25th Anniversary of The Advocate

The Advocate

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

Volume 25, Issue No. 2 March 2003

The Right to Counsel in Kentucky

Kentucky Bar Association Passes *Gideon* Resolution Supporting the Right to Counsel in Kentucky

ABA's Ten Principles of a Public Defense Delivery System

Kentucky Vehicle Stops Data

Raising the Claim of Racial Profiling

Muller Appointed Kentucky Criminal Justice Council Director

DPA ON THE WEB

DPA Home Page http://dpa.state.ky.us

DPA Education http://dpa.state.ky.us/train/train.htm

DPA Employment Opportunities:
http://dpa.state.ky.us/career.htm

***The Advocate* (since May 1998)**:
http://dpa.state.ky.us/library/advocate/default.htm

Legislative Update:
http://dpa.state.ky.us/library/legupd/default.html

Defender Annual Caseload Report:
http://dpa.state.ky.us/library/caseload.html

Please send suggestions or comments to DPA Webmaster
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or webmaster@mail.pa.state.ky.us

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DPA'S PHONE EXTENSIONS

During normal business hours (8:30a.m. - 5:00p.m.) DPA's Central Office telephones are answered by our receptionist, Alice Hudson, with callers directed to individuals or their voicemail boxes. Outside normal business hours, an automated phone attendant directs calls made to the primary number, (502) 564-8006. For calls answered by the automated attendant, to access the employee directory, callers may press "9." Listed below are extension numbers and names for the major sections of DPA. Make note of the extension number(s) you frequently call — this will aid our receptionist's routing of calls and expedite your process through the automated attendant. Should you have questions about this system or experience problems, please call Patricia Chatman at extension 258.

Appeals - Renee Cummins	#138
Capital Appeals - Michelle Crickmer	#134
Capital Post Conviction	(502) 564-3948
Capital Trials - Joy Brown	#131
Computers - Ann Harris	#130/#285
Contract Payments - Ruth Schiller	#188
Deputy Public Advocate - Patti Heying	#236
Education - Patti Heying	#236
Frankfort Trial Office	(502) 564-7204
General Counsel - Lisa Blevins	#294
Human Resources Manager - Al Adams	#116
Post-Trial Division - Joe Hood	#279
Juvenile Branch - Dawn Stinnett	#220
Law Operations - Karen Scales	#111
Library - Will Geeslin	#120
Payroll/Benefits - Beth Roark	#136
Personnel - Cheree Goodrich	#114
Post Conviction	(502) 564-3948
Properties - Larry Carey	#218
Protection & Advocacy	(502) 564-2967 or #276
Public Advocate - Debbie Garrison	#108
Recruiting - Gill Pilati	#117
Travel Vouchers - Ruth Schiller	#188
Trial Division - Sherri Johnson	#230

Table of Contents

The Right to Counsel in Kentucky — Ernie Lewis 4

Clarence Earl Gideon's Supreme Court Petition 6

Spotlight on La Mer Kyle-Reno -- Patti Heying 8

The ABA'S Ten Principles of a Public Defense Delivery System 10

Public Defender Administrators Are Subject To Civil Liability — Ed Monahan 14

Kentucky Vehicle Stops Database - 2001 Report — Deborah G. Wilson, Ph.D. 15

Raising the Claim of Racial Profiling at the Pre-Trial Stage in a Motion to Quash Arrest and to Suppress Evidence — David Mejia 20

Appellate Case Review — Euva Hess 24

Capital Case Review — Julia K. Pearson 27

Governor Appoints Nicholas Muller as KCJC Executive Director 28

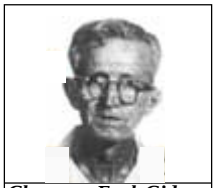
6th Circuit Review — Emily Holt 29

Plain View — Ernie Lewis 34

Recruitment — Gill Pilati 38

Frankly Speaking about *Franks* Hearings: Reviewing the Reliability of Search Warrant Affidavits — James L. Cox and Robert E. Stephens, Jr. 39

Practice Corner — Misty Dugger 43



Clarence Earl Gideon

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...

Right to Counsel. This year, we celebrate the 40th anniversary of *Gideon*. The history of how Kentucky's statewide public defender program fits into that anniversary gives some perspective. Over a half century ago the Kentucky Supreme Court held that "common justice demands" that an attorney must be appointed when a person charged with a felony is too poor to hire his own counsel. *Gholson v. Commonwealth*, Ky., 212 S.W.2d 537 (1948). In the 1960s Kentucky attorneys began to request compensation when they were forced to represent indigents charged with a crime. In 1963, the United States Supreme Court determined that if a state wants to take away a person's liberty, it has to provide an attorney to those persons too poor to hire their own in order to comply with the Federal Constitution. *Gideon v. Wainwright*, 372 U.S. 335 (1963). While consistently unsuccessful in convincing Kentucky's highest Court that the judiciary could and should order payment, Kentucky's appointed attorneys did persuade the Kentucky Supreme Court to the point that the Court began to directly encourage the General Assembly to provide a systematic solution for paying the attorneys who were being made to represent the accused. On September 22, 1972, Kentucky's highest Court characterized the forced representation of indigents as an "intolerable condition" and held it was an unconstitutional taking of an attorney's property - his service to the client - without compensation. From then on, no Kentucky attorney could be required to represent an indigent absent compensation. *Bradshaw v. Ball*, Ky., 487 S.W.2d 294 (1972). While the appeal in *Bradshaw* was pending, the 1972 Legislature, at the request of Governor Wendell Ford, created the Office of Public Defender, now the Department of Public Advocacy (DPA), and gave it the responsibility to represent all persons in Kentucky charged with or convicted of a crime. House Bill 461 sponsored by Representatives Kenton, Graves and Swinford passed the House 60-18 on March 7, 1972 and the Senate 26-5 on March 14, 1972. It allocated $1,287,000 for FY 73 and FY 74. Today, DPA is an independent agency operating a public defender program in all 120 Kentucky counties, and is located within the Public Protection and Regulation Cabinet which is headed by Secretary Janie Miller.

KBA. Kentucky lawyers exist to provide citizens counsel. The Kentucky Bar Association has resolved to advance the right to counsel for indigent criminal defendants. Their support is significant recognition of the importance of legal representation for the poor. **ABA.** The ABA has set out 10 principles that every public defender program should meet. A question to ask is, how does Kentucky fare in meeting these principles? **Our *Gideon* Feature.** Many people across the Commonwealth day in and day out fulfill the promise of *Gideon*. This issue we feature La Mer Kyle-Reno. **Racial Profiling.** What do Kentucky stops tell us about racial profiling? What are possible ways defense attorneys can effectively litigate racial profiling? We explore both in this issue. **KCJC.** The Kentucky Criminal Justice Council has a new Executive Director, Nicholas Muller. He leads an important policy development effort that is improving Kentucky's criminal justice system with a balanced approach to Kentucky's criminal justice problems. **Defender Programs Face Civil Liability.** The 9th Circuit has recently held that public defenders administrators can be sued under 42 U.S.C. Section 1983 for a deprivation of counsel due to providing insufficient resources.

Ed Monahan, Editor

The Right to Counsel in Kentucky

The Kentucky Bar Association has been a significant part of the development of the right to counsel in Kentucky. In the recent past, KBA Presidents Dick Clay and Don Stepner played an important role on the *Kentucky Blue Ribbon Group on Improving Indigent Defense in the 21st Century*, whose recommendations have had a lasting impact on improving funding levels for the Department of Public Advocacy. At its 2002 Annual Meeting, the KBA recognized Governor Patton for his role in improving indigent defense in Kentucky. The KBA has been a partner in supporting a vigorous right to counsel in our Commonwealth.

It was appropriate then for the assistance of the Kentucky Bar Association to be sought in response to the recent budget crisis as it effects public defender services in Kentucky. Chairman of the Public Advocacy Commission Robert Ewald and Public Advocate Ernie Lewis appeared before the Board of Governors on January 17, 2003 to seek the Board's approval of a Resolution which would accomplish two things. First, the resolution addressed the 40th Anniversary of the *Gideon v. Wainwright*, 372 U.S. 335 (1963) decision. Second, the resolution addressed the budget crisis. The Board was told that the resolution was needed to both celebrate Gideon and to communicate that the KBA was appreciative of the work of Kentucky's public defenders. The Board was also told that the budget crisis had the potential of requiring case appointments to be declined resulting in the accused not being represented by counsel as a result of insufficient funding. The Board was informed that Kentucky was on the verge of committing a systemic constitutional violation in regards to its obligations under Gideon.

The Kentucky Bar Association Board of Governors in response passed unanimously the attached resolution. By doing so, the Board of Governors is asking local bar associations to recognize March 18, 2003 as Gideon Day, as well as to educate the bar and the public regarding the importance of equal access to justice in our democracy. The Board of Governors also communicated to the Governor and the General Assembly to their desire that the policy makers in Kentucky "ensure that budgetary reductions that threaten the quality of services provided by and impose excessive caseloads upon Kentucky's public defenders be avoided, and that reasonable and adequate funding levels be made available to the Department of Public Advocacy during this biennium."

Ernie Lewis
Public Advocate
E-mail: elewis@mail.pa.state.ky.us

KBA *Gideon* Resolution

A RESOLUTION recognizing March 18, 2003 as *Gideon Day* throughout the Kentucky Bar Association and supporting a reasonable funding level for Kentucky's public defenders.

WHEREAS, Clarence Earl Gideon, a 51-year-old man with an eighth-grade education, was charged with breaking into a Florida poolroom on June 3, 1961 and stealing coins from a cigarette machine. He said that he was innocent.

WHEREAS, Gideon's request for counsel was denied by the State of Florida trial judge. Gideon was forced to defend himself against the case presented by the state's prosecuting attorney. Gideon tried to cross-examine the witnesses against him. He was convicted of felony breaking and entering with intent to commit a misdemeanor, and was sentenced to five years in state prison.

WHEREAS, Gideon submitted a handwritten petition to the United States Supreme Court from his Florida prison cell, arguing that the United States Constitution does not allow poor people to be convicted and sent to prison without legal representation. Twenty-two state attorneys general submitted a brief supporting him.

WHEREAS, on March 18, 1963, the Supreme Court unanimously ruled that Gideon's trial and conviction without the assistance of counsel was fundamentally unfair and violated the Sixth and Fourteenth Amendments to the United States Constitution. It is an "obvious truth," the Court stated, that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."

WHEREAS, at his retrial with the assistance of counsel, Clarence Earl Gideon was found to be not guilty. This acquittal occurred partly as a result of appointed counsel's cross-examination of the taxi cab driver upon whose testimony Gideon had been convicted at the first trial.

WHEREAS, as a result of the *Gideon* decision, all states are now obligated to provide court-appointed counsel to persons who have been charged with a crime who are too poor to afford an attorney.

WHEREAS, later Supreme Court decisions have further expanded the states' obligation to provide counsel to accused individuals who cannot afford to hire a private attorney – most recently, misdemeanor defendants receiving a suspended sentence (*Alabama v. Shelton*). This obligation exists even as state budget revenues shrink and the pressure to cut expenditures grows.

WHEREAS, 40 years later, implementation of the right to counsel is uneven across the nation in terms of quality of representation, funding, staffing, training, caseloads, and timeliness of appointment. The importance of *Gideon*'s promise of equal justice has been reaffirmed by recent exonerations of the innocent as a result of DNA evidence including two such exonerations in Kentucky, and revelations of deficient and underfunded indigent defense systems.

WHEREAS, Kentucky has long recognized the right to counsel in Section 10 of the Kentucky Constitution and decisions of the appellate courts.

WHEREAS, in *Gholson v. Commonwealth*, Kentucky's highest court in 1948 stated that "common justice demands" that an attorney must be appointed when a person charged with a felony cannot afford to hire his own counsel.

WHEREAS, members of the Kentucky Bar Association have long represented indigents accused of crimes at little or no fee for many years before and after the *Gideon* decision. In *Bradshaw v. Ball*, the Kentucky Court of Appeals held that forcing lawyers to represent poor persons charged with a crime without compensation was unconstitutional.

WHEREAS, the Department of Public Advocacy was created in 1972 when House Bill 461 was passed by the General Assembly at the request of Governor Wendell Ford in order to implement fully in Kentucky the mandates of the *Gideon* decision.

WHEREAS, most recently in 1999, Kentucky's *Blue Ribbon Group*, upon which two Kentucky Bar Association Presidents served, found that the Kentucky public defender system was the poorest funded system in the country in terms of defender salaries, funding per case, and funding per capita.

WHEREAS, much progress with Kentucky's public defender system has been made since 1999, but recent budget reductions coupled with an increase in caseloads threaten to undermine that progress.

WHEREAS, the Department of Public Advocacy today represents over 108,000 persons each year who cannot afford to hire an attorney to represent them.

WHEREAS, Kentucky's public defenders, both public and private, number over 400 lawyers and staff, and include persons who have made representing the poor their career and vocation.

WHEREAS, numerous private lawyers continue to serve as contract public defenders at considerable cost to them.

WHEREAS, the Department of Public Advocacy, having had its budget reduced 4% during FY01 and FY02, is now faced with the prospect of a 2.6% budget reduction in FY03 and a 5.2% budget reduction in FY04.

WHEREAS, Kentucky public defenders opened an average of 435 cases during FY02, 7.2% more than the previous year.

WHEREAS, rising caseloads and a declining budget threatens the quality of services being rendered by Kentucky's public defenders.

WHEREAS, the Kentucky Public Advocacy Commission, which includes representatives of the Kentucky Bar Association, has called upon the Kentucky Bar Association Board of Governors to take action to avoid a crisis in the delivery of public defender services in Kentucky.

NOW, THEREFORE,

Be it resolved by the Board of Governors of the Kentucky Bar Association:

Section 1. That March 18, 2003 is hereby designated as Gideon Day throughout the Kentucky Bar Association.

Section 2. That the Kentucky Bar Association hereby rededicates itself to the principle of equal justice for all regardless of income.

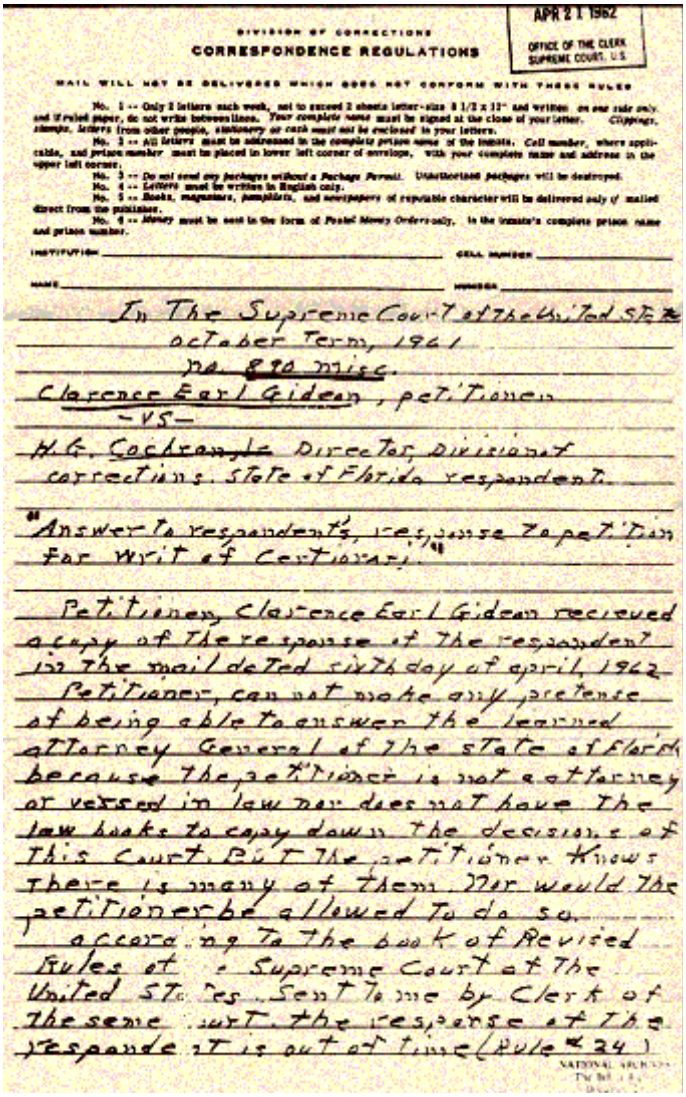
Section 3. That the Kentucky Bar Association Board of Governors hereby calls upon the Governor and the General Assembly to ensure that budgetary reductions that threaten the quality of services provided by and impose excessive caseloads upon Kentucky's public defenders be avoided, and that reasonable and adequate funding levels be made available to the Department of Public Advocacy during this biennium.

Section 4. That members of the Kentucky Bar Association, including representatives of prosecution, public defense, the courts, and the private bar, are encouraged to engage in appropriate commemorative activities to educate the public about the importance of equal access to justice in our great democracy, and the mandates of *Gideon*'s constitutional mandate even in the face of periodic budgetary constraints.

Section 5. That the Kentucky Bar Association Board of Governors salutes public defenders and staff throughout the Commonwealth of Kentucky for their dedication to public service.

Section 6. That commemorative copies of this resolution shall be printed and made available to local bar associations, government agencies, schools and the public, to promote ongoing understanding of and commitment to the fulfillment of *Gideon*'s promise. ■

Clarence Earl Gideon's 1962 Petition to the U.S. Supreme Court



DIVISION OF CORRECTIONS
CORRESPONDENCE REGULATIONS

APR 2 1 1962
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MAIL WILL NOT BE DELIVERED WHICH DOES NOT CONFORM WITH THESE RULES

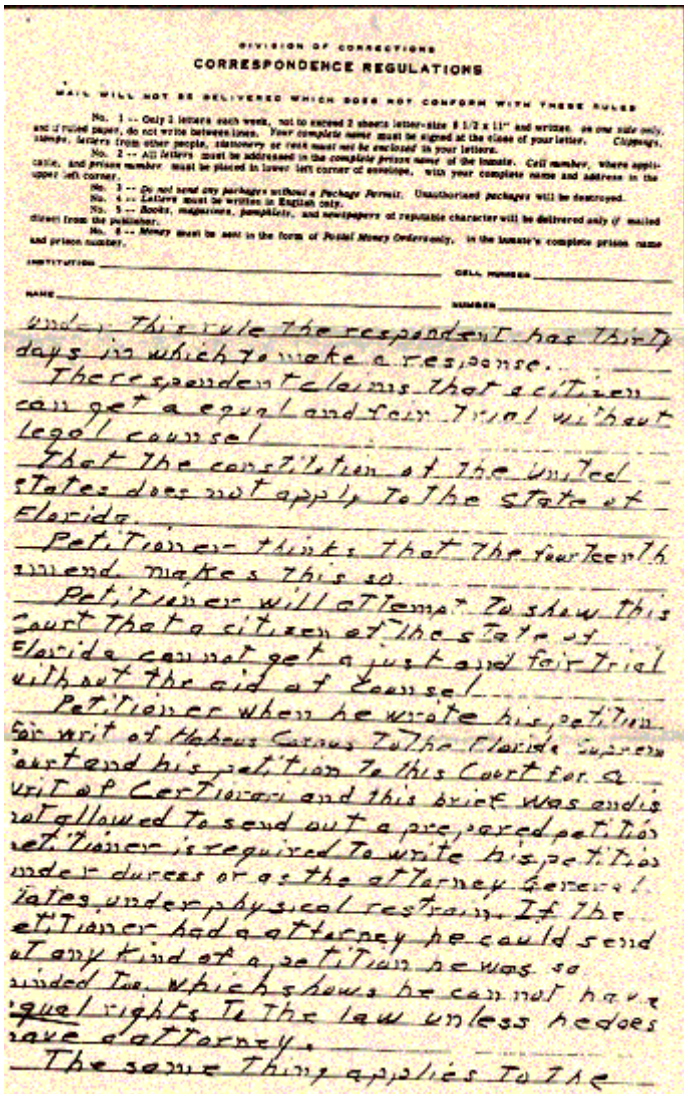
No. 1 -- Only 2 letters each week, not to exceed 2 sheets letter-size 8 1/2 x 11" and written on one side only and if ruled paper, do not write between lines. Your complete name must be signed at the close of your letter. Clippings, stamps, letters from other people, stationery or cash must not be enclosed in your letters.
No. 2 -- All letters must be addressed in the complete prison name of the inmate. Cell number, where applicable, and prison number must be placed in lower left corner of envelope, with your complete name and address in the upper left corner.
No. 3 -- Do not send any packages without a Package Permit. Unauthorized packages will be destroyed.
No. 4 -- Letters must be written in English only.
No. 5 -- Books, magazines, pamphlets, and newspapers of reputable character will be delivered only if mailed direct from the publisher.
No. 6 -- Money must be sent in the form of Postal Money Orders only. In the inmate's complete prison name and prison number.

INSTITUTION _____ CELL NUMBER _____
NAME _____ NUMBER _____

In The Supreme Court of the United States
October Term, 1961
No. 890 Misc.
Clarence Earl Gideon, petitioner
-vs-
H.G. Cochran Jr. Director Division of
corrections, State of Florida respondent.

"Answer to respondent's response to petition
for writ of certiorari."

