutor made much of Dr. Cooke's confused belief that he had interviewed Sanders during a time when Mr. Sanders was in court for the first or second day of voir dire.

Events Shortly After Sanders' Arrest

After Sanders was arrested, original trial counsel became concerned about his client's mental health. The psychologist who evaluated Sanders at that time told original counsel that Sanders was under severe emotional stress, was suicidal and had a serious psychiatric disorder, possibly a dissociative disorder. Neither the psychologist nor jail personnel who were charged with Sanders' care at that time testified. The Supreme Court found trial counsel not ineffective for his failure to present those persons because their testimony would have been "cumulative" to Sanders' own testimony about his emotional state and thoughts of suicide immediately after his arrest. *Sanders*, *Id.* at 14.

Failure to Advise Sanders Wife About the Marital Privilege

Sanders' wife, Debbie, testified during the guilt phase. Sanders argued that counsel was ineffective for failing to advise Ms. Sanders that she could invoke the marital privilege. The Court disposed of this issue by noting that Sanders had presented no evidence to indicate whether Ms. Sanders had been advised about the existence of the marital privilege, and refuse to testify, and that her testimony opened the door to testimony of previous incidents of violence. *But see Fraser v. Commonwealth*, Ky., 59 S.W.3d 448, 456 (2001) (in order to dismiss post-conviction motion, record must **conclusively**

disprove, not conclusively prove allegations); first emphasis in original; second emphasis added.)

The Court noted that Sanders' argument that Debbie Sanders' testimony had opened the door to presentation of damaging evidence had been presented on direct appeal and would not be reconsidered in post-conviction.

Other Issues

Sanders briefed 28 issues, which the Court considered. However, in its analysis, the Court plowed no new legal ground.

Dissent

Justice Stumbo, joined by Justice Keller, would have remanded for an evidentiary hearing on three issues: 1) penalty phase preparation; 2) failure to call jail employees and a psychologist who examined Sanders shortly after his arrest; and 3) counsel's failure to advise his wife that she could assert the marital privilege against testifying against her husband.

Penalty Phase

After Sanders was found guilty, trial counsel advised the court that mitigation testimony had been presented throughout the guilt phase. Counsel's penalty phase took less than 20 minutes to present; he did not present any medical evidence as to Sanders' mental health and in his guilt phase close, he did not once refer guilt phase evidence.

Events Shortly After Sanders' Arrest

An evidentiary hearing was necessary to determine whether counsel's failure to present the psychologist and jail personnel was strategy or ineffectiveness. "What could be more important to a diminished capacity defense than testimony from a trained mental health professional with access to the defendant immediately after the crime, supported by testimony from witnesses who were charged with [Sanders'] custody and welfare during incarceration?" *Sanders*, slip op, at 2. (Stumbo, J., dissenting).

Marital Privilege Issues

The dissent found no evidence in the record that Ms. Sanders was aware of her right not to testify against her husband. Thus, an evidentiary hearing was needed to make a final determination of this issue.

***White v. Commonwealth*, (rendered May 16, 2002) (not to be published)**

Memorandum opinion of the Court

Guilt Phase Ineffectiveness

White initially denied involvement in the murder of three elderly people in Breathitt County. Trial counsel's preparation focused on White's assertion. However, shortly before trial, after counsel learned that one of White's co-defendants²

had turned state's evidence, White changed his plea from not guilty to not guilty by reason of insanity or intoxication. The Court disposed of White's claims of counsel's ineffectiveness by finding their preparation reasonable. "Because the defendants originally claimed they were not guilty, there was no reason to investigate White's background or his physical or mental health." *White*, slip op. at 2.

Even after the co-defendant flipped, counsel was under no obligation "to discover and provide information about every aspect of White's entire life or an account of several generations of his extended family." *Id. But see Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (The sentencer must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any aspect of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.").

