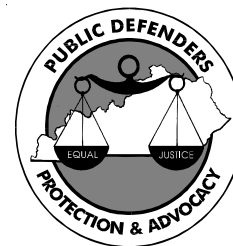


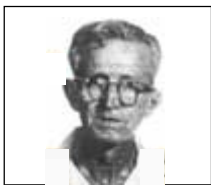
25th Anniversary of The Advocate

The Advocate



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Clarence Earl Gideon

The Future of the Right to Counsel in Kentucky



Chief Justice Joseph E. Lambert



Public Advocate Ernie Lewis



Phyllis H. Subin

**Subin on
National Litigation
Performance Standards**



Dave Stewart

**DPA Investigator/
Leader Remembered**

- **KY Court Reverses on *Batson* Error**
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The Advocate: Ky DPA's Journal of Criminal Justice Education and Research

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

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FROM THE EDITOR...

Right to counsel and the future of KY's defender delivery system. The 40th anniversary of the nation's highest Court holding that a person is entitled to counsel if they cannot afford one before the government seeks to take their liberty is a landmark pronouncement. It is something we now understand in this country as bedrock. In March 2003 DPA celebrated this anniversary with reflections from prominent criminal justice leaders and asked many defenders and others from across Kentucky's criminal justice system to think about what the statewide public defender program should be on the 50th anniversary of *Gideon*. In the last issue of *The Advocate*, we brought you the remarks made by Commonwealth Attorney George Moore and Secretary of Public Protection and Regulation Janie Miller. This issue we offer the remarks of the Chief Justice and the Public Advocate. In September 2003 we will set out the long-term goals of the statewide public defender system developed at this program and through subsequent work with DPA leaders and the Public Advocacy Commission. Defenders face many challenges and there are many opportunities for us to meet those challenges. We are on our way to 2014 to provide representation in which the criminal justice system and the public has high confidence in its competence. **The standards of defender performance.** When we go to the doctor, we want medical care that meets the national standard of practice for physicians. After all, it is the only body we have. Clients want the same when represented by a defender. There has been good thinking and decision-making nationally by the National Legal Aid and Defender Association and the American Bar Association on what the standard of practice is for representation of criminal defendants and capital defendants. We bring you some straightforward commonsense thinking by nationally known defender leader Phyllis Subin on how to apply these standards in Kentucky, along with an article on the newly revised ABA capital standards. **Our clients.** They are why we exist, well over 100,000 each year. The initial interview of our client is quite important. It is similar to what we feel when we first meet our medical doctor. We want many things from our doctor, information, help, respect, choices, and we want confidence in the assistance we receive. Clients want this, too. DPA Trial Division Director David Mejia sets out common sense ideas on how to do the client interview well. We include an interview from, a medical release form and the NLADA Performance Guideline on client interviews. **Parole.** What's the Parole Board doing in terms of parole decisions compared to 1984 and intervening years? Dave Norat, Law Operations Division Director, sets out that information. We also include an interesting amendment to the budget bill that affects some persons' parole eligibility date. **Racial discrimination not tolerated by courts.** We all know it exists. It is difficult to prove but the Kentucky Court of Appeals readily recognized it in *Pryor v. Commonwealth*, No. 2002-CA-000145-MR (May 30, 2003; not to be published). We reprint the opinion of the Court. The Supreme Court of Minnesota in *State v. Fort*, 660 N.W.2d 415 (MN May 1, 2003), a case argued by Lenny Castro's office, ruled that police need reasonable articulable suspicion before they can ask someone stopped for a traffic violation if they can search the car. The Court wrote: "...[I]nvestigative questioning, consent inquiry, and subsequent search went beyond the scope of the traffic stop and was unsupported by any reasonable articulable suspicion" therefore evidence obtained from exceeding the scope of the stop is suppressed. The defendant was black. We reprint this case as it shows that the Minnesota Supreme Court is not permitting racial profiling. Lenny Castro has educated us in Kentucky on litigating racial discrimination. See Leonardo Castro, "What Does Race Have to Do with It?" *The Advocate* Vol. 24, No. 3, at 4 (May 2002) <http://dpa.state.ky.us/library/advocate/may02/advframe.html>. Kentucky has a racial profiling statute that our Public Advocate has educated us on its use in litigation. See Ernie Lewis, "The Use of the Racial Profiling Act in Drug Cases," *The Advocate*, Vol. 24, No. 7 at 25 (Nov 2002) <http://dpa.state.ky.us/library/advocate/nov02/advframe.html>.

Remembering good people. Dave Stewart and Donna Potter. Death is a part of life. Death is hard for us to handle, especially when it comes too soon. We remember in this issue, two defenders, Dave Stewart and Donna Potter.

Ed Monahan, Editor

CHIEF JUSTICE'S REFLECTIONS ON RIGHT TO COUNSEL

It is a great pleasure to be with all of you today. I am happy to have the opportunity to join in this celebration of 40 years or the 40th anniversary of *Gideon v. Wainwright*. I am also happy to be here today because I see in this room many of Kentucky's finest lawyers. As I glanced around the room, I saw lawyers who appear regularly and routinely, and very well, in the Supreme Court of Kentucky. I just say to you, speaking for the court and on behalf of the court, you immeasurably contribute to the quality of our work. Day after day and case after case, I read briefs written by lawyers in this room, and some of course who are not here, representing defendants in criminal cases and I am amazed at how thorough, and how in-depth, and how much those briefs and the arguments you present assist the court in doing what we are constitutionally and legally charged to do; that is render appropriate decisions in the cases that come before us.

When I got here I heard Ernie make a comment to the effect that we have come a long way since *Bradshaw v. Ball*. That was a comment that I had written down in my notes, because I remember a day as some of you who are my age and older remember, when there was no state indigent defender program in Kentucky. Many of the younger of you certainly cannot remember that, but I remember a time when, Jerry Cox and others here will recall it also, when indigent defense was rendered by the youngest, most inexperienced, and least busy lawyer in the community. The lawyer in the community who had absolutely nothing else to do, and the judge knew it, and the judge would often appoint that young lawyer to come and in effect "bless" the proceedings. It was often in those days the appointments were made late and funding was unavailable. It amounted to a judicially and legally condoned window dressing of the proceeding - to dress up the case so that it didn't look too bad later on. But to call what took place in that day and time *criminal defense* was a vast exaggeration of the reality. Then came *Gideon v. Wainwright*. Many of you have read, and I am confident been inspired as I was, by the celebrated book by Anthony Lewis, *Gideon's Trumpet*. I don't know how long ago it was that I read that book, but as a young lawyer in that time, I was personally inspired by decision, and the recounting of all that went into the making of that decision and its aftermath. That decision of course enshrined in our Constitution the right to counsel, the right to meaningful, effective counsel in criminal cases where the defendant is indigent. To again borrow the words of Anthony Lewis, *Gideon's trumpet* was heard and continues to this day to be heard.

Again reflecting on some of the thoughts expressed by Ernie, we have indeed entered a new era. We have entered a time when all across this nation in the broadest possible sense and throughout every element that touches in any way the

criminal justice system, people are beginning to rethink what we are doing, how we are doing it, how it could be made better - beginning to think of and find new strategies to attack the problems our whole society faces and

the problems of persons who commit crime. One approach is that is now being taken that undoubtedly will impact the criminal defense bar is the use of family courts. Family courts proceed from the idea that what affects one member of a family affects all members of a family. They proceed from the idea that what we need is a court devoted exclusively to cases involving children and families and a court presided over by one judge who gets to know a family, who gets to know their problems, who can address their problems in a broad sense - with the idea of not just adjudicating a particular case on a particular day and then gong on to the next case, but actually helping to prevent, to intervene, to perhaps even solve a problem along the way. That is the idea of family courts and I truly believe that there is a role in family courts, in this process for criminal defense attorneys. The simple fact is that many, many of the individuals that you see in your practices have come from homes and environments and circumstances that lead almost inevitably to the commission of crime. If we can do something along the way to interdict that path, that straight shot to the penitentiary, if we can do something to prevent that, it will inevitably improve the quality of criminal justice in Kentucky and/or diminish the occurrence of crime in this state.

We are also in the process of implementing in many cases drug courts. As all of you know drug court judges are all - every single one of them - volunteers. I do not have the power nor do I endeavor to compel any judge to become a volunteer drug court judge. Those judges do drug courts in addition to their normal full-time judicial duties and do it simply because they believe in the concept. As recent as three or four years ago, we had only a handful of drug courts in Kentucky. Now we have in the neighborhood of 50 drug courts in Kentucky and I can tell you that a major initiative is under way now to recruit additional judges into the Kentucky drug court program. I noticed in the news yesterday that the national administration had requested an appropriation of \$50 million dollars for drug court in the current budget and that was cut by \$5 million dollars out of the \$50 so that the amount approved by Congress or the amount that is likely to be approved by Congress is now at \$45 million dollars. In one sense that is a rather paltry sum, but in another sense that does represent a commitment from the national administration. I had a conversation not all that long ago



Chief Justice Joseph E. Lambert

with DEA Administrator Hutchinson and I can tell you that he and, as he tells me, the national administration are committed to the concept of drug courts. They believe that drug courts and drug prevention and drug treatment are concepts that work and are concepts that are absolutely essential to the problems that we face with respect to drug offenders in this state. I just read yesterday in a publication from the National Association of Drug Court Professionals that there is a new study released by the NADCP to the effect that they believe and the study reflects that drug courts do work particularly with those who have felony drug charges - that direct judicial involvement in the process and supervision with the carrot of probation or dismissal and the stick of incarceration - that coupled with treatment and counseling and all that goes with the process is a successful formula. I think we can use that study to speak with policy makers about the necessity for better funding of drug courts.

When I make my presentations to the General Assembly with respect to the judicial branch budget, we always include in our budget a request for drug court funding for staff and for testing equipment and so forth. And while I am on that point, the cost of maintaining a person in a Kentucky drug court program is a bit less than \$2700 per year. Compare that with the cost associated with maintaining a person in a penal institution in Kentucky. I believe the executive branch of state government uses the number \$15-16,000 per year. So, we are talking on the one hand \$2700 dollars per year up to as much as \$15 or \$16 thousand dollars a year. I have often argued that if you want to think about it in purely economic terms that we can afford several drug court failures for the cost that would be required to maintain an individual in a penal institution. I recently received a letter from a circuit judge who is a close friend of mine, one I have known for many years and whom I highly regard informing me of his intention to retire in the near future. In that letter, he was responding to some

correspondence that we had had concerning the implementation of the drug court in his jurisdiction and he wrote me a letter. The letter talked about a number of things but I'd like to read you a small portion of that because I think it tells where a lot of people are coming from and moving to with respect to drug courts in Kentucky. He says this, "*I would acknowledge that in the past I have not enthusiastically embraced the drug court concept, over the past year I have begun to rethink that position and now conclude that its origin was rooted in my stodgy conservatism. In the past with dramatic increases in drug problems due to methamphetamine and oxycontin, I accept that finding another approach is critical.*" I accept that finding another approach is critical. This is from a person who is a self-described stodgy conservative and I can tell you that is a fair description. A lot of people are rethinking their views on drug courts, rethinking their views on reentry courts, and they are realizing that it is no longer a complete solution simply in the words of my late and esteemed colleague Justice Leibson to "warehouse people." We need to think about some different approaches and that is why this conference that is taking place today is such a wonderful idea.

You all are meeting here, you see the problems every single day. You see what is out there - the ideas that Ernie mentioned a few moments ago when was going through his list of things that need to be considered and thought about. That is a wonderful list and if you all could just address a few of those, I am confident that some real good ideas will come out of this occasion. It is a great pleasure to be with you. It is always good to be with this group.

Thank you. ■

Chief Justice Joseph E. Lambert
Kentucky Supreme Court

Opportunities for leadership are available to you, and to us, every day. But putting yourself on the line is difficult work, for the dangers are real. Yet the work has nobility and the benefits, for you and for those around you, are beyond measure....A sacred heart is an antidote to one of the most common and destructive 'solutions' to the challenges of modern life: numbing oneself. Leading with an open heart helps you stay alive in your soul. It enables you to feel faithful to whatever is true, including doubt, without fleeing, acting out, or reaching for a quick fix. Moreover, the power of a sacred heart helps you to mobilize others to do the same-to face challenges that demand courage, and to endure the pains of change without deceiving themselves or running away.

Heifetz & Linsky, *Leadership on the Line: Staying Alive through the Dangers of Leading* (2002)

PUBLIC ADVOCATE'S COMMENTS ON THE EVENT OF THE GIDEON DAY MARCH 27, 2003

Forty years ago, in a handwritten petition to the United States Supreme Court, Clarence Earl Gideon said, "it makes no difference how old I am or what color I am or what church I belong to, if any. The question is, I did not get a fair trial. I have no illusions about law and courts or the people who are involved in them. I have read the complete history of law ever since the Romans first started writing them down and before that of the laws of religions. I believe that each era finds an improvement in law; each year brings something new for the benefit of mankind. *Maybe this will be one of those small steps forward.*"

Indeed, Clarence Earl Gideon's handwritten petition, and the movement that began as a result, represents a big step forward in the history of mankind, and her quest for equal justice under law. We are here today to celebrate the *Gideon v. Wainwright* decision. You have affirmed the *Gideon* decision by your presence here today. There is something about that case 40 years ago that continues to move us, to remind us of what we stand for, and to challenge us to meet the promise of that case.

The *Gideon* decision is being celebrated elsewhere in Kentucky. The Kentucky Bar Association Board of Governors passed a resolution recognizing March 18, 2003 as Gideon Day throughout the Bar, and calling 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." The Kentucky House of Representatives likewise passed House Joint Resolution 111 recognizing March 18, 2003, as Gideon Day. This Resolution rededicated Kentucky to the principle of equal justice for all regardless of income. Both resolutions celebrate the work done by public defenders every day across this Commonwealth.

Today we have the right people to celebrate this decision. We are here today to look into the future at how we take some of those small steps Clarence Earl Gideon described. We

have here today new and old public defenders, defender managers, judges, prosecutors, corrections officials, juvenile justice experts, people from the mental health field, clients, and others who are interested in this issue. This is the right group of people to look into the future of indigent defense.

The Criminal Justice System Must be Understood as a System

It is important to understand indigent defense as part of a system of criminal justice. The document *Criminal Justice in Crisis* (1988) put out by the ABA stated that "Prosecutors appreciate the need for and role of the defense lawyer and do not believe that these lawyers impair their ability to control crime or to prosecute cases effectively. In the case of the indigent defendant, the problem is not that the defense representation is too aggressive but that it is too often inadequate because of underfunded and overburdened public defender offices."

Later, at the 2000 National Symposium on Indigent Defense sponsored by the US Department of Justice, Attorney General Janet Reno reiterated that criminal justice must be understood as a system. "Our system will work only if we provide every defendant with competent counsel...we should all have one common goal, that justice be done."

I have seen in the past 7 years as Public Advocate that Kentucky is beginning to view the criminal justice system as a whole. The Governor's Criminal Justice Response Team, which met during 1997, had representatives of all parts of the criminal justice system when it proposed sweeping changes of our system. House Bill 455, the Governor's Crime Bill, certainly contemplated a systems approach in the creation of the Kentucky Criminal Justice Council. This Council has broad representation from all elements of the system, and at a minimum provides a forum four times per year for criminal justice issues to be addressed from a broad systems approach. Public Defenders are being included like no time in the past. We are not only on the Council, but we are also being included in both state and local criminal justice bodies from the Corrections Commission to Juvenile Delinquency Prevention Councils.

It is from the systems perspective that we gather here today. It is important for the criminal justice system as a whole to envision the future of indigent defense. That is why we are visioning for the future with people from disciplines other than the public defender community.

Really believe in your heart of hearts that your fundamental purpose, the reason for being, is to enlarge the lives of others. Your life will be enlarged also. And all of the other things we have been taught to concentrate on will take care of themselves.

Pete Thigpen, Executive Reserves

We Have Come Far

As we look into the future, it is important to remember where we've been. It is a familiar story. Kentucky provided attorneys to poor people long before the *Gideon* decision. Yet, those lawyers did so on a *pro bono* basis. Offices in Louisville and Lexington were created prior to the passage of a statute. Later, *Bradshaw v. Ball* required compensation for lawyers for the poor. In response, Governor Ford proposed and the General Assembly passed KRS Chapter 31 creating a statewide system of indigent defense.

Initially, the Kentucky Public Defender's Office featured an Appeals Branch in Frankfort and an assigned counsel system throughout the Commonwealth. This lasted from about 1972-1978. However, the assigned counsel system proved too expensive. In 1982, the assigned counsel system was abolished by statute, replaced by a mixed system of full-time offices and contracts with private lawyers.

From 1978-1996, Kentucky had a mixed system of indigent defense. The LEAA funded the creation of a number of full-time offices throughout southeastern Kentucky. Offices were established in Paducah, Hopkinsville, Richmond, and several other places when the local system could not provide counsel. By 1996, there were 47 counties being covered by a full-time office; 73 counties continued to maintain a system of private lawyers providing services on contract.

My goal since becoming Public Advocate in 1996 was to complete the full-time system in all 120 counties by 2004. That goal is now within reach. Today, 112 counties are being covered by a nearby full-time office of lawyers whose only job is to provide criminal defense representation to poor people charged with crimes. The 2003 General Assembly funded 2 additional offices in Boone and Harrison Counties, covering an additional 5 counties. It is hoped that an appropriations increase can be obtained soon that will enable us to cover the last 3 counties, Campbell, Barren, and Metcalfe, during the next fiscal year. Together with our fully developed, full-service Post-Trial Division, we have become a truly full time state-administered public defender system.

During this entire history, we have struggled with inadequate funding irrespective of the delivery system. The Governor's Task Force on Indigent Defense in 1993-1994 concluded that significant additional funding was needed. That same conclusion was reached by the *Blue Ribbon Group on Improving Indigent Defense* in its influential 1999 Report. That Report concluded that Kentucky then had the lowest funded public defender system in the nation, using 3 benchmarks of defender salaries, funding-per-capita, and funding-per-case. \$6 million of the \$11.7 million called for by the *Blue Ribbon Group* was put into the budget by Governor Patton and passed by the 2000 General Assembly.

We Are Not Here to Dwell on the Past

We could spend our time discussing the what-ifs, or the mistakes of the past, on this day. We could spend our day rehashing old wounds and ancient conflicts. We could spend our time bemoaning the failure of the General Assembly to fund the remaining \$5.7 million called for by the *Blue Ribbon Group*. We could as well spend our time on our existing problems. But we are not going to do that.

We Are Here to Look Into the Future of Indigent Defense in Kentucky

In many ways, this is the beginning of a new journey, a quest for the completion of the promise of *Gideon v. Wainwright* as it applies to our Commonwealth. In this agency, many of us are at the end of our careers. This agency itself is moving past the first generation of lawyers who made the promise of *Gideon* a reality. Like Moses of old, we have wandered in the wilderness for 40 years, and are now looking into the Promised Land. For many of you younger public defenders, you will be implementing 10 years from now many of those things we envision today.

We Are Here to Ask Questions

What are the questions we are here to ask? When will our defenders have appropriate caseloads? What is an appropriate caseload for a defender, an urban defender, a rural defender, an appellate or post-conviction defender? Should each of our offices have a social worker? If we had social workers in each office, what would they do? Would they work with families? Can public defenders help stop crime? Should stopping crime be a goal of the public defender system? What is the role of the public defender in the different specialty courts springing up throughout the Commonwealth like drug court or family court? What is a good delivery system for handling conflicts of interest? What is the purpose of standards? Are we using our existing standards in any meaningful sense? Are we doing enough with our Spanish speaking clients and the growth in the number of Hispanic clients? Are we recruiting and educating and retaining lawyers sufficiently, now that we are the biggest law firm in the state? How should we relate to the other parts of the criminal justice system?

What can be done to ensure that innocent persons are not convicted, or once convicted are not remaining in prison? What should defenders be doing with persons with mental illness, or substance abuse, beyond their criminal case? How can defenders help address reentry problems of inmates? Should our urban offices be brought more into the active life of DPA? Do we have parity with prosecutors in Kentucky? Are we meeting the promise of *In re Gault* in our representation of children? What is our proper role in representing detained and committed children? Can an institutional defender system comply with national standards in representing capital cases?

Continued on page 8

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The Promise of *Gideon* is Unfulfilled

It is well known that the promise of *Gideon* is unfilled not only in Kentucky but throughout the Commonwealth. States continue to devise methods for getting around providing counsel to all eligible persons. Yet, only recently in *Alabama v. Shelton*, the high Court once again rejected those efforts. The Court reaffirmed that the Sixth Amendment requires counsel not only for felonies, not only for misdemeanors, not only for juveniles, but also for those cases in which probation is the intended result.

Yet, despite *Alabama v. Shelton*, there remains a rural Georgia County where a reporter discovered a line of persons going up the back stairs of a courthouse. At the top of the steps was a prosecutor handing out deals to uncounseled persons charged with crimes. They left the top room with their deal, and proceeded to the courtroom to enter their pleas, all without the advice of counsel.

Yet, despite *Gideon*, Oregon just cut over \$20 million from their system of indigent defense, delaying arraignments until the beginning of the new fiscal year. This was all done in the name of a fiscal crisis. Yet, *Gideon* says nothing about suspending the promise during a time of a fiscal crisis. Indeed, it is during a fiscal crisis that *Gideon* must be enforced, when the crime rate soars.

Yet, despite *Gideon*, Mississippi recently passed a statute creating a state run system of indigent defense. The legislature then promptly turned around and refused to fund the system.

Yet, despite *Gideon*, the state of Virginia has a cap of \$112 for misdemeanors and \$395 for felonies that carry up to 20 years in prison.

In Kentucky, we are not immune from falling short of *Gideon's* promise. We see many persons in district court without counsel. We have many persons who are not appointed counsel for several days after their arrest, in derogation of their Fourth Amendment rights. We have inmates who do not have access to courts, particularly those Class C and D inmates being held in our county jails. We have innocent inmates who are unable to prove their innocence, whose time has run on the filing of their 11.42 or their habeas petition.

Worse yet, we have public defenders in Kentucky handling over 500 cases per year. How can a public defender handle a mixed caseload of 500+juvenile, misdemeanor, and felony cases? How can such a defender try cases while meeting national standards? What must be done to have these defenders meet the promise of *Gideon*?

We Have the 10 Principles to Guide Us

The ABA House of Delegates passed the 10 Principles first written by the American Council of Chief Defenders. In sum, these principles ask the following questions of the Kentucky public defender system:

- Is our defender system for the selection, funding, and payment of defense counsel independent?
- Do we have both a defender office and active participation of the private bar throughout the Commonwealth?
- Is counsel made available within 48 hours of arrest?
- Does counsel have sufficient time and confidential space in which to meet their clients?
- Are the caseloads too high to allow for quality representation?
- Are case assignments being made according to the ability, training, and experience of the lawyers, rather than convenience?
- Is there vertical representation so that each client has the same attorney throughout their court proceedings rather than a revolving door?
- Do we have parity between defender and prosecutor with respect to overall funding, salaries, benefits, and forensic services? Are contract and conflict attorneys being paid sufficiently?
- Is education provided to our defenders? Is it required?
- Is counsel supervised and evaluated for quality according to national and local standards?

We Need to be Aware of Other Trends

As we envision the future of indigent defense, we need to be aware of other trends that are occurring around the country. Among them are:

- Problem Solving Courts. We need to look at the "Ten Tenets of Problem Solving Courts" written by the American Council of Chief Defenders.
- Drug Courts are being found to work in many ways. What is the role of counsel in drug court?
- Family Courts are going to continue to grow in Kentucky and provide both challenges and opportunities to serve our clients and their families better.
- Mental Health Courts are being utilized around the nation.
- Reentry Courts are now being funded by the federal government. What is counsel's role in a reentry court? Does the person have a right to counsel in a reentry court?
- Community Defending is occurring successfully in many places, including Harlem, Brooklyn, and other areas. Does community defending have a place in a rural state like Kentucky?
- Social workers are being used in many if not most defender offices throughout the nation. We have only 2 social workers outside of Louisville. Are we missing the boat?
- Some places are utilizing a combined defender/civil legal services approach, such as Team Child in Seattle.
- In some states like Wisconsin, caseload standards are es-

tablished by statute. Defenders turn cases away when excessive caseloads are reached.