Petitioner, Clarence Earl Gideon received a copy of the response of the respondent in the mail dated sixth day of april, 1962.
Petitioner, can not make any pretense of being able to answer the learned attorney General of the state of Florida because the petitioner is not a attorney or versed in law nor does not have the law books to copy down the decisions of this Court. But the petitioner knows there is many of them. Nor would the petitioner be allowed to do so according to the book of Revised Rules of the Supreme Court of the United States. Sent to me by Clerk of the same court the response of the respondent is out of time (Rule # 24)



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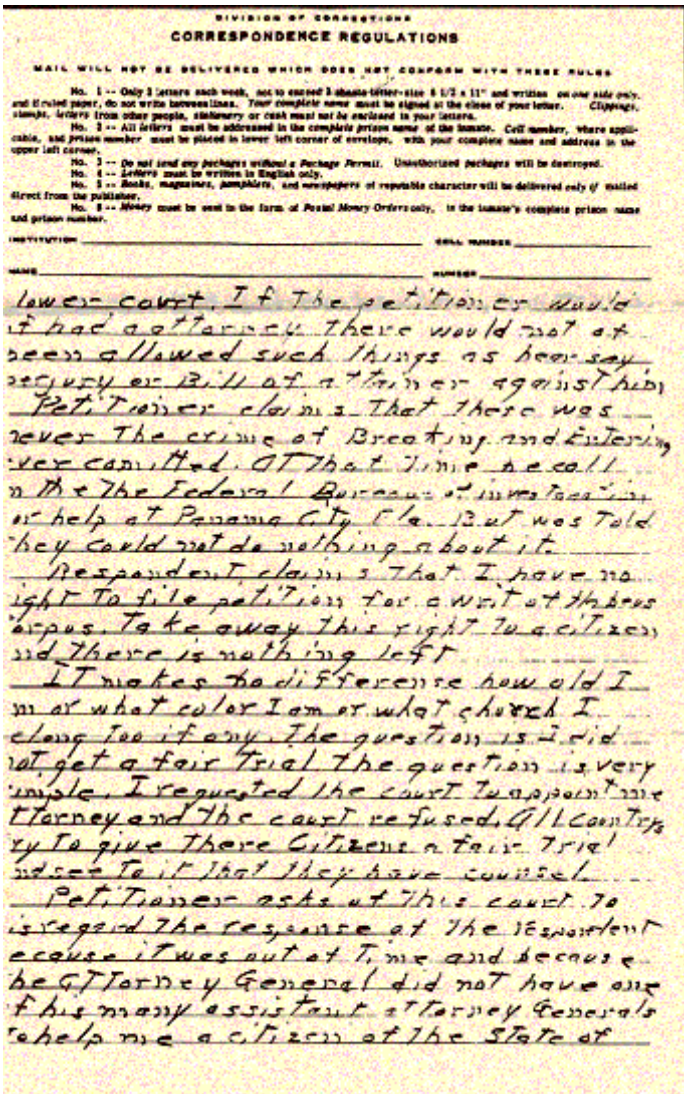
INSTITUTION _____ CELL NUMBER _____
NAME _____ NUMBER _____

under this rule the respondent has thirty days in which to make a response.
The respondent claims that a citizen can get a equal and fair trial without legal counsel
That the constitution of the United States does not apply to the state of Florida.
Petitioner thinks that the fourteenth amend makes this so.
Petitioner will attempt to show this court that a citizen of the State of Florida can not get a just and fair trial without the aid of counsel
Petitioner when he wrote his petition for writ of Habeus Corpus to the Florida Supreme court and his petition to this Court for a writ of Certiorari and this brief was and is not allowed to send out a prepared petition petitioner is required to write his petition under duress or as the attorney General states, under physical restraint. If the petitioner had a attorney he could send of any kind of a petition he was so minded to. which shows he can not have equal rights to the law unless he does have a attorney.
The same thing applies to the

Big Prisons, Small Towns: Prison Economics in Rural America

A new report has been released by The Sentencing Project, ***Big Prisons, Small Towns: Prison Economics in Rural America***. It examines the impact of new prison construction in rural communities. Focusing on New York State, which has constructed 38 upstate prisons over the past 20 years, the analysis finds no economic advantages as measured by per capita income or employment rates for prison counties compared to non-prison counties. The report also examines some of the factors which limit these economic benefits and suggests that rural officials reconsider whether prison construction is a viable economic development strategy. The report can be found at www.sentencingproject.org/news/ruralprisons.pdf. For further information, contact Marc Mauer, The Sentencing Project , 514 10th St. NW , Suite 1000 , Washington, D.C. 20004 , tel (202) 628-0871 fax (202) 628-1091.



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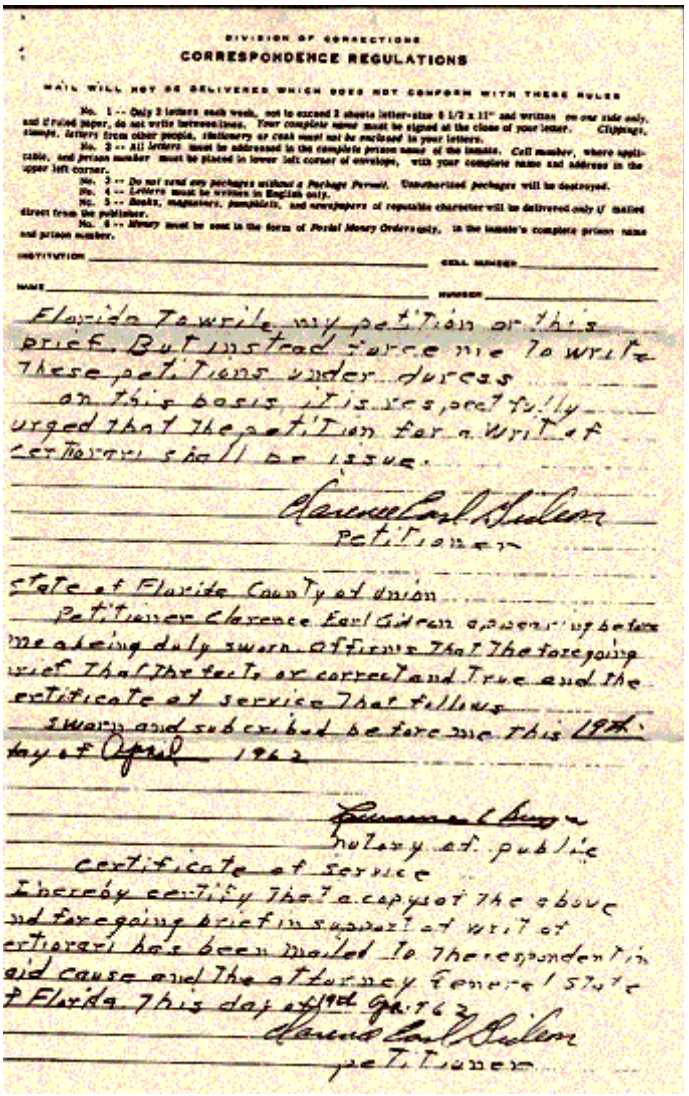
INSTITUTION _____ CELL NUMBER _____

NAME _____ NUMBER _____

lower court. If the petitioner would
if had a attorney there would not at
been allowed such things as hear-say
perjury or Bill of attainer against him
Petitioner claims That there was
never the crime of Breaking and Entering
ever committed. At That time he call
on the The Federal Bureau of Investigation
or help at Panama City Fla. But was told
they could not do nothing about it.
Respondent claims That I have no
right To file petition for a writ of habeas
corpus. To take away This right To a citizen
and There is nothing left
It makes the difference how old I
am or what color I am or what church I
belong too if any. The question is did
not get a fair Trial The question is very
simple. I requested the court To appoint me
attorney and the court refused. All Country
try To give there Citizens a fair Trial
indeed To it That They have counsel
Petitioner asks at This court To
disregard The response of The Respondent
because it was out of Time and because
the Attorney General did not have one
of his many assistant attorney Generals
to help me a citizen of The State of



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INSTITUTION _____ CELL NUMBER _____

NAME _____ NUMBER _____

Florida To write my petition or this
brief. But instead force me To write
these petitions under duress
on this basis it is respectfully
urged that the petition for a Writ of
certiorari shall be issue.

Clarence Earl Gideon
Petitioner

State of Florida County of Union

Petitioner Clarence Earl Gideon appeared before
me duly sworn affirms That The foregoing
brief That the facts are correct and True and the
certificate of service That follows
Sworn and subscribed before me This 19th
day of April 1962

Notary of public

certificate of service

I hereby certify That a copy of the above
and foregoing brief in support of writ of
certiorari has been mailed To the respondent in
said cause and The attorney General State
of Florida This day of 19th April 1962

Clarence Earl Gideon
petitioner

DPA's *Gideon* Event: A Promise Within Reach - March 27, 2003

The Department of Public Advocacy is embarking upon a strategic planning process that will map our future service and organizational goals for the next ten years. With the assistance of the Governor, *The Blue Ribbon Group*, legislators, judges, prosecutors, defenders, criminal justice professionals, and many others, the DPA is on the verge of attaining its goal of providing Kentucky with a statewide, full-time public defender system. This event will come at a time of budget reductions throughout state government, heightening the importance of the event. During this 40th anniversary of *Gideon v. Wainwright*, the time is ripe for an open conversation about the future of the DPA and its role in serving its clients and the Commonwealth of Kentucky.

On March 27, 2003, members of the entire criminal justice community will be gathering in Frankfort for a unique meeting driven by the topics regarding the future proposed by those in attendance. Participants will have the opportunity at the meeting to suggest topics for discussion. Topics that participants might choose to discuss could include:

- Problem Solving Courts
- Community Defending
- Recruiting Future Public Defenders
- Reasonable caseloads
- Team Child approaches to Juvenile Court
- Can public defenders help reduce crime?
- Juvenile representation
- The ABA's National Principles of Public Defense

When: March 27, 2003 8:30 a.m. - 5 p.m. **Where:** Holiday Inn in downtown Frankfort, Kentucky

Facilitator: Sharon Marcum, Executive Director of Governmental Services Center

For further information, call Debbie Garrison at (502) 564-8006.

In The Spotlight. . . .La Mer Kyle-Reno

"Never believe that a few caring people can't change the world. For, indeed, that's all who ever have." *- Margaret Mead*

26-year old Jarvis Brookins huddles in a hallway just outside of the courtroom in the Mason County Justice Center. He holds a knife to his neck. . . blood drips down into his shirt from a half inch deep wound and he is sobbing. He is surrounded by a group of law enforcement officials who are trying to convince him to release his weapon. The tension in the hall is palpable. Hearts pound and perspiration is starting to bead on their foreheads. At any second, with one flick of his wrist, the young man could die. Also in the crowd is a young, professional-looking woman who is speaking calmly with Jarvis in an effort to save his life.

La Mer Kyle-Reno

Repeatedly, the courtroom door opens and someone calls her name, "Ms. Kyle-Reno? You're needed again." She swiftly moves into the courtroom, picks up her next case on the court docket and takes part in the proceedings which have continued despite the drama occurring just outside the room. She deftly handles each case and quickly returns to her traumatized client crouching in the hall.

After an hour of hustling between the courtroom proceedings and the drama unfolding in the hall, she watches as the young man drops the knife. Medics rush in and hold compresses to his neck to stop the flow of blood. Soon, he is escorted to the waiting ambulance and La Mer Kyle-Reno walks beside him. The shaken man turns to his young attorney and says, "I'm sorry you had to see this." She replies, "That's all right, although I prefer to meet under better circumstances."

And this was just day number one in a new court.

When La Mer Kyle Reno walked into her first day of court in her new position as a public defender for the newly created Public Defender Office in Maysville, Kentucky, she expected a relatively quiet day. Her supervisor, Tom Griffiths, had handed over several cases for her to cover that day, briefed her on them and explained it should all be fairly routine. He needed to cover court in another county. He had confidence that she was perfectly capable of handling Circuit Court proceedings on her own. At this point, he'd already observed her for a year when they worked together in the Paducah, Kentucky Public Defender Office. As it turned out, the day was anything but routine.

Becoming an attorney seemed a natural step for La Mer who grew up an only child in Dayton, Ohio. Her mother, Shelia Kyle-Reno, was a lawyer for Legal Aid in Dayton and later worked with the AFSCME (American Federation of State County and Municipal Employees) Union in Cincinnati and Columbus, Ohio. La Mer's values were carved out in a self-described "politically active" home and she remembers riding on her mother's shoulders at women's rights rallies. She learned at an early age the importance of active involvement in one's community in order to bring about change.

La Mer thrives on observing a situation, analyzing what is missing or needed and then developing a program that will improve the situation. As a teenager, she worked as a youth counselor and while earning her degree at the University of Dayton School of Law, she started a group called LEADeRS (Labor Employment and Alternative Dispute Resolution Students) because very few classes in labor law were being offered. She also organized a program that enabled law students to get certified in Basic Mediation skills.

Her passion is becoming involved with the community in which she lives. Soon after settling into the Maysville community, she set about trying to organize a Teen Trial Court. She has also become involved in other community-related events, such as the local theatre where she has performed in a variety of musicals. She is easily recognized by people who smile and wave at her when she enters restaurants or shops. It is clear from the way in which she returns their greetings that she genuinely enjoys knowing the people around her. "I go out

of my way to meet people because everybody has something interesting to say," she says.

Defense attorneys often view themselves as the lone warriors standing beside their clients in a hostile world. But La Mer has an instinct for establishing relationships with everyone around her, including not only her clients but also people from the community, judges, police detectives and prosecutors. In developing these relationships, she finds that she is better able to serve the needs of her clients who are forever at the top of her agenda.

She earned her stripes in her first year with DPA in an office that started with nine attorneys and then lost six of them soon after her arrival. The already heavy workload increased to a seemingly insurmountable challenge. It was a challenge La Mer faced head-on and used to hone her skills. At first, she attempted to be the aggressive warrior she thought she needed to be in court but found that this style did not suit her. "People told me I was too nice and clients would perceive I was on the other side," she says, "I tried and it was so much more stressful. Some people work well with that warlike style but that's their style and not mine." She also points out that young attorneys who "try to be like somebody else end up being chewed up after a while."

This approach of community involvement is not new and is in fact outlined in a series called *Raising Voices* produced by the Community Justice Institute at the Brennan Center for Justice at NYU School of Law.* The debut monograph of this series is called *Taking Public Defense to the Streets*. It endeavors to urge defenders to break through their isolation to build relationships with client communities, and explains why they should do it. This process of involvement allows the defense attorney to better investigate and develop the facts in their cases among many other advantages.

La Mer seems to have an innate talent for establishing connections with people and her talents are obvious in the courtroom. People respond to her smile and her confidence. She is respected by judges, other defense attorneys, prosecutors and her clients.

Does her approach work? In her first year practicing in Maysville, she won six out of seven misdemeanor trials.

Judge W. Todd Walton, II of the 19th Judicial District speaks very highly of La Mer's presence in the courtroom. He says, "La Mer Kyle-Reno is one of the most pleasant people I have ever known. I often wonder how someone, especially a public defender, can be so genuinely cheerful day in and day out. La Mer is a true and zealous advocate for her clients. Even with little available wiggle room La Mer will always protect and defend the dignity of her client. The workload of the public defenders in the 19th Judicial District/Circuit is very great and I am most impressed with La Mer's ability to maintain her cases in a competent, professional and productive manner while keeping her trademark smile and good humor."

La Mer came to the Kentucky Department of Public Advocacy almost by accident. While still in law school, she attended an employment recruiting event at the University of Cincinnati. The firm with which she intended to interview was not in attendance and she spotted the table for DPA. Recalling her mother's early years as an attorney for Legal Aide in Ohio, she decided to find out more about Public Advocacy. She says her interest was peaked both by the training the agency offers as well as its mission of representing people without the means of hiring a private attorney.

Her skills have been observed by others in the agency. Rebecca Lytle, an experienced and talented attorney with the Capital Trial Branch in the Frankfort Office, takes note of La Mer's work over the past two years, "La Mer is that unique individual who can rule the courtroom with a velvet gloved fist yet dissect prosecutors with a surgical scalpel. She maintains a grace of presence rarely seen in one of her tender years as a law practitioner. Her perspective and quick mind are not only an asset to her clients, but also of invaluable help to colleagues and their clients. She is always ready to brainstorm theories of defense or to lend a calming, helpful and comforting hand during the throes of battle. Her humor lightens the most depressing of moments and her optimism and encouragement are galvanizing. All in all, La Mer is one of the most outstanding attorneys within our department and an asset to all who have an opportunity to work with her."

"I love what I do," La Mer states, "and the more people give me grief, the more I love it."

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

On February 5, 2002 ABA House of Delegates adopted the following recommendation of its Standing Committee on Legal Aid and Indigent Defendants Criminal Justice Section, Government and Public Sector Lawyers Division, Steering Committee on the Unmet Legal Needs Of Children, Commission on Racial and Ethnic Diversity in the Profession, Standing Committee on Pro Bono and Public Service.

Recommendation

Resolved, that the American Bar Association adopts or reaffirms "The Ten Principles Of A Public Defense Delivery System," dated February 2002, which constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney.

Further resolved, that the American Bar Association recommends that each jurisdiction use "The Ten Principles Of A Public Defense Delivery System," dated February 2002, to assess promptly the needs of its public defense delivery system and clearly communicate those needs to policy makers.

Report

Introduction

"The Ten Principles of a Public Defense Delivery System" is a practical guide for governmental official, policymakers, and other parties who are charged with creating and funding new, or improving existing, systems by which public defense services are delivered within their jurisdictions. More often than not, these individuals are non-lawyers who are completely unfamiliar with the breadth and complexity of material written about criminal defense law, including the multitude of scholarly national standards concerning the issue of what constitutes quality legal representation for criminal defendants. Further, they operate under severe time constraints and do not have the time to wade through the body of standards; they need quick and easy, yet still reliable and accurate, guidance to enable them to make key decisions.

As explained more fully in the sections that follow, "The Ten Principles of a Public Defense Delivery System" fulfills this need. It represents an effort to sift through the various sets of national standards and package, in a concise and easily understandable form, only those fundamental criteria that are absolutely crucial for the responsible parties to follow in order to design a system that provides effective and efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney. By adopting "The Ten Principles of a Public Defense Delivery System," the ABA would create, for the first time ever, much-needed policy that is directed toward guiding the designers of public defense delivery systems.

The Need for ABA Policy Geared Toward Designers of Public Defense Delivery Systems

The ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) has provided technical assistance in all 50 states to bar leaders, legislators, and others interested in improving public defense services. Through our extensive work in the states, we have learned that oftentimes, the people who have the primary responsibility for establishing or improving public defense delivery systems are not lawyers and have little or no knowledge in the area of criminal defense services. In the state legislatures, where many choices are made regarding the design and funding of these systems, there appears to be a growing trend—the number of legislators who are also lawyers (and who would therefore better understand these issues) is declining, and their terms are getting shorter.

Another trend is that in many states, the legislature, supreme court, governor, or state bar association authorizes a "study commission" or "task force" to recommend plans for establishing or improving public defense delivery systems. This is especially the case as the crisis in indigent defense—in terms of quality of services and resource availability—continues to deepen across the country. These task forces generally have broad representation from all branches of government and many sectors of the community. For example, task forces that were recently established in North Carolina and Georgia include state legislators, judges, heads of executive agencies, private attorneys, and members of the community. In Michigan, a community organization called the Michigan Council on Crime and Delinquency has taken the lead and organized a task force composed primarily of non-defense attorney groups to recommend to the legislature a model plan for public defense services in Michigan. The commonality among all the task forces is the fact that the members volunteer their time and operate under tight deadlines within which recommendations must be made or else the window of opportunity closes, for political or other reasons.

There is no question that the people who are making these important decisions under such severe time constraints desperately need reliable guidance that is presented in an easily understandable, concise, and succinct package. SCLAID has received numerous requests for ABA policy written for and directed at the government officials and others who are responsible for designing public defense delivery systems; unfortunately, current ABA policy (in the form of numerous sets of criminal justice standards) does not address this particularized need, as explained further below.

Overview of National Standards on Providing Criminal Defense Services

The ABA was the first organization to recognize the need for standards currently relating to the provision of criminal defense services, adopting the *ABA Standards for Criminal Justice, Providing Defense Services* (now in its 3rd edition) in 1967. The *ABA Standards for Criminal Justice, Defense Functio*n, soon followed in 1971, and the *ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases* were adopted in 1989.

In addition, several other organizations have adopted standards in this area over the past three decades: the National Legal Aid and Defender Association adopted its *Performance Guidelines for Criminal Defense Representation* in 1995, *Standards for the Administration of Assigned Counsel Systems* in 1989, and *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* in 1984; the Institute of Judicial Administration collaborated with the ABA to create *the IJA/ABA Juvenile Justice Standards,* totaling 23 volumes adopted from 1979 through 1980; the National Study Commission on Defense Services adopted its *Guidelines for Legal Defense Systems in the United States* in 1976; and the President's National Advisory Commission on Criminal Justice Standards and Goals adopted Chapter 13, *The Defens*e, in 1973.