Other Issues

The Court considered other issues regarding ineffective assistance of counsel, prosecutorial misconduct, disproportionality, expert funding, leave to amend and unconstitutional delay in carrying out sentencing, but made no new legal findings.

UNITED STATES SUPREME COURT

***Ring v. Arizona*, 122 S.Ct. 2428 (2002)**

Majority: Ginsburg (writing), Stevens, Scalia (concurring), Kennedy (concurring), Souter, Thomas Breyer (concurring in judgment)

Minority: O'Connor (writing), Rehnquist

Ring was found guilty of felony murder, an offense punishable by life in prison. Under Arizona law, however, the trial judge alone acts as sentencer, with the option of sentencing Ring to life or death. The trial court found two aggravators: pecuniary gain and especially heinous, cruel and depraved and sentenced Ring to death.

The Supreme Court granted *certiorari* to reconcile the tension between *Walton v. Arizona*, 497 U.S. 639 (1990) (Arizona sentencing scheme constitutional) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (jury must determine whether defendant is guilty of every element of a crime, including an element elevating the crime to one with a higher degree of punishment). In *Ring*, the Court decided that because aggravating factors operate as an element of a greater offense, Arizona juries, not judges, must determine whether any exist.

Other states with similar capital sentencing schemes include Colorado, Idaho, Montana and Nebraska. The Arizona legislature is rewriting its capital punishment statutes. The Supreme Court of Idaho recently remanded a case for consider-

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ation of *Ring/Apprendi* concerns. *State v. Fetterly*, 2002 WL 1791425 (rendered August 6, 2002).

States with “hybrid” schemes, in which the jury reaches an advisory verdict, but the judge makes the ultimate sentencing determination, including an ability to “override” the jury’s less than death verdict, include Alabama, Delaware, Florida and Indiana.

***Atkins v. Virginia*, 122 S.Ct. 2242 (2002)**

Majority: Stevens, O’Connor, Kennedy, Souter, Ginsburg, Breyer

Minority: Rehnquist (writing), Scalia, Thomas
Scalia (writing), Thomas, Rehnquist

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court determined that contemporary values had not reached such a point that it could declare mentally retarded persons were sufficiently less culpable for their crimes that subjecting them to capital punishment would be unconstitutional. As the Court recognized in *Atkins*, that consensus changed in the intervening 13 years. In the decade of the 1990’s, 10 state legislatures, including Kentucky, enacted bans on such executions. In the 21st Century, 7 other states have followed suit.

“It is not so much the number of these States that is significant, but the consistency of the direction of the change,” especially given the fact that anti-crime legislation is a hot political topic in nearly every state and in the federal government. *Atkins*, at 2249. The Court also found support for its decision in other states which had not prohibited execution of the mentally retarded. In some of those states, no execution has been carried out at least since *Gregg v. Georgia*, 428 U.S. 153 (1976). In others which had reinstituted capital punishment and carried out such sentences, only 5, Alabama, Louisiana, South Carolina, Texas and Virginia, had executed at least one person with an IQ of less than 70 since *Penry* in 1989. In short, this information provided the Court with proof that a national consensus against execution of mentally retarded persons exists. *Id.*

Retribution Not Served by Executing the Mentally Retarded

Retribution for a crime necessarily means that the person convicted of the crime understand the consequences of that crime, *i.e.*, imprisonment or loss of life. “If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.” *Atkins*, at 2251.

Deterrence Likewise Not Served

Just as with retribution, the societal goal of deterrence is that the possible loss of life could prevent other persons from

committing murders. However, the very impairments which lead to less culpability for the mentally retarded—the inability to learn from experience, to understand, to process information, to reason, to control impulses—make it less likely that such persons can truly understand the possibility of execution as a result of their conduct.

Assistance To Counsel

Lastly, those very impairments which prevent a full understanding of retribution and deterrence also could prevent a mentally retarded person from assisting his counsel or being a witness in his own behalf. A lack of understanding of the events could also prevent a showing of remorse.