- When reform does not occur through legislative means, there have been successful lawsuits to enforce constitutional rights in Pittsburgh, Connecticut, Louisiana, Arizona, and Oklahoma.
- Budget cuts are occurring in many places. Our sister state of Minnesota is fighting a 15% budget cut.
- Parity in resource allocation between defenders and prosecutors. Some states have formalized the requirement of parity in salary and other resource allocation.
- The development and use of technology to achieve higher levels of efficiency, particularly through case management, and linking defender offices to other criminal justice agencies.
- Collaborations between defender organizations and law schools to develop innocence projects. Kentucky has been a leader among defender organizations in the innocence movement as one of the first to place an innocence project in a state agency.
- Criminal justice system collaboration to overcome turf resistance and to develop system integration.
- Attacking the criminalization of poverty as they have in Seattle. There it was discovered that many of the minor misdemeanors had a disproportionate impact on the poor, such as the seizure of licenses following certain convictions.
- Addressing racial bias in the criminal justice system.
- Adopting and implementing standards in the representation of capital cases.

A Challenge

One of the nation's defender leaders, Professor Kim Taylor-Thompson, issues a challenge appropriate for us today: "We've been doing this job as public defenders the same ways since *Gideon*, and the world has changed in 40 years. We need to start thinking about doing this differently. Courts are redefining themselves and reworking what they do, and they're trying to be problem solving in some way. Prosecutors are thinking about being community workers and getting out there and doing different things. The one actor that's really not getting out there and trying to do different things is the public defender—and we can."

Closing

I want to thank all of you for coming today. I encourage all of you to make good use of this opportunity. Look far into the future. Don't be constrained by past problems. Don't hold back if you have an idea. Be open to the ideas of others. Respect all viewpoints. Once this is completed, we will be sending a draft to you. The Public Advocacy Commission and the Department's Leadership Team will explore all of the ideas discussed here today seriously. We will take what you've done and formulate goals for the next 10 years of providing indigent defense.

Gideon continues to challenge us to provide equal justice to poor people. As Dr. Martin Luther King, Jr. used to say, the Arc of the Moral Universe is long, reaching toward earth. Equal justice will be achieved one day. We will achieve the promise of Clarence Earl Gideon's handwritten petition. Thank you again for the small step toward justice you are making by being here today. ■

Ernie Lewis

Public Advocate

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As difficult and painful as it is, we must walk on in the days ahead with an audacious faith in the future. When our days become dreary with low-hovering clouds of despair, and when our nights become darker than a thousand midnights, let us remember that there is a creative force in this universe, working to pull down the gigantic mountains of evil, a power that is able to make a way out of no way and transform dark yesterdays into bright tomorrows. Let us realize that arc of the moral universe is long, but it bends toward justice.

Rev. Dr. Martin Luther King, Jr., 1967

PUBLIC DEFENDERS AND THE RULE OF LAW: AN ETHICAL AND HISTORICAL ESSAY

The Rule of Law

No principle is more central to the Anglo-American justice system than the rule of law. The development of that concept, one historian has said, was "one of the most important and distinctive...of the common law." J.H. Baker, *An Introduction to English Legal History*, 3d Ed., Butterworths, 1990, 165. Essentially, the principle of the rule of law states that in a system of justice governed by it, everyone, including the persons making up the government, must answer to the command of the law. Put another way, no one is above the law. An idea with ancient roots, the rule of law has been praised by many writers. Plato expressed it as follows, "But where it [the law] is despot over the rulers and the rulers are slaves of the law, there I foresee safety and all the good things." *The Laws of Plato*, Translated with Notes and an Interpretive Essay by Thomas L. Pangle, University of Chicago Press, Chicago, 1980, 715d, [102]. No less a lawyer and statesman than John Adams said that a republic is the greatest of governments, and the greatest of republics is, "that form of government which is best contrived to secure an impartial and exact execution of the laws." "Thoughts on Government: Applicable to the Present State of the American Colonies," in *The Revolutionary Writings of John Adams*, Selected and with a Foreword by C. Bradley Thompson, Liberty Fund, Indianapolis, 2000, 288.

Baker discusses the concept in light of the growth of the common law when he writes,

The principle known as the 'rule of law' treats all exercise of authority as subject to the control of the regular courts of law and furnishes the subject with a legal remedy when any official, however mighty, exceeds the power which the law gives him...no power is outside the law; moreover any lawful power over the lives, liberty or property of others...must be exercised in accordance with certain minimum standards of fairness. Baker, *English Legal History*, 165.

While not an original Anglo-American idea, rule of law was more fully developed by our system of justice; more expressed and protected, expounded and nurtured; than in any legal system in history. The Anglo-American idea of rule of law, often expressed in some written form of constitution, should be distinguished from earlier attempts to codify the law set down by an arbitrary decision maker. What makes the *Magna Carta* (1215) so exceptional is not that it listed the law as it applied to king and nobility, but that it imposed limits beyond which they could not act. The *Magna Carta* was a pronouncement of limits upon arbitrary power, an early ex-

ample of the rule of law principle in action. Indeed, the rule of law is what distinguishes a constitution from a code of laws such as the Justinian's Code or the Napoleonic Code.

During the eighteenth century, the American idea of limited government was exceptional; the rest of the world conceived of the powers of government as sovereign and complete. Daniel L. Feldman, *The Logic of American Government: Applying the Constitution to the Contemporary World*, 1990, 179. The British Parliament of that period had come to see its powers over the American colonies as absolute. *Id.*, 178. Under the American scheme, however, the people and their successors became sovereign by adopting a "basic covenant, compact, or constitution." *Id.*, 177. This idea had its roots in the ancient middle-eastern, especially Judeo-Christian, concept of the covenant. Originally a covenant was an agreement between unequal parties, such as a ruler and his subject, or God and man, but in the American colonies this became a compact between equals, who agreed to live under a common rule of law. The earliest example of this type of compact or constitution in the colonies was the Mayflower Compact, by which the future inhabitants of a tiny colony pledged to unite into one people under the rule of law:

We...solemnly and mutually in the Presence of God and of one another, covenant [sic] and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation...And by Virtue hereof to enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the General good of the Colony; unto which we promise all due Submission and Obedience." "The Mayflower Compact," Reprinted with commentary in *Our Nation's Archive: The History of the United States in Documents*, Edited by Erik Bruun and Jay Crosby, Black Dog and Leventhal Publishers, New York, 1999, 43-44.

The United States Constitution begins, "We the people...ordain and establish this Constitution for the United States of America," a phrase imparting that the source of the Constitution's authority is its adoption by the people. J.W. Peltason, *Corwin and Peltason's Understanding the Constitution*, Deanna Johnson et al. Eds., 13th Ed., Harcourt Brace College Publishers, 1994, 38-39. The Kentucky Constitution likewise expresses that its source of authority is the sovereign people. Kentucky Constitution, Preamble. The people



Robert Stephens

ratified the written state and federal constitutions, establishing the powers they would grant the state and federal governments. While an extended discussion of social contract theory could be made here, the crux is that in creating a constitution the people entered into an agreement with each other to abide as one under the rule of law.

What methods exist, however, to ensure that this agreement is upheld? Free elections and political debate are two methods. There are other safeguards; for example, the courts are a strong defender of the constitution. Indeed, the ideas of a social contract and the rule of law are the ideas which lie at the heart of the term "unconstitutional." The judicially created doctrine first enunciated in *Marbury v. Madison*, 5 U.S. 137 (1 Cranch) (1803), is an expression of the supremacy of a constitution over the particular laws or governmental acts which follow its adoption. An act violative of the federal or state constitution is not void because a court says it is void. Rather, such an act is beyond the pale of governmental power. The sovereign, *i.e.* the people, never gave the government the power to act in such a manner. It violates the rule of law for government to thus exceed the boundaries of power set up in the constitution. But we cannot overlook another guardian of the rule of law, and the centerpiece of our discussion: the public defender.

Public Defenders: Guardians of the Rule of Law

As public defenders, the rule of law defines our central purpose. Public defenders essentially provide two functions, one individual and the other societal. One, we give individualized legal advice and assistance to individual clients who otherwise could not afford to hire an attorney. And two, we ensure that no one in society (at least ideally) is denied access to the law because of poverty. The two functions operatively work together. In other words, by zealously advocating for individual clients in particular situations, the public defender is ensuring the societal benefit. This idea is expressed by one commentator who has said, "The legal profession is essential to the effective functioning of our system of freedom under law." Paul G. Haskell, *Why Lawyers Behave as They Do*, New Perspectives on Law, Culture, and Society series, Westview Press, 1998, 37. Indeed, specifically addressing the criminal defense bar, Haskell contends that the lawyer is justified in representing even someone he knows is guilty because of the inherent power of the prosecuting state and the inherent worth of individual liberty. *Id.*, 42-43.¹

The core duty, therefore, of the public advocate is to ensure for everyone to whom he or she is appointed that the law is followed, which in turn benefits all of society. The public defender thus serves to uphold and animate the rule of law. Like the tribune of the people in ancient Rome, the public advocate guards the interests of the people from infringement by those who might design upon them. No other public office is so intimately bound with maintaining the rule of law. Prosecutors have an obligation to see justice is done,² and

judges are to be untarnished arbiters of the law,³ but only the public defender has as his or her primary duty upholding the rule of law even in the face of violation of the rule of law by either of these two public servants. Only the public defender is called to stand for adherence to the rule of law when judges or prosecutors violate it, though thankfully this is a rare occurrence.

It is not sufficient to say that public defenders are simply a part of our system of criminal justice, which itself upholds the rule of law. While that is a factually correct statement, it ignores the essential role of public defenders within the criminal justice system. All countries have some form of criminal justice system: all governments punish those who violate their laws. Only governments controlled by the rule of law, however, have internal boundaries on power; only a criminal justice system controlled by the rule of law would even conceive of a public defender's role. Only in a country governed by the rule of law would the state provide an attorney to legitimately defend those it seeks to prosecute. The idea of a public defender was born by the rule of law and cannot be separated from it. In practice, it is hard to see how the rule of law can exist, at least in terms of criminal justice, without the public defender: equal justice would otherwise be impossible, and justice that is not equal is definitionally meaningless.

By clarifying the right to counsel, therefore, supreme court justices fortified the constitution, providing warriors to fight to maintain and proclaim the ancient principle of the rule of law.⁴ Arguably, no other single act in the twentieth century did more to protect the constitutions of the United States from encroachment by governmental power than the creation of state and federal public defender systems. It is fitting to give pause, on the 40th anniversary of *Gideon v. Wainwright*, to consider the lasting systemic constitutional importance of this decision.

Public Defenders: A Special Role Imposes Special Duties

What does the principle of the rule of law, and the special relationship public defenders have in upholding the same, imply ethically? Are there some special duties imposed by this relationship? The position of this paper is that there are indeed such duties.

The first duty imposed by the special relationship between public defenders and the rule of law is so basic as to nearly avoid pronouncement. Perhaps the point is not made more often because so many who serve as public defenders understand it intuitively. Because the rule of law is so vitally connected to what our role in the criminal justice system is, however, we must not only understand or perceive its importance internally, we must advocate actively for its strict adherence. Public defenders, more than anyone else, should be discussing the importance of, and arguing for obedience to,

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the rule of law. What so many of us understand in the gut must be expressed, well and often, so that others: judges, prosecutors, and jurors, can understand and apply it in real people's cases.

Zealous advocacy for one's client is required of every attorney. That principle is so essential to the attorney client relationship as to be intertwined with the very ideas of representation and advocacy. Prosecutors, we have already noted, have a duty to see that justice is performed in every case, so partisan desire will not cloud the judgment of those entrusted with the vast prosecutorial power of the state. What of the public defender; does our duty to uphold the rule of law create a special obligation to uphold the law, beyond that imposed by the bar's rules of professional conduct? Of course it does. One must be cautious here, for the duty to represent one's immediate client is paramount, indeed untouchable. One must not do the prosecutor's job for the state, nor is one obligated (indeed, even allowed!) to disclose confidential information. But, in matters of law, of legal interpretation, public defenders especially must be vigilant in maintaining a reputation for scrupulous adherence to the rule of law. All attorneys are required to notify the court of known court rulings in the controlling jurisdiction which affect a legal question negatively for one's client,⁵ but public defenders above all other lawyers must seek to obtain and maintain a reputation for strict adherence to the law. This must be so because it is we who, most of the time for most clients, are arguing for meticulous faithfulness to the rule of law. Frivolous legal argument and interpretation, or blatant disregard for law on point, thus have no place with public defender work. As one of the greatest authors of the twentieth century eloquently put it, "those who will defend authority against rebellion must not themselves rebel." J.R.R. Tolkien, *The Silmarillion*, Edited by Christopher Tolkien, Houghton Mifflin, Boston, 1977, 57.

Finally, the special role of public defenders as guardians of the rule of law imposes another public duty. As the primary trumpets of the rule of law in our system of justice, it is incumbent on public defenders to become more vocal and active members of the community in which they work. Teaching on legal subjects, writing to the paper on important issues, becoming involved in mentoring programs, participating in criminal justice counsels or committees, indeed simply being an active member of the community are ways in which we can fulfill this public obligation. The point is to simply be involved, while never compromising the principles on which we stand, for those who are respected **and** well heard have the best hope of influencing change, of increasing the rule of law, in our communities. The variety of ways in which we can perform this public function are myriad, but the public trust to do **something** is vital.

Endnotes:

1. The gravity of this statement is indicated when one compares it with Haskell's other views on legal ethics. Generally (*i.e.* for civil law), Haskell favors a justice-centered approach to legal ethics, where lawyers should do only what is best for their clients within what the law permits **and** what is morally good. *Id.*, passim. In the criminal law, however, for the reasons already stated, Haskell sees the need for unfettered advocacy, regardless of actual guilt.
2. American Bar Association Model Rules 3.8.
3. A principle going back at least to the Code of Hammurabi, c. 1780 BC. "If a judge try a case, reach a decision, and present his judgment in writing; if later error shall appear in his decision, and it be through his own fault, then he shall pay twelve times the fine set by him in the case, and he shall be publicly removed from the judge's bench, and never again shall he sit there to render judgment." Code of Laws, No. 5. Translated by L.W. King, Available at the Internet Ancient History Sourcebook, <http://www.fordham.edu/halsall/ancient/hamcode.html>.
4. See *Gideon v. Wainwright*, 372 U.S. 335 (March 18, 1963). See also, *Gholson v. Commonwealth*, 212 S.W.2d 537 (1948), which proclaimed a Kentucky state right to counsel years before *Gideon*.
5. ABA Model Rule 3.3 (a)(3). While Kentucky has not adopted that portion of that model rule, it is widely respected and applied by practicing attorneys. At least it appears so in my practice. ■

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

-- Andre Gide, 1921

LITIGATION PERFORMANCE STANDARDS: MAKING THEM WORK FOR CLIENTS AND YOU!

- ☐ Introduction
- ☐ NLADA Criminal Defense Representation Standards
- ☐ Institute of Judicial Administration/
ABA Juvenile Justice Standards
- ☐ ABA Capital Standards
- ☐ ABA Criminal Defense Standards
- ☐ NLADA Training and Development Standards
- ☐ Overall Structure of NLADA'S Performance Guidelines
- ☐ Overall Structure of ABA'S Death Penalty
Performance Guidelines
- ☐ Performance Guidelines: A Tool for Beginner to Know
Criminal Defense Attorney's Functions
- ☐ Performance Guidelines: A Tool for the Experienced
Litigator to Identify Areas for Improvement
- ☐ Performance Guidelines: A Tool for the
Litigator to Persuade Deciders
- ☐ Litigation Performance Standards: A Tool for Trainers
- ☐ Performance Guidelines: A Tool for Defender
Organization Managers and Supervisors
- ☐ Conclusion

You can't be motivated by self-interests and expect to be a leader. The instant you feel exempt from the standards of the organization, you cease to be a leader. A leader galvanizes people by living their shared vision.

-- Cheryl Breetwor, ShareData

Introduction

Why bother to read or use national criminal defense and public defender standards?

As a full time public defender or an assigned counsel attorney, your caseload never shrinks — it multiplies and divides. You constantly battle to successfully juggle the demands of clients, the courts, and the cases themselves.

As a public defender supervisor/manager, you may not only be responsible for your own caseload, but you must also actively monitor your attorneys' cases and courtrooms. You're also somehow expected to find time to coach staff attorneys and to conduct case reviews and do performance agreements and evaluations while you struggle to maintain even current resource levels and support staff.

As a public defender trainer, you may squeeze your trainer role in between caseload preparation and courtroom appearances. It's frequently impossible to accurately evaluate staff training needs or to develop training programs with written training materials on a limited or nonexistent training budget. And let's not even mention staff complaints about training or being "forced" to attend presentations.

So, with all these overwhelming daily concerns, stresses, and problems, why should we force ourselves to read or use national criminal defense and public defender performance standards?

Because clients want to be represented well. Because national standards provide a way to understand what is expected to provide quality representation to your clients by those practicing criminal defense work.

One definition of "standard" is "something established by authority, custom, or general consent as a model or example...something set up and established by authority as a rule for the measure of ...value, or quality." *Webster's New Collegiate Dictionary* (1976).

"Standards are the key to uniform quality in all essential governmental functions. In the indigent defense area, uniform application of standards at the state or national level is an important means of limiting arbitrary disparities in the quality of representation based solely on the location in which a prosecution is brought." *Redefining Leadership for Equal Justice: Final Report of National Symposium on Indigent Defense 2000*, Office of Justice Programs, US Department of Justice at page 14.

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NLADA Criminal Defense Representation Standards

NLADA's *Performance Guidelines for Criminal Defense Representation* (1995) offer an excellent, comprehensive and worthwhile definition of what constitutes good solid trial lawyering for public defenders.

These *Guidelines* are found at: http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines

These *Guidelines* give realistic meaning to the United States Constitution's sixth amendment and Kentucky Constitution's Section 11 right to counsel. They articulate the ultimate goal for all trial counsel: "zealous and quality representation."

Institute of Judicial Administration/ ABA Juvenile Justice Standards

Juvenile practice has also been the subject of national standards which present a statement of professional conduct specially applicable to the representation of juveniles involved in delinquency proceedings. These IJA/ABA standards include chapters relating to defense representation and to juvenile prosecution as well as to a broad statement directed to the administration of juvenile court proceedings, disposition, detention and corrections. All of these are important advocacy tools for the juvenile court and juvenile post-conviction litigator.

The IJA/ABA standards cover the following areas:

1. Standards Relating to Adjudication
2. Standards Relating to Appeals and Collateral Review
3. Standards Relating to Architecture of Facilities
4. Standards Relating to Corrections Administration
5. Standards Relating to Counsel for Private Parties
6. Standards Relating to Court Organization and Administration
7. Standards Relating to Dispositional Procedures
8. Standards Relating to Dispositions
9. Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition
10. Standards Relating to Juvenile Delinquency and Sanctions
11. Standards Relating to the Juvenile Probation's Function: Intake and Predisposition Investigative Services
12. Standards Relating to Juvenile Records and Information Services
13. Standards Relating to Monitoring
14. Standards Relating to Planning for Juvenile Justice
15. Standards Relating to Police Handling of Juvenile Problems
16. Standards Relating to Pretrial Court Proceedings
17. Standards Relating to Prosecution
18. Standards Relating to Rights of Minors
19. Standards Relating to Transfer Between Courts
20. Standards Relating to Youth Services Agencies

Capital Standards

NLADA and the ABA have adopted national standards for the defense of capital cases that address the expectations for representation by trial and post-trial capital defense counsel. The ABA has recently revised them.

The *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (February 2003) are found at: <http://www.abanet.org/deathpenalty/guidelines.pdf>

ABA Criminal Defense Standards

The American Bar Association has a variety of standards related to the practice of criminal law. They include:

- Appellate Review of Sentences
- Criminal Appeals
- Defense Function
- Discovery
- Electronic Surveillance:
 - Technologically-Assisted Physical Surveillance
 - Private Communications
- Fair Trial & Free Press
- Guilty Pleas
- Joinder & Severance
- Legal Status of Prisoners
- Mental Health
- Post-Conviction Remedies
- Pretrial Release
- Special Functions of the Trial Judge
- Prosecution Function
- Providing Defense Services
- Sentencing
- Speedy Trial
- Trial by Jury

NLADA Training and Development Standards

The National Legal Aid and Defender Association has *Defender Training and Development Standards* (1997) that set out the necessity for defender programs to provide education for their staff and a set of standards for having a system to develop and provide the needed education.

Those national defender training standards are found at: http://www.nlada.org/Defender/Defender_Standards/Defender_Training_Standards

Overall Structure of NLADA'S Performance Guidelines

The *Guidelines* do not define the duties of death penalty, post-conviction or appellate counsel. Although they are specifically directed to trial counsel, the *Guidelines* offer a standard of performance that may be used to define effective assistance of counsel in briefs and at post-conviction hearings.

NLADA's *Performance Guidelines* are comprehensive but not exhaustive. The language allows for flexibility. While some

actions are absolutely essential, others are left to counsel's considered judgment and discretion, and to the particularities of practice and law in the jurisdiction.

The *Guidelines* are divided into nine sections which I have captioned as follows:

Guideline Section 1: Rule, Duties and Education/Training of Counsel

Guideline Section 2: Pre-Trial Release Proceedings

Guideline Section 3: Counsel's Duties of Initial Appearance, Preliminary Hearing, and with regard to Prosecution Requests for Non-Testimonial Evidence

Guideline Section 4: Investigation, Discovery, Theory of the Case

Guideline Section 5: Pre-Trial Motions

Guideline Section 6: Plea Negotiations

Guideline Section 7: Duties at Trial

Guideline Section 8: Sentencing

Guideline Section 9: Post-Sentencing Duties

Each Guideline Section contains multiple *guidelines*, which, taken together, define the role, duties, and obligations of defense counsel. After each *guideline* there are references to the "Related Standards" that include nationally recognized standards, codes that address an aspect of representation, statutes, regulations, and policy manuals developed by public defender and assigned counsel programs. The Commentary, supported by footnotes citing to primary legal and secondary materials, provides an explanation and rationale for each *guideline*.

For all of us who are committed to the delivery of quality criminal defense services at the trial level, the Commentary and footnotes alone make the NLADA's *Performance Guidelines* a must read. The Commentary is thoughtful, well-reasoned and additional justification for demanding the resources and training opportunities to support a qualified staff. The footnotes also provide a treasure trove of information, documentation and case citations that all of us should find useful when confronting judges, prosecutors, legislators, the program funding source, and the press.

Overall Structure of ABA'S Death Penalty Performance Guidelines

The *Guidelines* are divided into ten sections, and address trial and post-conviction areas of litigation. There are 27 *Guidelines*:

- 1.1 Objective and scope
- 2.1 Adoption and implementation of a plan to provide high quality representation
- 3.1 Designation of a responsible agency
- 4.1 Defense team and supporting services
- 5.1 Qualifications of defense team
- 6.1 Workload
- 7.1 Monitoring; removal
- 8.1 Training
- 9.1 Funding and compensation

- 10.1 Establishment of performance standards
- 10.2 Applicability of performance standards
- 10.3 Obligations of counsel respecting workload
- 10.4 The defense team
- 10.5 Relationship with the client
- 10.6 Additional obligations of counsel representing foreign national
- 10.7 Investigation
- 10.8 The duty to assert legal claims
- 10.9.1 The duty to seek an agreed-upon disposition
- 10.9.2 Entry of guilty plea
- 10.10.1 Trial preparation overall
- 10.10.2 Voir dire and jury selection
- 10.11 The defense case concerning penalty
- 10.12 The official persistence report
- 10.13 The duty to facilitate the work of successor counsel
- 10.14 Duties of trial counsel after conviction
- 10.15.1 duties of post-conviction counsel
- 10.15.2 Duties of clemency counsel

The purpose of these standards is clearly set out. Guideline 1.1 states "is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence...." The Commentary to that Guideline states, "...these Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases."