Collectively, these standards contain the minimum requirements for legal representation at the trial, appeals, juvenile, and death penalty levels and are a scholarly, impressive, and extremely useful body of work. However, they are written for the most part for lawyers who provide defense services, not for governmental officials or policymakers who design the systems by which these services are delivered. As the Introduction to the *ABA Standards for Criminal Justice, Defense Function* notes, "The Defense Function Standards have been drafted and adopted by the ABA in an attempt to ascertain a consensus view of all segments of the criminal justice community about what good, professional practice is and should be. Hence, these are extremely useful standards for consultation by lawyers and judges who want to do 'the right thing' or, as important, to avoid doing 'the wrong thing.'" Further, the sheer volume of the standards make it impracticable for policymakers or others charged with designing systems to wade through them in order to find information of relevance to their duties. Indeed, even one of the smallest of the volumes, the *ABA Standards for Criminal Justice, Defense Function,* is 71 pages in length and contains 43 black letter standards with accompanying commentary. Thus, the standards do not address the particular need for ABA policy expressly directed toward those who are responsible for designing and funding systems at the state and local levels.

The Ten Principles of a Public Defense Delivery System

"The Ten Principles of a Public Defense Delivery System" fulfills this need. If adopted by the ABA, it would provide new policy targeted specifically to the designers and funders of public defense delivery systems, giving them the clear and concise guidance that they need to get their job done.

Conclusion

Through this resolution, the American Bar Association would fulfill a critical need by providing, for the first time ever, a practical guide ("The Ten Principles of a Public Defense Delivery System") for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, systems to deliver effective and efficient, high quality, ethical, conflict-free legal representation to accused persons who cannot afford to hire an attorney.

Respectfully submitted,

L. Jonathan Ross, Chair
Standing Committee on Legal Aid and Indigent Defendants
February 2002

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 office[7] 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 fea-

Continued on page 12

Continued from page 11

sible 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* (3 rd 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 Service*s, (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 Judical 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. Wainwrigh*t, 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* (3 rd 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 *(Performanc*e); 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). *C*f. 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 *pass*im.

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.

Public Defender Administrators Are Subject To Civil Liability

Public defender administrators are subject to civil liability under 42 U.S.C. Section 1983 for constitutional deprivations of effective assistance of counsel in the allocation of resources to public defenders.

Recently, the 9th Circuit Court of Appeals ruled in *Miranda v. Clark County, Nevada*, _____F.3d____ (9th Cir. February 3, 2003) (*en banc*) that the "head of a county public defender's office, as administrative head of an organization formed to represent criminal defendants, may be held accountable under 42 U.S.C. Section 1983 for a policy that leads to a denial of an individual's right to effective representation of counsel."

The Court acknowledged that under *Polk County v. Dodson*, 454 U.S. 312 (1981) that the individual public defender who was performing the conventional roles of an attorney for a client that such a lawyer was not a state actor and not subject to Section 1983 liability. *Polk County* left open the question of whether there may be liability for "administrative and possibly investigative functions." *Polk County*, 454 U.S. at 324 - 25.

In *Miranda v. Clark County, Nevada* the plaintiff, who was convicted of capital murder, sentenced to death and who served 14 years, had his conviction overturned by a state court because the public defender provided ineffective assistance of counsel for failing to investigate his case. Nevada did not retry Miranda who maintained his innocence. The public defender who represented Miranda at his initial trial had been a lawyer for just over a year and had never tried a murder case. That defender interviewed 3 of the 40 witnesses given to him by the defendant and did not subpoena any of them to trial. Miranda also alleged that 2 policies caused him to receive deficient representation.

One policy provided that defendants who flunked a polygraph received minimal resources for preparing for trial. The second policy was to assign the least experienced counsel to capital cases with no training or experience in capital litigation.

The 9th Circuit determined that the representation provided Miranda at his trial was "well below the accepted standard of representation of a capital defendant." The Court held that the individual public defender was not liable under Section 1983 since he was representing the client and not the county or state and was therefore not, as a matter of law, a state actor under *Polk County*.

However, the 9th Circuit held that the chief public defender administrator who was responsible for allocating the finite resources and making policies on the use of resources was subject to liability under Section 1983 since such action was state action, as the administrator was not representing an individual client.

The 9th Circuit determined that the policy that allocated fewer resources to clients who did not pass the polygraph is a "policy of deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt…. This is a core guarantee of the 6th Amendment and a right so fundamental that any contrary policy erodes the principles of liberty and justice that underpin our civil rights. *Gideon*, 372 U.S. at 340-41, 344; *Powell v. Alabama*, 287 U.S. 45. 67-69 (1932); see also *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764, 1767 (2002)." Polygraph results cannot be determinative of allocation of resources according to the 9th Circuit.

The 9th Circuit also held that assigning untrained and inexperienced attorneys to represent capital clients did allege a ground that was sufficient to create a "claim of 'deliberate indifference to constitutional rights' in the failure to train lawyers to represent clients accused of capital offenses."

Kentucky's public defender program does not have such a polygraph policy, and it has adopted national performance standards of the American Bar Association and the National Legal Aid and Defender Association. ■

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KY's Attorney General and 21 Other Attorney Generals Take a Stand before US Supreme Court

A brief for the state governments of twenty-two States and Commonwealths, as amici curiae in *Gideon*, urging reversal, was filed in the United States Supreme Court by Edward J. McCormack, Jr., Attorney General of Massachusetts, Walter F. Mondale, Attorney General of Minnesota, Duke W. Dunbar, Attorney General of Colorado, Albert L. Coles, Attorney General of Connecticut, Eugene Cook, Attorney General of Georgia, Shiro Kashiwa, Attorney General of Hawaii, Frank Benson, Attorney General of Idaho, William G. Clark, Attorney General of Illinois, Evan L. Hultman, Attorney General of Iowa, John B. Breckinridge, Attorney General of Kentucky, Frank E. Hancock, Attorney General of Maine, Frank J. Kelley, Attorney General of Michigan, Thomas F. Eagleton, Attorney General of Missouri, Charles E. Springer, Attorney General of Nevada, Mark McElroy, Attorney General of Ohio, Leslie R. Burgum, Attorney General of North Dakota, Robert Y. Thornton, Attorney General of Oregon, J. Joseph Nugent, Attorney General of Rhode Island, A. C. Miller, Attorney General of South Dakota, John J. O'Connell, Attorney General of Washington, C. Donald Robertson, Attorney General of West Virginia, and George N. Hayes, Attorney General of Alaska.

Kentucky Vehicle Stops Database 2001 Report

Introduction

The Rule of Law which underlies a democratic form of government and, therefore, democratic policing strategies, is based on the presumption that, unless specified under the law, individual characteristics such as age, ethnicity, economic and socio-demographic characteristics of individuals should not be taken into account in the administration of justice. Biased policing occurs when "…(intentionally or unintentionally) personal, societal, or organizational biases and/or stereotypes are applied in the decision-making processes in the administration of justice.[1] Racially biased policing is only one form of bias that can be introduced into the administration of justice. Racially biased policing occurs when the police inappropriately consider race or ethnicity in deciding with whom and how to intervene in an enforcement capacity."[2] Racial profiling is a form of bias within policing and includes "…any police action that relies on the race, ethnicity or national origin of an individual rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity."[3]

Racial profiling and the larger category of biased policing has a number of specific consequences. Those most significant are:

- Hinders police effectiveness by eroding public confidence and trust and interferes with strong police and community partnerships;
- Hinders police effectiveness by leading police to believe that only "certain people" commit crimes;
- Violates federal and civil statutes; and
- It is a form of discrimination and is therefore, wrong.

The larger consequence of biased policing and, therefore, racial profiling is that it undermines the basic principles of a rule of law and democratic government and democratic policing through the erosion of public trust and police ineffectiveness that are the result.

Recommended Strategies

Both the National Organization of Black Law Enforcement Executives and the International Association of Chiefs of Police recommend specific strategies to address biased policing. These strategies are as follows:

- Implementation of a policy specifically condemning discrimination of any kind;
- Implementation of policies defining and prohibiting racial profiling;
- Officer training;
- Accessible and transparent civilian complaint process; and
- Data collection for both analysis and periodic review to assess compliance.

Kentucky Strategies

The Kentucky strategies to address biased policing and, therefore racial profiling, were initiated in April 2000. At this time, Governor Paul Patton signed an Executive Order specifying that"… no state law enforcement officer shall stop any person solely because of race, ethnicity or gender." During the summer and fall of 2000, representatives of the Justice Cabinet and state law enforcement met and developed a model policy prohibiting racial profiling and developed an instrument for the collection of data related to vehicle stops. Twenty-six local and county law enforcement agencies volunteered to participate in the vehicle stops data collection project along with the state law enforcement agencies. Throughout the fall of 2000, pilot data collection was conducted. Data collection began in January 2001.

During the 2001 session of the Kentucky General Assembly legislation passed (Senate Bill 76) that required all law enforcement agencies in the state to adopt a policy that met or exceeded the model policy developed by the Kentucky Justice Cabinet. This legislation additionally tied the continuation of Kentucky Law Enforcement Foundation Program funding to adoption of this biased policing/racial profiling policy.

Lastly, the Kentucky State Police and Department of Criminal Justice Training both instituted, in 2001, in-service training and units within basic law enforcement training that would address racial profiling, cultural awareness and/or model racial profiling policy definitions and strategies.

Vehicle Stops 2001 Data Collection and Report

This report, based on information available in the Kentucky Vehicle Stops Database for 2001, is a summary of some limited and exploratory findings concerning the nature of vehicle stops conducted by the agencies participating in this project. It is not meant to be information from which a conclusion can be drawn concerning the presence or absence of biased-policing and/or racial profiling within an agency or unit within an agency. The data is too limited and is only baseline information. The methodological issues related to determinations of the presence or absence of biased-policing and/or racial

Continued on page 16

Title: Vehicle Stops Report

The KY Vehicle Stops Database 2001 Report (Nov 2002) can be found at:
http://www.kcjc.state.ky.us/documents/statewiderpreport2001.pdf

Continued from page 15

profiling are extremely complex and no set of data has yet been developed that can conclusively determine the presence or absence of these types of inappropriate policing decisions and actions.

This is the first set of quantitative information that has been developed to provide information on some of the characteristics of vehicle stops made by law enforcement agencies in Kentucky. These agencies are not deemed to be representative of all law enforcement agencies in the Commonwealth nor is the data to be construed as statewide data. Without information over a number of years, this data cannot be considered representative of agency activities. It is, at best, data collected on official actions taken over a maximum of 12 months and, in some instances, less than 12 months. Some agencies in the database did not begin submitting data until several months following January 1, 2001. It is also not a complete analysis of the data since numbers of cases, limited representation of minority group drivers, limited qualitative information and limited research resources prohibited a more definitive analysis.

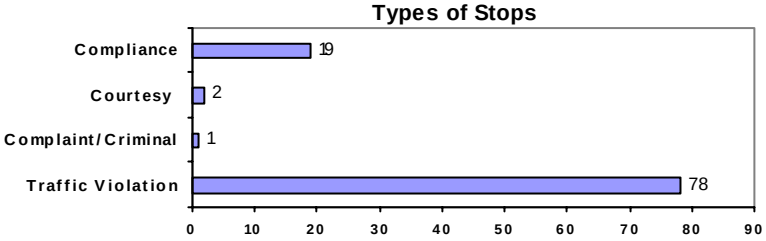
The data is presented as a preliminary analysis of vehicle stop information. It is presented as information to be used as a management tool to be reviewed by statewide as well as individual agency leadership and policy-makers. It may suggest characteristics of vehicle stops that require further review and, especially, the collection of additional qualitative information. It has prompted a number of improvements in the Kentucky Vehicle Stops Database form that have already been implemented. These include the addition of more ethnic categories for drivers, information on why a search was conducted and information on whether the vehicle stopped had an in- or out- of-state license plate. The analysis has additionally presented the need for more qualitative information such as the nature of the violation that prompted the vehicle stop. The purpose is to provide law enforcement leadership with information that will stimulate further analysis, thought and queries that will prompt bias-free and therefore more effective policing within the Commonwealth.

Findings

Stops reported in the Kentucky Vehicle Stops Database totaled 311,393 between January 1 and December 31, 2001. Most of the agencies contributing to the database were state law enforcement agencies (81%). The remainder were local (15%) and county (sheriff's departments and county police) law enforcement agencies (3%).

As noted in Chart 1, the greatest portion (78%) of these stops were for traffic violations. The remaining stops were compliance (19%), courtesy (2%) and complaint/criminal (1%).

Chart 1
Types of Stops



The ethnicity of drivers stopped by the participating agencies during 2001 is displayed in Chart 2. Most of the drivers (90%) were Caucasian. The remaining drivers were African American (8%), Hispanic (2%), Asian American (1%) and Native American (.05%).

Chart 2
Ethnicity of Driver

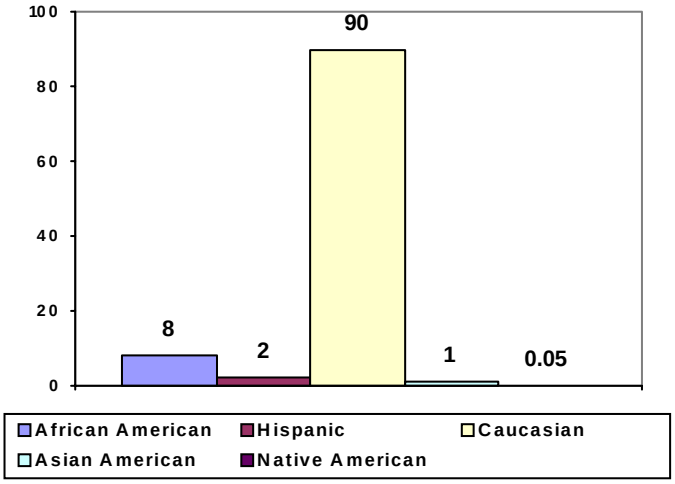


Table 1 shows the ethnic distribution of drivers stopped for the various types of stops. When the small numbers of stops for complaint/criminal violations is taken into consideration, the ethnic distribution of drivers within each stop type mirrors the distribution for total stops.

Table 1
Ethnicity of Driver by Type of Vehicle Stop
Type of Stop

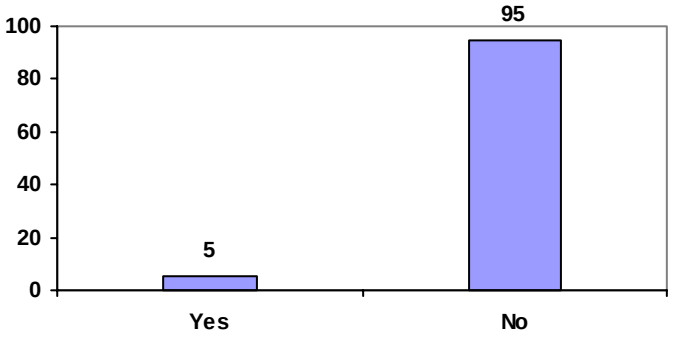
ETHNICITY OF DRIVER	TOTAL STOPS	TRAFFIC STOPS	COMPLAINT/ CRIMINAL	COURTESY STOPS	COMPLIANCE
TOTAL NUMBER	304788	237876	4342	5473	57097
Asian American	1%	.08%	.4%	.3%	.3%
African American	8%	8%	10%	7%	8%
Hispanic	2%	1%	3%	2%	2%
Caucasian	90%	90%	87%	91%	89%
Native American	.05%	.05%	.1% (N=6)	(N=1)	(N=20)
TOTAL	100%	100%	100%	100%	100%

Table 2
Type of Vehicle Stop by Ethnicity of Driver
Type of Stop

ETHNICITY OF DRIVER	TRAFFIC STOPS	COMPLAINT/ CRIMINAL	COURTESY STOPS	COMPLIANCE	TOTAL PERCENT (NUMBER)
Asian American	89%	.9% (N=18)	.8% (N=16)	9%	100% (1995)
African American	78%	2%	2%	9%	100% (24878)
Hispanic	68%	2%	2%	19%	100% (4546)
Caucasian	78%	1%	2%	19%	100% (273235)
Native American	80%	5% (N=6)	1% (N=1)	15% (N=20)	100% (134)

Table 2 contains information on the distribution of vehicle stop types for each ethnic group of driver. Asian American drivers were stopped for traffic violations more often than drivers from other ethnic categories. Hispanic drivers were less likely to be stopped for traffic violations than members from other ethnic categories. The percentages of drivers stopped for complaint/criminal and courtesy stops did not vary significantly. However, Asian American and African American drivers were stopped in lower proportions for compliance violations than Caucasians, Hispanics and Native American Drivers.

Chart 3
Searches Conducted



As shown in Chart 3, searches were conducted in 5% of all stops logged in the database during 2001. This consisted of a total of 17,914 searches. Of these searches, 23% resulted in a positive finding. Most searches (79%) were conducted during traffic violation stops. The remaining searches were conducted during complaint/criminal violation (10%), compliance (9%) and courtesy (2%) stops.

Ethnicity of the driver was found to be related to the probability that a vehicle stop would result in a search. Vehicle stops involving Hispanic drivers (14%) were more likely than vehicle stops involving African American (6%), Caucasian (5%) or Asian American (2%) drivers to result in a search.[4]

Since both ethnicity of the driver and type of vehicle stop were related to the probability of a search, the proportion of drivers from the various ethnic groups who were searched during each type of stop was examined. The findings of this assessment are contained in Table 3.

As shown in Table 3, when the influence of the type of stop on the probability of search is controlled, a statistically significant relationship remains between the ethnicity of the driver and the probability that a search will be conducted during a vehicle stop. That is, when those instances of fewer than 10 stops within an ethnic category are eliminated, Hispanics have a greater probability of being searched, overall, regardless of the type of vehicle stop. Caucasians and African Americans do not differ significantly in the proportions of drivers from these two ethnic groups who are searched while involved in the various types of vehicle stops. [5]

Table 3
Search Conducted by Ethnicity of Driver by Type of Stop
Percent Searched
Type of Stop

ETHNICITY OF DRIVER	TRAFFIC STOPS	COMPLAINT/ CRIMINAL	COURTESY STOPS	COMPLIANCE
TOTAL STOPS	235924	4288	5378	56873
TOTAL SEARCHES	11490	1508	233	1256
Asian American	2%	22% (N=4)		2% (N=3)
African American	7%	34%	6%	3%
Hispanic	16%	43%	14%	9%
Native American	7%(N=7)	33% (N=2)		15% (N=3)
Caucasian	5%	35%	4%	2%

Table 4
Searches With Positive Findings
By Ethnicity By Type of Vehicle Stop
Type of Stop

ETHNICITY OF DRIVER	TRAFFIC STOPS	COMPLAINT/ CRIMINAL	COURTESY STOPS	COMPLIANCE
TOTAL SEARCHES	14269	1492	276	1442
TOTAL POSITIVE	3095	524	60	320
Asian American	15% (N=7)	20% (N=1)	0	0
African American	22%(N=303)	31% (N=43)	13% (N=4)	12%(N=15)
Hispanic	13%(N=63)	18%(N=8)	6% (N=1)	7% (N=7)
Native American	29%(N=2)	0	0	0
Caucasian	22%(N=2716)	36%(N=471)	24% (N=55)	25% (N=296)

Among those vehicle stops that resulted in a search, the proportion of the searches that resulted in a positive finding was found to be related to the ethnicity of the driver. Searches conducted of vehicle stops involving Caucasian (23%) and

Continued on page 18

Continued from page 17

African American (22%) drivers most often resulted in a positive finding. Searches conducted involving vehicle stops with Hispanic drivers (12%) were the least likely to result in a positive finding. As shown in Table 4, this relationship between ethnicity and the outcome of a search was evident for each type of traffic stop.

With the exception of traffic stops, the numbers of searches conducted among drivers of the various ethnic categories is too small for meaningful interpretation. However, among traffic stops, Hispanic drivers (13%) had the lowest probability of the search resulting in a positive outcome.

The average time of the stops made by the contributing law enforcement agencies during 2001 was 13 minutes. The most frequent stop time among the 302,578 stops was 5 minutes. 67% of all stops lasted 10 minutes or less while 16% of all stops were more than 20 minutes in duration.

Table 5
Length of Stop (Minutes)
By Ethnicity of Driver

ETHNICITY OF DRIVER	LENGTH OF STOP
Caucasian	13
African American	14
Hispanic	20
Asian American	11
Native American	13
TOTAL	**13**

Statistically significant differences were noted in the average duration of vehicle stops based on the driver's ethnicity. Vehicle stops involving Hispanic drivers (20 minutes) had the longest average stop time. Vehicle stops involving African American (14 minutes), Caucasian (13 minutes), Native American (13 minutes) and Asian American (11 minutes) drivers had relatively comparable stop times that were significantly shorter than those for Hispanic drivers.

The average length of duration for a vehicle stop was also found to be related to the type of stop. Vehicle stops involving compliance violations (26 minutes) or complaints/criminal violations (21 minutes) lasted significantly longer than stops for traffic violations (10 minutes) or courtesy stops (9 minutes).

Since ethnicity of the driver and type of vehicle stop were related to the duration of the stop, the length of stops for each ethnic category of driver were assessed within each type of vehicle stop category. The findings are contained in Table 6.