Dissents

In his dissent, Chief Justice Rehnquist took his Brethren to task for “plac[ing] weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion.” *Atkins*, at 2252 (Rehnquist, C.J., dissenting). He found little precedent for using such sources in reaching a decision, indeed, finding them “antithetical to considerations of federalism, which instruct that any ‘permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and application of laws) that the people have approved.’” *Id.*, citing *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality opinion).

Justice Scalia renewed his arguments against the Court’s “death is different jurisprudence.” *Atkins*, at 2267.

The analysis in the majority’s opinion provides a good roadmap for ensuring that capital punishment is for the worst of crimes, and that persons who are less culpable are not subject to the ultimate punishment.

One other note of interest in both *Atkins* and *Apprendi* is that some members of the Court are beginning to use international law in their opinions.

Endnotes

1. The jury did not know about the similarities in Dr. Flenning and Dr. Cooke’s opinions because trial counsel did not have access to Dr. Flenning’s opinion. Dr. Flenning was not a witness at the trial.
2. That co-defendant was granted immunity for his involvement in the crimes. ■

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PRACTICE CORNER

LITIGATION TIPS & COMMENTS

Designation Of Record Must Include Specific Dates Of Proceedings

When filing a designation of record, the designation must include the specific dates of all proceedings to be included in the certified record on appeal. The circuit clerk can only certify what has been specifically designated. Failing to include dates will result in the appellate court receiving an incomplete record because the clerk will not include videotapes or transcripts. When this occurs, a motion to supplement is necessary in order to obtain the remainder of the record and the appellate process is delayed. One quick and easy way to keep an ongoing record of court dates is to make notations while in the courtroom. By making notations on the outside jacket of the case file itself or by stapling a designation of record sheet to the inside cover of the file jacket, you develop a convenient, chronological record of the court dates. This method is also convenient for attorneys who may cover your court appearances. This list can then easily be converted into the designation of record.

~ Christy Mattingly, Paralegal I,
Appeals Branch, Frankfort

Prior to Entering Guilty Plea to Class D Felony Advise Client that KRS 532.070 is Not Applicable

Under KRS 532.070, the trial court has discretion to order a one-year term to be served as 12 months in the local jail rather than one-year in a state penitentiary. This statute provides discretion for class D felonies, permitting a trial judge to sentence a defendant to a term of one year or less in county jail if he/she opines that a prison sentence is unduly harsh. However in *Bailey v. Commonwealth*, Ky., 70 S.W.2d 414 (2002), the Kentucky Supreme Court recently ruled that this statute does not apply to defendants who enter guilty pleas.

In *Bailey*, the Appellants entered guilty pleas on DUI charges and the Commonwealth recommended a total of one year in prison on the charges. However, the trial judge sentenced the Appellants to 12 months in county jail instead, pursuant to KRS 532.070 (2). On appeal the Supreme Court reversed and held that the statute could be applied only when a jury fixed the sentence, not when a defendant entered a guilty plea. The Court overruled *Commonwealth v. Doughty*, Ky. App., 869 S.W.2d 53 (1994) to the extent it held otherwise.

~ Euva Hess & Misty Dugger,
Appeals Branch, Frankfort

**** CLARIFICATION AND CORRECTION

Three Steps Required to Properly Preserve a Directed Verdict Motion



Misty Dugger

The July 2002 column advised readers not to forget two steps to properly preserve a motion for directed verdict: a motion at the close of the Commonwealth's evidence and the close of all the evidence. There is a third step: objecting to the giving of any instructions. Thus, to preserve a directed verdict motion,

- Step 1 - Move for a directed verdict at the close of the Commonwealth's evidence.
- Step 2 - Renew directed verdict motion at the close of all the evidence. This may include renewing the motion at the close of the defense evidence and again at the close of the Commonwealth's rebuttal evidence.
- Step 3 - Object at the opening of the instructional conference to the giving of any instructions.