Guideline 10.1 states that the "Responsible Agency should establish standards of performance of all counsel in death penalty cases." It also provides that the agency "should refer to the standards when assessing the qualifications or performance of counsel." The Commentary to that Guideline states that the standards should be used in "determining the eligibility of counsel for appointment or reappointment to capital cases and when monitoring the performance of counsel."

Guideline 10.5 emphasizes the critical aspects of the relationship with the client.

Post-conviction duties are addressed in guideline 10.15.1. That standard states that "Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to: 1. Maintain close contact with the client regarding litigation developments; and 2. Continually monitor the client's mental, physical and emotional condition for effects on the client's legal position; 3. Keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and 4. Continue an aggressive investigation of all aspects of the case."

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Performance Guidelines: A Tool for Beginner to Know Criminal Defense Attorney's Functions

Everyday, in courtrooms around the country, indigent defendants are represented by public defenders or assigned counsel who care about their work and the quality of their representation. Unfortunately, some defense advocates have not received sufficient training or adequate supervision to know or to understand all the tasks that must be accomplished to provide quality representation from initial appearance through post-sentence duties.

NLADA'S *Performance Guidelines* are not only a learning tool, but also an operations manual which offers a concrete statement of tasks for all phases of representation. Even if you have no training and no supervision, the *Guidelines* provide a full checklist of requirements, duties and considerations that every trial attorney must evaluate and, if appropriate, execute. An important use of performance standards is for the beginning attorney to read when asking, "what is my function day-to-day." It operates as the "manual" of practice.

Performance Guidelines: A Tool for the Experienced Litigator to Identify Areas for Improvement

You may already know and do many of the representational tasks that are discussed in the *Guidelines*. However, there may be areas where you are less proficient. The *Guidelines* help identify those areas and provide clear guidance on the direction you should seek.

For instance, in many places, motion practice is not an active part of the attorney's representation plan. *Guideline Section Five* offers an excellent discussion of the decision to file pre-trial motions; the types of motions that may be considered; the filing and arguing of pre-trial motions; and the subsequent filing of pre-trial motions.

Performance Guidelines: A Tool for the Litigator to persuade Deciders

As a litigator, you may motion the court or your office case supervisor for funds to hire an expert or an investigator. You consider the expert and/or the investigator essential for the defense of the case, but it is a constant, uphill battle for funds and resources. Use these national *Performance Guidelines* as additional justification for your request by citing to *Guideline 4.1*, which calls for expert assistance "when necessary or appropriate to: (A) the preparation of the defense; (B) adequate understanding of the prosecution's case; (C) rebut the prosecution's case."

Another example is the using the standard on the necessity of investigation to persuade a judge to provide a continuance to complete that indispensable investigation. *Guideline 4.1* entitled, "Investigation" states in part: "(a) Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts

constituting guilt. The investigation should be conducted as promptly as possible." It goes on to provide what sources the investigative information may include.

Law school teaches us how to use statutes, caselaw, law review and other articles to support our arguments. Let's now incorporate national standards for defense representation and performance into our arguments for additional case resources. If these *Performance Guidelines* help us to learn and grow as litigators, let's use them to improve judicial rulings and to educate our own supervisors and managers.

Litigation Performance Standards: A Tool for Trainers

As a public defender trainer, I know that many trainers constantly search for ways to quickly and efficiently develop quality criminal defense advocates who excel as "courtroom persuaders."

The ABA Death Penalty Guidelines and NLADA's *Performance Guidelines* are first rate training tools for new and experienced lawyers. Here in one cohesive volume is a comprehensive statement of the tasks that our lawyers should consider and execute at every stage of the litigation process. Successful courtroom performance depends upon excellent preparation as well as courtroom advocacy skills. The two sets of *Guidelines* clearly explain all the preparation building blocks that facilitate a solid advocacy performance.

Public defender organizations have traditionally focused their training on courtroom trial skills. Programs send attorneys to the National Criminal Defense College or to NLADA's Trial Practice Institute, or create their own in-house advocacy institutes. If in-house training exists, it too favors trial advocacy skills programming.

While these programs provide an excellent learning experience, they ignore what remains a major part of our practice: plea negotiation and sentencing advocacy. Driven by changes in state sentencing laws (mandatory sentence statutes, guideline sentencing, habitual offender statutes, sentence enhancements, and victim rights legislation), many defenders or assigned counsel increasingly engage in plea negotiation to limit the horrific sentence exposure that our clients face.

Using NLADA's *Performance Guidelines* as a beginning definition of the skills and tasks necessary for meaningful negotiation (*Guideline Section Six*) and for successful sentencing advocacy (*Guideline Section Eight*), we must add these skill sessions to our training agenda. We need to deal with the reality of case disposition for many clients. Good negotiation skills do not develop by osmosis. They must be nurtured and developed just as we work on courtroom advocacy skills. On too many occasions, we ignore or fail to recognize the many ways that our advocacy and preparation for sentence hearings may impact the presentence report and the sentencing judge's decision. These *Guidelines* define pro-active sentencing advocacy that makes it one of the best sections for all attorney levels.

Pro-active sentencing advocacy often means that we must actively seek programming that is an alternative to jail or prison. While some defender organizations employ alternative sentencing specialists or social workers who assist the attorney and who work with the client from evaluation to courtroom presentation, many defender offices do not have funding or sufficient funding to meet client demand. Again, let's use these national *Guidelines* (Guideline 8.1) as cited justification in a motion to the court for the necessary funds to hire an alternative sentencing specialist.

Performance Guidelines: A Tool for Defender Organization Managers and Supervisors

NLADA's *Performance Guidelines* are a must read for everyone who has a managerial or supervisory function in an office.

The *Performance Guidelines* are a strong weapon in our continuing battle with funding sources for additional monies and resources. "Zealous and quality representation" requires sufficient funding for lawyers and for professional and administrative support staff as well as experts and alternative sentencing advocates, assuming that the latter must be paid by the defender program and not by court order. "Zealous and quality representation" doesn't necessarily mean budget bloat. Let's use this representation goal to define what is basic and necessary for a lean, spare professional legal program which has the ability to adequately service its client population.

These *Guidelines* also assume that our attorneys and staff receive sufficient, on-going training, and that they are kept up to date on relevant areas of substantive law, procedure and practice. No defender program may adequately accomplish this task unless it provides an in-house training program with qualified trainers who have sufficient time and resources to plan programs, to create information/training materials, and to disseminate that information within the organization. NLADA's *Performance Guidelines* provide additional justification for the funding to create or to improve a continuing in-house legal education program.

Some defender programs have used these *Guidelines* as an "aspirational" goal to which they are moving. Others have employed the *Performance Guidelines* as an "operations manual." In either case, if our managers have a responsibility to train and to supervise attorneys whom they must also evaluate, then we need a quality checklist definition of the representation tasks that our trial attorneys must accomplish at all levels of representation. NLADA's *Performance Guidelines* provide a definition which programs may adopt in whole or in part or which they may use as reference in drafting their own guidelines or standards. Beyond just an individual program's adopted Performance Standards, a few defender programs have gone to either their state's appellate courts or to state bar associations, seeking Court or Bar adoption or endorsement of uniform *performance guidelines for criminal defense representation* to guarantee at least a minimal level of defense representation.

Managers and supervisors may also use these two sets of *Guidelines* as a policy tool to oppose or to support procedural practice changes initiated by the legislature, the courts, or the prosecutor. For instance, many jurisdictions are moving to institute video arraignments at initial appearance. Whether you decide to accept or to oppose this change, mold these new procedures in ways that protect our clients. Insist upon the funding of additional, necessary attorney and administrative staff. *Guideline Section 2*, Pre-Trial Release Proceedings, and *Guideline Section 3*, Counsel's Duties at Initial Appearance, provide ample justification for your argument that a meaningful right to counsel must be maintained at initial appearance video proceedings.

Standards provide practical assistance to the supervisor working with staff attorneys to insure conformance to ethical rules. The ABA Model Rules encourage review by other professionals and require supervisors to insure the ethical performance of their attorney employees. Model Rule 1.1 requires "competent representation to a client." The Commentary to the rule contemplates peer review to maintain the "requisite knowledge and skill." Model Rule 5.1 imposes ethical responsibilities on a supervisor to "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."

A very important use of standards is that of a device for confronting the litigator who is not performing at the necessary level and who is resistant to feedback on his performance. When a supervisor confronts the lawyer who does not have a good motion practice, or good client relationships, or does not believe in constructing a decent file, or filing a sentencing motion, the supervisor often has difficulty with the resistant lawyer who says, "who says I need to do those things? I get good results. Nobody is complaining." National standards provide support to the confronting supervisor, who can say, "this is the nationally recognized standard of practice. You are not meeting it. This well thought out performance standard says you are operating below the accepted norm." That can be a pretty powerful persuasive communication.

Pretrial release is very important to all our clients. It is especially important to clients charged with a misdemeanor, as many of them will have their case effectively completed when released, as time served will be the lengthiest sentence option the Court will practically consider. It is an area some defenders do not litigate as vigorously as some private criminal defense attorneys. The *NLADA Performance Guidelines* are clear on the pretrial release responsibilities of the litigator.

Guideline 2.1 General Obligations of Counsel Regarding Pretrial Release states:

"The attorney has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client."

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Guideline 2.3 Pretrial Release Proceedings states:

“(a) Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release.

(b) Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.

(c) If the court sets conditions of release which require the posting of a monetary bond or the posting of real property as collateral for release, counsel should make sure the client understands the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should advise the client and others acting in his or her behalf how to properly post such assets.

(d) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court to any special medical or psychiatric and security needs of the client and request that the court direct the appropriate officials to take steps to meet such special needs.”

Conclusion

Why read or use national standards, NLADA's *Performance Guidelines for Criminal Defense Representation* (1995), the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (February 2003), and other national standards? Because clients want quality representation. Because, whether you are a public defender trial attorney or assigned counsel, trainer, supervisor/ manager, or chief defender you can make these *standards work* for your clients and for you.

As an educational, supervisory, policy, persuasive and political tool, using national standards of practice makes sense for all of us and for our clients. “Zealous and quality representation” is neither a fantasy nor a dream. Standards help make that goal a reality. ■

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Supreme Court's Ruling in *Wiggins v. Smith*:

Attorney Falls Short of National Standards

Statement of Clinton Lyons, NLADA President and CEO

June 26, 2003: The Supreme Court's decision today makes clear that jurisdictions which do not adhere to clear national standards regarding public defense services do so at their own peril. We are proud that the standards developed by the National Legal Aid & Defender Association, regarding the appointment and performance of counsel in death penalty cases have been recognized by the Supreme Court as defining a reasonable and necessary professional standard of performance. These standards were authored by NLADA in 1988 and adopted by the ABA the following year.

Hopefully, jurisdictions all over the country that have not already done so will recognize the wisdom of adopting and enforcing standards to ensure the integrity of their criminal justice processes and avoid unwarranted reversals of criminal convictions.

Likewise, we are pleased that the Court has breathed some life back into the process of federal courts' "habeas corpus" review of state criminal convictions. Though the Maryland Court of Appeals had found that the attorneys' abysmal performance in this case might have been a reasonable "tactical" decision, and many federal courts in recent years have felt compelled to "defer" to such state court rulings under a 1996 congressional law restricting habeas corpus, the Supreme Court today refused to stand idly by and let a state execute a man who almost certainly would not face execution if his attorneys had done their jobs properly. By this ruling, the Court affirms that in the face of a manifest injustice, it will not be a potted plant — the Congress's exhortations to the contrary notwithstanding.

For many decades, NLADA has developed standards regarding public defense systems and the duties required of attorneys in representing persons accused of crimes, and has advised jurisdictions on how to bring their systems into compliance with the standards. There are sets standards written to apply not only to death penalty cases, but to all cases, and to all types of public defense systems.

The National Legal Aid & Defender Association (NLADA), founded in 1911, is the oldest and largest national, nonprofit membership organization devoting all of its resources to advocating equal access to justice for all Americans. NLADA champions effective legal assistance for people who cannot afford counsel, serves as a collective voice for both civil legal services and public defense services throughout the nation and provides a wide range of services and benefits to its individual and organizational members.

COMMONWEALTH OF KENTUCKY
CIRCUIT COURT
CRIMINAL DIVISION

INDICTMENT NO.

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

MOTION TO CONTINUE

XXXXXXXXXXXXXXXXXX

DEFENDANT

Comes the defendant, by and through counsel, and moves this Honorable Court, pursuant to RCr 9.04, his State and Federal Constitutional rights of due process, the right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution and Section Eleven of the Kentucky Constitution, to continue the trial from _____ to a future date certain. In support of his motion the defendant states the following:

1. The defendant is charged with one count of murder. This is a capital offense, which carries a possible sentence of life imprisonment.
2. In addition to this case which is set for trial on _____, Defense counsel has a death penalty multiple murder jury trial scheduled for _____ as well as several other felony trials scheduled the first week of April. The death penalty case may very well take longer than a week to complete the trial.
3. With this combination of cases set for jury trial in a very short time period, including a death penalty case, Defense counsel has been unable to adequately prepare the above case for trial.
4. The Department of Public Advocacy, which employs present defense counsel, has adopted the National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation.

Guideline 4.1, *Performance Guidelines for Criminal Defense Representation*, 1995, concerns investigation and specifically states:

- (a) Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible.
 - (b)(3) potential witnesses: Counsel should consider whether to interview potential witnesses, including any complaining witnesses and others adverse to the accused.
 - (4) Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.
1. Counsel's office has only one investigator. He is also the investigator for the death penalty case set for jury trial _____. The investigation in this case is not yet complete. The investigator has not had sufficient time to locate and interview potential witnesses for the prosecution or defense.
 2. Specifically, on _____, Counsel received additional Discovery from the Commonwealth indicating that there were three additional witnesses who gave statements concerning this case. The Police Report is dated _____.
 3. Further, an order for the Commonwealth to provide the photographs in this case, signed on October 7, 2002, has not been complied with by the Commonwealth. Counsel has not received any of the photographs taken in connection with this case.
 4. Counsel has not previously requested a continuance.
 5. Counsel requests a short delay but at least two months. Counsel is available for trial of this case the week of _____ or any date between _____.
 6. Counsel believes this minimal delay would create only minimal inconvenience to witnesses and the court.
 7. Further, this case has only been before this court since _____.
 8. The defendant would be prejudiced if his case were to proceed to trial prior to the investigation of the recently Discovered material mentioned above. Further prejudice to the Defendant would be caused by the missing Discovery.
 9. In order for present counsel to comply with the performance guidelines as outlined above and to provide effective assistance of counsel as required by the Sixth Amendment to the Federal Constitution and Section Eleven of the Kentucky Constitution, a continuance of the trial date is necessary.

WHEREFORE, the defendant respectfully requests that this case be continued from the previously scheduled trial date of _____.

Respectfully Submitted,

Kristin Bailey ■

THE INITIAL ATTORNEY-CLIENT INTERVIEW

For most of us, it starts the same way, whether we are reading the morning paper, traveling to or from court, ending the business day, we get “the call.” We are notified that there is a client in custody who we must see. Some of us, as career defense attorneys or public defenders, have done it hundreds of times, others thousands: The “Initial Client Interview.” This article will discuss this primary obligation of criminal defense practice, with a view toward elevating and enlightening and maybe even entertaining (if not improving) how we do these. An initial client interview that is courteous, professional and candid (yes, that includes finding out he “did it”), and productive, by way of being mutually informative, is a singular success. By equally informative, it should be mutually responsive to both the client’s and lawyer’s questions to the other. When this occurs, the lawyer achieves its obvious primary purpose and, at the same time, lays the foundation for a successful attorney-client relationship. As a guide for new lawyers, young assistant public defenders and supervising attorneys in defense practice, the NLADA Performance Guidelines for Criminal Defense Representation, Guide 2.2 Initial Interview, is an excellent learning tool and standard.

Attorney Preparation

Readiness, as far as what is needed to conduct a more productive initial interview, of course, requires obtaining basic information of the charge and arrest, as well as vital related information on the existence of arrest or search warrants. With awareness of the actual charge, prior to the initial interview, the attorney can assess bail criteria, potential maximum punishment and the likelihood of gaining swift pretrial release. Alternatively, where it is seen that the nature of the charge is more serious, counsel, in the initial interview, can conduct a more comprehensive inquiry of the client in preparation of protracted bail litigation.

Apart from simply “getting a copy of the charge,” what the attorney should do before seeing the jailed client is to put him/herself in the right set of mind to look upon, talk to, and give some semblance of comfort through professional reassurance to an individual behind bars. An incarcerated person, who maybe for the first time, is distraught and much in need of help and assurance that can only be provided by the words, advice, and answers to questions of that person’s lawyer. Words that, at the least, can forecast what is to come in the hours, days, and weeks ahead. In my experience, when I first meet a new client who is locked up, the first thing I always say is “How are you?” It is important to learn your client’s physical and mental health, also, it is necessary for assessing bail worthiness and later for preparation of the defense. Generally, learning how your client has responded

to the rigors of arrest, police escort to the station, booking, and processing, provides crucial information about your client’s physical and mental health and durability. Thus, medical and psychological history is absolutely essential. It must be learned in the first client interview.



David Mejia

The Interview

There are two parallel things going on in the initial interview in the course of the gathering of information from the client. First, information that bears on pretrial release, such as ties to the community through place of birth, family, schooling, employment, domicile and economic stability. Secondly, information that bears on the defense to the charge, plus bail, such as mental/physical condition, the client’s criminal record; particularly, his record of arrests, prosecutions, misdemeanors/felony convictions; and bail history. Finally, it is essential to learn facts surrounding the arrest, the identity of material witnesses to the arrest and charge, the existence of physical evidence including documents, records, and tangible objects. The foregoing provide insight into the nature and scope of the police investigation, its strength or weakness, and the challenges ahead in confronting the accusation against the client.

In the matters listed above, it is equally essential to obtain information that provides a means to verify what is given. For example, the name, address and telephone numbers of the client’s employer, family member, or other contact person should be regularly obtained. Similarly, if applicable, obtaining the names, addresses and telephone numbers of the client’s landlord or mortgage banker are important to verify the client’s ability to raise bail funds. An awareness of the precise charge, the client’s criminal history, and ties to the community bear equally on the amount of monetary funds that will probably be necessary to assure pretrial release. Of course, with this, the client’s knowledge and explicit permission to contact verifying sources of information must be first obtained. To get medical records, an appropriate written Medical Release must be executed. Note: Recent federal regulations require compliance with strict guidelines in obtaining medical information. (See, (HIPAA) Health Insurance Portability and Accountability Act of 1996 Public Law 104-191 and Administrative Simplification (26 Kb), Social Security Act, Sec. 1173, as amended, 42 U.S.C.A. 1320d-2, 45 CFR Sec. 164.501 (2002)).

Answering Client's Questions

When it comes to client interviews, there is no firm agenda. Every first interview is different based on the varying personalities, ages, experiences clients have had with the criminal justice system and their prior experience any with defense lawyers. The pace of the interview may also vary depending on where it is conducted: standing up talking through iron bars; in the lawyer's office; or a courtroom hallway. These different settings obviously can alleviate or lower the emotional pitch or level of calmness. Whatever the place, it should be expected that the client will have a need to have his concerns or questions addressed. The best lawyer-interviewer is a good listener.

Whether at the beginning or end of the interview, the client should be told what bail procedures will occur in the court, and when, and that the client, before going to court, may be interviewed by a pretrial release officer. Here, I always advise clients to fully and honestly cooperate with bail officials, but warn them at the same time to never discuss the charged offense. In the first interview, counsel should be prepared to inform the client of the minimum and maximum punishment applicable to the charge and to provide a forecast, based on common sense and experience, of how long the prosecution may be pending in the court. On this, I routinely advise the client that he will not be required nor compelled to speak in court, that I will be doing that for him; and that nothing will happen without his knowledge, participation and awareness. I also promise the client that whenever something is said by the court or prosecutor, that he does not understand, that it will be explained. Finally, that no decision, step, nor request on his behalf will be made unless he knows it and approves. Under the code of professional responsibility, there are three fundamental, constant decisions made in the defense of a criminal prosecution that rest solely in the person of the defendant: the decision to plead guilty or not guilty; the election of proceeding to bench or jury trial; and the decision whether the defendant will take the stand and testify in his own defense. (See Annotated Model Rules of Professional Conduct, Third Edition, Rule 1.2(a) Scope of Representation)

Client Forms

From the first day I began as a criminal defense lawyer, in 1976, to today as Director of the Trial Division, I have endeavored to advance and promote the use of a written "Client Interview" form in this most vital phase of the attorney client relationship. A suggested copy or format for use in the initial attorney client interview follows this article.

Why is the use of a "form" important, useful or recommended? In my years in practice, its use and the documentation of information in it, is indispensable to effective practice from the initial court appearance, to bail hearings, pre-trial motion practice, the trial of the case and sentencing. As with all

others, time works against our memory; and details, information large and small, obtained during the initial attorney client interview, if not reduced to writing, if not readily available throughout the defense of the case, is easily forgotten. Let me give you an example, this occurred in my own practice, some 15 years ago. I represented a man named Michael Johnson (I've changed the name for purposes of this article). While Michael's case was in the pre-trial stages, while he was on bail and at a routine status, the prosecution unexpectedly brought forth information that Michael had an outstanding arrest warrant from the State of Texas, for bail jumping. The information on the warrant matched my client's name, including middle name, date of birth and place of birth, but the social security number was different. Because I was able to instantly retrieve my initial attorney client interview, in my file, that contained verifying information of Michael's correct social security number, I was able to satisfy the court that Michael was not the same person wanted in Texas. This saved Michael from being taken into custody for several hours or overnight to correct the inaccuracy of the prosecutor's allegation. Thus, the simple exercise of having my client's social security number in my file, recorded and verified months earlier, made for more efficient, accurate and professional representation in that instance.

Some Closing Advice From the Ages

Late in the nineteenth century, a school notebook was discovered at Mount Vernon, George Washington's life-long home. It dated from 1745 when he was in his teenage years attending school in Virginia. In his own handwriting is found the foundation of a solid character education. Historical research showed, in that notebook, that young George Washington had copied "Rules of Civility" and had listed them by number from 1 to 54. A few are given here as a timeless guide to all lawyers in the conduct of attorney-client interviews:

*Every action in company ought to be with
some sign of respect to those present*

* * *

Let your discourse ... be short and comprehensive.

* * *

*Think before you speak; pronounce not imperfectly, nor
bring out your words too hastily, but orderly and distinctly.*

* * *

*Undertake not what you cannot perform;
but be careful to keep your promise.*

* * *

*Labor to keep alive in your heart that little
spark of celestial fire called conscience.*

David S. Mejia
Trial Division Director
Dmejia@mail.pa.state.ky.us

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NLADA Performance Guidelines for Criminal Defense Representation (1994)

With Permission of NLADA, we reprint a listing of their National Criminal Defense Guidelines with the text of several guidelines: The full guidelines can be found at: http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines. DPA has adopted these in DPA Policy 17.06.