Table 6
Length of Stop (Minutes)
By Ethnicity of Driver By Vehicle Stop Type
Type of Stop

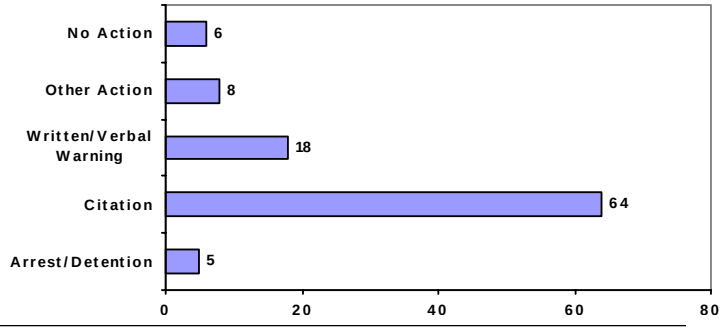
ETHNICITY OF DRIVER	TRAFFIC STOPS	COMPLAINT/ CRIMINAL	COURTESY STOPS	COMPLIANCE
TOTAL STOPS	10	21	9	26
Asian American	9	16	5	28
African American	11	16	8	28
Hispanic	16	24	13	30
Native American	10	11(N=6)	10 (N=1)	27
Caucasian	10	11(N=6)	10 (N=1)	27

The findings in Table 6 show statistically significant differences in vehicle stop times based on the ethnicity of the driver for all types of stops except courtesy stops. Given the small number of Hispanic drivers involved in courtesy stops (N=96), the differences in times had a better than 5% probability of being due to chance alone. However, among the three other types of stops, the trend is for those vehicle stops involving Hispanic drivers to take longer periods of time than those stops involving drivers from other ethnic categories. This "difference" is greatest for vehicle stops made for traffic violations.

The length of time for a vehicle stop was also found to be related to whether or not a search was conducted and to whether or not the search resulted in a positive outcome. Those vehicle stops in which a search was conducted lasted, on the average, 28 minutes while those in which no search was conducted lasted, on the average, 13 minutes. When a search was conducted and the outcome was positive, the stop took a longer period of time (32 minutes) than those stops during which a search was conducted but the findings were negative (22 minutes).

The final disposition of vehicle stops by the contributing law enforcement agencies during 2001 and reported in the database is contained in Chart 4. As shown in this chart, the greatest portion of all stops made resulted in a citation issued (64%) followed in frequency by written or verbal warning (18%), arrest or detention (5%), other action (8%) and no action (6%).

Chart 4
Disposition



CONCLUSIONS AND RECOMMENDATIONS

This data is not representative of all agencies within the Commonwealth. It is based on vehicle stops information from all state law enforcement agencies and a small subset of local and county law enforcement agencies within the Commonwealth. As noted previously, this report, based on information available in the Kentucky Vehicle Stops Database for 2001, is a summary of some limited and exploratory findings concerning the nature of vehicle stops conducted by the agencies participating in this project. It is not meant to be information from which a conclusion can be drawn concerning the presence or absence of biased-policing and/or racial profiling within an agency or unit within an agency. The data is too limited and is only baseline information. The methodological issues related to determinations of the presence or absence of biased-policing and/or racial profiling are extremely complex and no set of data has yet been developed that can conclusively determine the presence or absence of biased-policing and/or racial profiling are extremely complex and no set of data has yet been developed that can conclusively determine the presence or absence of these types of inappropriate policing decisions and actions.

Overall, the data reflect the following:

- Ethnic distribution of drivers stopped for various reasons does not differ substantially by reason for stop. That is, the ethnic distribution of drivers stopped for traffic, complaint/criminal, courtesy and compliance stops does not vary.
- Variation does exist within the various ethnic groups of drivers among the types of stops. That is, the percentage of drivers within each ethnic category that were stopped for the various reasons does differ. For example, Hispanic drivers were stopped for traffic violations proportionately less than drivers from other ethic categories. Whether this reflects driving patterns and habits or the discretion of law enforcement officers cannot be determined.
- When drivers were stopped, the probability that a search would be conducted was related to the ethnicity of the driver. Vehicle stops involving Hispanic drivers were more likely to result in a search than vehicle stops involving drivers from other ethnic categories.
- While the numbers of drivers stopped for reasons other than traffic violations who were not Caucasian or African American is relatively small, the data suggest that some relationship between the ethnicity of the driver and the probability of a search exists regardless of the type of stop. Vehicle stops involving Hispanic drivers were more likely to result in a search than vehicle stops involving drivers from other ethnic categories.
- When searches were conducted, regardless of the type of vehicle stop, the outcome was more likely to be negative when the driver was Hispanic than when the driver was Caucasian or African American.
- The duration of a vehicle stop was found to be related to the ethnicity of the driver for traffic, complaint/criminal, and compliance stops. Vehicle stops involving Hispanic drivers lasted longer periods of time than those involving drivers from other ethnic categories.

Based on the findings from the vehicle stops database, the following recommendations are made:

- Attempt to determine what factors may be influencing the various trends related to stops involving Hispanic drivers.
- Implement the proposed amendments to the vehicle stops data collection form to include the driver's age; expanded driver ethnic categories; residence of the driver; if a search is conducted, the reason for the search; and additional details concerning the justification for the vehicle stop.
- Continue the data collection and annual analysis as a means of monitoring and imposing accountability.
- Expand the data collection process to include qualitative information using civilian focus groups and random consumer audits/surveys.
- Expand the data collection process to include qualitative information on the police reaction to the strategies implemented to address racially biased policing.
- Implement community education programs to familiarize the public with appropriate police tactics and strategies.
- Develop means to assess, and if necessary to enhance, the accessibility and transparency of civilian complaint processes.
- Ensure the bias-free policing is a theme throughout all phases of police basic and in-service training.
- Continue to promote and maintain the current integrated approach to biased policing through policies, discipline, accountability and training.

Endnotes:

1. Ronald Davis, National Organization of Black Law Enforcement Executives
2. Police Executive Research Forum and National Organization of Black Law Enforcement Executives
3. Ramirez, et.al., Department of Justice, 2000
4. The small number of Native American drivers stopped as well as the small number of drivers searched makes conclusions regarding this ethnic group statistically invalid.
5. The small number of Native American drivers searched during each type of stop as well as the small numbers of Asian Americans searched during stops other than traffic makes conclusions regarding these two ethnic groups statistically invalid. ■

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Raising the Claim of Racial Profiling at the Pre-Trial Stage in a Motion to Quash Arrest and to Suppress Evidence

Bias, intolerance, prejudice and bigotry in the criminal justice system, as a reflection of its existence in our society as a whole, was the subject of two monthly publications last year in *The Advocate* (vol. 24, issues No. 3 and 7, May and November 2002). The general topic of racism and the specific subject of racial profiling were discussed in stories, antidotes and articles. See, "Race, Cops, and Traffic Stops," 51 University of Miami Law Review 425 (1997). It is illegal in our Commonwealth, as formally recognized in Kentucky state law in Kentucky's Racial Profiling Act, KRS 15A.195(1), which provides that no police officer "shall stop, detain, or search any person when such action is *solely* motivated by consideration of race, color, or ethnicity." [*emphasis added*] In his November 2002 *Advocate* article, Ernie Lewis presented a general overview of our Racial Profiling Act, the federal civil rights laws, the United States and Kentucky Constitutions as well as general Fourth Amendment principles and the Exclusionary Rule to pre-trial motions in drug cases (volume 24, No. 7). This article presents an alternative approach, one almost exclusively based upon the Fourteenth Amendment, Equal Protection Clause. It is called the "*Batson* approach." *Batson v. Kentucky*, 476 U.S. 79 (1986).

Whren v. United States, 517 U.S. 806 (1996), implicitly allows racially motivated traffic stops so long as there exists a second, objectively reasonable ground for the stop *e.g.* speeding, weaving, broken tail light. The existence of such proof, under *Whren*, effectively eliminates racial bias as the "sole motivation" for the traffic stop and the subsequent search and seizure. Thus, the *Whren* decision has been universally seen as a ruling that condones racial profiling in police practice on Fourth Amendment grounds so long as there exists another, objective reason to justify a police stop, arrest and subsequent search. For example, so long as a violation of traffic law occurs, the subjective motivation, agenda or racially motivated bias of the law enforcement officer is reduced to an irrelevancy. *Whren* states, "The fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." Citing *United States v. Robinson*, 436 US at 136. Thus, *Whren* virtually closed the door on claims of racially motivated police behavior, subterfuge, pretext or other illegal police conduct so long as *any* objective reason, such as broken tail light, is produced by the prosecution to justify the stop and subsequent police action. While closing the door on strict Fourth Amendment grounds, the Supreme Court left open the possibility of a different approach, one predicated upon Equal Protection: "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the [Fourteenth Amendment] Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in an ordinary, probable-cause Fourth Amendment analysis (116 SCt at 1769)."

In view of the foregoing language, the purpose of this article shall be to introduce a different way to litigate a claim of racial profiling, called the "*Batson* approach." *Batson v. Kentucky*, 476 US 79 (1986). This approach is inspired by the above language of *Whren* and a number of law review articles: Harris, *Profiles in Injustice* (New Press 2002); Buckman and Lamberth, "Challenging Racial Profiles: Attacking Jim Crow on the Interstate" (1999); Hall, "Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence: *Whren v. United States*, *United States v. Armstrong*, and the Evolution of Police Discretion," 76 Tex L Rev 1083 (1998); Larrabee, "DWB and Equal Protection: The Realities of an Unconstitutional Police Practice," 6 J L & Policy 291 (1997). A discussion of this authority and reasoning was presented at the recent NLADA conference I attended in Milwaukee, by Kenneth M. Mogill and Delphia T. Simpson entitled "Litigating Claims of Racial Profiling in Defense of a Criminal Charge – A *Batson*-Inspired Approach." (November 15, 2002).

When taking on the defense of a criminal prosecution, where it is evident that a traffic stop or arrest is racially motivated, it should be remembered that the fundamental guarantee of the Constitution, particularly the warrant requirement, is to serve as a protection between citizens and the illegality of police. The basic function of a warrant is not to stop police officers from relying on common sense but rather to require that normal inferences "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting crime." Quoting Justice Jackson in the case of *Johnson v. United States*, 333 US 10 at 14 (1948). Police historically have not enjoyed the discretion granted to prosecutors or judges. Instead, police discretion has always been the subject of constitutional limits and protections. Protections against unreasonable searches and seizures as enforced by the Exclusionary Rule *Mapp v. Ohio*, 367 U.S. 643 (1961). The above-cited law review commentators have articulated a legal approach to racial profiling that brings such misconduct back into the ambit of a claim of "selective enforcement" under the Fourth Amendment as a superior means of attacking racially discriminatory police activity. The Fourth Amendment guarantees citizens protection from unreasonable searches and seizures. Unreasonableness encompasses protections guaranteed by the Fourteenth Amendment's Equal Protection Clause. As such,

Editors Note: Kentucky's Racial Profiling Act may provide a separate state exclusionary rule irrespective of *Whren*. See Ernie Lewis, "The Use of the Racial Profiling Act in Drug Cases," *The Advocate*, Vol. 24, No. 7 at 25.

the law recognizes that systematic racial discrimination falls within the complete set of harms against which the Fourth Amendment's reasonableness standard should guard. Police practices that disproportionately affect individuals on the basis of race or ethnicity are appropriate for stringent Fourth and Fourteenth Amendment Constitutional examination, irrespective of the existence of probable cause or collateral objective grounds for the initial stop, arrest and search. See, Larrabee, "DWB and Equal Protection: The Realities of an Unconstitutional Police Practice," 6 J L & Policy 291 (1997).

Racism and racially motivated behavior is not always conscious. "Empirical evidence suggests that race is frequently the defining factor in pretextual traffic stops." See, "Race, Cops, and Traffic Stops," 51 University of Miami Law Review 425 (1997). Thus, raising a claim of racial profiling in the defense of a criminal prosecution, based upon an allegation that the law enforcement officer's conduct was motivated by race or color, does not amount to a change that the prosecutor or police officer is a racist. Race matters. It always has. We live in a society that has historically never disregarded race or ethnicity. It is a part of who we are as Americans. This is shown in statistical studies that prove again and again that systems of within law enforcement, such as police arrests, narcotics prosecutions, jury verdicts, imposition of the death penalty, as just some examples, disproportionately affect citizens of color. In her discussion of unconscious racism in the criminal justice system, Sheri Lynn Johnson discussed unconscious racism in criminal procedure and examined why unconscious racism on the part of well-intention people is ignored in criminal decisions. See, 73 Cornell Law Review 1016 (1988).

In his Milwaukee presentation at the NLADA conference, Mr. Mogill discussed applying *Batson v. Kentucky* to such police conduct urging that just as it became necessary for the Supreme Court in *Batson* to outlaw racial discrimination in the course of a prosecutor's exercise of peremptory challenges during jury selection, the same approach can be taken to challenge police officers' race-based decision making in the course of traffic stops and street level arrests. The broad discretion given to law enforcement in open society and the fact that police conduct carries such an enormous potential for abuse offers broader instances and opportunities for attacking racially motivated choices in the street than in the case of jury selection in the court. *See Atwater v. City of Lago Vista*, 532 US 318 (2001); and *United States v. Mesa*, 62 F3d 159 (6th Cir 1995). In both *Atwater* and *Mesa* courts discussed the breadth of traffic laws in this country, the regularity of their violation, and the reality that a police officer can find a valid reason to stop a vehicle traveling on the highway at almost any time, at any place, for virtually any reason. The reality is if local police strictly enforced all traffic laws, they would arrest half the driving population on any given morning. How common is the occurrence of police abuse of traffic laws to justify highway stops of motorists? A Florida traffic study demonstrated that, in the period of accumulating such data, 1% of drivers stopped on Interstate 95 received a traffic ticket. See, Larrabee, 6 J L & Policy at 297-298; and the dissent of Chief Justice Lay, in *United States v. McKines*, 933 F2d 1412 at 1436 (8th Cir 1991) where it was said:

"We have no reliable statistical numbers telling us how many innocent people are stopped, questioned, and sometimes searched by law enforcement officers proceeding on little more than intuition. Testimony from drug agents in some airport stop cases, however, shows that only a small percentage of travelers stopped are ever arrested. Cloud, "Search and Seizure by the Numbers The Drug Courier Profile and Judicial Review of Investigative Formulas," 65 B U L Rev 843, 876 & n 135 (1985). In one case, the district court calculated that *the DEA agent involved had arrested only three to five percent of the airport suspects he stopped*." *United States v. Moya*, 561 F Supp 1, 4 (ND IL 1981), affd 704 F2d 337 (7th Cir 1983).

Life's experiences and the awareness that a police officer's broad discretion, exercised daily in the course of performance of duties, compels an understanding that such discretion exercised on the basis of race or color, carries constitutional significance. Racial Profiling occurs when the officer's choice of who to stop, who to remove from their car, who to ask to consent to a vehicle search or a search of their person and possessions, is driven by a conscious or unconscious belief that African Americans or Hispanics are more likely to be transporting drugs, contraband, open alcohol or other physical evidence of criminality. Such conduct by police, even subjectively well intentioned, is debasing, humiliating and repulsive. It "undermines public confidence in the fairness of our system of justice." *See Batson*, 476 US at 87. As lawyers, one might ask, how will we know when this has occurred?

The answer lies in our clients' lives; in their stories of the facts and circumstances surrounding their arrest. It can be found in the stories of the witnesses, perhaps other vehicle passengers, who experienced the event. Racial Profiling by its nature is not an isolated event. Rather, it is a pattern. Incidents of selective law enforcement are found, again and again, in the communities where our clients either live or the communities they are visiting or passing through. Studies confirm that racial profiling typically occurs on major interstate highways arteries, in low income communities viewed by police as "high crime," in public locations of mass transportation such as airports, bus stops, terminals. Where racial profiling yields evidence, police will establish patterns of such race-based tactics. These patterns, proof of race-based disproportionate police traffic stops and arrests, lie waiting in the records of police departments. Sometimes, they can be found in the personnel files of individual police officer's whose conduct yields citizen complaints.

The starting point to this *Batson* approach is to allege race-based police exercise of discretion in the course of police-citizen contacts in the enforcement of [traffic] laws. *Batson* requires first an allegation of purposeful conduct in an officer's exercise of discretion. An accused "may make out a *prima facie* case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 US at 93-94. In traffic stops,

Continued on page 22

Continued from page 21
Kenneth Mogill urges, the *Batson* statistical base is the inverse of what takes place in race-based jury selection. There, it is impermissible for the commonwealth attorney, in the prosecution of an African American, to strike African Americans in order to obtain a jury of twelve that is disproportionately white, resulting in substantial under-representation of the defendant's race. In a traffic stop challenge, the approach is reversed where the incidence of those stopped (African Americans) results in a statistical over-representation of that minority population. Proof, is in the fact that the accused is African American and police department traffic stop statistics showing that, for example, African Americans are 7% of the population of the community yet are 25% of all traffic stops…irrespective of whether the stops lead to an arrest and prosecution. In alleging discrimination in jury selection, it has been said, "The prima facie case method […] was 'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'" *United States Postal Service v. Aikens*, 460 US 711, 715 (1983) (cite omitted).

The second phase of the *Batson* approach, and here's the good part, as in the case of a *Batson* Challenge during *voir dire*, once a *prima facie* case is made, the burden shifts to the Commonwealth to offer a race-neutral explanation for the traffic stop. By application of the *Batson* procedure to racial profiling in the police officer's discretion to stop the defendant, here: "The State cannot meet this burden by mere general assertions that it's officials did not discriminate or that they properly performed their official duties… Rather, the State must demonstrate that 'permissible racially neutral selection criteria and procedures have produced the monochromatic result.'" *Batson*, 476 US at 93-94 (cites omitted). Significantly, the prosecutor, as in a *Batson* challenge during jury selection, cannot rebut the defendant's allegation by denying a racial motive, alleging good faith or claiming that the officer in fact saw a traffic violation committed while on patrol. As *Batson* stated "if these general assertions were accepted as rebutting defendant's *prima facie* case, the Equal Protection Clause would be but a vain and illusory requirement. The prosecutor [here, the arresting police officer] therefore must articulate a neutral explanation related to the particular case.... The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Batson* at 98, cites omitted.

The third and last step in the *Batson* approach is for the trial court to determine whether the evidence has established purposeful racial discrimination by a preponderance of the evidence. Significant here, as in a *Batson* challenge mounted during jury selection, is whether the prosecution's evidence refutes the inference of discriminatory purpose and whether, if established, the arresting officer's pattern of traffic stops, in light of his testimony, proves "discriminatory purpose". Keep in mind, this approach is not that like those made in charges of "selective prosecution." *See e.g. United States v. Armstrong*, 517 US 456 (1996). Rather, the present approach is the police officer's, not the prosecutor's, abuse in his exercise of discretion. It is, at its core, unconstitutional selective police enforcement based upon race or ethnicity.

The attached is a form motion to suppress that is based upon facts from an actual case that I litigated several years ago. The name of the defendant, the city, the state and the date have been changed. It was filed and litigated in federal court prior to my having become aware of the "*Batson* Approach" discussed in this article. As additional grounds for the motion, I have included the Kentucky Racial Profiling Act as well as the Fourth and Fourteenth Amendments.

Discovery of police records, data and statistics are no doubt indispensable to the defendant's making his proof. Subpoenas or discovery requests specifically focusing on the kind of information relevant to developing racial profiling should be served and filed before the evidentiary hearing on the motion to quash arrest or to suppress evidence. A defendant is entitled to law enforcement records material and relevant to pretrial allegations. *Alderman v. United States*, 394 US 165, 182-185 (1969), discussed in *United States v. Apple*, 915 F2d 899 (4th Cir 1990). *See also United States v. Wright*, 121 FSupp2d 1344 (D Kan 2000) (as to discovery relevant to Fourth Amendment challenge to lawfulness of electronic surveillance). If information is obtained indicating that the particular police officer has engaged in a pattern of race-based conduct, that officer's personnel file, which may include reports made by persons complaining of such conduct, may be sought as exculpatory or impeaching material. *See, Denver Policemen's Protective Assn v. Lichtenstein*, 660 F2d 432 (10th Cir 1981); and *Kallstrom v. City of Columbus*, 136 F3d 1055 (6th Cir 1998).

At the evidentiary hearing conducted on a motion to suppress predicated upon a claim of racial profiling, Kentucky Rules of Evidence, Rule 104(b) and 611 (a) and (b) apply as rules of "inclusion" rather than of "exclusion" favoring the admissibility of all evidence offered by the accused to advance his theory and to meet the burden of proof applicable to such proceedings. *Huddleston v. United States*, 485 US 681, 691-692 (1988); and *see also Kroger Co. v. Willgruber*, Ky., 90 S.W.2d 61 (1996); *Turner v. Commonwealth*, Ky., 914 S.W.2d 343 (1996). In the context of hearings on pre-trial motions, it can be argued that materiality is not meant to include only evidence that is directed at an element of the prosecuted defense, but also testimony and evidence that establish a pattern of racially motivated incidence relevant to an officer's "motive" or "common scheme" or "design" under Kentucky Rules of Evidence, Rule 404(b). *See United States v. Crowder*, 87 F. 3d 1405, 1410 (D.C. Cir., 1996); *Commonwealth v. English*, Ky., 993 S.W.2d 941, 944 (1000); *Bell v. Commonwealth*, Ky., 875 S.W.2d 882 (1994); *State v. Lough*, 889 P.2d 487 (Wash 1995). Thus, Police Department records can be found admissible as relevant, and material at a suppression hearing alleging a Fourteenth Amendment violation by racial profiling in the officer's abuse of police discretion in his enforcement of traffic laws.