This is from *Baker v. Commonwealth*, Ky., 973 S.W.2d 54 (1998). Specifically, the *Baker* opinion states:

"Appellant moved for a directed verdict at the close of the Commonwealth's case, alleging insufficiency of the evidence. This motion was properly denied by the trial court as appellant was not entitled to a complete acquittal of all charges in the indictment and all lesser included offenses. See *Campbell v. Commonwealth*, Ky., 564 S.W.2d 528 (1978). **In the instant case, appellant made no objection to any of the instructions, thus failing to allow the trial court the opportunity to pass on the issue, and leaving the issue unpreserved. RCr 9.54(2).**

"Furthermore, this Court has held that a "motion for a directed verdict made at the close of the plaintiff's ... case is not sufficient to preserve error unless renewed at the close of all the evidence...." *Kimbrough v. Commonwealth*, Ky., 550 S.W.2d 525, 529 (1977)." *Baker* at 55.

~Misty Dugger, Appeals Branch, Frankfort;
With Thanks to Dave Eucker, Appeals Branch,
Frankfort, for the correction.

If you have a practice tip to share, please send it to Misty Dugger, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to:

Mdugger@mail.pa.state.ky.us. ■

The ABA'S Ten Principles of a Public Defense Delivery System

1. The public defense function, including the selection, funding, and payment of defense counsel,¹ is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.² To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.³ Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.⁴ The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.⁵

2. Where the caseload is sufficiently high,⁶ the public defense delivery system consists of both a defender office⁷ and the active participation of the private bar. The private bar participation may include part time defenders, a controlled assigned counsel plan, or contracts for services.⁸ The appointment process should never be ad hoc,⁹ but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.¹⁰ Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.¹¹

3. Clients are screened for eligibility,¹² and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention or request,¹³ and usually within 24 hours thereafter.¹⁴

4. Defense counsel is provided sufficient time and a confidential space with which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.¹⁵ Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client.¹⁶ To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.¹⁷

5. Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.¹⁸ National caseload standards should in no event be exceeded,¹⁹ but the concept of workload (*i.e.*, caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.²⁰

6. Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.²¹

7. The same attorney continuously represents the client until completion of the case. Often referred to as "vertical representation," the same attorney should continuously represent the client

from initial assignment through the trial and sentencing.²² The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.²³ Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.²⁴ Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases,²⁵ and separately fund expert, investigative and other litigation support services.²⁶ No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.²⁷ This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

9. Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.²⁸

10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.²⁹

ENDNOTES

1. "Counsel" as used herein includes a defender office, a criminal defense attorney in a defender office, a contract attorney or an attorney in private practice accepting appointments. "Defense" as used herein relates to both the juvenile and adult public defense systems.
2. National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter "NAC"], Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter "NSC"], Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992) [hereinafter "ABA"], Standards 5-1.3, 5-1.6, 5-4.1; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989) [hereinafter "Assigned Counsel"], Standard 2.2; NLADA *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984) [hereinafter "Contracting"], Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) [hereinafter "Model Act"], § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter "ABA Counsel for Private Parties"], Standard 2.1 (D).
3. NSC, *supra* note 2, Guidelines 2.10-2.13; ABA, *supra* note 2, Standard 5-1.3(b); Assigned Counsel, *supra* note 2, Standards 3.2.1, 2; Contracting, *supra* note 2, Guidelines II-1, II-3, IV-2;

- Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Monitoring* (1979) [hereinafter “ABA Monitoring”], Standard 3.2.
4. Judicial independence is “the most essential character of a free society” (American Bar Association Standing Committee on Judicial Independence, 1997).
 5. ABA, *supra* note 2, Standard 5-4.1
 6. “Sufficiently high” is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase can generally be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.
 7. NAC, *supra* note 2, Standard 13.5; ABA, *supra* note 2, Standard 5-1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2. “Defender office” means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.
 8. ABA, *supra* note 2, Standard 5-1.2(a) and (b); NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.
 9. NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.
 10. ABA, *supra* note 2, Standard 5-2.1 and commentary; Assigned Counsel, *supra* note 2, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).
 11. NSC, *supra* note 2, Guideline 2.4; Model Act, *supra* note 2, § 10; ABA, *supra* note 2, Standard 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).
 12. For screening approaches, see NSC, *supra* note 2, Guideline 1.6 and ABA, *supra* note 2, Standard 5-7.3.
 13. NAC, *supra* note 2, Standard 13.3; ABA, *supra* note 2, Standard 5-6.1; Model Act, *supra* note 2, § 3; NSC, *supra* note 2, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4 (A).
 14. NSC, *supra* note 2, Guideline 1.3.
 15. American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993) [hereinafter “ABA Defense Function”], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter “Performance Guidelines”], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra* note 2, Standard 4.2.
 16. NSC, *supra* note 2, Guideline 5.10; ABA Defense Function, *supra* note 15, Standards 4-2.3, 4-3.1, 4-3.2; Performance Guidelines, *supra* note 15, Guideline 2.2.
 17. ABA Defense Function, *supra* note 15, Standard 4-3.1.
 18. NSC, *supra* note 2, Guideline 5.1, 5.3; ABA, *supra* note 2, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 2, Standard 13.12; Contracting, *supra* note 2, Guidelines III-6, III-12; Assigned Counsel, *supra* note 2, Standards 4.1, 4.1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2 (B) (iv).
 19. Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should “reflect” (NSC Guideline 5.1) or “under no circumstances exceed” (Contracting Guideline III-6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). See also *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) [hereinafter “Death Penalty”].
 20. ABA, *supra* note 2, Standard 5-5.3; NSC, *supra* note 2, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) [hereinafter “Appellate”], Standard 1-F.
 21. Performance Guidelines, *supra* note 11, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 15, Guideline 5.1.
 22. NSC, *supra* note 2, Guidelines 5.11, 5.12; ABA, *supra* note 2, Standard 5-6.2; NAC, *supra* note 2, Standard 13.1; Assigned Counsel, *supra* note 2, Standard 2.6; Contracting, *supra* note 2, Guidelines III-12, III-23; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4 (B) (i).
 23. NSC, *supra* note 2, Guideline 3.4; ABA, *supra* note 2, Standards 5-4.1, 5-4.3; Contracting, *supra* note 2, Guideline III-10; Assigned Counsel, *supra* note 2, Standard 4.7.1; Appellate, *supra* note 20 (Performance); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1 (B) (iv). See NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g., there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). Cf. NAC, *supra* note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).
 24. ABA, *supra* note 2, Standard 5-2.4; Assigned Counsel, *supra* note 2, Standard 4.7.3.
 25. NSC, *supra* note 2, Guideline 2.6; ABA, *supra* note 2, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra* note 2, Guidelines III-6, III-12, and *passim*.
 26. ABA, *supra* note 2, Standard 5-3.3(b)(x); Contracting, *supra* note 2, Guidelines III-8, III-9.
 27. ABA Defense Function, *supra* note 15, Standard 4-1.2(d).
 28. NAC, *supra* note 2, Standards 13.15, 13.16; NSC, *supra* note 2, Guidelines 2.4(4), 5.6-5.8; ABA, *supra* note 2, Standards 5-1.5; Model Act, *supra* note 2, § 10(e); Contracting, *supra* note 2, Guideline III-17; Assigned Counsel, *supra* note 2, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1 (A).
 29. NSC, *supra* note 2, Guidelines 5.4, 5.5; Contracting, *supra* note 2, Guidelines III-16; Assigned Counsel, *supra* note 2, Standard 4.4; ABA Counsel for Private Parties, *supra* note 2, Standards 2.1 (A), 2.2; ABA Monitoring, *supra* note 3, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.

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