Section 1

- Role of Defense Counsel
- Education, Training and Experience of Defense Counsel
- General Duties of Defense Counsel

Section 2

- General Obligations of Counsel Regarding Pretrial Release
- Initial Interview
- Pretrial Release Proceedings

Section 3

- Presentment and Arraignment
- Preliminary Hearing
- Prosecution Requests for Non-Testimonial Evidence

Section 4

- Investigation
- Formal and Informal Discovery
- Theory of the Case

Section 5

- The Decision to File Pretrial Motion
- Filing and Arguing Pretrial Motions
- Subsequent Filing of Pretrial Motions

Section 6

- The Plea Negotiations Process and the Duties of Counsel
- The Contents of the Negotiations
- The Decision to Enter a Plea of Guilty
- Entry of the Plea before the Court

Section 7

- General Trial Preparation
- Voir Dire and Jury Selection
- Opening Statement
- Confronting the Prosecution's Case
- Presenting the Defense Case
- Closing Argument
- Jury Instructions

Section 8

- Obligations of Counsel in Sentencing
- Sentencing Options, Consequences and Procedures
- Preparation for Sentencing
- The Official Presentence Report
- The Prosecution's Sentencing Position
- The Defense Sentencing Memorandum
- The Sentencing Process

Section 9

- Motion for a New Trial
- Right to Appeal
- Bail Pending Appeal
- Self-Surrender
- Sentence Reduction
- Expungement or Sealing of Record

Summary of Selected Black-Letter Guidelines

Guideline 2.2 Initial Interview

a. Preparation:

Prior to conducting the initial interview the attorney, should, where possible:

1. be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known;
2. obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by bail agencies concerning pretrial release, and law enforcement reports that might be available;
3. be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
4. be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release;
5. be familiar with any procedures available for reviewing the trial judge's setting of bail.

b. The Interview:

1. The purpose of the initial interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literary, be overcome.
2. Information that should be acquired includes, but is not limited to:

A. the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status (if applicable), employment record and history; B. the client's physical and mental health, educational and armed services records; C. the client's immediate medical needs; D. the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision; E. the ability of the client to meet any financial conditions of release; F. the names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals; 3. Information to be provided the client includes, but is not limited to: A. an explanation of the procedures that will be followed in setting the conditions of pretrial release; B. an explanation of the type of information that will be	requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense; C. an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney; D. the charges and the potential penalties; E. a general procedural overview of the progression of the case, where possible; c. <i>Supplemental Information</i> Whenever possible, counsel should use the initial interview to gather additional information relevant to preparation of the defense. Such information may include, but is not limited to: 1. the facts surrounding the charges against the client; 2. any evidence of improper police investigative practices or prosecutorial conduct which affects the client's rights; 3. any possible witnesses who should be located; 4. any evidence that should be preserved; 5. where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.
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IN MEMORY OF DONNA ROBINSON

Donna Robinson Potter passed away on April 27, 2003 after a courageous battle with cancer. She was with DPA for 15 years and was an Administrative Specialist III for the Pikeville office.

Shirl Alley remembers Donna as "a true pleasure to work with. I first met Donna in 1995 when I came to work for DPA. Over the years Donna and I became close friends and it was an experience that has enriched my life. Donna was a great person. In learning my work from Donna, I was able to gain confidence in myself and my performance as a secretary. There are occasionally people that enter your life that will never be forgotten and Donna was one of those people."

Leta Baharestan remembers, "Donna Robinson was a friendly, warm person who made both the staff and our clients feel welcome. From my first day in the office, she made me feel good about being a part of the Pikeville office. Her attitude

and leadership helped make our office a good place to be."

"Donna was a breath of fresh air to our office," says Traci Hancock. "When I first began working with the Department, she was very eager to show me around and introduce me to many people. She was almost always smiling and could find laughter in almost every situation. She will be greatly missed in the Pikeville office."

Donna was a stronghold for the Pikeville office and she will truly be missed. ■



*Donna Robinson Potter
with Grandson Bryce*

**Release of Information
(HIPAA)**

I, _____ SS# _____ authorize the following entities and individuals to release information regarding my personal, educational, employment, medical, institutional, social, criminal, and psychological history to _____, and other staff of _____ who are members of my legal defense team.

In accordance with the Health Insurance Portability and Accountability Act, 45 C.F.R. § 164.501 (2002), et. seq. (HIPAA), the dates of service for which the information is requested are from my date of birth on _____ to _____, the date of this release. See 45 C.F.R. § 164.

In accordance with HIPAA, the specific date on which this release will expire is _____.

I understand that information used or disclosed pursuant to the authorization may be subject to limited re-disclosure by my defense team for purposes related to my legal representation. I understand that such limited disclosures by my defense team will not be protected by HIPAA privacy rules.

The HIPAA "minimum necessary" standard does not apply to this request for disclosure to the individual who is the subject of the information. All information in the possession or control of the entity or individual should be provided.

"Information" includes typewritten or handwritten recordings of interviews, notes (including handwritten notes), log entries, records of all kinds, memoranda, electronic recordings, audio tapes, video tapes, compact disks, correspondence, emails, computerized records, other records, reports, and data entries of any kind. This release authorizes copying, by photocopy or otherwise, and transmission of said documents, via FAX or other appropriate means.

I reserve the right to revoke this authorization in writing by sending a dated letter signed by me to any or all of the entities and persons named below.

The entities and individuals to whom this RELEASE is directed are as follows:

Hospitals, clinics, physicians, therapists, psychiatrists, nurses, psychologists, and any other medical or mental health professionals and personnel;

Educational institutions, schools, vocational programs, including learning disabled educational programs, educationally or mentally handicapped programs, and special education programs;

School counselors, teachers, professors, principals, vice-principals, psychologists, therapists, nurses, and any and all other school personnel;

Jail, prison, or law enforcement personnel, including police personnel, sheriff personnel, guards, prison officials, social workers, psychologists, psychiatrists, doctors, nurses, and mental health related personnel;

All court and judicial personnel including clerks, judges, designated workers, probation officers, social workers, court reporters, court deputies and court secretaries;

Kentucky's Cabinet For Human Resources, other state or local social services departments, offices of child protective agencies, caseworkers, social workers, nurses, assigned homemakers, and special assistance personnel;

Records custodians of any of the above named entities.

All persons, agencies, or corporations who would have claims of confidentiality or privilege on behalf of the undersigned are hereby released from all claim of privilege or confidentiality related to information provided pursuant to this release. Claims of Privilege include all claims and protections pursuant to state, local, and federal statutes and constitutional provisions.

A copy of this RELEASE shall be considered as effective as an original.

ALL FORMER RELEASES SHALL BE DECLARED VOID.

(NAME OF CLIENT)
COMMONWEALTH OF KENTUCKY)
COUNTY OF _____)

Subscribed and sworn before me this _____ day of _____, 20__.

NOTARY PUBLIC

My commission expires: ■

ASK CORRECTIONS

The 2003 Kentucky House Bill 269, the budget bill, temporarily changes the way time on parole is counted.

House Bill 269, the budget bill, passed in the 2003 Regular Session of the Kentucky General Assembly has temporarily modified KRS 439.344, "Effect of Parole Time on Sentence." The change now allows for the period of time spent on parole to count toward service of a sentence in certain circumstances. But, this time will only count when the violation is other than a new felony conviction. This language which changes the statute is referred to as budget language and is only in effect between April 1, 2003 and June 30, 2004.

HB 269 is the bill passed by the General Assembly which authorized the funding level for the different agencies in the Executive Branch of the Commonwealth of Kentucky for the 2002-2004 Fiscal Biennium, often times called the budget bill. The authorizations or any language contained in HB269 expires June 30, 2004, the end of the 2002-2004 biennium.

The HB 269 language reads: "Probation and Parole Credit: Notwithstanding KRS 439.344, the period of time spent on parole shall count as a part of the prisoner's remaining unexpired sentence, when it is used to determine a parolee's eligibility for a final discharge from parole as set out in KRS 439.354, or when a parolee is returned as a parole violator for a violation other than a new felony conviction."

The questions and answers below should help explain what this temporary language change does and who may benefit from the change.

QUESTION:

During the 2003 Legislative session KSR 439.344 was revised to allow the time out on parole to count toward service of a sentence. My client was paroled on 2 occasions, and returned to prison for violations of his parole in 2000 and again in 2002. Would my client receive credit on his sentence for the periods of time spent on these 2 parole periods?

ANSWER:

The revision to KRS 439.344 was not made retroactive. This credit, known as parole supervision credit, only applies to persons whose parole is revoked for technical violation charges after April 1, 2003.

QUESTION:

Under the recent revisions of KRS 439.344, does an inmate receive credit for the full period of time spent on parole? My client spent several years on parole before being violated for receiving some new misdemeanor convictions. The Parole Board revoked his parole on April 18, 2003.

ANSWER:

Yes, parole supervision credit is given for time spent on parole up to the issuance of a parole violation warrant. A person may then receive credit for time spent in jail on parole violation charges, under certain circumstances, and that time is known as parole violation time credit.

QUESTION:

My client spent over 2 years on parole before being returned to prison with a new felony conviction. The new felony offense was committed while he was out on parole. Does the parole supervision credit apply to him?

ANSWER:

No, parole supervision credit only applies if a person is returned to prison and his parole is revoked on technical violation charges. If a parolee returns to prison for a new felony conviction committed while on parole he does not qualify for the parole supervision credit.

QUESTION:

So, it does not matter when my client was paroled or for how long she was on parole? What is important is that in order for her to be credited with the time she has spent on parole the parole violation must be for something other than a felony and the violation must occur between April 1, 2003 and June 30, 2004.

ANSWER:

Yes.

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PAROLE ELIGIBILITY: HAS ANYTHING CHANGED SINCE FY 99-00? AN UPDATE AND THE REST OF THE STORY

In August 2001, *The Advocate* tried to determine what exactly did parole eligibility mean and how do we answer clients, victims and members of the community who regularly ask, "How much time really will be served?" Or, "Oh!, He got a five year sentence so he will out in a year." Or, "Everybody makes parole the first time they see the parole board."

The answer to those questions in August 2001 was that during FY 1999-2000 an offender had 1 chance in 11 of making parole the first time they saw the Parole Board. It meant that in FY 1999-2000 an offender had a better chance of making parole after having received one or more deferrals from the Parole Board than making parole at an initial appearance. It further meant that for FY 1999-2000 the granting of parole decreased by 30% when compared to FY 1983-1984 and that the likelihood of getting a serve out had increased by 31%.

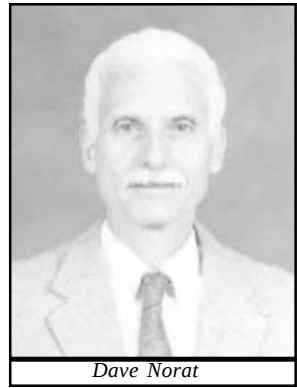
Has anything changed since FY 1999-2000? Do we need to tell our clients, victims and members of the community something different? Well, it looks like yes. The percentage of individuals receiving parole increased by 7% since FY 1999-2000 with a 7% decrease in the number of serve outs. But what is the rest of the story?

According to the *Kentucky Parole Board* statistics compiled by the Department of Corrections for fiscal year 2001-2002, 16% or 862 individuals were recommended for parole out of the 5,316 cases that received initial hearings/reviews in fiscal year 2001-2002. Of the remaining 84%, 45% or 2,404 were deferred and 39% or 2,050 were ordered to serve out their sentences. The Board's report does not tell us what is the average length of a deferral or what is the average length of time for serve out of a sentence. The report does tell us that: a five-year sentence does not mean the individual will be out in a year. An individual had a 1 in 6 chance of making parole in FY 2001-2002, compared to a 1 in 11 chance in FY 1999-2000, upon initial review. In FY 1999-2000 an individual had about an equal chance of being served out on a sentence (46%) as the individual had of being deferred (45%) when seeing the Board for the first time.

Deferrals have a better chance of parole. The Board's statistics show that if an offender was given a deferral(s), the offender will have a better chance of being paroled coming off the defer-

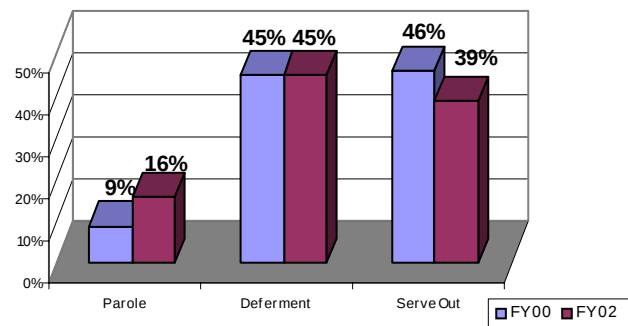
ment. A deferral is when the offender is told he will have to serve an additional number of months before the Parole Board will see him again to review his case for possible parole.

This is also known as a "flop" in the prisons. An offender may receive more than one deferral before being paroled.



Dave Norat

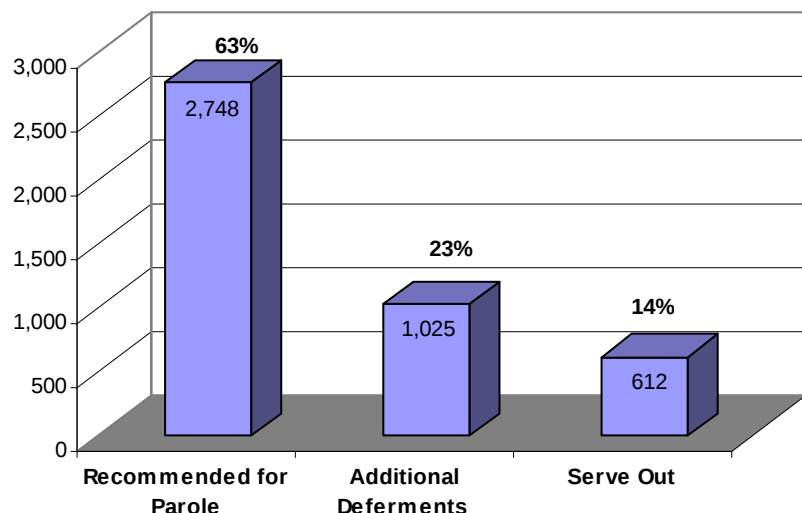
Parole Board Actions - Initial Interviews FY 00 vs. FY 02



Note: In FY00 there were 102 inmates who were eligible for parole based on time served but were not seen due to failure to complete sex offender treatment programs.

In FY 2001-2002 the Parole Board interviewed or reviewed 4,385 deferred cases. Of those deferred cases, 2,748 (63%) were recommended for parole, 1,025 (23%) received an additional deferral and 612 (14%) were ordered to serve out. The FY 2001-2002 statistics do not say how many deferrals

Parole Board Actions - Deferred Cases Interviewed/Reviewed FY 2001-2002



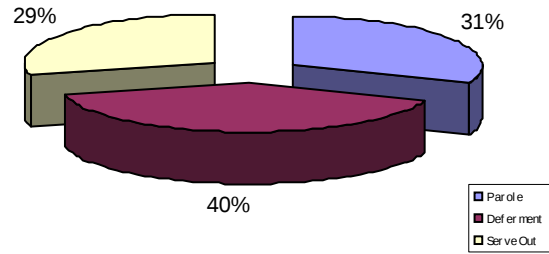
an individual may have been given before being granted parole. There is also no information given on the average length of deferrals before parole is granted.

Parole violators least likely to be paroled. In FY 2001-2002, 1,789 parole revocation cases were interviewed or reviewed by the Board. Of those 1,789 cases only 17 (1%) were recommended for parole with 1,138 (64%) receiving a deferment or additional deferment and 634 (35%) ordered to serve out their sentences.

The Parole Board conducted 11,490 parole interviews in FY 2001-2002. In FY 2001-2002 the Parole Board saw 11,490 offenders for either an initial appearance, a parole revocation review or deferred interview/review. In FY 2001-2002 individuals least likely to make parole were those individuals coming before the Board after a parole revocation (1%), followed by those who are seeing the Board for the first time (16%). Individuals seeing the Board after one or more deferments (64%) had the greatest chance of being granted parole

A review of the data below helps us to answer the question "How much time really will be served?" In three of last five years between 29 to 31 % of the total number of individuals who came up for parole either; on an initial review; from a deferment; or, a revocation made parole.

Comparative Data for All Type Interviews Conducted 2001-02



Only 2 offenders serving a life sentence were paroled in FY 2002. In FY 2001-2002, 17 offenders serving a life sentence saw the Parole Board. Of those 17, 15 were deferred and 2 were recommended for parole.

So what does the Board consider:

While the available statistics do not provide information as to what type of individual is granted parole upon initial review, we do know what factors the parole board applies in its decisions to grant or deny parole at any stage of an individual's eligibility. These criteria are found in Section 4

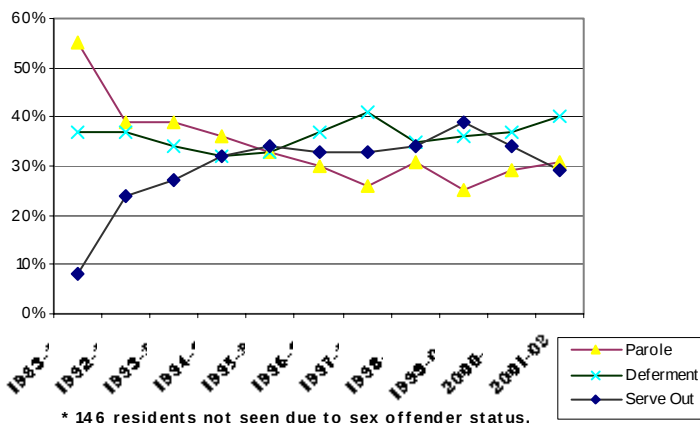
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Comparison Data for All Type Interviews Conducted FY 84, FY 93 thru FY 02

	83-84	92-93	93-94	94-95	95-96	96-97	97-98	98-99	*99-00	00-01	01-02
Parole	55%	39%	39%	36%	33%	30%	26%	31%	25%	29%	31%
Deferment	38%	37%	34%	32%	33%	37%	41%	35%	35%	36%	40%
Serve Out	8%	24%	27%	32%	34%	33%	33%	34%	39%	34%	29%

* 146 residents not seen due to sex offender status

Comparative History Data FY 1992-93 to FY 2001-02



Life Sentences Paroled by the Board (1995-2002)

Fiscal Year	Paroled	Total Interviewed	% Paroled
1995	3	7	0.43%
1996	0	7	0.00%
1997	1	6	0.17%
1998	0	3	0.00%
1999	0	0	0.00%
2000	1	12	0.08%
2001	2	14	0.14%
2002	2	17	0.12%
TOTAL	9	74	0.12%

Continued from page 29

of 501 Kentucky Administrative Regulations, Chapter 1:030. The factors are:

- (a) Current offense - seriousness, violence involved, firearm use and, life taken or death occurred during commission;
- (b) Prior record;
- (c) Institutional adjustment and conduct - disciplinary reports, loss of good time, work and program involvement;
- (d) Attitude toward authority - before incarceration, during incarceration;
- (e) History of alcohol or drug involvement;
- (f) History of prior probation, shock probation, or parole violations;
- (g) Education and job skills;
- (h) Employment history;
- (i) Emotional stability;
- (j) Mental capacities;
- (k) Terminal illness;
- (l) History of deviant behavior;
- (m) Official and community attitudes toward accepting inmate back in the county of conviction;
- (n) Victim impact statements and victim impact hearings;
- (o) Review of parole plan - housing, employment, need for community treatment and follow-up resources;
- (p) Any other factors involved that would relate to the inmate's needs and the safety of the public.

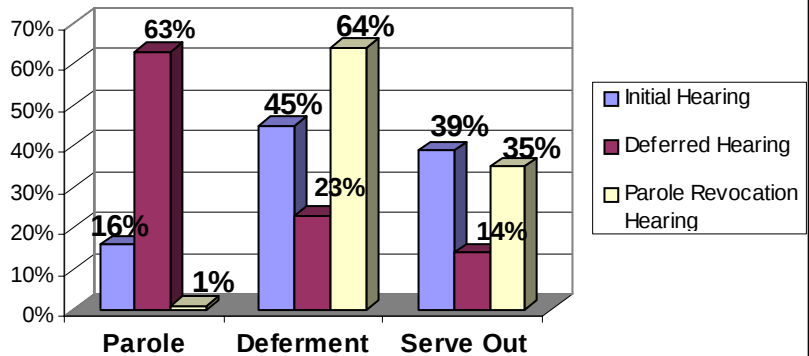
Parole eligibility: What does it really mean?

It means that there has been a 6% increase in the number of individuals receiving parole when compared to FY 1999-2000.

Parole eligibility: The rest of the story.

The rest of the story is that most likely an individual will receive a deferment from the Parole Board rather than being paroled at their first hearing before the Parole Board. Looking at the numbers we learn that the 6% increase is a result of an increase in the number of deferments given by the Board and the number of individuals who receive parole coming off of a deferment. An individual had a significantly greater chance of making parole (63%) coming off of one or more deferments than making parole at an initial or first hearing (16%).

**FY 2001-2002 Parole Board Action - Comparison
Parole vs. Deferment vs. Serve Out**



Parole eligibility: The story continues.

The Board, which consists of seven diverse members who reach their own decision in each case, gave fewer serve outs (29%) in FY 2001-2002 than any other time in the last eight years. While we do not know the average length of deferments per appearance or the average number of deferments prior to being granted parole, a conclusion we can make from these percentages is that the Board has found a middle ground when reviewing individuals for parole, paroling individuals after they have served more than the minimum amount of time on a sentence but before they would be released from prison on a serve out even if the Board releases an individual on parole prior to a serve out. The Board may keep the individual on parole for at least one year. KRS439.342. This is an important fact to know when informing your client, victim, or community member. ■

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To escape criticism --
do nothing, say nothing, be nothing.

--Elbert Hubbard

FEMALES IN THE JUVENILE JUSTICE SYSTEM

PART ONE OF A TWO PART SERIES

Part one of a two part series. The second part will deal with the alternative treatments and practical solutions for attorneys dealing with juveniles.

*....Little girls are made of sugar and
spice and everything nice – nursery rhyme*

Introduction

The purpose of the article is to examine the effects of a growing trend in juvenile law in the nation and in this Commonwealth. There are a disproportionate number of young females now entering the juvenile justice system. This article will examine this apparent rise in numbers of young women entering the juvenile justice system and explore reasons responsible for this phenomenon.

Increased Numbers

A report issued by the American Bar Association and the National Bar Association states the following:

“Girls are the fastest growing segment of the juvenile justice population, despite the overall drop in juvenile crime....While juvenile crime rates...have steadily decreased since peaking in 1994, arrest, detention, and dispositional custody data show an increase in both the number and percentage of girls in the juvenile justice system...”¹

The research supporting this statement demonstrated that all delinquency cases involving girls increased by 83% between 1988 and 1997. However, it is alarming to note that violations involving weapons, drug abuse and assault were all dramatically higher for females between 1990 and 1999.² In addition to these statistics, a Surgeon General’s report revealed that the ratios of male to female youths committing violent acts when sampled between 1983-1993 were 7.4: 1 and 7.0:1, respectively.³ However, by 1998, the ratio had closed to 3.5: 1.

Status Offenders⁴

In spite of the trend for girls to commit more serious crimes, most girls enter the juvenile justice system through status behavior. One source indicates that approximately 50-60% of girls coming into the system have committed status offenses.⁵ Females are **still** more likely than males to be arrested for status offenses.

To understand how to assist female juvenile offenders on all levels, it is necessary to examine why the trend exists as well

as identify differences between male and female juvenile offenders. These two concepts are linked together and provide some insight into how to help these clients.

Are girls committing more crimes or has society’s response to their behavior changed?

Preliminary studies suggest that girls may not actually be committing more crimes. Rather, what has changed is society’s response to their behavior. Girls’ family conflicts are now often re-labeled as violent offenses. Police practices regarding domestic violence and aggressive behavior have changed. In addition, gender bias prejudices girls in the processing of misdemeanor cases. The bias stems from a fundamental systemic failure to understand the unique developmental issues facing girls today. *Id.* at 3. Another change corresponds to the breakdown of family life that has occurred from the latter half of the 20th Century until the present day. Before this change, families tended to rely upon one another to assist a struggling adolescent. However, recent research indicates that many more parents or guardian’s now consider the justice system to be a viable alternative to help deal with their daughter’s behavior.

“Boys Will Be Boys” and Other Societal Expectations

Between 1990 and 1999, arrests of juvenile females increased more – or decreased less – than male arrests in almost all criminal offense categories.⁶ The number of cases in which female juvenile offenders were detained increased 65% between 1988 and 1997, as compared with only 30% increase for boys. *Id.* at 1. Girls are disproportionately charged with status offenses which serve as their initial foray into the juvenile justice system. Most parents are less tolerant of female misbehavior than male misbehavior. People often assume that when girls are out of control, they are having sex, they can get pregnant. Boys are assumed to be “hanging out,” doing drugs. In many jurisdictions, many girls committed as status offenders still receive mandatory medical exams including pelvic.