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COMMONWEALTH OF KENTUCKY
JEFFERSON CIRCUIT COURT
CRIMINAL DIVISION
INDICTMENT NO: 02-CR-1234

COMMONWEALTH OF KENTUCKY **PLAINTIFF**

VS. **MOTION TO QUASH ARREST AND TO SUPPRESS EVIDENCE**

JESUS MARTINEZ **DEFENDANT**

The defendant, Jesus Martinez, by his attorney David Mejia, Department of Public Advocacy, Commonwealth of Kentucky, moves, pursuant to the Kentucky Rules of Criminal Procedures, RCr 9.78, the Kentucky Racial Profiling Act, KRS 15A.195(1), for an order of this Court quashing his arrest as having been made without probable cause, without a warrant, without legal justification, under the Fourteenth and Fourth Amendments of the Unites States Constitution, particularly under the Equal Protection Claus, and under the Kentucky Constitution, Sections 2 and 10. Defendant further moves to suppress all physical evidence obtained as the direct product of the warrantless illegal police traffic stop and removal of defendant from his vehicle for the purpose of searching of defendant's person and property resulting in police seizure of marijuana.

1. Jesus Martinez is charged with trafficking in marijuana in his vehicle allegedly committed on January 20, 2003 at a location northbound in Interstate 65 near Waterfront Park in Louisville, Kentucky, in violation of KRS 218.1421(4)(a).

2. That day, Louisville Police Officer, Detective Young (Star 48164) operating in an unmarked unit did not see the defendant commit an offense; had no eyewitness statement that Jesus Martinez committed a violation of law, had no eyewitness description of Jesus Martinez as having been involved in a crime; in sum, had neither probable cause nor legal justification to make a random police stop of the defendant's automobile. *Carroll v. United States*, 267 U.S. 132 (1925); *Chambers v. Maroney*, 399 U.S. 42 (1970); *United States v. Ross*, 456 U.S. 798 (1982).

3. In the performance of his discretion as a police officer, Detective Young did not have as his primary objective or duty, the enforcement of traffic laws. Instead he was purposefully seeking evidence of violations of the criminal laws. In that regard, on the basis of an alleged moving violation, speeding, which the defendant denies having committed, seeing that Jesus Martinez was Hispanic and operating a motor vehicle and with the belief that he could stop, detain and search him, Detective Young activated his police lights and siren, required the defendant to pull his car over to the curb.

4. There and then, Detective Young detained the defendant, searched him, searched his vehicle and seized suspect marijuana. Thereafter, in an effort to explain or to justify his having committed a racial profile traffic stop, Detective Young issued a speeding ticket to Jesus Martinez. While defendant was issued a traffic ticket, upon the officer's allegation that he observed Jesus Martinez speeding, which defendant has denied by his plea of not guilty to that charge, should this court determine and find reasonable cause to stop defendant's car for speeding, it is defendant's allegation here that the officer's traffic stop, arrest and search of Jesus Martinez-even if defendant was in fact speeding-was motivated by the fact that defendant is Mexican American. Selective enforcement of traffic laws violates the United States Constitution.

5. The Equal Protection Clause of the Fourteenth Amendment prohibits selective enforcement of traffic laws based on race or national origin. *Whren v. United States*, 517 US 806 (1996); *Batson v. Kentucky*, 476 US 79 (1986). The conduct of Louisville Police Officer, Detective Young in effecting a traffic stop based upon defendant's nationality also violates the Kentucky Racial Profiling Act, KRS 15A.195(1).

WHERFORE, it is requested that a hearing be conducted into the allegations presented herein and at the conclusion thereof that this court enter an order finding the officer's stop, search and arrest of defendant illegal and ordering all evidence derived therefore suppressed under the Exclusionary Rule. *Mapp v. Ohio*, 367 U.S. 643 (1961); *United States v. Leon*, 468 U.S. 897 (1984); *Crayton v. Commonwealth*, Ky., 846 S.W. 2d 684 (1993).

Respectfully submitted,

_____

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Appellate Case Review


Euva Hess

Barnes v. Commonwealth
—— S.W.3d —— (2002),
2001-SC-544—MR
Reversing and Remanding

Comments by the Commonwealth in closing argument were prosecutorial misconduct. Beckham appealed his 22 year sentence based on a conviction for "intentionally killing Troy Miller." The Supreme Court reversed and remanded because the prosecutor's closing argument violated Appellant's right to a fair trial. Specifically, the prosecutor told the jury that to acquit would be a crime worse than murder. Moreover, the Court frowned upon the prosecutor telling the jury that "appellant's invocation of his right to silence is what made him a suspect and distinguished his case from those self-defense shootings that are cleared by the police." Lastly, the Court frowned upon the Commonwealth's comparison of the case to the O.J. Simpson trial.

Commonwealth v. Christie,
—— S.W.3d. —— (2002),
2000-SC-0694-DG; 2000-SC-0702-DG
Reversing and Remanding

Trial courts have discretion to admit expert testimony concerning the reliability of eyewitness identification. The Supreme Court held that trial courts have the discretion under KRE 702 to admit expert testimony on the reliability of eyewitness identification. (*Overruling Pankey v. Commonwealth* and *Gibbs v. Commowealth*).

When counsel proffers expert testimony under 702, the trial court must find the testimony is both relevant and reliable. This finding does not require a hearing so long as the record before the court "is complete enough to measure the proffered testimony against the proper standards of reliability and relevance." The record upon which the court may rely without a hearing would include proposed expert's reports, affidavits, deposition testimony, and existing precedent. "Failure to make a determination on the admissibility of expert testimony without an adequate record is abuse of discretion."

For purposes of KRE 403, the trial court should consider the weight and nature of the evidence in deciding whether to admit the expert testimony. Such testimony should be admitted where there is no other inculpatory evidence other than eye witness identifications.

Riley v. Commonwealth
—— S.W.3d —— (2002),
2001-SC-0859-MR
Affirming

Trial court does not have an obligation to inquire whether the defendant knowingly and intelligently waived his right to testify. Riley appealed his 20 year sentence based on convictions for 3 counts of first degree Burglary, 1 count of Second Degree Burglary, and PFO Second Degree. The Supreme Court held that despite the trial court's knowledge of a conflict and disagreement between defense counsel and the defendant, the trial court had no obligation to "inquire of Appellant whether he knowingly and voluntarily waived his right to testify."

Kotila v. Commonwealth,
—— S.W.3d —— (2002),
2000-SC-341
Reversing and Remanding

Kotila appealed his 25 year sentence for Manufacturing Methamphetamine, enhanced by possession of a handgun.

The Commonwealth failed to prove that Kotila knowingly and voluntarily waived his rights at the police station. However, Kotila's statements at the time of his detention in the Walmart parking lot were voluntary. The Supreme Court reversed and remanded because the "majority of Kotila's incriminating statements were procured in violation of his constitutional rights." The Commonwealth failed to prove that Kotila knowingly and voluntarily waived his rights prior to interrogation at the police station. However, the Supreme Court held that the statements made by Kotila at the Walmart while he was being detained – that he wanted a lawyer so he could sue them for false arrest were not a "request for counsel that was sufficiently clear and unambiguous so that a reasonable officer under the same circumstances would have known that he was requesting counsel." "Appellant's desire to initiate a civil suit did not equate to an invocation of his constitutional rights…"

A defendant possessing less than all of the chemicals required to manufacture methamphetamine does not get an attempt instruction. The trial court did not err by failing to instruct the jury on criminal attempt to manufacture methamphetamine. The Supreme Court held that 218A.1432, which criminalizes possession of "the chemicals … for the manufacture of methamphetamine" requires a defendant possess only some of the chemicals, not all of the chemicals. Thus, despite the fact that no combination of the chemicals in Kotila's possession would result in methamphetamine, he was still guilty of the primary offense.

Evidence of Kotila's possession of a handgun was admissible during the guilt phase of trial. During the guilt phase, the Commonwealth presented evidence concerning possession of the firearm by Kotila. On appeal, Kotila argued that evi-

dence should not come in until the guilt phase as it is an "aggravator" used to enhance punishment under 218A. The Supreme Court held that the evidence properly came in during the guilt phase because possession of the gun in connection with the drugs is a question of fact for the jury.

KRS 218A.1432 is constitutional. Although the statute does not contain a list of specific chemicals, a legally sufficient standard of conduct is defined so that an ordinary person would know what conduct is prohibited and that arbitrary or discriminatory enforcement would not result. Moreover, intent may not be presumed from mere possession of the chemicals, some other factor must be present, to wit: chemicals and equipment being found together, inordinate quantities of chemicals, or evidence that the chemicals and equipment have been utilized in a manner inconsistent with their ordinary purpose.

***Adkins v. Commonwealth*,**
—— S.W.3d —— (2003),
2001-SC-86
Affirming

Adkins appealed his seventy year sentence for murder, robbery, and burglary.

Testimony of a witness may be admissible even though witness intends to take the Fifth on some questions during cross examination. At trial, the Commonwealth called Adkins's girlfriend knowing she would take the Fifth on any questions related to her drug use during this time – probably on cross-examination. She had pending drug charges based on the officer's search of the motel room. The Supreme Court found no error. The questions posed by the defense were collateral. Additionally, the Court noted that in these situations, defense counsel should move to strike all or part of the witness's testimony. The Supreme Court held that their ruling in *Combs v. Commonwealth*, Ky., 74 S.W.3d 738 (2002) is a two way street. Just as the Commonwealth cannot prevent the defendant's alibi witness from testifying because he/she may take the Fifth on cross, the defendant cannot so prevent the Commonwealth's witness from testifying.

Incriminating statements made by the defendant to third parties and later reported to the police may not implicate state action. The Supreme Court held that the trial court did not err by failing to suppress the statement made by Adkins to his brother. Adkins's brother worked for the Department of Juvenile Justice. The brother visited Adkins at the jail. Although the brother admitted his purpose in the visit was to find out what had happened, the Supreme Court held there was no state action thus implicating *Miranda*. The Court recognized that there could be state action if a private citizen entered this setting per court order or if the government coerced the citizen so that it was responsible for the citizen's conduct.

***Burchett v. Commonwealth*,**
—— S.W.3d —— (2003),
2000-SC-0179
Reversing and Remanding

Habit evidence remains inadmissible in Kentucky Courts. The Supreme Court reiterated that evidence of a defendant's habit is not admissible. The Court found evidence that the defendant smoked a marijuana joint daily was not admissible to prove he had smoked on the day of the collision. Habit evidence remains inadmissible because it violates KRE 403 and because proof of habit requires numerous collateral inquires that lead to delay and jury confusion.

***Commonwealth v. Hale*,**
—— S.W.3d —— (2003),
1999-SC-120-DG
Reversing and Remanding

Supreme Court overturns "Forfeiture of Sentence" rule. The Commonwealth appealed the Laurel Circuit Court's grant of a writ of habeas. Hale was a federal prisoner in Kentucky on work release. He committed another felony offense and received a 4 year sentence to be served in Kentucky correctional institution. Kentucky did not follow proper procedure and sent Hale back to federal custody. Hale served his federal time and was returned to Kentucky pursuant to a detainer. Hale filed a habeas alleging that Kentucky had forfeited the right to enforce the four year sentence by improperly releasing him to the feds.

The Supreme Court held that the "Forfeiture of Sentence" rule announced in *Jones v. Rayborn*, Ky., 346 S.W.2d 743 (1961), was "antiquated, judicially-created policy." The "Forfeiture of Sentence" rule basically prevented Kentucky from reclaiming a defendant where the state has not followed the correct procedure for release of the defendant to another sovereign.

***Mills v. Commonwealth*,**
—— S.W.3d ——, (2003),
2001-SC-226-MR
Reversing and Remanding

Mills appealed his fifty year sentence based on convictions for first-degree Robbery and Second Degree Persistent Felony Offender.

Allowing the victim to remain in the courtroom prior to testifying violates separation of witness rule. The Supreme Court reversed and remanded because the trial court violated RCr 9.48 which governs the separation of witnesses. The trial court allowed the robbery victim to remain in the courtroom during the trial. The victim witnessed the testimony of most of the witnesses, including the investigating officer, prior to his own testimony.

Continued on page 26

Continued from page 25

Schoenbachler v. Commonwealth,
—— S.W.3d —— (2003),
2000-SC-109-DG
Affirming

The Commonwealth bears the burden to prove the defendant's ability to pay in a flagrant non-support case. In this case, the Commonwealth met that burden by offering evidence that defendant's former employer allowed him to work "light duty" at construction site and that defendant's son had assisted him with odd jobs like mowing the lawn, painting the house, and small engine repair.

Thomas v. Commonwealth,
—— S.W.3d —— (2003),
2001-SC-806-DG
Affirming

A defendant becomes a convicted felon for purposes of the possession of a handgun statute the moment he enters a guilty plea. Thomas entered a conditional guilty plea reserving the right to appeal the trial court's refusal to dismiss the indictment charging him with possession of a handgun by a convicted felon. The following events lead to this indictment. First, Thomas entered a guilty plea in Daviess County to drug charges and requests drug court. Second, Thomas was picked up in Muhlenberg for Possession of a handgun by a convicted felon. Third, Daviess County approved drug court. Finally, Muhlenberg indicted on the charge. Thomas filed a Motion to Dismiss the handgun indictment arguing that he was not a convicted felon at the time of his arrest in Muhlenberg. The Daviess court was still considering giving him drug court, which upon successful completion could result in dismissal of his guilty plea to the drug charge.

The Supreme Court held that Thomas became a convicted felon for purposes of the handgun statute when he entered the plea to the gun charges. Thus, the subsequent prosecution for possession of a handgun was permitted per *Grace v. Commonwealth*, Ky. App., .915 S.W.2d 754 (1996).

Neal v. Commonwealth,
—— S.W.3d —— (2003),
2001-SC-296
Affirming

Neal appealed his life sentence based on convictions for wanton murder, first degree robbery, and second-degree persistent felony offender.

The Commonwealth has no duty to ensure defense's access to witness prior to trial. The Supreme Court held that the Commonwealth did not improperly deny the defense access to the co-defendant, a witness at trial. The Commonwealth's only obligation is to turn over witness statements. The witness is free to speak with whomever he chooses.

The Supreme Court found an indirect reference to a polygraph examination permissible. The Court held that the jury was not tainted by "the Commonwealth's veiled" reference to Neal's polygraph examination. The Commonwealth asked a witness "if he gave a statement to an expert interrogator."

Complicity instruction did not deny the defendant a unanimous verdict. The instruction did not contain alternate theories that were not supported by the evidence. The jury could conclude that Neal exercised some degree of command over his co-defendant based on their friendship. Additionally, the jury could conclude they acted in concert. "Conspiracy as envisioned by the statute governing complicity does not necessarily require detailed planning and a concomitant lengthy passage of time. All that is required is that the defendants agreed to act in concert to achieve a particular objective and that at least one of them committed the objective."

Trial court is permitted to play an edited version of trial for a second jury empanelled for the penalty phase. The jury that convicted Neal was not able to agree on a penalty. The trial court empanelled a second jury for the penalty phase. When the Commonwealth and defense could not agree on a summary of the facts in the case, the trial court permitted the jury to view the testimony from the trial edited to exclude bench conference and openings and closings. The Supreme Court found no error because the robbery in this case was the aggravator. The second jury was not required to make a new finding of fact; therefore, there was no confrontation clause violation.

Commonwealth's offer on a guilty plea is not mitigating evidence. The Supreme Court held that the Commonwealth's offer on a guilty plea is not mitigating evidence in the penalty phase of a capital case. ■

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***Gideon v. Wainright,* 372 U.S 335 (1963):** "...reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

CAPITAL CASE REVIEW

UNITED STATES SUPREME COURT

***Sattazahn v. Pennsylvania*, 123 S.Ct. 732 (2003)**
Majority: Scalia (writing), Rehnquist, Thomas, O'Connor, Kennedy
Concur: O'Connor (writing)
Minority: Ginsburg (writing), Stevens, Souter, Breyer

A defendant sentenced to life after a jury deadlocks on sentencing faces the Catch-22 of waiving his/her right to appeal what may be successful issues in order to prevent the danger of being sentenced to death upon retrial.

Sattazahn could not prove that he was "acquitted"[1] of the death penalty. The jury deadlocked and the judge was statutorily required to sentence Sattazahn to death. Thus, no one made any findings or resolved any facts for Sattazahn. *Sattazahn*, 123 S.Ct. 732, 738, quoting *Commonwealth v. Sattazahn*, 763 A.2d 359, 367 (Pa. 2000). Counsel should take notice the difference between this case and *Eldred v. Commonwealth*, Ky., 973 S.W.2d 43 (1998). In *Sattazahn*, the Supreme Court believed the jury made no findings.[2] In *Eldred*, the jury found the existence of a statutory aggravating factor and recommended life without parole for 25 years. In other words, the *Eldred* jury made findings.

Justice Scalia cited the Court's recent decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 122 S.Ct. 2428 (2002), as further proof. In both *Apprendi* and *Ring*, the Court made clear that aggravating circumstances were the "functional equivalent" of an element of the crime. As Scalia put it, "the underlying offense of 'murder' is a distinct, lesser-included offense of 'murder plus one or more aggravating circumstances'" and requires jury findings. In other words, the jury must unanimously find that the prosecution has not met its burden of proof of the aggravators before jeopardy attaches. In this case, the jury deadlocked.[3] Because Sattazahn did not request written findings, he is not entitled to Double Jeopardy protection. *Sattazahn*, at 739-740.

Sattazahn also argued that his second death sentence violated the due process clause of the Fourteenth Amendment because he was unfairly deprived of his "life" and "liberty" interests. The Court found this argument simply a double jeopardy claim wearing different clothing.

Concurrence. Justice O'Connor wrote that while she concurred in the opinion, she did not concur in the extension of *Apprendi* because of her continuing belief that it and *Ring* were wrongly decided.

Dissent. In *United States v. Scott*, 437 U.S. 82 (1978), the Court set forth two specific categories regarding a defendant's interest in avoiding multiple prosecutions when there has been no final determination of his/her guilt. In the first category: mistrials, reprosecution is virtually a given. *Scott*, at 93-94.

Sattazahn fits within the second category: "termination of a trial in [a defendant's] favor before any determination of factual guilt or innocence." *Sattazahn*, at 745, citing *Scott*, 437 U.S. at 94. It fit here because Pennsylvania law provided for a sentence from which the prosecution could not appeal. *Id*., at 746.

KENTUCKY SUPREME COURT

***Furnish v. Commonwealth*,**
— S.W.3d — (November 21, 2002)
REVERSED for resentencing with a Life Without Parole instruction
Majority: Graves (writing), Lambert, Johnstone, Keller, Cooper, Stumbo
Concur: Keller (writing), Stumbo, Johnstone (voir dire issue only)
Dissent: Wintersheimer (writing)

Life Without Parole Instruction

Furnish was indicted in August, 1998 for crimes which occurred in May and June of that year. In July, KRS 532.025 was amended to include a provision for sentencing to life without possibility of parole. Prior to trial, Furnish moved to have the jury instructed about this sentencing alternative. The trial court ruled that the new alternative was not mitigating, as required in the bill authorizing the new sentence, and refused to instruct the jury.

Part of counsel's argument in the motion included Furnish's consent to waive his right to argue against *ex post facto* application of the statute. The Commonwealth argued that Furnish did not give "unqualified consent," as required in *Phon v. Commonwealth*, Ky., 17 S.W.2d 106 (2000). The Court failed to see how much more clear in his "consent" Furnish could have been. Thus, he was entitled to an LWOP instruction.

Limitations on Voir Dire

During voir dire, the trial court informed counsel that it could ask about the minimum sentence, but only on a continuum from 20 years to death because the jury would otherwise be mislead into believing that 20 years was a viable option. The Court believed that such limitations nevertheless allowed the jury to examine the full range of options.

Continued on page 28

Continued from page 27

Comment on Pre-Arrest Silence

When officers arrived to search the residence where Furnish was staying, he was handcuffed and taken to a room in the Kenton County Detention Center so that search warrants could be executed. He was specifically told he was not under arrest. He made statements such as "'I don't know what you're talking about'" and "'I got nothing else to say'" when he was asked about the victim's murder. A detective and the Commonwealth's Attorney repeated these statements to the jury.

The Court did not review the *Miranda* or custody issues, citing the "inescapable conclusion that [because] [Furnish] did not remain silent, but rather denied any knowledge of crimes" that his constitutional rights were not violated by the jury hearing his statements. *Id.*, at *9.

Other Issues

The Court considered other claims including issues surrounding continuance, judicial bias, cause and peremptory challenges, 404(b) and (c) evidence, evidence issues, and humanization of the victim, but made no new legal pronouncements.

Endnotes:

1. *Bullington v. Missouri*, 451 U.S. 430 (1981).
2. It could be argued that 9 of the 12 jurors in Sattazahn's trial also found the existence of an aggravator, but believed that death was not warranted. They did not enter written findings.
3. The dissent points out that after the jury deadlocked, Sattazahn's counsel moved that the trial court impose a life sentence. On **its own volition**, the court inquired as to whether the jury was "hopelessly deadlocked," and only after that, imposed a life sentence. *Sattazahn*, 123 S.Ct. 732, 747, n. 5. ■

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Governor Appoints Nicholas Muller as KCJC Director

FRANKFORT, KY (February 5, 2003) Governor Paul Patton and Justice Cabinet Secretary Ishmon F. Burks today announced the appointment of Nicholas P. Muller as the executive director of the Kentucky Criminal Justice Council, effective immediately. Muller replaces Kim Allen who resigned to accept a position with the Louisville Jefferson County Metro Government.

Muller's career spans nearly 35 years within both state and federal criminal justice systems. Most recently he served on the Pennsylvania Board of Probation and Parole, appointed by then Governor Tom Ridge.

"It is important for the momentum and the work of the Criminal Justice Council to continue," said Governor Patton. "I am impressed with Nicholas Muller's wealth of experience and knowledge. His enthusiasm and commitment will serve the council well as it proceeds with evaluating all aspects of the criminal justice system."

Muller received a Bachelor's Degree in Psychology in 1967 and a Master's Degree in Administration of Justice in 1975, both from the University of Louisville. Muller began his career with the Kentucky Department of Corrections as a psychologist and caseworker at the Kentucky State Reformatory. In 1969 he was appointed a United States Probation Officer for the western district of Kentucky and promoted to Supervising Probation Officer from 1973 to 1982. From 1982 to 1995 Muller served as Chief Probation Officer, Western District of Pennsylvania, United States Probation Office.

Nicholas Muller

He was appointed chairman of the Pennsylvania Board of Probation and Parole in 1995, serving two years in that capacity. Citing a desire to concentrate on interviewing and decision-making, Muller asked to assume the role of a regular board member, doing so from 1997 to 2001. He retired in 2001 and returned to Kentucky to be near to family.

"Over the years I have developed a strong sense of the honor and merit of public service," stated Muller. "This opportunity to head the Criminal Justice Council and work closely with its members allows me to continue doing what I like to do."

The Criminal Justice Council, a multi-disciplinary group comprised of 32 members, was created in 1998. It was established to study and make recommendations to the governor and legislators concerning criminal justice reform. ■

6th Circuit Review

Emily Holt

Ritchie v. Rogers
313 F.3d 948 (6th Cir. 12/18/02)

Change of Venue Motion Where Immense Pre-trial Publicity

Ritchie was convicted in Ohio state court of murdering her 4-year-old daughter. Ritchie initially reported her daughter as a missing child, and the town of Dayton rallied to her aide. After the little girl's body was found in a pool of water, Ritchie confessed. Further details emerged about the crime when Ritchie's boyfriend plead guilty to related charges and, in his plea colloquy, stated that Ritchie killed her daughter when she walked in on he and Ritchie having sex. Immense publicity surrounded the case. The *Dayton Daily News* called the murder story the #1 news story for 1995.

17 days before the trial began, defense counsel supplemented an initial motion for a change of venue with 23 pages of news articles. Ritchie argued, under an Ohio case, *State v. Herring*, 21 Ohio App.3d 18 (1984), that pretrial publicity "was so pervasive and prejudicial that an attempt to seat a jury would be a vain act." The trial court did not rule on this motion until after a jury had been seated.

Presumed Prejudice Standard: Was There a "Wave of Public Passion?"

The 6th Circuit frames the first issue it considers as follows: "Did the materials submitted by the petitioner in support of a motion for change of venue demonstrate 'presumed prejudice?'" The Court notes there is Supreme Court precedent distinguishing presumed prejudice cases (where the trial setting is inherently prejudicial) from actual prejudice cases (where review of voir dire testimony and media coverage indicates a fair trial was impossible). *Murphy v. Florida*, 421 U.S. 794, 798 (1975). In the absence of actual prejudice, a reviewing court cannot reverse without a showing of "trial atmosphere. . . utterly corrupted by press coverage." *Id.* Another way to describe the showing required for a meritorious presumed prejudice claim is the voir dire and record of publicity must reveal a "'wave of public passion' that would have made a fair trial unlikely by the jury that was empanelled as a whole." *Patton v. Yount*, 467 U.S. 1025, 1040.

The 6th Circuit concludes that the Ohio Court of Appeals, in affirming Ritchie's conviction based on this claim, correctly applied U.S. Supreme Court precedent to the facts of this case. It does not matter that the Ohio Court of Appeals opinion relied on Ohio state cases where those cases apply clearly established U.S. Supreme Court precedent. Furthermore, the Court compares the pretrial publicity in this case to that in *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999), a case where, soon after the Rodney King case acquittal, a Detroit police officer killed a suspect. *Nevers* involved much more adverse publicity and this Court upheld his convictions. There was not a "wave of public passion" present in this case.

Actual Prejudice Standard: What Happened in *Voir Dire* in Light of Publicity?

The second issue the Court considers is "did the conduct of the voir dire which resulted in a finding of no 'actual prejudice' violate the due process rights of petitioner?" This involves an examination of the voir dire testimony and the extent and nature of the media coverage. The Court notes that this issue is made very difficult by the conflict between a defendant's right to a fair and impartial jury and the 1st amendment right of the media. In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), the Court was faced with the media's right to cover a murder case involving the killing of 6 family members in a town of only 850 people. The trial court had barred the media from publishing any accounts of the defendant's confessions, and the U.S. Supreme Court vacated the "prior restraint" orders.

In the case at bar, the trial court was, by virtue of the pre-trial motion for change of venue, very aware of the extensive pretrial publicity and recognized that voir dire would be of the utmost importance. Shortly before jury selection began the local paper published an extensive article about the case, noting that the trial judge would be hard-pressed to find a fair jury. The trial court, when conducting voir dire, asked potential jurors to categorize their position on the case, with each juror rating from 1-4 their knowledge, with 1 being no familiarity and 4 being much familiarity with the case and a firmly held opinion about the defendant's guilt.

No juror categorized herself as a 1. Category 2 jurors (some familiarity with case, but no opinion as to guilt) were not voir dire'd on pre-trial publicity and were not present during that voir dire. Category 3 and 4 jurors were voir dire'd on the issue of pre-trial publicity and their opinion as to guilt. Category 3 jurors were initially voir dire'd individually but because the process was so slow, the trial court changed the voir dire to group voir dire in the middle of the process; jurors were excused if they had an opinion as to guilt and it was firmly held. Category 4 jurors were individually voir dire'd, with all of them being excused. Remaining Category 3 jurors and Cat-

Continued on page 30

Continued from page 29

egory 2 jurors were then group voir dire'd on other issues. Ritchie attacks the change from individual voir dire to group voir dire in the Category 3 jurors. She used all of her peremptory challenges and 2 Category 3 jurors, voir dire'd only as part of the group, remained on the jury. Ritchie specifically argued that those 2 jurors were contaminated by the group voir dire process.

The Court rejects this argument, citing to *Mu'Min v. Virginia*, 500 U.S. 415 (1991), where the Supreme Court held that individual voir dire was not constitutionally required and approved of a trial court's refusal to question venirepersons about the specific contents of news reports. It also points to *Irwin v. Dowd*, 366 U.S. 717, 722-723 (1961), where the Court held that jurors are not required to "be totally ignorant of the facts and issues involved" and that it does not matter that a venireperson has a preconceived notion of the defendant's guilt or innocence "if the juror can lay aside his impression or opinion and render a verdict based upon the evidence presented in court."

Smith v. Hofbauer
312 F.3d 809 (6th Cir. 12/10/02)

Conflict of Interest Where Defendant and Defendant's Attorney Both Under Indictment in Same County

Smith was charged with first-degree criminal sexual conduct and being a 4th-felony offender in Kent County, Michigan. He hired attorney Jeffrey Balgooyen to represent him. Three weeks after Smith's arraignment, Balgooyen was indicted by a Kent County grand jury of possession with intent to deliver cocaine.

On the eve of Smith's trial, Balgooyen moved to withdraw from Smith's case, on the grounds that he could not make contact with Smith and could not work out a financial arrangement. The trial court denied the request, and also reminded Smith that the prosecution had offered a good deal if Smith would plead guilty. Smith rejected the offer, went to trial, and was convicted of first –degree criminal sexual conduct.

A month later, Balgooyen plead guilt to attempted possession with intent to deliver cocaine and was sentenced to 5 months in jail and probation. This plea was before a different judge than Smith had appeared before and a different prosecutor handled the case.

A court-appointed attorney appeared with Smith at his final sentencing. Smith plead guilty to being a second-felony offender in exchange for dismissal of the fourth-felony offender and received a sentence of 25-40 years imprisonment. Smith, appealed to the Michigan Court of Appeals, arguing that Balgooyen's pending drug charge in the same county created a conflict of interest which denied Smith his right to effective assistance of counsel *per se*. Simultaneously, Smith filed a motion in the trial court to remand his case for an evidentiary hearing regarding his IAC claims. Only one of those claims involved a conflict of interest, and it was raised in the context of the failure to challenge the jury based on underrepresentation of African-Americans. The Court of Appeals rejected Smith's appeal, holding "because the judge and the prosecutor involved in counsel's case were not the same as defendant's, no actual conflict of interest has been shown." Because of this decision, the trial court denied the motion for an evidentiary hearing. The Michigan Supreme Court later affirmed the Court of Appeals, noting that Smith gave no examples of how Balgooyen lessened his defense as a result of his pending felony, and there was no evidence of an actual conflict of interest. In fact, the Court noted that Balgooyen had done a very good job representing Smith. The federal district court also agreed with this finding and rejected Smith's claim.

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the U.S. Supreme Court held that in analyzing an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984), prejudice is only presumed when the defendant shows "an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 350. In *Sullivan* the Court held that in cases involving joint representation of defendants at trial, *i.e.* one attorney representing co-defendants, automatic reversal is not required unless an objection is made at trial. If no objection was made, the defendant, in pursing a *Strickland* claim, must prove (1) an actual conflict of interest (2) adversely affecting his attorney's performance. *Sullivan*, 446 U.S. at 348.

***Mickens* Not Clearly Established Federal Law as to Extension of *Sullivan* to Cases Not Involving Joint Representation**

Specifically at issue in the case at bar is the impact of *Mickens v. Taylor*, 122 S.Ct. 1237, 1239 (2002). In *Mickens*, the Court examined the petitioner's burden of proof under *Sullivan* when the trial court did not inquire into a potential conflict of interest of which it knew or should have known. *Id.*, 122 S.Ct. at 1245. The Court held that the *Sullivan* showing was required. *Mickens* involved successive representation. The Court specifically held that it was not extending *Sullivan* to cases of successive representation or cases of conflict based upon anything but joint representation. "Whether Sullivan should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question." *Mickens*, 122 S.Ct. at 1246.

Under *Williams v. Taylor*, 529 U.S. 362, 412 (2000), *Mickens*, decided in 2002, was not "clearly established Federal law, as determined by the Supreme Court of the United States." The Michigan Supreme Court decided this case in 1995, way before *Mickens* was decided. Furthermore, *Mickens* expressly stated that whether *Sullivan* should be extended was not decided in that opinion, so it is still not clearly established federal law.

Dissent: Smith Entitled to Evidentiary Hearing

District Judge Oberdorfer, sitting on this case, concurs that Smith is not entitled to a writ, but would grant him an evidentiary hearing in district court. Oberdorfer believes that *Sullivan* is not limited to cases of joint representation conflicts, but applies to all conflict cases. Furthermore Oberdorfer opines that the conflict in this case is even more egregious than the conflict in *Sullivan*. He is especially troubled by Balgooyen's failure to challenge the jury and his role in the rejection of the prosecution's offer on a guilty plea. He cites to *Greer v. Mitchell*¸264 F.3d 663 (6th Cir. 2001), which held that when a petitioner has used diligence in attempting to obtain an evidentiary hearing in state court, but is denied one, he is entitled to one so as to create a factual record.

Spytma v. Howes
313 F.3d 363 (6th Cir. 12/4/02)

15-year-old Spytma, and a 12-year-old friend, were charged with murdering, assaulting, and sexually assaulting a woman who lived in their neighborhood. Both juveniles were transferred to adult court for trial, and following separate bench trials, both were convicted of murder and sentenced to LWOP.

On federal habeas review, the magistrate recommended granting conditional habeas relief because Spytma's jury waiver was not knowingly and intelligently given. The magistrate rejected issues regarding whether his transfer to adult court was lawful and whether he received ineffective assistance of counsel. Both parties objected to the magistrate's report and recommendation. The district court adopted the magistrate's recommendations on all issues except the court found that the jury waiver was knowingly and voluntary.

Post-Conviction Claim is Pending Between Appeals at the State Level For Purposes of Tolling the 1-Year AEDPA Statute of Limitations

The 6th Circuit first addressed Michigan's claim that the one-year statute of limitations bars the bringing of this habeas action. Specifically the state argues that the time during which petitioner's post-conviction claims were pending in the state court, between a lower court's decision and the filing of a notice of appeal, does not toll the statute of limitations. The Court quickly rejects this claim, noting that in *Carey v. Saffold*, 122 S.Ct. 2134, 2138 (2002), the Supreme Court held that a claim is pending the entire term of state court review, including the time between one court's judgment and the filing of an appeal to a higher state court.

Juvenile's Due Process Rights Not Violated By Poor Juvenile Transfer Hearing

As to the transfer to adult court, Spytma claims that his due process rights were violated by the juvenile court's failure to make required state-required findings of fact. The Court notes that in *Kent v. U.S.*, 383 U.S. 541 (1966) that while the Supreme Court did find that juveniles are entitled to some minimum procedural safeguards, the Court failed to specify the exact nature of the due process requirements at a transfer hearing. Michigan, at the time, required a 2-step process where the court first determined if there was probable cause to believe the juvenile committed a felony offense and then determined if the interests of the juvenile and the interests of the public would best be served by granting a waiver of jurisdiction to the adult court. The following criteria was to be considered: prior record and character of child, physical and mental maturity, and pattern of leaving; seriousness of the offense; where the offense is part of a repetitive pattern of offenses which would lead to the conclusion the child is beyond rehabilitation under juvenile programs; the relative suitability of programs available to the child; and whether it is in the best interests of public welfare and protection of the public that the child stand trial as an adult offender. The juvenile court judge was required to fully investigate all of the criteria and make written findings.

In the case at bar, Spytma's transfer hearing focused almost exclusively on the issue of probable cause. Only 4 pages of the 61-page transcript involved the second determination. No witnesses testified in this phase and the focus of the hearing was on how serious this crime was. The court made an observation that no facilities would serve Spytma and bound him over to the circuit court. In fact, an evidentiary hearing in the case established that there were some programs in Michigan specifically designed to help juvenile murderers. No specific findings, as required, where made by the judge in this case.

In determining whether the failure to make required findings under state law on the record violates Spytma's constitutional due process rights, the Court looks to another 6th Circuit case, *Deel v. Jago*, 967 F.2d 1079 (6th Cir. 1992). *Deel* involved facts very similar to the case at bar. The *Deel* Court, however, ultimately concluded that while the hearing in that case was "open to serious criticism," the petitioner's due process rights were not violated. Likewise, in the case at bar, while the Court recognizes the deficiencies in the juvenile court's judge's actions, minimum due process requirements were met, *i.e.* Spytma had an attorney and the hearing was on the record. Furthermore the Court notes that the case is subject to harmless error analysis and any "reasonable" judge would have ordered the transfer due to the brutality of the crime.

No Relief on Jury Waiver Claim Where Defendant Did Sign Consent Form

As to Spytma's jury waiver claim, the Court looks to *U.S. v. Martin*, 704 F.2d 267, 272 (6th Cir. 1983). The waiver should be in writing; the government should consent to the waiver; trial court should consent to the waiver; and the defendant's waiver should be made knowingly, intelligently, and voluntarily. The latter factor requires that that the defendant pos-

Continued on page 32

Continued from page 31

sess a minimum amount of knowledge concerning his jury trial right and the mental capacity to understand the implications of waiving that right. He should know that a jury is made of 12 members of the community, knows he participates in jury selection, and knows the verdict of the jury must be unanimous, and the judge will alone decide guilt or innocence if he waives the jury trial right. An on-the-record colloquy between the court and the defendant is recommended, but is not a constitutional requirement.

Spytma did sign a jury waiver form. However the only evidence of the circumstances surrounding the finding of the form is the signed form. There was no on-the-record colloquy; the court record just says it was signed in open court. Spytma's attorney does not recall consulting with petitioner about the waiver, but did testify at an evidentiary hearing that because of the brutality of the crime, he is sure he would have advised a bench trial. Spytma testified at an evidentiary hearing that he did not understand the right and just did what the lawyer told him to do. He also testified that he signed the form in jail, not in open court. The only other witness to the jury waiver is the petitioner's mother who was deceased at the time of the evidentiary hearing.

Compliance with the signing of a waiver creates a presumption that the waiver is voluntary, knowing, and intelligent. *U.S. v. Sammons*, 918 F.2d 592, 597 (6th Cir. 1990). Furthermore, the Court notes that it must give high deference to the Michigan state court's findings of a valid jury waiver. The only evidence that Spytma asserts to support his argument is his own testimony at the prior evidentiary hearing. This is not enough to rebut the Michigan courts' findings.

Patterson v. Haskins
2003 WL 118277 (6th Cir. 1/15/03)

In this case, the 6th Circuit reverses the district court's denial of a writ of habeas corpus, and grants a writ based on a defective jury instruction that violated Patterson's due process rights.

Writ of Habeas Corpus Granted Where Jury Instruction Did Not Include Element of Proximate Cause

Mr. Patterson was watching his ill daughter, Lacey, while his wife was at work. Lacey became more and more sick. Eventually Mrs. Patterson came home, and at around 3:30 a.m. on December 18, 1994, the parents placed Lacey on the couch and went to their bedroom. Mrs. Patterson soon heard Lacey moaning and breathing heavily. Lacey said her stomach hurt. When Patterson checked her stomach, he found it was very hard. At 3:50 a.m., they called Taylor and explained her symptoms, including that her eyes were rolling back. Taylor told them to call 911 immediately, and he rushed to the house.

At 4:11 a.m., Mrs. Patterson called 911, and reported that Lacey was unconscious. Attempts to resuscitate Lacey in the ambulance were unsuccessful. An ER nurse at the hospital observed that Lacey was "lifeless" and "blue." When the nurse removed Lacey's gown she observed multiple contusions all over her body. Some were shades of brown and others were purple, indicated that the bruises were in different stages of healing. None of the bruises, however, were new. Mr. Patterson told her that Lacey "fell down the stairs two weeks ago." Lacey died soon after arriving at the hospital.

Mr. Patterson denied the bruising on Lacey's body. Mrs. Patterson speculated that the CPR caused the bruises and said that when she had seen Lacey's body 2 days earlier there were no bruises. She did say Lacey fell down the stairs a week ago and that she hurt her eye when "flinging around a Barbie doll."

The forensic pathologist essentially said that the bruises were of different ages, and that Lacey's illness, while caused by blunt force trauma to her abdomen, which resulted to the fatal bursting of her bowel, was not necessarily caused by another person harming her.

Mr. and Mrs. Patterson were tried jointly; Mr. Patterson was indicted for murder, but was convicted of the lesser-included offense of involuntary manslaughter caused by child endangerment. Mrs. Patterson was indicted for felony child endangerment, and convicted of misdemeanor child endangerment.

On federal habeas review, the issues before the court are whether Patterson's due process rights were violated when the involuntary manslaughter jury instruction failed to include the element of proximate cause and whether there was sufficient evidence to convict him of involuntary manslaughter.

Ohio statutes define involuntary manslaughter as "causing the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony." Ohio Rev. Code § 2903.04(A). The proximate cause element is designed not to penalize defendants whose conduct "may have caused death in the sense that he set in motion events which culminated in her death, which therefore would not have occurred in the absence of that conduct" but to penalize a defendant's conduct only when the result of his conduct was "natural, logical, and foreseeable." This question is whether a reasonable person could have expected the result that did occur to occur? "The defendant will be held responsible for those foreseeable results which are known to be, or should be known to be, within the scope of the risk created by his conduct. Here, that means that death reasonably could be anticipated by an ordinarily prudent person as likely to result under these or similar circumstances." *State v. Losey*, 491 N.E.2d 379, 382 (Ohio Ct.App. 1985).

The jury instructions given to the jury are not part of the record in this case so the Court looks to the transcript of oral

instructions given by the judge to the jury. Interestingly, Ohio has involuntary manslaughter based on aggravated assault and involuntary manslaughter based on child endangering, as well as involuntary manslaughter based on assault. While the trial court did instruct the jury on proximate cause in the jury instruction on involuntary manslaughter caused by aggravated assault, it did not include that element in the instruction on involuntary manslaughter caused by child endangerment. In fact, all the jury instruction said was to convict Patterson of involuntary manslaughter based on child endangering, the jury had to find beyond a reasonable doubt that Patterson "recklessly abused Lacey Patterson." There is no requirement in the instruction that Patterson "caused the death of Lacey Patterson as a proximate result of committing or attempting to commit [the predicate act]." Following the instruction for involuntary manslaughter based on child endangerment was instruction for another lesser-included offense, involuntary manslaughter based on assault. This instruction did include the proximate cause element.

In addressing this claim, the Ohio Court of Appeals held that the instruction for involuntary manslaughter based on child endangerment was sufficient because it was "bookended" by instructions that did include the proximate cause element. Unfortunately, this analysis neglects a critical holding of the U.S. Supreme Court that "the Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *U.S. v. Gaudin*, 515 U.S. 506, 522-523 (1995). The Ohio Court of Appeals did not follow clearly established Supreme Court precedent, *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000), but created a new standard that requires instructions to only be "sufficiently detailed" to pass constitutional muster.