Boys who engage in delinquent or status-offense behavior are, in the eyes of parents and much of society, just being boys. *Id.* at 5. The author’s experience and anecdotal evidence suggest that juvenile justice decision-makers seek to lock girls up to protect them from themselves. *Id.*

The root causes of a girls’ delinquent behavior often differ greatly from males. Girls develop differently than boys.⁷ Research demonstrates that girls in the delinquency system have histories of physical, emotional and sexual abuse, have

Continued on page 32

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family problems, suffer from physical and mental disorders, have experienced academic failure and succumb more easily to the pressures of domination by older males.⁸ Research has identified different vulnerabilities and protective factors in female adolescents. *Id.* Many girls report lower levels of self-confidence than do boys. As a result, they tend to internalize, with a higher rate of depression, anxiety, withdrawal and eating disorders. Delinquent girls have more often been sexually abused than boys and are more likely to develop post-traumatic stress disorder in response to their exposure to violence.

Females in the juvenile justice system share many distinct characteristics:

- **Family Fragmentation:** The families of girls in the juvenile justice system are fragmented by multiple and serious stressors including poverty, death, violence, and a multigenerational pattern of incarceration.
- **Victimization Outside the Juvenile Justice System:** Most girls in the juvenile justice system have a history of violent victimization.
- **Victimization Inside the Juvenile Justice System:** Once they enter the juvenile justice system, girls are vulnerable to physical and sexual abuse similar to and sometimes worse than they experienced in their homes and communities.
- **Serious Physical and Mental Health Disorders:** The vast majority of girls in the juvenile justice system are experiencing one or more serious physical and/or mental health disorders.
- **Separation of Incarcerated Mothers from their Children:** A significant number of girl offenders are mothers who already have been separated from their young children.
- **Widespread School Failure:** Schools are failing girls in multiple ways in their home communities and in the juvenile justice system. The experience of educational failure is almost universal among delinquent girls interviewed. These failures included suspension/expulsion from school, repeating one or more grades and/or placement in a special classroom.
- **The Breaking Point- Early Adolescence:** Girls appear to be more vulnerable to their first experiences of academic failure, pregnancy, juvenile justice system involvement and out-of-home placement between the ages of 12 and 15.
- **Non-violent Offenders:** A majority of girls in the juvenile justice system are non-violent offenders charged with relatively minor status, property or drug offenses. Even the fastest growing segment of offenders, girls charged with assault, may be inappropriately labeled as violent based on conduct arising out of intra-familial conflict.
- **Resiliency:** Girls in the juvenile justice system have significant strengths that they can draw upon to overcome the multiple stressors that challenge them. *Id.* at 6.⁹

Conclusion

The numbers of females in the juvenile justice system are on the rise with no end in sight. The continuing need to address this issue will pose unique challenges to all practitioners involved in the criminal justice system. The importance of a multi-faceted approach to girls and their special issues cannot be underestimated.

Endnotes

1. American Bar Association and the National Bar Association, *Justice by Gender: The Lack of Appropriate Prevention, Diversion and Treatment Alternatives for Girls in the Justice System* (May 1, 2001).
2. Statistics showed that in the years of the study, arrests of females for weapons charges rose almost 50%; drug abuse violations rose nearly 200%; simple assault rose over 90% and aggravated assault rose over 50%.
3. Surgeon General, Executive Summary, *Youth Violence: A Report of the Surgeon General* (2001).
4. Status offenses are those which would not be criminal if committed by an adult, such as truancy, possession of alcohol, and curfew violations. KRS Chapter 630.
5. American Bar Association and the National Bar Association, *Justice by Gender: The Lack of Appropriate Prevention, Diversion and Treatment Alternatives for Girls in the Justice System 2* (May 1, 2001).
6. Fedders, Barbara, *More Young Women In The Juvenile Justice System: Girls In Trouble* (2002). Barbara Fedders is clinical staff attorney at the Boston College of Law School Juvenile Rights Advocacy Project.
7. Beyer, Marty, *Delinquent Girls: A Developmental Perspective*, Kentucky Children's Rights Journal, Vol. IX, No. 1, Spring, 2001.
8. American Bar Association and the National Bar Association, *Justice by Gender: The Lack of Appropriate Prevention, Diversion and Treatment Alternatives for Girls in the Justice System 3* (May 1, 2001).
9. Citing the research conducted by Leslie Acoca & Associates 1998 report entitled, *No Place To Hide: Understanding and Meeting the Needs of Girls in the California Juvenile Justice System*. ■

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JUVENILE CASELAW UPDATE – A FOCUS ON RECENT CASES FROM THE KENTUCKY COURT OF APPEALS

Several cases have been decided recently by the Kentucky Court of Appeals dealing with the use of detention in juvenile court. At the time of this writing several of these cases are not final but their status can be verified by checking the Court of Appeals website or contacting the DPA Juvenile Post Disposition Branch.

Contempt and Detention: On May 2, 2003, the Kentucky Court of Appeals reversed and remanded the case of *A.W., a Child Under Eighteen*. The Court held that the juvenile court judge had the inherent authority to impose contempt but that in this case, the child was denied her due process rights. The error was so egregious as to require reversal despite the lack of any objection at trial. A.W. did not speak at the contempt hearing except to state her name and birth date. The Court reversed on three grounds. First, the Court found that the juvenile court was not authorized to accept the attorney's stipulations as A.W.'s admission of guilt; second the Court found that the juvenile court failed to make the required findings that A.W.'s conduct amounted to indirect criminal contempt; finally, the Court held that the juvenile court failed to evaluate if less restrictive alternatives (to 60 days in detention for failing to abide by her curfew) were available and considered. Several other important findings are in this nonfinal opinion. The Court cautioned that juvenile courts should **refrain** from using contempt authority to punish probation violators when other options are available, noting that such behavior undermines the credibility of the juvenile court. The Court stated that "In sum, juvenile probation is not a contract between the court and the defendant, but it is an extension of the court's *parens patriae* authority over a child who has been committed to the care of the Commonwealth." This finding provides clear authority for trial and post trial counsel to seek motions to terminate commitment to the state when it can be established that less restrictive alternatives and/or better treatment options are available. The Court reminded the parties that "criminal contempt" should amount to an "obstruction of justice" which "tends to bring the court into disrepute, citing *Commonwealth v. Burge*, Ky., 947 S.W. 2d 805, 808 (1996). This cautionary note of the Court highlights our obligation as defense counsel to require the state to meet its burden of proof on a charge of criminal contempt. It is hard to see a single charge of curfew violation as an obstruction of justice. A.W. cannot be cited in court for authority until the opinion is final.

A second case concerning the use of contempt was reversed on many of the same grounds as A.W. In *C.G., a child*, decided March 14, 2003, the Court held that *Boykin v. Alabama*, 395 U.S. 238 (1969) was **not** satisfied when a plea was entered finding a child in contempt of court for missing school for three days where child **did not** admit the truth of the allegation, **nor did** the juvenile court engage in the required plea colloquy, **nor did** the juvenile court find that no less restrictive alternatives to detention were available or appropriate. The Court upheld an imposition of sixty days for contempt. C.W. had also objected on ap-

peal to the lack of notice regarding the charge of contempt, but no objection had been made below and thus the Court did not reverse on that issue. The case cannot be cited in court for authority until the opinion is final.

Appellate courts in other jurisdictions have struggled with similar issues. See e.g. *R.G., a Juvenile v. State of Florida*, 817 S.W.2d 1019 (2002), where appellate court noted that case before it was sixth emergency habeas corpus petition against same judge filed between

March 2002 and May 2002. Appellate court could not tell from face of record if judge had violated probation or held child in contempt. If it was probation violation, statutorily required steps were not followed, if it was indirect criminal contempt, the child was not provided notice required in an order to show cause.

Detention for Persons Over Eighteen- Still a No NO: On September 27, 2002, the Kentucky Court of Appeals addressed two cases with fact scenarios involving persons who were over eighteen coming before the juvenile court for disposition of offenses that occurred before the eighteenth birthday. *D.R.T. v. Commonwealth* and *M.R. v. Commonwealth*. The appellate court reiterated the holding in *Jefferson County Department for Human Services v. Carter, Ky.*, 795 S.W.2d 59 (1990). KRS 635.060 (2) and (3) provide the only sentencing options available to a juvenile court in sentencing an adult who was under the age of eighteen at the time of the offense. The Court reiterated that a juvenile court is without authority to order persons over eighteen to adult detention for offenses committed before their eighteenth birthday.

Least Restrictive Alternative: The last case out of the Court of Appeals *In the interest of X.B., a child v. Kentucky* was decided on April 25, 2003. X.B.'s case was reversed and remanded for failure of the juvenile court to assess if the disposition imposed was the least restrictive alternative as required by 600.010(2)(c). The record lacked any evidence that probation or some other less restrictive alternative would not have been appropriate. The Court noted that X.B.'s age (13) and lack of a prior record supported something less than commitment and placement with D.J.J. This case is final and published.

Themes: Together these cases indicate that a close reading of the juvenile code is critical to a successful practice in juvenile court, objections and preservation of the record at the trial level are important and that the goal of rehabilitation and treatment should imbue all decisions made by a juvenile court judge. ■



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In The Spotlight. . . Leta Baharestan

“What we call the beginning is often the end.
And to make an end is to make a beginning. The end is where we start from.”
-T.S. Eliot “Four Quartets”

Lives shift in mysterious cycles. Change is inevitable. Most resist it. Some are crushed by it. A few embrace it. Leta Baharestan charges toward it.

Cushioned pews line the back of the modern Floyd County District Courtroom. People wander in and settle into seats. A family of four huddles together, whispering. The mother lays her head on her arms across the back of the pew in front of her as if in prayer. Other small, nervous groups speak in hushed tones. The room demands quiet. No one here will challenge that. Some fidget. They are waiting. A moment approaches which could change their lives forever.

A door in the back opens. A petite woman wearing glasses glides into the room, down the aisle, past the bar and to a table. A light blue suit compliments her honey-colored hair and she carries a briefcase. She is older, but it's hard to determine her age. She looks over some papers, glances up, smiles and calls a name in a soft voice. A young man nervously stands and approaches her. She speaks with him, then excuses herself to retrieve records. When she returns, others have entered and taken their places in the front. The judge enters. All rise. It begins.

Throughout that morning's sessions, Leta Baharestan moves and speaks with quiet confidence. The nervous young man's case is dismissed. She seems very much at home here. One would assume she has been an attorney for many years. That assumption is wrong. She received her license to practice in 2001 from the University of Tennessee and she had lived many lifetimes, which brought her to this moment.

In one incarnation, Leta married an Iranian citizen and spent 10 years teaching English at an International School in Iran and caring for her own two children. In 1979,



however, the political atmosphere changed radically and they were forced to leave. The plan was for Leta to bring the children, ages 13 and 10, back to the states and her husband would send money and then follow. He didn't.

For over a month, Leta didn't hear from him. She had come back to the states with only \$100 in her pocket and two children suffering from culture shock. Eventually, she learned

that her husband had been arrested and was being held in a cell block with 9 other men. These were tense days of waiting for news. Of the nine men in the cell, six were executed, one bribed his way out and one was sentenced to 7 years. Her husband was fortunate. They released him with no explanation. He didn't stay to find out and soon rejoined Leta and the children.

Years later, at an age when most people consider retirement, Leta Baharestan shifted into her next incarnation as an attorney. She responds, “At my age, some people think they can stop learning. It's energizing for me and it's scary but if it's not scary, you never learn anything and you never grow.”

Gill Pilati recruited her for the Pikeville Office. Her journey brings her back to the place where she started. In one past life, she taught English in the Pikeville high school.

Leta smiles, “Isn't this a good way to end a career? You're helping people and learning new things every day. That's what I'm most afraid of . . . getting stale.” Then she laughs, “I have told my family that if I say I'm going back to school, they have permission to kill me.” She stops and muses, “Although . . . I don't know very much about computers.” She laughs again, “I still don't know what I'm going to be when I grow up!” ■

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PLAIN VIEW . . .

Kaupp v. Texas, 123 S.Ct. 1843 (2003)

The United States Supreme Court has revisited a settled area of the law, and reaffirmed an important Fourth Amendment principle in this *per curiam* decision.

The case arose in Texas. Another juvenile who had confessed dropped Robert Kaupp, a 17-year old boy, into a suspected murder. Kaupp had taken a polygraph and passed. The original suspect failed a polygraph. The Harris County Sheriff's Department failed to obtain a warrant to question Kaupp. Interestingly, they sought from the district attorney's office something they called a "pocket warrant," which was apparently something unique to Texas allowing the picking up of someone for questioning. They did not get a conventional arrest warrant because they did not believe they had probable cause to arrest Kaupp.

So instead they went to Kaupp's house. 6 officers went to Kaupp's house at 3:00 a.m., and after Kaupp's father let them in, went to Kaupp's bedroom, awakened him with a flashlight, and said, "we need to go and talk." They took the handcuffed Kaupp out into the January night dressed only in his underwear, drove by the crime scene where the victim had been found, and then went to the sheriff's office. There, they advised him of his *Miranda* rights and began to question him. After a time, he "admitted having some part in the crime." As a result of his admissions, he was convicted and sentenced to 55 years imprisonment. The Texas State Court of Appeals affirmed the conviction, holding that the police did not need probable cause because no arrest had occurred until after Kaupp confessed. The Court held that by stating "Okay" to the "we need to go and talk" statement, Kaupp had voluntarily gone with the police. The Court remarkably stated that "a reasonable person in [Kaupp's] position would not believe that being put in handcuffs was a significant restriction on his freedom of movement." The Court further stated that because Kaupp "did not resist the use of handcuffs or act in a manner consistent with anything other than full cooperation," that this somehow indicated consent.

The United States Supreme Court vacated the Texas Court of Appeals opinion (2001 WL 619119, 2001 Tex. App. LEXIS 3732 (Tex. App. 2001)) and remanded in this *per curiam* decision. The Court affirmed that a seizure of a person occurs when "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" The Court also affirmed that a person cannot be removed from his

home and taken to a police station for questioning without probable cause or a warrant. Utilizing these principles, the Court stated that Kaupp had been arrested. The Court rejected the state's position that

Kaupp's stating "Okay" had indicated consent. "There is no reason to think Kaupp's answer was anything more than 'a mere submission to a claim of lawful authority.'" The Court relied further upon the fact that Kaupp had been removed from his house in handcuffs and in his underwear, that he had been taken to the crime scene, that he had been taken to an interview room in a police station, and that the officers had been armed. The Court remanded on the question of whether the "state can point to testimony undisclosed on the record before us, and weighty enough to carry the state's burden despite the clear force of the evidence shown here." Absent that, the confession had to be suppressed.

Baker v. Commonwealth, 2003 WL 1936956, 2003 Ky. LEXIS 98 (Ky. 2003) (Not Yet Final)

Baker went to a Kroger store in Richmond to have a negative developed. The clerk developed the picture, and saw that it was a picture of a nude child. When Baker went back to pick up the picture, the clerk told him that the picture could not be developed. Store security was contacted, and ultimately the photo was turned over to the Richmond Police Department. The police obtained a search warrant for Baker's home. During the search, a camera was seized along with a roll of undeveloped film. The undeveloped film resulted in additional counts of the use of a minor in a sexual performance. Counsel's motion to suppress was denied, and the defendant was sentenced to 30 years after a jury found him guilty.

The Court affirmed the ruling on the suppression motion in an opinion by Justice Graves. The defendant alleged that because the search warrant did not specifically allow for a seizure of the camera or a roll of film, that the Fourth Amendment had been violated. The Court found that the seizure was justified because during the execution of the warrant the defendant had stated that the camera had additional photographs of his stepdaughter, and because the warrant had specified pictures and photographs. The Court rejected the notion that a "negative" was not a "photograph."



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Lovett v. Commonwealth,
2003 WL 1936676, 2003 Ky. LEXIS 76 (Ky. 2003)
(Not Yet Final)

A confidential informant contacted a Marshall County Sheriff's Detective and told him that Lovett was manufacturing methamphetamine. The informant told the Detective about the operation and the meth lab, giving a detailed description of the anhydrous ammonia tank that the defendant had moved into his barn. The informant stated that he had been a regular visitor to the defendant's meth lab and that he had possessed a duffel bag with items used in meth manufacturing. The Detective took the affidavit in support of the search warrant and a proposed 2-page search warrant and faxed the documents to the Marshall District Judge. The Judge then signed the warrant and faxed the warrant back to the Detective at 2:04 a.m. The Detective along with a "tactical response team" went to Lovett's house at 3:00 a.m. to execute the warrant. Evidence was found that resulted in Lovett's arrest. Ultimately, the defendant entered a conditional guilty plea following the denial of his motion to suppress. The motion had been based upon the allegation that probable cause had not been demonstrated.

The Court affirmed the denial in an opinion written by Justice Cooper. The Court found that probable cause had been demonstrated on the face of the affidavit. The Court rejected the defendant's complaint that the Detective had not demonstrated the confidential informant's reliability. Relying upon *Illinois v. Gates*, 462 U.S. 213 (1983), the Court found that under the totality of the circumstances the informant was reliable. "[T]he mere fact that DeFew's affidavit did not contain recitations as to the informant's veracity, reliability, and basis of knowledge is not conclusive that the warrant was issued without probable cause." The Court noted that the affidavit contained detailed descriptions of the meth operation and lab, and had cited that the informant had witnessed these things several times when he was personally in the defendant's home. Further, the Court noted that the informant could be relied upon because he gave the detective information that was "against his penal interest."

The Court also considered several issues that were not raised by the defendant in his motion. The Court did not find the affidavit to be stale since the meth operation was an "ongoing, long-term activity." The Court did not credit misstatements in the affidavit, such as the statement that the defendant had prior drug convictions when he had one for a vehicular offense and one for "promoting contraband." The affidavit had not noted that the informant was in a drug rehabilitation program. "If the informant was a drug addict at the time he gave his information to DeFew, there is no evidence that DeFew was aware of that fact when he executed the search warrant affidavit." The Court rejected the allegation that the judge was not "neutral and detached" due to the fact that he faxed the warrant back to the detective. Finally, the

Court rejected the knock and announce argument because no facts had been elicited at the suppression hearing in support. "If the issue had been raised at the suppression hearing, the Commonwealth may have been able to prove that the loud noise and shouting did, in fact, constitute the 'knock and announce,' or that the failure of the TRT team to knock and announce fell within an exception to the rule...we will not assume improper conduct from a silent record."

United States v. Ridge,
2003 WL 21134680, 2003 U.S. App. LEXIS
9550, 2003 FED App. 0149P (6th Cir. 2003)

An informant told the police that Stocklem was operating a meth lab in Red Bank, Tennessee. While executing a warrant on Stocklem's house, the police answered a cell phone call that stated, "Danny's on the way with the money." When the defendant Danny Baker drove up with Andy Ridge, the police moved in on the vehicle and removed both. They saw a gun on the passenger seat where Ridge had been sitting. Ridge was charged with possessing a firearm during a drug trafficking offense. After losing a suppression motion, Ridge pled guilty conditionally.

The Sixth Circuit affirmed the denial of the suppression motion in an opinion by Judge Moore and joined by Judges Clay and Lawson. The Court held that the police had a reason to believe that a person "known to cook methamphetamine at that location was scheduled to arrive" during the execution of a search warrant, and that this presented a dangerous situation. The Court held that the police had a right to conduct a *Terry* stop, which led to the discovery of the gun in the seat where Ridge sat.

United States v. Pennington,
115 F.Supp. 2d 910 (W.D. Tenn. 2000)

The Memphis Police Department obtained a search warrant for Pennington's house from a Shelby County Judicial Commissioner, a non-lawyer appointed by the Shelby County Commission. During the execution of the warrant, Officer Tipton got to the front door and yelled "Memphis Police Department. Search Warrant." He later testified that he waited 8-10 seconds before prying the door open to enter. Three defense witnesses testified that the police entered without announcing their presence. The defendant entered a conditional guilty plea after his motion to suppress was denied.

The Sixth Circuit affirmed the denial of the motion to suppress in an opinion written by Judge Sargus and joined by Judges Kennedy and Gilman. The Court first held that the non-lawyer judicial commissioner appointed by the local legislative body constituted a "neutral and detached magistrate" eligible to issue a search warrant. The Court relied upon *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), where the Supreme Court had found a Tampa, Florida clerk with no law degree or special training to be a neutral and detached magistrate.

The Court also held that the execution of the search warrant had been reasonable with no violation of the knock and announce rule. The Court relied upon *United States v. Spikes*, 158 F.3d 913 (6th Cir. 1998). There the Sixth Circuit had declined a rigid rule for determining the length of time required between the knocking and the entry. The *Spikes* court looked at whether the search involved a search for drugs, whether the potential drug traffickers might be armed, the time of day when the search is executed, and the manner in which the announcing is accomplished. Using those factors, the Court held that the search was reasonable. The officers were searching for drugs. The officers were searching at 3:45 in the afternoon. "When the police execute a warrant in the dead of the night...the length of time the officers should wait increases." The officer heard the sound of footsteps running away from the door. "Under such circumstances, an eight-to-ten second wait by the police is objectively reasonable under the Fourth Amendment to justify a forced entry into the residence based upon a search warrant."

***United States v. Spikes*,**
158 F.3d 913 (6th Cir. 1998)

Defendants Copeland and Hartwell were parked illegally on a Flint, Michigan, street on June 30, 1999, when they were seen by two Michigan State Troopers. They pulled out and after driving for a mile were stopped, at which point the officers obtained consent to search and recovered two stolen weapons. The defendants were charged thereafter with conspiracy to distribute a controlled substances and possession of a firearm by a convicted felon. After a jury trial, the defendants were convicted and pursued this appeal.

The Sixth Circuit affirmed the convictions. In an opinion written by Judge Cole and joined by Judges Gilman and Mills, the Court found that the officers had probable cause to stop the vehicle and thus no Fourth Amendment violation had occurred. The Court found that the police had the right to stop the defendants for a parking violation. "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." Further, the Court held that stopping the defendants one-mile after observing the parking violation was reasonable.

***United States v. Pinson*,**
321 F.3d 558 (6th Cir. 2003)

A confidential informant was sent to a house in Nashville, Tennessee, where he purchased one rock of crack cocaine. A Nashville Police Officer then applied for a search warrant asking to search the place where the informant had purchased the cocaine. His affidavit told the magistrate that within the previous 72 hours he had sent the informant to purchase cocaine, that he had purchased the cocaine, that the informant is "reliable from past information received from said CI resulting in the lawful recovery of narcotics," and that based

upon the officer's experience, persons present where drugs are purchased "have controlled substances, paraphernalia, weapons, or other evidence of criminal conduct secreted on their person." The warrant was issued. The police arrived at the residence, noticed a woman on the front porch and yelled for her to get down on the ground. The police then yelled "Police, search warrant," waited 5-10 seconds, and beat the metal security door down with a battering ram. They also beat down the inner door. When they entered the house, they saw 2 women by the couch, and Pinson standing in the door of a bedroom. The search resulted in a large quantity of drugs being seized and Pinson arrested and charged with a variety of federal drug and firearm offenses. Pinson entered a conditional plea of guilty after his motion to suppress was denied.

The Sixth Circuit affirmed the conviction in an opinion written by Judge Polster and joined by Judges Gilman and Gibbons. The Court rejected all attacks on the warrant, including that the affidavit failed to show probable cause, that the affidavit failed to show the crime was linked to the premises, that the affidavit failed to name or describe the seller of the cocaine, and that the evidence was stale, relying heavily upon *United States v. Allen*, 211 F.3d 970 (6th Cir. 2000), (*en banc*). The Court noted that to be adequate, the affidavit had to contain the officer's "attestation, in some detail, of the reliability of the confidential informant and the evidence sufficient to provide a basis for the magistrate judge's conclusion that it was probable that evidence of a crime would be found at 2713 Torbett Street."