The omission of an element of an offense in a jury instruction is subject to harmless error review. *Neder v. U.S.*, 527 U.S. 1, 10 (1999). This error was not harmless. The record indicates that the jury during deliberations asked the court to clarify "involuntary manslaughter." The judge simply referred them back to the jury instructions, which, of course, was the subject of their confusion. Furthermore the "bookend" argument advanced by the Ohio Court of Appeals, and the State on habeas review, actually supports an inference that this may have confused the jury even more. They probably thought this missing elements was what distinguished involuntary manslaughter based on child endangerment from the other types of involuntary manslaughter. Finally, the proof in this case was simply not overwhelming.

No Procedural Default on Claim Where State Court did Rule on Merits of Claim

The state argues that this claim is procedurally defaulted. Patterson's trial attorney did not object to the jury instruction and this issue was not raised on direct appeal. After retaining new appellate counsel, Patterson raised this issue in an application to reopen the appeal that was filed in the Ohio Court of Appeals. The Ohio Court of Appeals rejected this claim, not on a state procedural bar [which is required for a claim to be procedurally defaulted for federal review, *Harris v. Reed*, 489 U.S. 255, 260 (1989)], but on the merits of the claim. It simply ruled that there was no error committed by the trial court in the giving of instructions. This claim was not procedurally defaulted.

Short Takes:

***U.S. v. Cole*, 2003 WL 94362 (6th Cir. 1/13/03):** In this case the 6th Circuit simply re-affirms the basic principle that statements volunteered by a criminal defendant are not subject to *Miranda v. Arizona*, 384 U.S. 436 (1966). Cole repeatedly stated a gun was his, but that he had not been carrying it, while he was being booked at the police station. "Volunteered statements of any kind are not barred by the 5th amendment and their admissibility is not affected" by *Miranda*. *Miranda*, 384 U.S. at 478. Furthermore, the fact that Cole's first statement to police upon his arrest was in violation of *Miranda* (the officer asked Cole who owned the gun without reading him *Miranda* rights) does not mean that subsequent, similar statements are so tainted they are inadmissible. *Oregon v. Elstad*, 470 U.S. 298, 309 (1985).

***U.S. v. Galloway*, 2003 WL 131846 (6th Cir. 1/17/03):** Galloway was arrested at the Cincinnati-Northern Kentucky airport for importation and possession of ecstasy. The Court first holds that *Miranda v. Arizona*, 384 U.S. 436 (1966), is inapplicable to statements made to U.S. Customs Agents because a secondary customs inspection a routine, non-custodial detention. The Court also rejects a claim of prosecutorial misconduct. At issue in the case was whether Cole's co-defendant, who testified against him at trial in exchange for leniency, was a mule for Cole or whether it was her ecstasy. It was improper for the prosecutor to tell the jury, "I have tried several cases myself where we see the mule term, and we have a defendant who claims he or she is a mule, and I have had several cases where, kind of like the bodyguard scenario, where the individual responsible for the drugs travels with the individual carrying the drugs." *Gall v. Parker*, 231 F.3d 265, 312 (6th Cir. 2000), *cert. denied*, 533 U.S. 941 (2000). However, the statement was not flagrant. *U.S. v. Leon*, 534 F.2d 667, 679 (6th Cir. 1976). Judge Clay writes an excellent dissent. He would reverse on the prosecutorial misconduct claim in that the evidence was not overwhelming, and there was really no curative admonition. Judge Clay is particularly suspicious of Kirsch's "highly motivated testimony." ■

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PLAIN VIEW . . .

Ernie Lewis, Public Advocate

Kotila v. Commonwealth
2002 WL 31887769
Ky., December 19, 2002
(Not Yet Final)

Ron Kotila was in the parking lot of a Somerset Wal-Mart when an off-duty police officer, David Nelson, drove onto the lot with his wife. Nelson saw Kotila place something into or remove something out of a partially opened window. Nelson had his wife contact the manager of Wal-Mart, and the police, because he suspected Kotila of shoplifting. Kotila went back into Wal-Mart, and came back out again. The officers had discovered that the plates on the car did not match. Nelson confronted Kotila with 2 other officers. Kotila was told that he was suspected of shoplifting and he was frisked. The frisk produced nothing of interest. A bag taken from the car by either Kotila or the police revealed "2 lithium batteries and six forty-eight count boxes of antihistamine tablets." Kotila or Newsome, his companion, then consented to a search of his car. The police found that an outstanding warrant existed for Kotila's arrest. A search of the car revealed methamphetamine, chemicals, a gun, and other meth-producing equipment. Kotila challenged the admissibility of the evidence with a motion to suppress, which was denied.

The Kentucky Supreme Court, which otherwise reversed the conviction, held that the search did not violate the Fourth Amendment. The Court agreed that the officers had seized Kotila outside of the WalMart. The Court found, however, that under *Terry v. Ohio*, 392 U.S. 1 (1968) and *Baker v. Commonwealth*, Ky., 5 S.W. 3d 142 (1999), there was a reasonable, articulable suspicion. The Court relied upon the fact that Kotila had been seen putting something into the car, that he was possibly intoxicated, and that his license plate did not match the vehicle. The Court relied upon the officer's stating at the evidentiary hearing that "I'd been related a complaint by another officer" and when asked about the cross tag he stated, "Well, that's reasonable suspicion in itself that something was wrong." Under these circumstances, the Court held that the officer was justified in stopping Kotila.

The officers were limited to finding out Kotila's identity and asking about the suspicious behavior, *i.e.* the intoxication and shoplifting. It was at that point that Kotila gave his consent, which resulted in items being found supportive of probable cause. The consent was not tainted by an illegal stop due to the seizure being justified by a reasonable suspicion. "Because the officer making the initial stop for possible shoplifting did have reasonable and articulable suspicion, the seizure was not a violation of Appellant's rights. The subsequent search of the vehicle, though unsupported by the shoplifting allegations, was conducted on the consent of either Appellant or Ms. Newhouse, or both, and therefore required neither reasonable suspicion, probable cause, nor a warrant. All of the policing methods employed by the officers at Wal-Mart were legal. Therefore, the evidence produced by the search of the vehicle was in no way tainted, and was correctly admitted as evidence at trial."

Coleman v. Commonwealth
2002 WL 31887067
Ky., December 19, 2002
(Not Yet Final)

This Kentucky Supreme Court opinion written by Justice Keller is exceptionally important. This case arose when Louisville Probation and Parole Officer Tracy Goins along with several other probation and parole officers and several Louisville police officers went to Coleman's home to "verify [sic] his residence." Although Coleman had tested positive for marijuana earlier, that was not the purpose of the home visit. They knocked on his door, asked to come in, walked into the apartment, smelled marijuana, asked Coleman where his bedroom was, and then searched his bedroom, finding drugs and a gun. The entry into the home was made without a warrant of any kind. After arrest and indictment, Coleman moved to suppress the evidence. This was denied by the trial court in a "brief order" made without findings of fact or conclusions of law. Coleman entered a conditional guilty plea. In a 4-3 opinion, the Kentucky Supreme Court reversed the conviction.

The question posed by the majority was as follows: "did Officer Goin's initial entry into the home without permission constitute an unreasonable search?" The Court answered that the search was indeed unreasonable.

The Court reaffirms that the "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" The Court rejects the trial court's distinction that the entry was justified because the entry occurred in connection with parole regulations. Instead, the Court states that "although Appellant may have been required by the terms of his parole to permit his parole officer to visit him at his residence, Officer Goins had no lawful basis to enter Appellant's home after Appellant refused her entry."

This opinion is significant because it states clearly that a person on parole or probation has not been stripped of his

Fourth Amendment rights by that status. "We believe that we would completely abrogate a parolee's constitutional protections against unreasonable searches and seizures if we were to endorse the Commonwealth's view that, regardless of whether a parole officer has reasonable suspicion that the parolee has violated the terms and conditions of his parole, the 'home visit' parole condition authorizes a parole officer to enter a parolee's residence for the purpose of searching for indicia of residency. After all, what is the purpose of a policy on warrantless searches if Probation and Parole officers can rummage through a supervisee's belongings under the rubric of an 'at-home visit' without any suspicion—reasonable or otherwise—of wrongdoing on the part of the supervisee?"

The Court held that a visit into the home by a probation and parole officer is a search and not merely a visit. The Court analogized the visit to an administrative inspection, citing *Camara v. Municipal Court of City and County of San Fransisco*, 387 U.S. 523 (1967). The search is a "special needs" search requiring a reasonable and articulable suspicion. *United States v. Knights*, 534 U.S. 112 (2001). The Court noted that the Justice Cabinet and Department of Corrections had adopted a policy stating that "[I]f reasonable suspicion exists to believe that an offender is violating a condition of supervision or the officer has possession of evidence of a violation of the terms and conditions of supervision, an officer may search without a warrant." The Court found that the officer had not searched under a reasonable suspicion regarding the defendant's having given erroneous residency information or was otherwise violating the conditions of parole. "Because we find no other exception to the warrant requirement, we find that Officer Goin's entry into Appellant's home was unlawful, and we hold that the trial court should have suppressed the evidence that was discovered during the subsequent search as well as Appellant's statements relating to the contraband discovered."

Justice Graves' dissent was joined by Justice Lambert and Justice Wintersheimer. Justice Graves stressed that Coleman had tested positive for marijuana, and that this was a violation of his parole conditions. This constituted a reasonable suspicion for the warrantless special needs entry. When the officer went to Coleman's home to verify his residency, he was "justified in entering the residence because verification of residence reasonably entailed entering the premises to observe indicia of Appellant's living there for some time." Once inside the residence, the officer smelled marijuana, which "furnished a sufficient legal and factual basis for the parole officer to conduct a warrantless search." "Since Appellant consented to warrantless searches as a condition of parole, he should have reasonably expected a warrantless search when he engaged in conduct that gave rise to a reasonable suspicion."

Whitmore v. Commonwealth
2002 WL 31819655
Ky., November 21, 2002
(Not Yet Final)

The police were serving a warrant in Jefferson County at a residence. After entering, they saw Whitmore on the couch. According to the Court, he "fit the description of an individual sought for questioning in connection with the assault." He was apparently not the person named in the warrant. He "fidgeted around" and turned away from the officer. The officer asked Whitmore his name, and he gave an alias. The officer was a police liason in a housing project, where the residence was located, and had been to the apartment. The officer asked Whitmore to stand and take his hands out of his pocket. When he refused to do so, the officer patted him down to search for weapons; upon feeling a bulge, and recognizing it as containing a bag of crack cocaine, the officer arrested Whitmore and seized a plastic bag containing 20-25 pieces of crack cocaine. Whitmore moved to suppress the evidence, but was overruled by the trial court, who found that the evidence was admissible under the "plain feel" rule. Whitmore was convicted at trial and sentenced to 6 years on trafficking in cocaine.

The Court of Appeals reversed the conviction, citing *Commonwealth v. Crowder*, Ky., 884 S.W. 2d 649 (1994). The Court held that "a simple bulge in the pocket of the jacket could not qualify as being immediately apparent contraband as required under the
'plain feel' rule." The Supreme Court granted discretionary review and reversed the decision of the Court of Appeals.

The Court first held that the pat down of Whitmore had been a legal *Terry* search. The Court found that the officer had a reasonable suspicion that Whitmore was armed based upon the fact that the officer had seen weapons at the apartment before, that he fidgeted and turned away upon being confronted, that he had given a false name and refused to remove his hand from his pocket. "Considering the totality of the circumstances, the police officer had sufficient facts to form a reasonable belief that Whitmore was armed and that she was entitled to conduct a protective pat down search."

The Court then held that when the officer was conducting a lawful pat down search, that she had a right to seize the cocaine based upon her recognition of it as being contraband. The Court stated that "evidence can be properly seized under the plain feel doctrine unless the officer doing the pat down manipulated the object in some way before determining it to be contraband or if the contraband is in a container, thus, making its identity not immediately apparent."

United States v. Miller
314 F.3d 265 (6th Cir. 2002)

Tony Haas contacted Tim Fee, the Jackson County Sheriff,

Continued on page 36

Continued from page 35

on July 25, 2000, and told him that Carl Ray Miller had an indoor marijuana growing operation in his new mobile home. Haas stated that he had been at the mobile home on several occasions when he did electrical and plumbing work for Miller. Fee took Haas to the mobile home and checked mileage, direction, and ownership of the home. He filled out an affidavit and obtained a search warrant. The search revealed 304 marijuana plants, 1 pound of processed marijuana, and a variety of accoutrements to a marijuana growing operation. He was arrested and charged with a variety of federal drug crimes. His motion to suppress was recommended to be granted by the US Magistrate Judge, but the District Judge denied the motion. The Sixth Circuit affirmed in a decision written by Judge McKinley, and joined by Judges Siler and Moore.

The Court rejected Miller's primary position that the affidavit written by Sheriff Fee was insufficient to support probable cause because the reliability and veracity of Haas was not demonstrated. Miller argued that "a named informant who has never before given information to the police is tantamount to an anonymous tipster," requiring "substantial police corroboration." The Court viewed Haas not as an anonymous tipster because he allowed himself to be named in the affidavit and therefore "was subject to prosecution if this information was fabricated."

The Court also found that the "affidavit provides a substantial basis to conclude that a search would uncover evidence of wrongdoing." Haas had been in Miller's home less than a day prior to the issuance of the search warrant and he had observed the marijuana growing operation. The Court also found that Haas' reliability and veracity had been demonstrated. The Court noted that Haas had explained how he obtained the information, gave dates and times he had been at the mobile home, that he knew directions to the mobile home, that he knew marijuana was in the house, that he knew the marijuana was growing in 3 bedrooms, and that it was being dried.

Judge Moore wrote a concurring opinion, noting that this was a close case, and that were "it not for this court's en banc opinion in *United States v. Allen*, 211 F. 3d 970 (6th Cir. 2000) (en banc), and its endorsement of *United States v. Pelham*, 801 F. 2d 875 (6th Cir. 1986), I would conclude that the affidavit was insufficient. Bound as I am by *Allen* and *Pelham*, I concur."

United States v. Carpenter
2003 WL 124203 (6th Cir. 2002)

Lt. Crumley of the Hawkins County, Tennessee Sheriffs Department was flying over the home of Lonnie and Sheila Carpenter when he looked down and saw a marijuana patch, a road and path leading from Carpenter's back door to the patch, and Carpenter and his son walking from the patch to the trailer. Crumley gave that information to officers on the ground, who asked Carpenter for consent to search the trailer. Carpenter refused. One of the officers, Captain Ronnie Lawson, then obtained a search warrant, the execution of which resulted in the finding of marijuana. The Carpenters were indicted for manufacturing marijuana. Their suppression motion was denied by the district court.

The affidavit in support of the search warrant read that upon "information I received from Lt. Crumley, there is a road connecting the above described residence to the Marijuana Plants. Having personal knowledge that Lt. Crumley is certified in the identification of Marijuana I feel there is probable cause to search the said residence and property and seize any illegal contraband found."

The Sixth Circuit, in an opinion by Judge McKinley and joined by Judge Siler, found that the affidavit was insufficient to demonstrate probable cause. It "fails to set forth the facts supporting that belief. There was no mention of the beaten paths leading to the backdoor of the residence. There was no reference to any Defendant being near the marijuana. There was no reference to any knowledge that the residence had been used in any manner to facilitate the manufacture of marijuana or that any drugs or drug paraphernalia had been seen in or around the residence." However, the Court found that the exclusionary rule would not be applied based upon the good faith exception. "Without question, the officers knew additional facts which would have been sufficient to establish probable cause had they been included in the affidavit. Captain Lawson's only mistake was in failing to articulate in the affidavit the details which were known. Although we find the affidavit insufficient, we conclude that the officers reasonably relied upon the search warrant when issued. Thus, the *Leon* 'good faith' exception applies here and the Defendants' motions to suppress were properly denied."

Judge Moore dissented. She would have held that a *Leon* exception existed, that "Captain Lawson's affidavit was 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" Further, Judge Moore objected to using officers' knowledge not placed in the affidavit to be supportive of the probable cause determination. "This rule undermines the very purpose of the warrant requirement, as it enables law enforcement officials to bypass the judiciary altogether…I am not at all convinced that the police officers' knowledge of additional facts that they could have presented to the court demonstrates a good faith reliance on the warrant. To my mind, their additional knowledge shows their awareness of the warrant's deficiencies."

United States v. Copeland
304 F.3d 533 (6th Cir. 2002)

At 1:00 a.m. on June 30, 1999, 2 Michigan State Troopers saw Copeland and Hartwell sitting in a car on the wrong side of the road at a 45-degree angle. Copeland pulled away from the curb and began to drive at a legal speed. The officers fol-

lowed and eventually pulled Copeland over. Smelling alcohol and seeing it, the officers arrested Copeland and Hartwell. Evidence seized incident to the arrest was used to charge the defendants with conspiracy to distribute a controlled substance. The defendants' suppression motion was denied.

The Sixth Circuit affirmed the denial of the suppression motion in an opinion written by Judge Cole and joined by Judges Gilman and Mills. The Court analyzed the facts under *Whren v. United States*, 517 U.S. 806 (1996). The Court summarized Sixth Circuit law interpreting *Whren*, saying that the Court had found that a police officer may stop a defendant based upon a moving violation, based upon inappropriate registration requirements, and finally based upon violation of a parking statute. While the district court had found that "a parking violation, by itself, does not constitute adequate grounds to stop a vehicle because it is not a traffic violation," the Sixth Circuit disagreed. "It is clear, then, that an officer can effect a stop based upon a driver's failure to comply with Michigan's parking regulations, even if the vehicle is no longer parked. Thus, an antecedent parking violation can conceivably form the basis for probable cause to stop a vehicle."

SHORT VIEW . . .

1. *Graham v. State*, 807 A.2d 75 (Md.App.,2002). A police officer cannot conduct a consensual encounter on the street and then frisk the person for his own safety, turning a consensual encounter into a *Terry* frisk. The State had asserted that it had a right to conduct a "field interview" and frisk the person being interviewed for protection without a reasonable suspicion. The Maryland Court of Special Appeals called the concept of a "field interview" to be a "treacherous concept" and rejected it. The Court also expressed doubt about whether a "consensual frisk" can ever be truly consensual.
2. *State v. Nordlund*, 53 P.3d 520 (Wash.App. Div. 2,2002). Two affidavits in support of a petition to search a computer did not supply a sufficient nexus between the crime and the place to be searched; rather, the search more resembled a fishing expedition. Here, the police sought to have the defendant's computer searched to provide information about where he was on the day of a rape, and further because sex offenders collect pornography on their computers and this information could supply evidence of intent. The Court declared that a computer is the "modern day repository of a man's records, reflections, and conversations," requiring scrupulous scrutiny when a petition is presented to search the computer.
3. *United States v. Yousif*, 308 F.3d 820 (8th Cir. 2002). Leaving a highway following a sign announcing a checkpoint does not provide a basis for the police to stop the driver. Further, consent to search that occurs after the stopping will seldom be valid consent. In this case, the police had set up a "ruse checkpoint" on I-44 where they had no checkpoint, but stopped all cars exiting the highway following the sign announcing the checkpoint. The Court noted that "the mere fact that some vehicles took the exit under such circumstances does not, in our opinion, create individualized reasonable suspicion of illegal activity as to every one of [the drivers]. Indeed, as the government's evidence indicated, while some drivers may have wanted to avoid being caught for drug trafficking, many more took the exit for wholly innocent reasons—such as wanting to avoid the inconvenience and delay of being stopped or because it was part of their intended route."
4. *People v. Lidster*, 779 N.E.2d 855 (Ill., 2002). The police set up a roadblock to investigate a week-old hit-and-run, searching for witnesses. Lidster was arrested after being stopped at the roadblock, at which time he was discovered to be under the influence of alcohol. The Illinois Supreme Court threw out the roadblock as unconstitutional relying upon *Indianapolis, Ind. v. Edmond*, 431 U.S. 32 (2000).
5. *Estep v. Dallas County*, 310 F.3d 353 (5th Cir. 2002). In the "it-takes-chutzpah" category, the police asserted that they had a right to search the defendant's truck, which they had stopped for speeding, based upon his having a National Rifle Association sticker on the back of his truck. The 5th Circuit rejected this factor as well as the presence of camouflage gear in the truck as being insufficient to establish probable cause to search the vehicle.
6. *State v. Steelman*, 2002 WL 31398545 (Tex. Crim. App. 10/23/02) (Not to be published). The police received an anonymous tip that a person was dealing drugs from his house. When they went to the house, they smelled burnt marijuana. The defendant, who left the house when the police knocked, sought to reenter the house and obtain identification. The police followed him, asked for permission to search the house (which was refused), and then searched later pursuant to a warrant. The Texas Court of Criminal Appeals held that this violated the defendant's Fourth Amendment rights. The anonymous tip did not give the police probable cause, nor did the smelling of the odor of marijuana. Since 4 individuals were at the house, the police had no probable cause to arrest 1 of them. "The officers in this case had no idea who was smoking or possessing marijuana, and they certainly had no particular reason to believe that Steelman was smoking or possessing marijuana."
7. *Murphy v. Commonwealth*, 570 S.E.2d 836 (Va. 2002). The feeling of a baggie during a weapons frisk is not sufficient to search the person or seize the baggie, according to the Virginia Supreme Court. Under *Minnesota v. Dickerson*, 508 U.S. 366 (1993), in order to come under the plain feel doctrine, it must be immediately apparent from the frisk that the item being felt is contraband.
8. *State v. Dunn*, 653 N.W.2d 688 (N.D.,2002). The police violated the Fourth Amendment when they investigated

Continued on page 38

Continued from page 37

a loud party and searched the pockets of a jacket they found outside the house where the party was being held. The Court found that the jacket had not been abandoned; rather, the police should have inquired regarding the ownership of the jacket prior to going through the pockets of the jacket.

9. *State v. Wallace*, 812 A.2d 291 (Md., 2002). While the alerting by a narcotics dog to the outside of a car provides probable cause to search the car, it does not constitute probable cause to search all of the passengers in the car.
10. *People v. Cox*, 2002 WL 31725205 (Ill. 2002) (Not to be published). The police violated the Fourth Amendment by taking 15 minutes to write a traffic ticket, thereby allowing for a narcotics dog to arrive and sniff the exterior of the car. Here, the defendant was stopped for a minor traffic violation (a rear registration light was out). The narcotics dog arrived 15 minutes after the stop, while the officer was still writing the ticket, and alerted. A search of the car and the defendant revealed marijuana. "While we will not impose a rigid time limitation on the duration of a traffic stop, we are concerned with the duration of the traffic stop in the present case..[T]he dog-sniff test of defendant's vehicle was impermissible. Officer McCormick did not have 'specific and articulable facts' justifying the call to Deputy Zola for assistance and the subsequent dog-sniff test of defendant's vehicle. Further, defendant's detention, considered in light of the scope and purpose of the traffic stop, was overly long."
11. *People v. Stehman*, 2002 WL 31839220 (Ill. 2002) (Not to be published). Once a person gets out of a car, the *Belton* rule no longer applies, and the police may not search the car incident to a lawful arrest, according to the Illinois Supreme Court. The Court states that "where the police first confront the arrestee outside of his vehicle, the ambiguity which *Belton* seeks to avoid no longer exists, and the rationale for its bright-line rule is absent. Rather, where searches occur beyond the scope of *Belton*'s bright-line intent, the factors in *Chimel* of officer safety and evidence preservation must be present in order for a search incident to arrest to be lawful." ■

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Recruitment

The Kentucky Department of Public Advocacy is recruiting for staff attorneys to represent the indigent citizens of the Commonwealth of Kentucky for the following locations:

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The Constitutional Right to Counsel

Section 11, **Kentucky Constitution** (1891)	***Sixth Amendment,*** **United States Constitution** (1791)
In all criminal prosecutions, the accused has the right to be heard by himself and counsel….	In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense.

Frankly Speaking about *Franks* Hearings: Reviewing the Reliability of Search Warrant Affidavits

Robert Stephens

Consider the following scenario. A client, meeting with his defense attorney, looks over the discovery materials and, upon coming to the search warrant affidavit says, "Hey, this address on here isn't my house! The place the informant mentioned isn't my place at all." The attorney knows he can challenge the "four-corners" of the search warrant affidavit if it does not meet the probable cause requirement. He remembers a case about challenging the veracity of the affiant who got the search warrant issued, but has not read it in a while. What was that case; *Franks*?

There is no greater mechanism for the protection of individual rights under the Fourth Amendment than the requirement of a search warrant, reviewed by an impartial magistrate, before agents of the government can search property of a would be criminal defendant. The reliability of this protective measure depends upon two independent factors: one, the real, impartial testing by the magistrate of the governmental agent's basis for establishing probable cause; and two, the truthfulness of the governmental affiant's basis for establishing probable cause. What tool exists to permit review of the search warrant process, as to each of the factors of reliability? Review of the four-corners of the affidavit, to see if the magistrate should have found probable cause, is always permitted. But, can one look deeper, into whether the affiant police officer or other governmental agent acted with deliberate falsity or with reckless disregard for the truthfulness of the information affirmed to in seeking the search warrant? This deeper review, of the truthfulness and dependability of the affirmed "facts" which were the basis for establishing probable cause, is guaranteed by the United States Constitution through a *Franks* hearing, so called because established by the United States Supreme Court in *Franks v. Delaware*, 438 U.S. 154 (1978). *Franks* hearings are not easy to obtain, but at least they provide a device for reviewing the affiant's veracity in the *ex parte* request for a search warrant.

Mechanics of a *Franks* Hearing

The warrant clause of the Fourth Amendment is the "bulwark of Fourth Amendment protection." *Franks*, 164. In determining that a deeper review, of the veracity of the warrant affiant's sworn facts and circumstances, was necessary, the Court, in fact, based its rationale on the language of the warrant clause. After all, the warrant clause's requirement for a finding of probable cause implies a truthful factual showing. *Id.*, 164-65. Truthful, at least, "in the sense that the information put forth is believed or appropriately accepted by the affiant as true." *Id.*, 165. In deciding whether to approve a search warrant, the magistrate independently reviews the warrant affidavit's listed facts and circumstances to see if the probable cause requirement has been met. *Id.* The Court said a further review at times was necessary "[b]ecause it is the magistrate who must determine independently whether there is probable cause,…[and] it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or reckless[sic] false statement, were to stand beyond impeachment." *Id.* The Court could conceive of "no principled basis for distinguishing between the question of the sufficiency of an affidavit, which also is subject to a post-search re-examination, and the question of its **integrity**." *Id.*, 171 (emphasis added). Furthermore, the Court placed special emphasis, in enumerating reasons for establishing *Franks* reviews, on the *ex parte* nature of the warrant application. Our system of justice is based upon the adversarial process, and any deviation from that contest, any *ex parte* procedure, is automatically more suspect. *Id.*, 169.

In *Franks*, the Supreme Court established a procedure for testing the integrity of the warrant affidavit, but what is the procedure for accessing this tool? A *Franks* review is a three step process. We will look at each of these in turn.

Step One, The Allegation:
One must make an actual allegation of deliberate falsehood or reckless disregard for the truth. *Id.*, 171. A mere desire to cross-examine the affiant/officer, for discovery purposes, is not enough to gain a hearing. *Id.*, 170-71. Rather, one must make a substantial preliminary showing through an offer of proof, by affidavit or witness testimony, of intentional falsehood or reckless disregard for the truth. *Id.*

While alleging negligent action, or mere mistake, are not enough to gain a hearing, it is important to stress that *reckless* **disregard for the truth is enough**. *Id.*, 171. One must not fall into the trap, in requesting a *Franks* hearing, of thinking one must establish the affiant actively lied. The prosecutor, or perhaps the judge, may at first blush believe this is what the defense is alleging. If one is charging the warrant affiant with deliberate falsehood, and can make a substantial showing of the same, that is permitted, but the more likely offer of proof will be that the affiant acted with reckless disregard for the truth or falsity of the facts and circumstances upon which he relied in seeking the warrant.

Step Two, Test of Redacted Affidavit for Probable Cause:
If one makes the substantial initial showing to establish the affiant's deliberate falsehood or reckless disregard for the

Continued on page 40

Continued from page 39

truth, a hearing will still not be required unless the affidavit, with the questionable material redacted, is insufficient to establish probable cause. *Id.*, 171-72. Essentially, this is a "no harm-no foul" measure. Be sure, therefore, to address the issue of whether, should the material in question be redacted, probable cause remains in the affidavit, which would preclude a *Franks* hearing.

Step Three, The Hearing:

If all requirements are met, and one obtains a *Franks* hearing, one must still prevail at the hearing by establishing the allegation of deliberate falsehood or reckless disregard for the truth to obtain relief. In all likelihood, since in step one the defense had to make a substantial showing of willful falsehood or reckless disregard for the truth, if one gets to a hearing the judge will already be questioning the affiant's veracity or judgement; but causing the judge to question, and establishing the same, are separate concerns. A good cross examination of the affiant/officer is vital to this end, and the approach taken when accusing deliberate falsehood must of necessity be different than when alleging the officer acted recklessly in believing the source(s) for the affidavit's information.

Helpful Hints

The first thing one must beware of, as we have already discussed, is the tendency to make the initial showing harder than it already is. Actual falsity **may** be shown, but reckless disregard for the truth by the affiant is sufficient. Reckless disregard is not only more likely (mercifully few police officers are willing to lie to obtain what they want), but eminently more provable. It is a law school basic that recklessness is more easily established than intent. At any rate, be prepared for the initial prosecutorial reaction, "You're saying the police officer lied in his affidavit!" when what one is more likely trying to establish is the lower, reckless disregard for the truth, standard.

Second, with the prevalent use of informants by police today, especially in seeking search warrants, and given the questionable veracity inherent to these sources, special diligence is imposed upon the affiant/officer before relying upon statements made by an informant. Remember that in a *Franks* review the issue is the deliberate falsehood or reckless disregard for the truth of the affiant/officer, **not** the informant source. *Id.*, 171. Nonetheless, a police officer may act with reckless disregard by carelessly believing what an informant says. Several questions are prudent. What is the informant's criminal background? Did the police officer make the simple check at the clerk's office to find the informant's criminal history? Has he previously been truly reliable? Does he commonly get into trouble and extricate himself by informing on others? Was the informant released from jail to give the relied upon information? What happened to the informant after the information was given? Ask others in the office if the officer has done this kind of thing in other cases, or if they know the informant. In a case involving a *Franks* issue in our office, we knew the named informant from experience in another county, and therefore knew of his significant criminal history. We also knew of instances where the affiant/officer had done a much better job in finding credible information before seeking a search warrant, permitting us to juxtapose the officer's reckless disregard with his earlier credible work. If no one knows the informant well, or to gather more information about a known informant, the office investigator could run a simple records check in the local clerks' offices. The point is to gather information on the source of the warrant affiant's testimony for potential use in assessing the strength of a *Franks* review, because **who** the source **is** often is really more important than **what** the source **says**.

The Sixth Circuit Court of Appeals made this point in *United States v. Elkins*, 300 F.3d 638 (2002). In that case, the affidavit had cited a "confidential informant" as the source, when really the tip came from an anonymous source. *Elkins*, 651. The former term implied a tipster known to police, and "[t]ips from known informants have more value than those from unknown ones." *Id.* Disregarding the difference between known and unknown informants in that case, the Court stated, suggested the police making the warrant affidavit acted with recklessness in regard to the truth of the information in the affidavit. *Id.* It should be noted, however, that this is much more difficult where the informant is not named in the warrant affidavit.[1]

Third, get the hearing! Certainly the standard for this is somewhat high, but remind the judge that in determining if the defense is entitled to a hearing, he or she does not have to immediately determine whether the affiant acted with deliberate falsehood or reckless disregard for the truth. A preliminary substantial showing is required, but determination of fact is reserved for the actual hearing, when more evidence, with full cross-examination, can shed light on that weightier issue.

Conclusion

Franks reviews provide a useful tool for looking behind the four corners of the warrant affidavit, into the alleged intentional falsehood or reckless disregard for the truth by the officer/affiant. While somewhat difficult to obtain and to win, under the right circumstances *Franks* hearings can obtain relief for our clients in situations where otherwise unjustly gained search warrants would be allowed to bear their ill fruit.

Endnotes:

1. This raises the issue of at what point the tipster becomes a material witness. One could argue, in the right circumstances (as where there is an unexplained discrepancy evident on the warrant affidavit, such as the wrong house from our earlier scenario), that the unnamed tipster be provided for testimony in relation to the *Franks* review.

COMMONWEALTH OF KENTUCKY
28TH JUDICIAL CIRCUIT
PULASKI CIRCUIT COURT
DIVISION I
INDICTMENT NO. 02-CR-00128-002

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. **RESPONSE CONCERNING FRANKS HEARING**

_____ DEFENDANT

Comes now the defendant, by counsel and responds to the Commonwealth's opposition to this Court holding a *Franks* hearing concerning the search warrant in this case. The grounds for this response are as follows:

1. A defendant is entitled to challenge the veracity of a search warrant in certain situations. One of the situations is in a case such as this where the affidavit in support of the search warrant is alleged to contain deliberately or recklessly false or misleading information. *See Franks v. Delaware*, 438 U.S. 154 (1978).
2. Pursuant to the Fourth Amendment and Section Ten of the Kentucky Constitution, the people have a right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.
3. The search warrant in this case speaks of a house that belongs to a James Bun Goff. The house that was searched did not belong to James Goff.
4. The informant in this case was not reliable. First, the search warrant mentions that the informant was taken by the house. What was not mentioned was that the informant was transported from the McCreary County Jail where he was incarcerated. This informant was highly unreliable as shown from the records of McCreary and Pulaski Counties.
5. The address of James Goff could have easily been found since James Goff was placed on probation by the Pulaski Circuit Court in Division II. *See Commonwealth of Kentucky v. Jim Goff*, Indictment No. 00-CR-00218-002. Mr. Goff's probation was ordered to be supervised. Furthermore, if the information given by the informant is reliable, a question arises concerning the dates in the search warrant. The dates given by the informant indicate that the alleged manufacturing was going on while Mr. Goff was on probation. Has Mr. Goff had his probation revoked? Did anyone speak to his probation officer about the address of Mr. Goff? Did anyone ask the probation officer about these allegations concerning Mr. Goff?
6. The bond that Mr. Goff was allowed to post in Indictment No. 00-CR-00218 shows that his address was 68 West Gate Drive, Somerset, Kentucky. This goes to show that Mr. Goff's address was not the address given on the search warrant.
7. As to the reliability of the informant, he was charged in case number 00-M-01235 with Alcohol Intoxication. However, a bench warrant was issued for his failure to appear on September 14th, 2000. The informant was arrested on January 28, 2001 by Trooper Billy Correll. This would demonstrate that Trooper Correll had some knowledge of this informant before obtaining this search warrant. Trooper Correll would have to know that this informant's reliability would be uncertain due to his failing to appear in Pulaski District Court.
8. On August 8th, 2001, Mr. Baird entered a plea of guilty to two (2) counts of Criminal Possession of a Forged Instrument Second Degree under McCreary Circuit Court Indictment No. 00-CR-00076. Barely two months later, Mr. Baird was arrested on October 7th, 2001 and charged in case number 01-F-00176 in the McCreary District Court with Burglary Second Degree and Theft Over $300.00. The violation date was September 2nd, 2001. Therefore, while he was awaiting sentencing on the offenses in Indictment No. 00-CR-00076, he was arrested for Burglary Second Degree and Theft Over $300.00. It appears that Mr. Baird was in jail at the time he was driven by the residence in question. Later on, Mr. Baird was sentenced to the Criminal Possession of Forged Instrument charges. Was the issuing magistrate made aware of the circumstances surrounding Mr. Baird and his incarceration? Certainly, these circumstances would have a large bearing on Mr. Baird's reliability. These factors demonstrate a reckless disregard for the truth concerning Mr. Goff's residence.

WHEREFORE, the defendant requests that the *Franks* hearing be held and for any and all other relief entitled to her.

Respectfully submitted,

_____
James L. Cox
Counsel for Defendant
Department of Public Advocacy

Continued on page 42

Continued from page 41

COMMONWEALTH OF KENTUCKY
28TH JUDICIAL CIRCUIT
PULASKI CIRCUIT COURT
DIVISION I
INDICTMENT NOS. 02-CR-00128-001
02-CR-00128-002

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. **MOTION TO SUPPRESS ANY AND ALL EVIDENCE SEIZED PURSUANT TO THE SEARCH WARRANT**

_____ DEFENDANTS

Comes now the defendants, pursuant to the Fourth and Fourteenth Amendments to the United States Constitution, Section 10 of the Kentucky Constitution, and RCr 9.78, and asks this Honorable Court to suppress any and all evidence seized pursuant to the search warrant. The reasons for this motion are as follows:

1. The affidavit for the search warrant stated that Jim "Bun" Goff lived and manufactured Methamphetamine at the address of 941 North Hart Road, Somerset, Kentucky. However, Jim "Bun" Goff was not the owner of the residence, he was not there when the search warrant was executed, and the property was the residence of Yancey and Elaine Lewis. They had resided there for some time. Further, the names of Mr. and Mrs. Lewis are not mentioned in the search warrant.
2. The reliability of the informant in this case is not established sufficient to satisfy the requirements under *Illinois v. Gates*, 462 U.S. 213 (1983).
3. Based on the affidavit for the search warrant, the defendants would ask for a *Franks v. Delaware*, 438 U.S. 154 (1978) type hearing. The affidavit states unequivocally that the residence was that of Jim "Bun" Goff. The defendants would ask for a hearing pursuant to the *Franks* case.
4. The information in the search warrant is stale. The informant gives the dates of mid August to mid September. What year is he referring to in the search warrant? Even if it is to be assumed the year was 2002, what information is there within the affidavit to show that Methamphetamine would still be manufactured at the residence?

WHEREFORE, the defendants ask this Honorable Court to suppress any and all evidence seized pursuant to this search warrant, for a *Franks* hearing, and for any and all other relief entitled to him.

Respectfully submitted,

_____
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PRACTICE CORNER
LITIGATION TIPS & COMMENTS


Misty Dugger

Helping to Clarify Appeals of Unconditional Pleas

Using the AOC form for general guilty pleas includes a written reminder that the client is waiving his right to appeal. Yet, the attorney should always specifically advise clients that a general guilty plea waives their right to appeal. This is especially true because busy trial judges may inadvertently advise a defendant of the right to appeal during the sentencing proceeding, and the result may be an appeal which the client actually waived and has no merit. If there was no defect in the plea colloquy, imposition of an illegal sentence or abuse of discretion by the trial court, then it is futile for an attorney to file a notice of appeal in cases where the attorney knows, and the client has been advised, that the right to appeal was waived. In such a circumstance, the burden is simply shifted to the appellate attorney to advise the client that there is no appealable issue following a valid plea to a lawful sentence. If the client cannot be persuaded to voluntarily dismiss, appellate counsel is required to file a brief explaining why there are no meritorious issues to be raised, consistent with *Anders v. California*, 386 U.S. 738 (1967). Of course, these considerations do not apply to conditional guilty pleas pursuant to RCr 8.09, or an appeal of the trial court's denial of client's request to withdraw a guilty plea. Further, if trial counsel intends to raise an issue of defective colloquy, illegal sentence or abuse of discretion noting that issue on the appeal information sheet will ensure that it is considered by the appellate attorney who is assigned.

~ Dennis Stutsman, Appeals Branch Mgr., Frankfort

Conviction on Appeal Can Not Be Used for Persistent Felony Offender Enhancement or Truth in Sentencing

Always confirm the appellate status of a defendant's prior convictions if those convictions are being offered by the Commonwealth as evidence during a truth in sentencing or persistent felony offender proceeding. *Thompson v. Commonwealth*, Ky., 862 S.W.2d 871 (1993) holds that a conviction can only be relied upon for truth-in-sentencing and persistent felony offender if it is a final judgment, meaning termination of the appeal or expiration of the time for taking the appeal. See also, *Kohler v. Commonwealth*, Ky. App., 944 S.W.2d 146 (1997) and *Tabor v. Commonwealth*, Ky. App., 948 S.W.2d 569 (1997). Similarly, *Melson v. Commonwealth*, Ky., 772 S.W.2d 631 (1989) holds that a prior conviction cannot be utilized for truth-in-sentencing or persistent felony offender enhancement until the case is disposed of by the reviewing court if discretionary review has been granted. However, the conviction may be utilized if it is being collaterally attacked. Thus, if the prior convictions are on appeal or pending discretionary review, counsel should move to have the persistent felony offender charge dismissed and/or move to prohibit the Commonwealth from presenting the prior convictions as evidence during the penalty phase of trial.

~ Misty Dugger,
Appellate Branch, Frankfort

Defendants Must Request Mitigating Sentence Under KRS 532.110 if Offenses Were Committed Prior to July 15, 1998

KRS 532.110(1)(c) was amended in 1998 to read, "The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed. ***In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years.***" (Emphasis added). However, courts are required to sentence a defendant in accordance with the laws in effect at the time the offense was committed unless the defendant specifically consents to the application of the new law that mitigates his punishment. KRS 446.110*; Lawson v. Commonwealth*, Ky., 53 S.W.3d 534, 550 (2001). Thus, if a defendant is being sentenced in excess of seventy years for offenses occurring before July 15, 1998, counsel must request that the client be sentenced under the new law. The record must also reflect that the defendant consents to a punishment that is mitigated by a new law. If the defendant does not exercise his right to be sentenced under the mitigating law prior to entry of final sentencing, then he forfeits this right and must serve the lengthier sentence.

~ Misty Dugger, Appellate Branch, Frankfort

Move for Mistrial if Commonwealth Fails To Produce Prejudicial Evidence Declared During Opening Statement

Sometimes it happens that in an opening statement by the Commonwealth a jury is given damaging information that apparently would be admissible but which in fact is not thereafter produced during the trial. In that instance, assuming the unproved information is considered prejudicial, the appropriate procedural remedy is motion for a mistrial. *See Senibaldi v. Commonwealth*, Ky., 338 S.W.2d 915, 919-920 (1960) and *Williams v. Commonwealth*, Ky., 602 S.W.2d 148, 149 -150 (1980)

Practice Corner needs your tips, too. If you have a practice tip to share, please send it to:

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