The Court also held that the 5-10 seconds the officers waited after knocking and announcing was sufficient under the facts of the case. The Court stated the standard for knock and announce cases: "The fact-specific inquiry needed to determine the reasonableness of the interim between announcement and entry mandates consideration of a number of factors, including the object of the search, possible defensive measures taken by the residents of the dwelling to be searched, time of day, and method of announcement." In this case, and based upon "the time of day when the officers executed the warrant, the commotion on the porch, and the knowledge that the residents would not respond to a knock on the door unless they received a telephone call first, we conclude that the time which elapsed between the announcement and entry was sufficient under the circumstances to satisfy the reasonableness requirement of the Fourth Amendment."

Judge Gilman recorded a reluctant concurrence. He felt bound by the *Allen* decision. Were it not for *Allen*, "I would hold that Officer Mackall's affidavit was legally insufficient to support the magistrate judge's conclusion that there was probable cause to believe that evidence of a crime would be found at Pinson's residence...It leaves out the key piece of information that the informant had observed large quantities of drugs, money, and weapons when he was in the residence. Without

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this additional information, I do not believe that the magistrate judge had a reasonable basis to conclude that the police would find contraband in the residence three days after the single rock of crack cocaine had been purchased by the informant.” Likewise, Judge Gilman cautioned readers about the precedential value of the knock-and-announce opinion. “Without these prior events, I would have found that the police officers had violated the knock-and-announce rule. This case, therefore, should not be cited for the general proposition that five seconds is a sufficient time for police officers to wait before forcing their way into a residence.”

Thacker & Gallagher v. City of Columbus,
328 F.3d 244 (6th Cir. 2003)

This is a case filed under 42 USC § 1983. It began when Jessica Gallagher called 911 and told the Columbus, Ohio dispatcher that Jeff Thacker had been cut. Two paramedics accompanied by the police went to the house where Thacker and Gallagher lived. They observed that Thacker and Gallagher were both drunk and that Thacker was bleeding profusely. Thacker invited the paramedics into his home, but not the police. The police entered along with the paramedics. The police noticed that Gallagher was bruised, and began to question her. Eventually, the police arrested Thacker for committing an act of domestic violence, charges that were eventually dismissed when Gallagher refused to cooperate. Thereafter, Thacker and Gallagher filed a civil suit. The district court granted the defendants’ motion for summary judgment, and the plaintiffs appealed.

The Sixth Circuit affirmed the district court in an opinion by Judge Cole. The Court declined to decide whether a 911 call alone might justify a warrantless entry into a private home. Instead, the Court held that the warrantless entry into the home was justified by the existence of exigent circumstances. “In particular, the totality of the circumstances, including the 911 emergency call, Thacker’s conduct, and the uncertainty of the situation, justified entry to secure the safety of the police, paramedics, and other people possibly inside the home.” The Court also held that the police had probable cause to arrest Thacker based upon Gallagher’s statement that Thacker had abused her, as well as other circumstances. As a result, the Court affirmed the granting of the motion for summary judgment.

State v. Fort,
660 N.W.2d 415 (Minn. 2003)

DPA has had a sister state relationship with the Minnesota Public Defender’s Office since 2001. The Regional Chief of Minneapolis is Lenny Castro, a person who taught Kentucky public defenders on the how-to’s of litigating the issue of racial profiling at a recent annual seminar. Lenny has sent to us a May 2, 2003 case from the Minnesota Supreme Court in which he litigated successfully a racial profiling issue. The

case is *State of Minnesota v. Fort*. It can be found at: <http://www.lawlibrary.state.mn.us/archive/supct/0305/OP011732-0501.htm>

The case began with a stop of a car for having a cracked windshield in which Fort, an 18-year old African American, was riding. The area in which the car was stopped was described as a “high drug” area. While one officer went to the driver’s side, another went to the passenger side to speak with Fort. Fort was asked to get out of the car, he was taken to the police car and was then questioned about drugs and weapons. When Fort denied having drugs or weapons in the car, the officer asked for consent to search his person. The officer did not advise Fort that he had a right to refuse the search. Crack cocaine was found on Fort, resulting in a possession of cocaine charge. Fort moved to suppress “on the basis that police officers may not justify a search based on consent during the course of a routine traffic stop unless there is a valid race-neutral reason to suspect wrongdoing.” The trial court suppressed the cocaine, holding that “in the context of a routine traffic stop, where police do not have an articulable basis to seek consent to search a passenger and fail to inform the passenger of the right to refuse consent to search, a subsequent search violates Article I, Section 10 of the Minnesota Constitution.” The Court of Appeals reversed.

The Supreme Court reversed the Court of Appeals, holding that “in the absence of reasonable, articulable suspicion, a consent-based search obtained by exploitation of a routine traffic stop that exceeds the scope of the stop’s underlying justification is invalid.” The Court concluded that Fort had been seized when the police approached him “in full uniform, including flashlight, gun, handcuffs, and mace...while the squad car lights continued to flash” and asked him to get out of the car, took him to a squad car, and began to question him. The Court reminded the lower courts that while the stop here was improper, “the scope and duration of a traffic stop investigation must be limited to the justification for the stop.” In conclusion, the Court stated that the “purpose of this traffic stop was simply to process violations for speeding and a cracked windshield and there was no reasonable articulable suspicion of any other crime. Investigation of the presence of narcotics and weapons had no connection to the purpose for the stop. We therefore conclude that the investigative questioning, consent inquiry, and subsequent search went beyond the scope of the traffic stop and was unsupported by any reasonable articulable suspicion.”

This case demonstrates at least 2 things. First, it demonstrates the value of litigating under the state constitution. Had this case been decided under *Whren*, it might have been decided differently. Second, it demonstrates that racial profiling cases can be litigated successfully. Indeed, in Kentucky, with our Racial Profiling Act, the chances of success on a case such as this should be much higher.

SHORT VIEW . . .

1. *United States v. Green*, 324 F.3d 375 (5th Cir. 2003). The Fifth Circuit has held that the police may not search a car incident to the arrest of a person when he is 25 feet away. Here, the defendant was arrested pursuant to a search warrant. He was arrested at the front door of his house, resisted, and was arrested some 6-10 feet from the car. A search of the car revealed a handgun. The Court found that the rationale underlying both *Chimel v. California*, 395 U.S. 752 (1969) and *New York v. Belton*, 453 U.S. 454 (1981) did not apply. The Court notes that the Sixth Circuit did not apply *Belton* under circumstances involving a 30 foot distance between the arrested defendant and his car, citing *United States v. Strahan*, 984 F.2d 155, 159 (6th Cir. 1993). "Because none of the concerns articulated in *Chimel* and *Belton* regarding law enforcement safety and the destruction of evidence are present in this case, the Government cannot justify the search of Green's vehicle under *Belton* or *Chimel*. Accordingly, we conclude that the district court erred in denying Green's motion to suppress the weapon obtained from his vehicle."
2. *Ransome v. State*, 816 A.2d 901 (Md. 2003). The Maryland Supreme Court has held that the police may not search a man they see on the street merely because he has a "bulge" in his pocket and appears nervous when approached. Here, three Baltimore police officers were driving through a high crime area when they saw one man on the sidewalk speaking with another man. The man, Ransome, had a bulge in his pocket. The police approached him, and he reacted in a nervous manner. The police frisked him, and found marijuana under his shirt and a roll of money in the pocket containing the bulge. The Court found no reasonable, articulable suspicion for this *Terry* frisk, and suppressed the evidence. "If the police can stop and frisk any man found on the street at night in a high-crime area merely because he has a bulge in his pocket, stops to look at an unmarked car containing three un-uniformed men, and then, when those men alight suddenly from the car and approach the citizen, acts nervously, there would, indeed, be little Fourth Amendment protection left for those men who live in or have occasion to visit high-crime areas." The Court in *State v. Lafond*, 2003 WL 367227, 2003 Utah App. LEXIS 13 (Utah Ct. App. 2003) ruled similarly.
3. *United States v. Crawford*, 323 F.3d 700 (9th Cir. 2003). A search of a parolee's or probationer's house conducted pursuant to a blanket waiver violates the Fourth Amendment unless there is a reasonable suspicion that a crime is being committed or that evidence of a crime can be found at the house. The 9th Circuit held that a parolee maintains a reasonable expectation of privacy in his house, although under *United States v. Knights*, 534 U.S. 112 (2001) that expectation is diminished. "Under federal law, Crawford's expectation of privacy in his own home is not wholly defeated by virtue of his parole status. As the Supreme Court has recognized, 'A probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be "reasonable.'" *Griffin v. Wisconsin*, 483 U.S. 868, 873 (U.S.). To find otherwise would be to equate a parolee's home with a prisoner's cell — a comparison that the Supreme Court has unequivocally rejected." *Crawford*, 708 The Court rejects the notion that the search here should be justified as a special needs search, noting that no special needs search case exists where a house can be searched without some justification. The Court also held that the waiver by the parolee, required to get out of prison, was involuntary. "We find that, by virtue of a signature on a compulsory parole condition, a parolee does not, in advance and in blanket fashion, consent to a general waiver of his rights under the Fourth Amendment." It should be noted that in this case the FBI conducted the search, and stated at a suppression hearing that they did not expect there to be evidence at the parolee's home. Rather, the FBI Agent testified that a parolee search pursuant to a "Fourth Waiver" is a "kind of tool to talk" to suspects about crimes. The result was that a confession made by Crawford as a result of the entry by the FBI agents and the subsequent search had to be suppressed.
4. *State v. Boyd*, 64 P.3d 419 (Kan. 2003). The Kansas Supreme Court has distinguished *Wyoming v. Houghton*, 526 U.S. 295 (1999), saying that where the police do not have probable cause to believe contraband is in a car, that they do not have authority to search a purse required to be left behind by a passenger. Here, the police pulled over a car based upon the failure the signal. The police followed the car because it left a house they were investigating for drug activity. The driver was nervous. He gave his consent to search his car. The police asked Boyd, a passenger, to get out of the car as well. Boyd started to take her purse, but the police demanded she leave the purse behind. A search of the purse revealed cocaine. In *Houghton*, the Court had held that a probable cause automobile search extended to a search of containers in the car. The Kansas Supreme Court held that the facts here distinguished this case from *Houghton*, in that in this case the police had no probable cause to believe contraband was in the car. Rather, their authorization for a search came from the driver's consent.
5. *In re B.R.K.*, 658 N.W.2d 565 (Minn. 2003). A juvenile at a party hosted by a friend has a reasonable expectation of privacy in his friend's house under the U.S. and Minnesota Constitutions. This case rests between *Minnesota v. Olson*, 495 U.S. 91 (1990) and *Minnesota v. Carter*, 525 U.S. 83 (1998) in that while a guest for a brief period of time, as in *Carter*, the fact that the juvenile was a

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- social guest made all of the difference. "The animating principle behind *Carter* is that an individual's expectation of privacy in commercial premises is less than an individual's expectation in a private residence, not that short-term social guests do not have a reasonable expectation of privacy."
6. *State v. Gant*, 43 P.3d 188 (Ariz. Ct. App. 2002). The United States Supreme Court granted *certiorari* on the issue of whether *New York v. Belton*, 453 U.S. 454 (1981) applies when a person has left a car prior to becoming aware of the police. The decision had held that the police could not search the car under these circumstances.
 7. *State v. Hamilton*, 67 P.3d 871 (Mont. 2003). The police may not search a wallet that has been turned over to them as lost. Rather, they may only search to the extent necessary to determine ownership. Where the police search a wallet thoroughly and discover drugs, a violation of the State Constitution has occurred. The Court stated that the defendant had a reasonable expectation of privacy in her wallet. "There is no question that Hamilton had an actual expectation of privacy with respect to the contents of her lost wallet. She expected that the person who found her wallet would look inside for identification, sees her driver's license or checkbook, and returns the wallet to her without further intrusion. Moreover, there is no question that society views a person's expectation of privacy in a wallet or purse as objectively reasonable. Few things are more inherently private than the contents of a wallet or purse." "We conclude that the least intrusive means possible must be used to identify the owner of lost property, protect the contents of personal property for the owner, and to protect the police from claims for missing valuables. The contents of a lost wallet can be secured by placing the wallet in an evidence bag and storing it in a secure place. This method is also sufficient to protect the police from a claim for lost or stolen valuables. Consequently, the State may only conduct a warrantless search of a lost wallet to determine ownership. Furthermore, an identification search must be conducted pursuant to standardized police procedure and must reach no further than necessary to confirm ownership."
 8. *State v. Licari*, 659 N.W.2d 243 (Minn. 2003). A person has a reasonable expectation of privacy in a rented storage unit. Further, where the lease states that the landlord of the storage unit "shall have the right to enter the premises at all reasonable times for the purpose of inspection, cleaning, repairing, altering or improving the premises of the building," this did not give the landlord the apparent authority to allow the police to search a unit without a warrant. The Court relied upon *Illinois v. Rodriguez*, 497 U.S. 177 (1990) to state that where the police make a mistake of law rather than a mistake of fact on the issue of whether the landlord and the lessee have "mutual use" of the storage unit, the police may not rely upon their belief that the landlord has the authority to consent to a search of the defendant's storage unit. The case was remanded for findings on other portions of the lease which may have given justification for the search.
 9. A recent story from the New York Times News Service highlighted the danger of relaxing the Fourth Amendment standards in hope that some other social good will come of it. It reports that "drug testing in schools does not deter student drug use any more than doing no screening at all." The report notes that the "U.S. Supreme Court has twice empowered schools to test for drugs... Both times, it cited the role that screening plays in combating substance abuse as a rationale for impinging on whatever privacy rights students might have. But the new federally financed study of 76,000 students nationwide, by far the largest to date, found that drug use is just as common in schools with testing as in those without it."
 10. *People v. Maury*, 68 P.3d 1 (Cal. 2003). A person who calls the police anonymously to report a crime does not have a reasonable expectation of privacy in his identity or information that he gives. Here, the police suspected the caller to be the perpetrator of the crime after he also asked for reward money for the information, and their investigation led to the arrest. The Court rejected the defendant's assertion that a flier regarding the hot-line promising anonymity required that his statements be suppressed. "When the stated purpose of anonymity (protection of fearful witnesses) and the intended purpose for the information (arrest and conviction of perpetrators) are considered together, the flier cannot reasonably be understood to assure readers that a criminal, by providing information on a crime, would be shielded from prosecution and conviction for that same crime."
 11. *State v. Lee*, 2003 WL 1918921, 2003 Md. LEXIS 251 (Md. 2003), <http://www.courts.state.md.us/opinions/coa/2003/81a01.pdf>. A knock-and-announce violation is not trumped by either the inevitable discovery or independent source doctrines, according to the Maryland Court of Appeals. "To apply the inevitable discovery rule... whenever there is a valid warrant, to render admissible, any evidence seized in execution of that warrant in violation of the knock and announce rule is, in effect, to create a blanket exception to that rule for all cases involving valid search warrants." ■

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RENDERED: May 30, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2002-CA-000145-MR

CARLOS M. PRYOR

APPELLANT

v.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
INDICTMENT NO. 01-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

**AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART**

BEFORE: DYCHE AND McANULTY, JUDGES; AND JOHN WOODS POTTER¹, SPECIAL JUDGE.

DYCHE, JUDGE. On May 28, 2000, at 11:47 p.m., Fulton Police Officer Wiley Penson entered the 3J's Market to arrest Carlos Pryor. Pryor had been purchasing gasoline and some convenience items at the store when Penson arrived. Penson approached Pryor with handcuffs, but Pryor resisted and, after a brief scuffle, Pryor fled the premises on foot. Pryor abandoned his girlfriend's car at the gas pump. During an inventory search conducted when the vehicle was impounded, a plastic bag containing a rock of crack cocaine was discovered in the ashtray.

Pryor was arrested the following February and indicted in March 2001 for Possession of a Controlled Substance (Cocaine) in the First Degree and First Degree Persistent Felony Offender (PFO). He was tried by jury on August 15, 2001, and found guilty as charged. He was sentenced to one year for the drug charged, enhanced to ten years' imprisonment on the PFO charge.

On appeal, Pryor first argues that he is entitled to a new trial because the Commonwealth used its peremptory strikes to remove all African American males from the jury. (An African American female remained on the jury.) The three part procedure outlined in *Batson v. Kentucky*, 476 U.S. 79 (1986), was followed, but Pryor complains that the Commonwealth's reasons for striking the three African American males were "nothing more than a ruse," and the trial court's acceptance of those reasons was clearly erroneous. We have examined the trial record and agree with Pryor that the Commonwealth's reasons for striking the three African American males were pretextual. While we would ordinarily defer to the trial court's discretion in evaluating the Commonwealth's reasons, in this case the trial court "merely accept[ed] the reasons proffered at face value." *Gamble v. Commonwealth*, Ky., 68 S.W.3d 367, 371 (2002) (citation omitted). We thus reverse Pryor's conviction and remand this matter to the Fulton Circuit Court for a new trial.

¹ Senior Status Judge John Woods Potter sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

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Pryor secondly asserts that he was entitled to a mistrial for the Commonwealth's repeated attempts to portray appellant as a drug dealer. Pryor specifically protests that the Commonwealth elicited testimony regarding the size of the crack cocaine rock seized from the vehicle. Because Pryor was merely charged with possession, he insists that the frequent references to the "large" rock of cocaine prejudiced him in the eyes of the jury. Pryor fails to convince us that there was a manifest necessity requiring the granting of a mistrial. *Commonwealth v. Scott*, Ky., 12 S.W.3d 682, 684-5 (2000). The trial court did not abuse its discretion in denying same.

Pryor thirdly asserts that there was insufficient evidence to support his conviction for possession of cocaine. Because the car belonged to his girlfriend and because Pryor testified that his friend Lorenzo Guerin was driving the car, Pryor feels he was entitled to a directed verdict of acquittal on the possession charge because there was not sufficient evidence connecting the rock of cocaine to him. We disagree.

The jury was amply apprised of Pryor's defense. Lorenzo Guerin did not appear as a witness at the trial, and no one other than Pryor could place Guerin at the scene; Pryor's girlfriend denied that the drugs belonged to her. There was more than sufficient circumstantial evidence of Pryor's constructive possession of the cocaine. *Burnett v. Commonwealth*, Ky., 31 S.W.3d 878, 881 (2000). It was not clearly unreasonable for a jury to find guilt beyond a reasonable doubt. *Commonwealth v. Benham*, Ky., 816 S.W.2d 186, 187 (1991).

Appellant's final argument is not properly preserved for review. Suffice it to say that we have examined the issue under the "manifest injustice" standard in Kentucky Rule of Criminal Procedure 10.26 and can find no palpable error. *Jackson v. Commonwealth*, Ky. App., 717 S.W.2d 511, 514-5 (1986).

The judgment of the Fulton Circuit Court is affirmed in part, reversed in part, and remanded for a new trial.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

George E. Seelig
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STATE OF MINNESOTA
IN SUPREME COURT
C2-01-1732

Court of Appeals

Page, J.

State of Minnesota,

Respondent,

vs.

Filed: May 1, 2003

Office of Appellate Courts
Mustafaa Naji Fort, petitioner,

Appellant.

SYLLABUS

Police expansion of a routine traffic stop beyond the underlying justification for the stop violates Article I, Section 10, of the Minnesota Constitution unless there is a reasonable and articulable suspicion of criminal activity beyond the traffic offense. Evidence obtained as a result of a search based on consent obtained by exploitation of an impermissibly expanded traffic stop must be suppressed.

Reversed.

Heard, considered, and decided by the court en banc.

OPINION

PAGE, Justice.

This case arises from appellant Mustafaa Naji Fort's appeal of a court of appeals' decision reversing an order to suppress cocaine found during a search of his person as part of a routine traffic stop. Fort was a passenger in the vehicle at the time of the traffic stop. In suppressing the cocaine found during the search, the district court held that "in the context of a routine traffic stop, where police do not have an articulable basis to seek consent to search a passenger and fail to inform the passenger of the right to refuse consent to search, a subsequent search violates Article I, Section 10 of the Minnesota Constitution." On appeal, the court of appeals reversed and remanded to the district court, holding that the district court failed to consider the totality of the circumstances as required by existing law. Exercising our independent authority to interpret our own state constitution, we conclude that in the absence of reasonable, articulable suspicion a consent-based search obtained by exploitation of a routine traffic stop that exceeds the scope of the stop's underlying justification is invalid. *Ascher v. Commissioner of Public Safety*, 519 N.W.2d 183, 185 (Minn. 1994). We therefore reverse.

On March 17, 2001, at approximately 9:30 p.m., Fort, an 18-year-old, African-American male, was the passenger in a car stopped by two Minneapolis police officers for speeding and having a cracked windshield. The vehicle was stopped at the intersection of Broadway and Lyndale Avenues in north Minneapolis, a location the officers considered to be in a "high drug" area. At the time of the stop, the police officers were in a marked squad car with its emergency lights activated. These lights remained activated as the officers exited the vehicle and approached the stopped car.

One officer approached the driver's side of the vehicle to speak to the driver, while the other officer approached the passenger's side to speak to Fort. This officer, in full uniform, was holding a flashlight and wearing a gun, mace, radio, and handcuffs on his belt. After determining that neither the driver nor Fort had a valid driver's license, the officers decided to tow the vehicle. The first officer escorted the driver to the squad car to speak with him. The second officer asked Fort to exit the vehicle, escorted Fort to the squad car, and began questioning him about drugs and weapons. Specifically, the officer asked Fort if there were any drugs or weapons in the vehicle. Fort replied, "No, sir." The officer then asked, "Do you have any drugs

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or weapons on you?" Fort again replied, "No, sir." Finally, the officer asked, "Would you mind if I searched you for drugs or weapons?" Fort answered, "No, sir." The officer did not inform Fort that he had a right to refuse the search request or that he was free to leave without being searched.

At the suppression hearing, the officer testified that before he began questioning Fort he noticed Fort was nervous and avoided eye contact. He further testified that he spoke to Fort in a normal tone of voice and intended to offer Fort a ride home, although he never informed Fort of his intent. In order to conduct the search, the officer had Fort place his hands on the squad car and then performed a pat-down. During the search, the officer felt and removed from one of Fort's pockets several small, hard lumps, which he suspected to be crack cocaine. Fort was subsequently arrested.

Fort was charged with fifth-degree felony possession of a controlled substance, in violation of Minn. Stat. § 152.025 (1998). He moved to suppress the cocaine found during the search on the basis that police officers may not justify a search based on consent during the course of a routine traffic stop unless there is a valid race-neutral reason to suspect wrongdoing. The district court granted Fort's motion, concluding that a search of a passenger in a vehicle conducted during the course of a routine traffic stop violates Article I, Section 10, of the Minnesota Constitution if the police officer (1) does not have an articulable basis to seek consent to search and (2) fails to inform the passenger of his right to refuse consent to search. On appeal, the court of appeals remanded, holding that existing law requires a totality-of-the-circumstances approach in analyzing consent-to-search cases. Fort petitioned this court for further review, which we granted.

Fort asks us to apply Article I, Section 10, of the Minnesota Constitution to require that a police officer have reasonable articulable suspicion to expand the scope of a routine traffic stop in order to investigate other matters unrelated to the reason for the stop and to request consent to search. The state responds by arguing that consent law should not be modified simply because a consent occurs in the context of a traffic stop, and that this case can be resolved without modifying state constitutional law. Moreover, the state maintains that Fort was not seized at the time of the consent inquiry, but that, at the very least, the case should be remanded to the district court for a factual determination on this issue. The state conceded in its brief and at oral argument that if Fort was seized at the time of the consent inquiry, then the seizure would be impermissible because the seizure went beyond the scope and duration of the traffic stop. *See State v. Blacksten*, 507 N.W.2d 842, 846 (Minn. 1993) (stating "detention of the person stopped may not continue indefinitely but only as long as reasonably necessary to effectuate the purpose of the stop" (citing *United States v. Sharpe*, 470 U.S. 675, 686-88 (1985))).

When reviewing a pretrial order on a motion to suppress evidence, this court may independently review the facts and determine whether the district court erred in suppressing the evidence as a matter of law. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). Moreover, this court reviews de novo a district court's conclusions as to the application of a provision of the Minnesota Constitution. *See State v. Wicklund*, 589 N.W.2d 793, 797 (Minn. 1999).

While the district court did not make specific findings with respect to whether Fort was seized at the time of the investigative questioning and consent inquiry, we can make that determination based on the record before us. Moreover, a fair reading of the district court's memorandum leads to the conclusion that the district court implicitly concluded that Fort had been seized and that the questions went beyond the scope of the initial stop.

Investigative stops are permitted if there is a particularized basis for suspecting criminal activity. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997); *see also United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (stating that "the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity"). Here, the car was stopped for speeding and a cracked windshield, both of which are violations of traffic laws. Thus, there was a particularized reason for suspecting criminal activity and a basis for stopping the car for further investigation of that activity.

We next determine whether Fort was seized under Article I, Section 10, of the Minnesota Constitution and the Fourth Amendment of the United States Constitution at the time the officer questioned him regarding the presence of narcotics and weapons. The state suggests that Fort, as a passenger, was not the subject of the traffic offense and was free to leave. However, "[t]emporary detention of individuals during the stop of an automobile by the police" constitutes a seizure under the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10 (1996). While the Supreme Court did not specifically address whether a vehicle's passengers are also considered seized during a traffic stop, the facts in *Whren* indicate that the vehicle was carrying passengers. *Id.* at 808. Nevertheless, we need not decide whether a passenger in a stopped vehicle is also seized because, even if Fort was not seized as part of the stop, a person is seized if a reasonable person, under the circumstances, would not feel free to disregard the police questions or to terminate the encounter. *See State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995).

Here, Fort was a passenger in a vehicle that was stopped for a routine traffic violation. An officer in full uniform, including flashlight, gun, handcuffs, and mace, approached the passenger's side of the vehicle while the squad car lights continued to flash and asked Fort to exit the vehicle. The officer then escorted Fort to the squad car and proceeded to ask him a series of questions. The questions were particularly intrusive given that they were aimed at soliciting evidence of drugs and weapons. On the facts presented, we conclude that, because an objectively reasonable person would not feel free to disregard the police officer's questions or to terminate the encounter, Fort was seized.

While there is nothing in the record to suggest that the initial stop was improper, the scope and duration of a traffic stop investigation must be limited to the justification for the stop. *See State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). In *Wiegand*, the defendants were stopped for a burned-out headlight, but the police conducted a search using a narcotics-detection dog in the absence of reasonable articulable suspicion of drug-related activity. *Id.* at 128-29, 137. We reversed the defendants' convictions holding, among other things, that under Article I, Section 10, of the Minnesota Constitution any expansion of the scope or duration of a traffic stop must be justified by a reasonable articulable suspicion of other criminal activity. *Id.* at 135.

Here, the officer testified at the pretrial hearing that the location of the stop was in a "high drug" area. He further testified that he intended to offer Fort a ride home and therefore conducted the search for purposes of officer safety. However, the district court, in concluding that the officer had no articulable basis to justify the search request, found this intention was not credible because it was not communicated to Fort. Moreover, the officer never said he suspected any crime other than the traffic violations. The purpose of this traffic stop was simply to process violations for speeding and a cracked windshield and there was no reasonable articulable suspicion of any other crime. Investigation of the presence of narcotics and weapons had no connection to the purpose for the stop. We therefore conclude that the investigative questioning, consent inquiry, and subsequent search went beyond the scope of the traffic stop and was unsupported by any reasonable articulable suspicion.^[1] Therefore, we reverse the court of appeals and reinstate the district court's suppression order.^[2]

Reversed.

^[1] While the investigative questioning, consent inquiry, and subsequent search may also have extended the duration of the traffic stop beyond that necessary for the stop, the record is such that we cannot say so definitively. That determination, however, is not required for resolution of the issues before us.

^[2] We feel compelled to make clear here, as we did in *Wiegand*, that our holding should not be read as limiting in any way a search conducted pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), for purposes of officer safety. *See State v. Wiegand*, 125 N.W.2d 125, 136 (Minn. 2002).

RECRUITMENT

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6TH CIRCUIT REVIEW

Mitchell v. Mason

325 F.3d 732 (6th Cir. 4/7/03)

Effect of *Bell v. Cone*, 122 S.Ct. 1843 (2002), on IAC Claims.

This is the second time this case has come before the 6th Circuit, and yet again it is a victory for the defendant. In 2001, the Court affirmed the district court's grant of Mitchell's habeas petition on the ground of ineffective assistance of counsel (IAC). Subsequently, the U.S. Supreme Court vacated the decision and remanded the case for further consideration in light of *Bell v. Cone*, 122 S.Ct. 1843 (2002). The 6th Circuit again affirms the granting of a writ of habeas corpus noting that while *Bell* changes the Court's analysis, it does not change the conclusion that Mitchell was denied effective assistance of counsel.

Mitchell was charged in Michigan state court with first-degree murder of Raymond Harlin after a fight between the 2 men. Gerald Evelyn was appointed as counsel for Mitchell and first represented him at the preliminary hearing on October 14, 1998. On February 3, 1989, Evelyn represented Mitchell at a pre-trial conference. On April 5, 1989, Evelyn was suspended from the practice of law in Michigan. He was reinstated on May 8, 1989, the day that jury selection began in Mitchell's trial.

Evelyn did not give an opening statement at trial nor did he present any witnesses on Mitchell's behalf. He did make a directed verdict motion at the close of the prosecution's case which was partially granted by the trial court by the reduction of the charge to second-degree murder. Mitchell was convicted of second-degree murder and sentenced to 10-15 years imprisonment.

Prior to trial Mitchell wrote numerous letters to the court, asking for a new attorney. Mitchell said that Evelyn had not visited him in prison nor would he speak to him in court. Eleven days before trial began the trial court held a hearing on Mitchell's motion for a new attorney. Evelyn failed to show up. Mitchell advised the court that Evelyn sent him a letter telling him he had been suspended from the practice of law for 1 month. The trial court took the motion under advisement. On the second day of jury selection, Mitchell renewed his motion for a new attorney. Evelyn told the judge that Mitchell was mad because he failed to visit him in the prison the night before as promised. The trial court denied Mitchell's motion. On the 6th day of trial, Evelyn told the trial court that he had received a grievance letter filed by Mitchell with the Attorney Grievance Commission. Evelyn offered to remove himself from the case. Mitchell told the judge that he was satisfied with Evelyn's representation.

Post-trial, Mitchell was granted an evidentiary hearing on whether he had been denied effective assistance of counsel. 2 eyewitnesses to the fight that resulted in Harlin's death testified that Evelyn never contacted them. Mitchell's mother testified that she was never able to reach Evelyn. Mitchell also testified to his lack of contact with Evelyn. The trial court found that Evelyn was not ineffective and both of the state appellate courts affirmed.

IAC Claim Not Procedurally Defaulted Because Trial Attorney Did Not Testify at Evidentiary Hearing.

The 6th Circuit first examines Michigan's claim that Mitchell has procedurally defaulted the ineffective assistance of counsel claim by failing to call Evelyn as a witness at the evidentiary hearing on effective assistance of counsel. Michigan claims that there is a state procedural rule that requires the trial attorney to testify at the evidentiary hearing. The Court quickly rejects this claim, noting that there was no "firmly established and regularly followed" state procedural rule to this effect. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991).

Complete Denial of Counsel Where Attorney Spent 6 Minutes With Client Pre-trial.

Mitchell seeks to apply *U.S. v. Cronin*, 466 U.S. 648 (1984), to his ineffective assistance of counsel claim. In *Cronin*, the Supreme Court held that prejudice must be presumed when trial counsel is totally absent during a critical stage of the proceedings. *Id.*, 466 U.S. at 659 n. 25. When Mitchell's state court conviction became final, this was clearly established Supreme Court law. The 6th Circuit holds that the fact that Evelyn spent only 6 minutes with Mitchell pre-trial is a complete denial of counsel at a critical stage of the proceedings. The Michigan Supreme Court analyzed Mitchell's case under *Strickland v. Washington*, 466 U.S. 668 (1984). In failing to examine Mitchell's case under *Cronin* instead, the Court erroneously and unreasonably applied clearly established Supreme Court law. 28 U.S.C. § 2254(d)(1)-(2).

***Bell v. Cone* Clarifies Distinctions Between *Cronin* and *Strickland* Claims.**

In *Bell v. Cone*, 122 S.Ct. 1843 (2002), the Supreme Court delineated the differences between claims governed by *Strickland* and claims governed by *Cronin*. When a claim is governed by *Strickland*, the defendant must demonstrate that specific errors made by trial counsel affected his ability to receive a fair trial. When a claim is governed by *Cronin*, the defendant does not have to prove prejudice resulted from the lack of effective counsel. The *Bell*



Emily Holt

Court held 3 types of cases warrant a presumption of prejudice analysis under *Cronic*: (1) accused is denied counsel at a critical stage; (2) counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) counsel is placed in circumstances in which competent counsel very likely could not render assistance. *Bell*, 122 S.Ct. at 1851.

Pre-trial is Critical Stage of Proceedings. Mitchell's case falls under the first category of cases in that he was denied counsel at a critical stage of proceedings, the entire pre-trial period. *Powell v. Alabama*, 287 U.S. 45, 57 (1932). Pre-trial is a critical period because it encompasses counsel's duty to investigate the case. *Strickland*, 466 U.S. at 691. "The Sixth Amendment guarantees more than a *pro forma* encounter between the accused and his counsel, and six minutes of consultation spread over three meetings do not satisfy its requirements."

Dissent by District Judge Carr: Strong Admonishment to Trial Court. District Judge Carr, who is sitting by designation in this case, dissents. Judge Carr believes that the cause and prejudice standard of *Strickland* is applicable to this case. Judge Carr also has strong words for the trial court in this case, noting "the state trial court in this case could and should have done a better job of upholding the Constitution" by granting a continuance to the defendant when difficulties between him and Evelyn became apparent.

McKenzie v. Smith

326 F.3d 721 (6th Cir. 4/23/03)

Writ of Habeas Corpus Granted Because of Insufficient Evidence. In this amazing case the 6th Circuit holds that the evidence introduced at trial was constitutionally insufficient to sustain McKenzie's conviction for assault with intent to murder and grants his petition for writ of habeas corpus.

In the early morning hours of March 7, 1984, 3-year-old Quattura Sutton was found lying unconscious on the floor of a vacant building. It was extremely cold that morning, and the little girl was not wearing a coat. She was taken to the hospital where it was determined that she was suffering from hypothermia and had several fresh bruises to her head, suggestive of abuse. Quattura was traumatized and withdrawn.

Quattura lived with her mother, Elena Carter, and Carter's boyfriend, the petitioner McKenzie, at the home of Carter's aunt Patricia. Patricia's 2 children, Tonya and Wilbert, also lived in the home that was located around the corner from the building where Quattura was found. On the night of March 6th, Carter and McKenzie were at the home using drugs with Darrell Reed. Reed left and, at some point, Carter told McKenzie that she was going to go out to get more money to buy drugs. McKenzie said he was going to lie on the couch with Quattura. He said he would lock the door and Carter

should ring the doorbell when she returned. Carter, however, had no intention of returning to the house but instead was meeting Johnny Williams to do drugs.

On the morning of March 7, Patricia found McKenzie crying because he could not find Quattura. The door to the house was unlocked. Patricia's 9-year-old son Wilbert testified that he woke up that morning when he heard McKenzie come into the house through the front door. Quattura's grandmother testified at trial, over defense objection, that on March 8th she visited Quattura at the hospital and when she asked how she was doing Quattura responded, "See, Grandma, what my daddy did to me." Testimony established that Quattura called McKenzie "dad." The statement was admitted as an excited utterance. Medical records established that a nurse who was present during this exchange noted that she thought Quattura said "Donna," not "daddy." Quattura was found incompetent to testify. The trial court excluded evidence that Quattura, when asked 2-3 days later who injured her, said, "Will did it." No physical evidence linked McKenzie to the assault. In fact, analysis of McKenzie's boots came up negative for bloodstains, and hairs found on Quattura were dissimilar to ones taken from McKenzie.

McKenzie did not present any evidence at trial. The prosecution introduced statements McKenzie made to police on March 7 and 8. He denied harming Quattura or removing her from the home. He said he did not end up sleeping on the couch with Quattura but slept in an upstairs bedroom and that he first noticed her missing at around 6:30 a.m.

The jury was initially deadlocked. The trial court overruled the defense's motion for a mistrial and gave an *Allen* charge. The jury ultimately returned with a guilty verdict and the trial court sentenced McKenzie to life imprisonment.

"When the crime itself is likely to inflame the passions of jurors, the courts must be vigilant in ensuring that the demands of due process are met." Because the Michigan appellate courts, while presented with an insufficiency of the evidence claim, never addressed it on its merits, the Court applies a *de novo* review to the case. *Hain v. Gibson*, 287 F.3d 1224, 1229 (10th Cir. 2002). On federal habeas review, the district court held that the state met its evidentiary burden because of Quattura's alleged statement to her grandmother that "daddy" did it. However, the Court of Appeals holds that "when the crime itself is likely to inflame the passions of jurors, the courts must be vigilant in ensuring that the demands of due process are met." Because Quattura was found incompetent to testify, cross-examination about the statement was impossible. Furthermore, 3-year-old Quattura was traumatized, drowsy, and in an "acutely deranged abnormal condition" when the statement was made, and a nurse thought she heard Quattura say "Donna," not "daddy." The Court states that this statement alone cannot be relied upon to support McKenzie's conviction. Other people were in the

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house when Quattura disappeared and no physical evidence or eyewitness testimony linked McKenzie to the crime.

The Court says that it doubts that Quattura's statement was even admissible as an excited utterance—especially in light of the trial court's refusal to allow the "Will" statement to come in—but notes that this is a matter of state law. The Court holds that under *Jackson v. Virginia*, 443 U.S. 307 (1979), given the circumstances of the child's hearsay statement and the lack of corroborating evidence, McKenzie's conviction is not supported by constitutionally sufficient evidence, and a writ of habeas corpus is issued.

McClendon v. Sherman

2003 WL 21012534 (6th Cir. 5/7/03)

McClendon was convicted in Michigan state court of 2 drug offenses in November 1991. His direct appeal concluded on August 28, 1995, when the Michigan Supreme Court denied his appeal. On April 23, 1997, McClendon filed a post-conviction motion in state court. This motion included a claim that he was denied effective assistance of counsel on direct appeal. The Michigan Supreme Court denied his application for leave to appeal his post-conviction claims on November 29, 1999.

McClendon filed a petition for writ of habeas corpus in federal court on November 28, 2000. This was within a year of the Michigan Supreme Court's denial of his application for leave to appeal his post-conviction claims. The district court dismissed McClendon's petition as untimely, and the 6th Circuit granted a certificate of appealability.

State Post-conviction Petition With Claims of Ineffective Assistance of Direct Appeal Counsel Tolls AEDPA Statute of Limitations, But Does Not Delay It. McClendon's petition was barred by the statute of limitations. His conviction became final on August 28, 1995, when the Michigan Supreme Court ruled on his direct appeal. Because his conviction was final before the adoption of the AEDPA, the statute of limitations began to run on April 24, 1996, pursuant to the one-year grace period announced in *Austin v. Mitchell*, 200 F.3d 391 (6th Cir. 1999), *cert. denied*, 530 U.S. 1210 (2000). The Court emphasizes that an application for state post-conviction or collateral relief does not delay when a petition becomes final; it merely tolls the running of the statute of limitations. *Payton v. Brigano*, 256 F.3d 405 (6th Cir. 2001), *cert. denied*, 534 U.S. 1135 (2002). The Court also rejects McClendon's argument that a state post-conviction petition raising an issue as to ineffective assistance of appellate counsel delays the running of the statute of limitations.

Thus, McClendon's conviction was final on August 28, 1995. The one-year statute of limitations began to run on April 24, 1996. The statute ran for 364 days before McClendon filed a

state post-conviction motion. The statute was tolled while this was pending. The statute of limitations began to run again on November 30, 1999, the day after McClendon was denied relief by the Michigan Supreme Court on his state post-conviction petition. Because McClendon only had 1 day remaining in the one-year statute of limitations, the limitation period reached its 365th day on December 1, 1999. He did not file his petition November 28, 2000.

Equitable Tolling Inappropriate Where Petitioner is Not Diligent. McClendon argues he is entitled to equitable tolling. The Court looks to the following factors in determining whether a petitioner is entitled to equitable tolling: (1) lack of actual notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) plaintiff's reasonableness in remaining ignorant of the filing requirement. *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988). The 6th Circuit holds that McClendon was not diligent in pursuing his writ after the Court announced the one-year statute of limitation in *Austin, supra*. The Court rejects McClendon's request that the doctrine of equitable tolling be applied to his case and dismisses his petition.

Bugh v. Mitchell

2003 WL 21057039 (6th Cir. 5/13/03)

Admission of Hearsay Statements Made by Child Rape Victim. Bugh was convicted in Ohio state court of raping his 4-year-old daughter, Robin, and was sentenced to 10-25 years imprisonment. He first argues that his 6th Amendment Confrontation Clause rights were violated when 4 adults were allowed to testify to out-of-court statements made by Robin. At trial, Robin only testified that Bugh "touched her privates," which is insufficient to support a rape claim. Thus, if the hearsay statements are inadmissible, the elements of rape were not proven at trial.

4 adults—Robin's mother, a counselor, the examining physician, and a social worker—testified to statements made by Robin to them in which she told them that her dad had not only touched her inappropriately but had also sodomized and raped her. While Robin was found to be competent to testify at trial, she was non-verbal throughout most of her testimony and only responded through head nods or shoulder shrugs. She sat on her mother's lap during her testimony. She indicated that she could not remember some details.

Scope of Confrontation Clause Is Broader than Evidentiary Hearsay Rules. Bugh argues on habeas review that the statements were not only inadmissible hearsay but also resulted in a violation of his 6th Amendment Confrontation Clause rights. The Court acknowledges that the scope of the Confrontation Clause is more expansive than hearsay rules; the Confrontation Clause "bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule." *Idaho v. Wright*, 497 U.S. 805, 814 (1990).

However, because the state appellate court failed to identify controlling Supreme Court precedent that it relied on, the 6th Circuit can only focus on whether the result of the decision was contrary to clearly established Supreme Court law. *Thompson v. Bell*, 315 F.3d 566, 585-586 (6th Cir. 2003).

No Confrontation Clause Violation Where Witness Whose Hearsay Statements Are Admitted Testifies at Trial. The Court holds that there was no Confrontation Clause violation. It notes that *U.S. v. Owens*, 484 U.S. 554 (1988), is very similar to the case at bar, and, in *Owens*, the U.S. Supreme Court held that the Confrontation Clause only guarantees the opportunity for cross examination, and the Confrontation Clause is not violated when a witness' memory fails at trial. The defense was able to expose the infirmities in Robin's testimony and memory by pointing out her youth and lack of memory. The jury was able to observe her body language and demeanor.

Prior Bad Acts Involving Sexual Assaults on Children Admissible: Evidentiary Rulings of State Courts Rarely Are Due Process Violations. Bugh also challenges the admission of evidence concerning similar, uncharged acts of child molestation. At trial, 16-year-old Keith Stout described an incident occurring 10 years earlier when Bugh was his stepfather and they lived in the same house. He told the jury that Bugh frequently would make him put his penis in Bugh's mouth. A second witness, Dr. Rick Thomas, testified that he once employed Bugh as a handyman at his home. He said that his daughter told him that Bugh had touched her sexually on a number of occasions and that he threatened her not to tell anybody about it. Thomas told the jury that Bugh told him that he was sorry and had sought counseling, but denied ever making threats. This evidence was objected to at trial.

The Court notes that evidentiary rulings of state courts are not due process violations unless they "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000). The 6th Circuit finds that the admission of evidence of prior bad acts in the case at bar does not violate Bugh's due process rights since there is no U.S. Supreme Court precedent barring said evidence.

Counsel Not Ineffective Where Decisions Reflect Sound Trial Strategy. Bugh's last claim is that he received ineffective assistance of counsel when his trial attorney failed to pursue an independent psychological examination of Robin to determine whether she was fantasizing or had been brainwashed to make these allegations. While Bugh's attorney, Rumbaugh, had sought an independent exam he did so less than a month before trial. The trial court told Rumbaugh to give him the name of an expert and a resume and he would consider it if it could be done before trial. Rumbaugh then located a doctor, but was told that Bugh needed to set up the examination. Rumbaugh passed on the information, and Bugh told him that he could not set up an appointment in time for

trial. Rumbaugh did not request a continuance. On habeas review, the district court concluded that Rumbaugh decided, as a matter of trial strategy, to focus his attention on limiting evidence to be admitted a trial and discrediting Bugh's ex-wife. The 6th Circuit agrees, noting that under *Strickland v. Washington*, 466 U.S. 668 (1984), there was a presumption that this was sound trial strategy. Furthermore, there is no evidence that Bugh would have not been found guilty if an examination of Robin would have taken place. *Id.*, 466 U.S. at 694.

Adams v. Holland

2003 WL 21146056 (6th Cir. 5/20/03)

Adams was convicted of felony murder and robbery in Tennessee state court and sentenced to life in prison plus 20 years. At issue on federal habeas review is whether he has procedurally defaulted on a Confrontation Clause claim and, if not, whether there was a Confrontation Clause violation.

Adams was convicted in February, 1991, and in October, 1992, the Tennessee Court of Criminal Appeals affirmed his convictions. Adams then applied for permission to appeal to the Tennessee Supreme Court, but failed to mention the Confrontation Clause claim at issue. Application for leave to appeal was denied in June, 1998. In June, 1999, Adams filed his habeas petition in district court. The district court dismissed all of Adams' claims; specifically, the court dismissed the Confrontation Clause issue as being procedurally defaulted by failing to bring it before the Tennessee Supreme Court in his application for permission to appeal. Adams moved for a certificate of appealability, but was denied. He filed a petition for rehearing with the Court of Appeals on June 21, 2001. While this petition was pending, the Tennessee Supreme Court promulgated Supreme Court Rule 39, which Adams argues removes the procedural bar.

Exhaustion Generally Requires Review by State Supreme Court, Even if Discretionary. Adams concedes that unless the Court of Appeals applies Rule 39 to his claim, it will be procedurally defaulted. This is because review by a state supreme court is normally an available state remedy that must be exhausted before a habeas petition can be filed, even if review is discretionary by the court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 847-848 (1999). However Rule 39 now provides as follows: "In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim."

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The appellee concedes that Rule 39 does remove review by the Tennessee Supreme Court as a necessary prerequisite for filing a federal habeas petition. However appellee argues that Rule 39 violates the Supremacy Clause of the U.S. Constitution because it conflicts with federal law as established in *O'Sullivan, supra*. Appellee's argument is that because discretionary review by the Tennessee Supreme Court is still available, *O'Sullivan* controls and to exhaust a claim filing an application for leave to appeal to the Supreme Court is necessary. Appellee argues in the alternative that even if Rule 39 does remove filing of a application for leave to appeal as a requirement for exhaustion, that it cannot be applied retroactively to Adams' claim in that it was promulgated after Adams petitioned for a rehearing on his request for a certificate of appealability.

States Can Promulgate Rules or Laws Lessening the Exhaustion Requirement. The 6th Circuit first holds that Tennessee can promulgate a law or rule lessening the requirements for exhaustion. The Court looks to *O'Sullivan*, 526 U.S. at 847, where the Court specifically excepted from its holding cases in which the state has explicitly disavowed state supreme court review as an "available state remedy." In the *O'Sullivan* Court's own words, "we note that nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that that remedy is available." Federal law does not prohibit a state from deciding for itself the availability of a particular state remedy. The 6th Circuit states that appellee's confusion may result from its hypertechnical definition of the word "available." "Available" in the context of exhaustion means that "technically available remedies are still not 'available' for habeas purposes when 'those remedies are alternatives to the standard review process.'" The alternative remedies become "'extraordinary:' technically available to the litigant but not required to be exhausted." *O'Sullivan*, 526 U.S. at 844. Thus, Rule 39 renders Tennessee Supreme Court review as "unavailable" in the context of habeas relief. The Supremacy Clause is not violated as this Rule does not explicitly conflict with federal law.

State Supreme Court Rule Operates Retroactively Because Rule Says It Will. The Court of Appeals then holds that Rule 39 does operate retroactively to prevent procedural default by Adams on his Confrontation Clause claim. This is because the Rule expressly states that it applies to "all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967." The language of the Rule also indicates that it is clarifying the law of Tennessee, not changing the law of available state remedies.

The Court of Appeals remands this case back to the district court. It notes that the record before lower courts have not included a transcript of closing argument. The Court orders the district court, in considering the merits of Adams' habeas claim, to consider the full record, including closing argument.

SHORT TAKES:

—*U.S. v. Treadway*, 2003 WL 21106271 (6th Cir. 5/16/03): Treadway hired Charles Agee to represent him at his trial on drug and firearm charges. Shortly after hiring him, the government noted that there was a potential conflict of interest in that one of Agee's former clients could be called to testify against Treadway. Agee moved to withdraw, and the court granted the order. That same day Treadway then hired James Schaeffer, Jr., to represent him, and he did through trial. On direct appeal of his convictions, Treadway argues that his 6th Amendment right to counsel was violated when the Court permitted Agee to withdraw from representation without a hearing where Treadway could be heard.

The 6th Circuit first holds that while *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982), and *Wilson v. Mintzes*, 761 F.2d 275, 280 (6th Cir. 1985), do allow a non-indigent defendant to have an attorney of his choosing, the instant case is different in that Agee would be violating his ethics should he have remained as Treadway's attorney because of the conflict of interest. The Court then finds that under the Due Process Clause of the 5th Amendment, Treadway was entitled to be heard at a hearing on Agee's withdrawal. A defendant should be given notice and an opportunity to be heard when his attorney of choice moves to withdraw. While this is plain error, the Court concludes that Treadway was not prejudiced in that he retained an attorney the same day that the order allowing Agee to withdraw was entered.

—*Dotson v. Wilkinson & Johnson v. Ghee*, 2003 WL 21134500 (6th Cir. 5/19/03): Ohio state inmates Johnson & Dotson filed 42 U.S.C. §1983 claims against the Ohio Adult Parole Authority asserting impropriety in their parole proceedings (examples: insufficient number of parole judges at hearing, refusal to allow inmate to make a statement, changing the years in which inmate met the parole board, etc.). The federal district court dismissed the § 1983 actions, holding that claims involving parole are only cognizable under a petition for habeas corpus because they involve the invalidity of the prisoners' confinement. In this *en banc*, divided opinion, the 6th Circuit reverses, holding "where a prisoner does not claim immediate entitlement to parole or seek a shorter sentence but instead lodges a challenge to the procedures used during the parole process as generally improper or improper as applied to his case, and that challenge will at best result in a new discretionary hearing the outcome of which cannot be predicted, we hold such a challenge cognizable under § 1983." The Court notes that the rationale for this holding is that Johnson and Dotson are not requesting a different decision from the parole board, they are simply asking that the parole board follow the law in making a decision. ■

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APPELLATE CASE REVIEW

Merriweather v. Commonwealth

99 S.W.3d 448 (2003)

Reversing and Remanding

Appellant was charged with first-degree burglary, first-degree criminal mischief and Persistent Felony Offender, first degree.

The trial court's attempt to accommodate defendant's request for a pool of potential jurors who had not sat on defendant's prior trial that same session was sufficient. Pre-trial, defense counsel filed a motion to preclude the jury pool because they had previously tried him on unrelated charges. In response, the trial court added 22 jurors from the district court pool and excused some jurors from the pool that had actually served on Merriweather's prior jury. After voir dire and strikes for cause, 6 jurors who had been in prior pool remained in the venire and the defense used 6 peremptory strikes to rid the jury of them. Appellant argued that he was prejudiced by the trial court's action as he had to use 6 peremptory strikes in order to face an impartial jury. The Supreme Court did not find error and cited *Young v. Commonwealth*, Ky., 286 S.W.2d 893 (1955) and *Bowling v. Commonwealth*, Ky., 286 S.W.2d 889 (1956), both of which cases held that service as a juror in a previous, unrelated trial alone was not sufficient grounds to suggest bias.

The officers did not err by conducting a show up identification in this case. The Appellant also argued that he was entitled to a new trial because of an improper "show up" identification. The night of the incident, the victim was taken to a squad car, in the back seat of which Appellant sat, to identify him as one of the people who had broken into her house. The Supreme Court stated that although "show up" identifications are disfavored, they can be permissible when they occur immediately after the crime, as long as the trial court conducts an analysis pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972).

The Commonwealth failed to present competent evidence to obtain Merriweather's PFO conviction. Appellant argued that his PFO conviction should be reversed because the foreign judgments of conviction were not properly authenticated. KRS 422.040 requires that foreign judgments be properly exemplified by the court that entered them and that the Commonwealth's failure to do so leads to a failure of proof beyond a reasonable doubt. However, the Supreme Court held that Merriweather could be re-tried on the PFO charge. Double jeopardy did not apply because the Commonwealth did not fail to present sufficient evidence, but rather failed to present sufficient *competent* evidence. Thus, the Court overruled *Davis v. Commonwealth*, Ky., 899 S.W.2d 487 (1995), to the extent that that case suggested that retrial in similar circumstances offended the concept of double jeopardy.

Stallworth v. Commonwealth

2000-SC-211-MR, —S.W.3d—,
(4/24/03)

Reversing and Remanding

Stallworth plead guilty to numerous charges and received a ten year sentence. During subsequent proceedings on Appellant's motion for shock probation, Appellant agreed that the trial court could amend the final judgment to reflect a twenty (20) year sentence, in the event the court revoked his probation.

Trial court cannot enhance a defendant's sentence as a condition of granting shock probation. The Supreme Court reiterated that the trial court could not enhance the defendant's sentence, either by adding years or changing "concurrent" to "consecutive," as a condition of granting shock probation. See *Galusha v. Commonwealth*, Ky. App., 834 S.W.2d 696 (1992). It is immaterial that this longer sentence is legal under 532.110 or that the trial court could have imposed the increased sentence under the original final judgement. The problem lies with the court revisiting a final order once the appeal time had passed (10 days after entry). The motion for shock probation does not give the court jurisdiction to alter the substance of the final judgment. (per *Prater v. Commonwealth*, Ky., 82 S.W.3d 898 (2002)). Moreover, the Court held that a defendant could not consent to a change in the final judgement. Such consent is not an effective waiver because "it attempted to waive his rights as to the finality of the length of sentence – a matter unrelated to the proceeding then before the court and moreover, a matter that the trial court no longer had no power to alter amend or vacate."

Baker v. Commonwealth

2001-SC-0504, —S.W.3d—, (4/24/03)

Affirming

Baker appealed his 30 year sentence based on convictions for 2 counts of using a minor in a sexual performance.

Seizure beyond the scope of search warrant was not error. At issue was the seizure of a roll of film that contained 9 photographs of the alleged victim similar to the photos resulting in the charges. The search warrant did not specifically permit the officers to seize film or the camera – rather it provided for photographs. According to the officer that testified at the suppression hearing, the victim told him during the search that the camera contained film that had other pictures of her on it. The trial court upheld the search based on this testimony. At trial, the victim testified that she did not know what was on the film when she pointed the officers to



Euva Hess

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the camera. Appellant argued that the trial court should have reconsidered the suppression motion based upon this testimony. The Supreme Court found no error.

The Supreme Court defined photograph under KRS 531.300(5). As additional grounds to suppress, Appellant argued that undeveloped film was not a photograph within the meaning of KRS 531.300(5). The SCT held that a photograph is made the moment the picture is snapped.

Baker was not entitled to a lesser included instruction on possession of matter portraying a sexual performance by a minor. In order to merit a lesser included instruction, the facts must be such that the jury "could have a reasonable doubt as to the defendant's guilt of a greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." Because Appellant admitted that he staged and took the pictures, his culpability exceeds mere possession.

Lovett v. Commonwealth,
2000-SC-1072 & 2000-SC-1078, —S.W.3d—, (4/24/03)
Affirming

Lovett appealed his 20 year sentence based on a conditional Alford plea to Manufacturing Methamphetamine and various other drug charges. He specifically reserved the right to appeal the court's ruling on the suppression issue and the trial court's order that the confidential informant's deposition could be taken as he was unavailable.

The search warrant affidavit was not defective even though it failed to state the confidential informant's basis of knowledge and reliability. Moreover, a lapse of two months does not render the report of an on-going methamphetamine lab stale. The Supreme Court used a "totality of the circumstances" test. They were satisfied with the probable cause finding based on the detail of information provided by the informant and the informant's statement that he had "personally observed the items in the affidavit on more than one occasion over the preceding months." Moreover, the Supreme Court noted that the informant's making of statements against his own penal interest "increase the degree of veracity that a court may attribute to the statements." The informant admitted being present in the meth lab and that he had been in possession of items in a duffel bag that could have lead to his own prosecution for manufacturing methamphetamine. Additionally the Supreme Court held that the officer seeking the warrant had no obligation to tell the magistrates of the informant's history of drug use.

The Supreme Court found appropriate the trial court's order to depose the confidential informant. The court complied with RCr 7.10(1). Moreover, the Commonwealth proved the confidential informant was unavailable for trial. The Su-

preme Court held that the Commonwealth need not resort to KRS 421.230 to 421.270 to procure the informant's attendance in order to constitute "a good faith effort" to obtain the witness. The Commonwealth's assertion that the confidential informant could not get a pass from the Teen Challenge program until February was sufficient.

Rosen, Judge & Commonwealth v. Watson
2002-SC-57, —S.W.3d—, (4/24/03)
Affirmed

The Commonwealth appealed the Court of Appeals' issuance of a writ of prohibition that denied the Commonwealth the ability to prosecute Watson on an escape charge. The case contains an extensive procedural history, which for purposes of this appeal boils to the following: Boyd District Court put a detainer on Watson while he was incarcerated on other charges. Watson filed a motion for speedy trial under 500.110. 180 days lapsed without action by the Commonwealth. Regardless, the court intended to allow prosecution to go forward. Watson sought and obtained a writ of prohibition from the Court of Appeals.

The Supreme Court held that under KRS 500.110 a petition for speedy trial is properly filed in the prosecutorial office which has lodged the detainer and the court in which the case that is the basis for the detainer pends. In this case, that was the district court since no indictment had come down. Moreover, the Supreme Court held that Watson was not required to wait until the Commonwealth got an indictment before filing under 500.110. "It is the filing of a detainer ... that triggers the application of KRS 500.110" (not an indictment). A filing under this statute will be premature only if it precedes the filing of the detainer. The indictment, or lack thereof, has no effect.

Cardine v. Commonwealth,
2002-SC-99-DG, —S.W.3d—, (4/24/03)
Reversing and Remanding

The automatic transfer rule that applies to all capital post conviction motion appeals does not apply to non-capital post-conviction motion appeals. The Supreme Court held that the automatic transfer rule, which provides that all death penalty post conviction motion appeals should automatically come before the Kentucky Supreme Court, does not apply in other post conviction cases even when the defendant receives a sentence of 20 years or more. "11.42 and 60.02 motions concern post conviction relief ... [and] are appealable to the Court of Appeals in all cases except those involving a death sentence." ■

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CAPITAL CASE REVIEW

UNITED STATES SUPREME COURT

Massaro v. United States, 123 S.Ct. 1690 (2003)

Majority: Kennedy (writing), Rehnquist, O'Connor, Stevens, Souter, Breyer, Ginsburg, Thomas, Scalia

Claims of ineffective assistance of counsel raised in a 28 U.S.C. Section 2255¹ proceeding are not defaulted if not brought first on direct appeal. *Massaro*, 123 S.Ct. at 1693. The Court rejected the policy reasons underlying the procedural default rule: "[it] is neither a statutory nor a constitutional requirement, but. . . is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." Forcing a defendant to bring ineffectiveness claims on direct appeal does not promote those interests. *Id.*

The trial record will be based on issues of guilt/innocence/penalty and may not bear the facts necessary to decide either prong of *Strickland v. Washington*, 466 U.S. 668 (1984) (ineffectiveness determined by 1) deficient performance; 2) prejudice therefrom). "If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. . . . The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them." *Id.*, at 1694.

The Court also cited to *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002), in which the Supreme Court of Pennsylvania catalogued the 37 states with similar case law and gave a good analysis as to why ineffectiveness claims are generally not appropriate for direct appeal. *Id.*, at 734-739 and 735 n. 13.

The Sixth Circuit gave similar reasoning in remanding for a hearing on appellate ineffectiveness in *Mapes v. Coyle*, 171 F.3d 408, 421 (6th Cir. 1999). See also *Hodge and Epperson v. Commonwealth*, Ky., 68 S.W.3d 338, 342 (2001); *Norton v. Commonwealth*, Ky., 63 S.W.3d 175, 178 (2001).

A *certiorari* petition concerning Kentucky procedures in death penalty cases vis-à-vis *Massaro* was filed May 19.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Powell v. Mitchell, — F.3d — (May 7, 2003)

Majority: (Clay, Gilman, Daughtrey (concur re: error in penalty phase)

Minority: Daughtrey (dissent re: harmless at guilt phase)

At trial, a psychiatrist hired to conduct a pre-trial competency evaluation testified that Powell did not enjoy a nurtur-

ing environment as a child, fluctuated between mild and borderline mental retardation, expressed antisocial behavior, did not appreciate others' feelings, had poor impulse control and overreacted. Although counsel's motion for a neuropsychiatrist to assist at the penalty phase was granted, the same psychiatrist testified at the penalty phase that she did not have enough time to do a full investigation or testing and reinforced her trial testimony that Powell could perform intentional acts. *Powell*, slip op. at 5.

The Sixth Circuit found Powell's *Ake* error in the guilt phase harmless. While he was not provided the "partisan" help required by *Ake*, he did have access to the psychiatrist's report and notes. *Id.*, at 15. Powell admitted he kidnapped an eight-year-old in order to rape her and that he threw her out a second-story window when people responded to her cries for help. Between Powell's admissions and the psychiatrist's testimony that he could form and commit intentional acts, the jury had enough evidence to find that Powell could purposefully commit a crime. *Id.*

There was penalty phase error. The psychiatrist herself admitted that she did not have the tools, nor had she done the necessary investigation to give the jury mitigation information. Thus, the *Ake* error had "a substantial and injurious effect or influence in" the jury's death sentence. *Id.*, at 17, citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Denial of Motion for a Continuance

After the guilt phase, the trial court denied defense counsel's request for a continuance in order to obtain an additional psychiatric exam to present at the sentencing hearing. Using the test familiar to Kentucky practitioners in *Hunter v. Commonwealth*, Ky., 869 S.W.2d 719, 724-725 (1994),² the court granted the writ on this error.

The Court also found ineffective assistance of counsel at the penalty phase but made no new legal pronouncements.

Dissent

Judge Daughtrey believed that guilt phase error was not harmless. Powell was certainly not given the assistance a person of means would have garnered. *Powell*, slip op. at 23. Nor did he receive "the expert assistance necessary to 'assist in evaluation, preparation and presentation of a defense.'" *Id.*, at 25; quoting *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). Powell appeared to act purposefully but neither the trial court nor the psychiatrist answered the question of whether he could **control** those actions.

Judge Daughtrey also noted that the access to expert help is not only for the client, but also for "lawyers untrained in psychology and psychiatry," who "could be flooded with

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data and opinion with no legitimate opportunity to understand, question, or dispute the material." *Id.*, at 26.

Endnotes

1. In *Gilliam v. Commonwealth*, Ky., 652 S.W.2d 856, 859 (1983), the Supreme Court called Section 2255 the "federal equivalent" of RCr 11.42.
2. Length of the requested delay; whether other continuances have been granted; convenience/inconvenience to the

parties, witnesses, counsel and the court; whether the delay was legitimate; whether the defendant contributed to the necessity for a continuance; whether the continuance would be identifiably prejudicial to the defendant's case; complexity of the case. ■

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IN MEMORY OF DAVE STEWART

Steve Heffley, Investigator, LaGrange Trial Office:

I had the privilege of knowing Dave for over thirty years. He was not only my supervisor but also a close friend. Dave began his career with the Department of Public Advocacy in May of 1974 after having taught school in the Eminence and Trimble County School Systems. Dave was an avid fisherman and woodworker when he was not at work. Dave began his career when there were only six investigators to cover the state. Dave saw the office grow from contract attorneys to the full-time office system that we now have. As the investigator coordinator, he helped hire and train many of the investigators now working. Dave not only gave guidance, inspiration and assistance to the investigators in the office but also to many attorneys in the office. Dave looked out for the investigators and was always trying to find ways to improve their training and performance. Dave was always willing to fight for what he thought the investigators needed. He was like a bulldog; he would fight till the other person gave up.

Dave had a tenacious dedication to everything he did in life whether it was his work, religion or hobbies. One story comes to mind concerning his feelings toward a particular rod and reel he loved. We were fishing one day and I accidentally rocked the small boat we were using. Dave lost his balance and fell out of the boat. Dave went completely out of sight except for his hand that was holding his rod and reel out of the water. He came up out of the water spitting, with moss and mud all over him but his rod and reel was safe and dry. Dave was also a practical joker as some people in the Frankfort office and I can attest to. He always liked to be one up on everyone in that respect.

Dave did not get to spend his retirement in the way that he had dreamed of. Instead of traveling, fishing and doing woodworking projects - he fought cancer. Dave was tenacious with his battle with cancer just as he was with his work. He underwent experimental treatments knowing that it probably would not help him but maybe the doctors would be able to help someone in the future.

We lost Dave on April 5, 2003 after almost a 4-year battle with cancer. He leaves behind his wife of 39 years, 2 sons and 5 grandchildren. We will forever miss him but never forget him.

Kathryn Power, Investigator, Richmond Office:

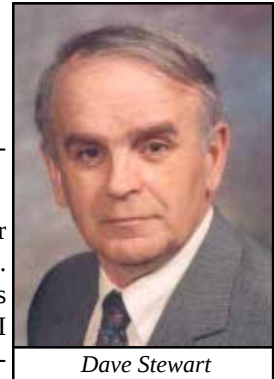
When I met Dave Stewart a little over 17 years ago, he frightened me a little. At my intake interview it was obvious he was very serious about the job I was taking on. He stressed how important it was to be honest, to work with integrity, to be careful, and to be supportive of our co-workers. He tried to prepare me for some of the hostility I would face and to keep myself safe while out in the field, alone. He also believed in the importance of being a participant in the investigator team who he knew would be a great support to me, a rookie. I soon found out that the tough exterior was covering a heart of gold.

Dave was tireless in his efforts to improve our job performance and he tried to ensure that each person had the support and recognition they deserved. He constantly fought to get his people the information, knowledge, and the necessary equipment needed to do their jobs well.

He was always there for me and everyone else who needed his assistance. I know I aggravated him on so many occasions, but he never complained; whether he agreed with you or not, he always had words of support and encouragement. He was dedicated to making things work better for everyone. His retirement left a great void for many of the DPA staff. I have greatly missed working with him over the past few years.

When there was time to relax, I got to know and see Dave's great sense of humor. During downtime at training, the many late night poker games were when we all got to see each other's more personal selves. The stories, jokes, laughter, and camaraderie we all shared have provided some of the best memories I will ever have.

If it weren't for Dave Stewart's support in my early years as an investigator, I don't know that I would still be here today. He got me through some rough times with dedication and a friendship that I will always cherish. I know he wondered if I would ever make it—but —Thanks to Dave, I did, and I am proud to be one of his proteges. ■



Dave Stewart

PRACTICE CORNER

LITIGATION TIPS & COMMENTS

Protect Client's Due Process Rights During Sentencing Phase of Trial by Informing the Jury of all Statutory Factors Relevant to Sentencing

Introduction of inaccurate parole eligibility guidelines and other misleading evidence has a significant chance of affecting the substantial rights of a client by altering jury sentencing decisions. This is especially true for defendants convicted of sex offenses.

Often parole eligibility evidence is first introduced by the Commonwealth pursuant to KRS 532.055(2)(a). However, nowhere does this statute mandate that the prosecution must introduce all factors that are favorable to the defendant. Therefore, the Commonwealth may introduce general parole eligibility evidence, but fail to inform the jury that a sex offender will not be eligible for such parole until after completing sex offender treatment program and that violent sex offenders will not be eligible until serving 85% of their sentence. See KRS 439.3401. Similarly, the Commonwealth seldom ever informs the jury of the three-year period of conditional discharge placed upon a convicted sex offender after he has served his sentence. See KRS 532.060(3).

It is imperative for defense counsel to make sure the jury is correctly informed regarding parole eligibility for sex offenders, lack of good time credit, lack of parole eligibility until completing sex offender treatment, and the application of a three year period of conditional discharge. If the Commonwealth introduces parole eligibility information, defense counsel should object and request the Commonwealth inform the jury of all relevant statutory factors affecting parole eligibility. Otherwise, defense counsel should introduce this evidence on its own behalf or assure the evidence is introduced through cross-examination. See *Robinson v. Commonwealth*, Ky., 926 S.W.2d 853, 855 (1996). If the trial court or Commonwealth limits defense counsel's introduction of evidence relevant to sentencing, defense counsel should object to the limitation as a violation of the defendant's right to due process under §11 of the Kentucky Constitution and the 5th and 14th Amendments to the U.S. Constitution.

~ Shelly Fears, Frankfort Appeals Branch

~ Donna Boyce, Mgr., Frankfort Capital Appeals Branch

Always Identify the Appellate Court in the Notice Of Appeal

When filing a notice of appeal from a circuit court criminal conviction always identify whether you are appealing to the Kentucky Court of Appeals or Supreme Court. If a judgment imposes a sentence of death, life imprisonment, or imprisonment for 20 years or more the appeal shall be taken directly to the Supreme Court pursuant to RCr 12.02. If the sentence imposed is for a term less than 20 years, the appeal is taken directly to the Court of Appeals. Identifying the correct ap-

pellate court in the notice of appeal will assure all certified materials are sent to the correct location and avoid delay of the appeal.

~ Misty Dugger, Frankfort Appeals Branch



Misty Dugger

Remember to Preserve *Batson* Challenges

When making a challenge to the prosecutor's striking of African-American jurors from the jury pool you must renew the objection *after* the prosecutor's alleged "race-neutral" reasons are given to adequately preserve the challenge for direct appeal. State again that you do not believe that the reasons given are race-neutral (and check their responses against the record if you can) and that you still object based on *Batson v. Kentucky*, 476 U.S. 79 (1986). Right before the jury is sworn, renew your objection to the seating of this jury (again based on *Batson*).

~ Karen Maurer, Frankfort Appeals Branch

Make Sure Record Clearly Reflects Joining of Co-Defendant's Motions and Objections

The appellate courts do not automatically assume a defendant has joined in his co-defendants' objection or motion. When representing one of multiple defendants, enter in the record a written motion/notice that you intend to join in all objections of co-defendants. Renew the motion/notice at the beginning of trial. This is necessary to preserve the record for appellate review.

~ Euva D. Hess, Frankfort Appeals Branch

Be Wary of Using Only Specific Directed Verdict Motions

Often a directed verdict motion should be made based upon highly specified grounds such as failure to prove jurisdiction or failure to prove an element of the offense. However, before you base your directed verdict motion solely on a single specific failure of the prosecution, make sure you are correct. If the defense presents a faulty theory below and then fails to make a general motion for directed verdict, the defendant cannot present a sufficiency argument on appeal because the issue was not preserved in the lower court. Thus, to insure the record is properly preserved for appellate review, always make both a specific and a general motion for directed verdict when possible. When in doubt, make simply a general motion.

~ Linda Horsman, Frankfort Appeals Branch

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

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