The Advocate

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Is there Probable Cause to Indict YOU for Manufacturing Meth?

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FROM THE EDITOR...

Jeff Sherr

Meth Manufacturing. Before you start reading this edition of *The Advocate*, take a moment and consider your environment. Is there a box of coffee filters by your coffee maker? Do you have a box of decongestant in your top drawer, next to the spoon you use to stir your coffee? On the table, is there a glass jar full of peppermints?

Is this probable cause under the new manufacturing methamphetamine statute? Sure, you may say, these items could be used by someone to cook meth, but what about intent? Well, you are holding in your hand a journal that cites statutes, Supreme Court opinions, and reference books that describe in detail just how making a batch of meth is done.

Has the legislature, in its understandable effort to address Kentucky's growing meth crisis, created a statute that makes it possible to detain or indict almost every citizen in Kentucky? In this edition, Brian Scott West examines the new statute in detail, providing arguments against the constitutionality of the statute and suggesting strategies to utilize in defending a manufacturing methamphetamine case.

Prosecuting a Defense Attorney for Possessing Images Obtained in Discovery. Is a criminal defense lawyer's possession of child pornography, for the representation of a client, an act that violates either federal or state law? DPA Law Clerk Will Martinez provides a survey of the current caselaw on this issue.

Juvenile Supervised Placement Revocation. Department of Juvenile Justice administrative regulations set forth a process by which DJJ can revoke a committed child's placement in the community and then place that child in a DJJ facility. Londa Adkins outlines the procedure and offers of criticism of the flaws with the process.

Interviews. In this primer, DPA Investigator Warren Allred offers tips for conducting successful interviews. This is an excellent, one-page overview for new lawyers, law clerks, paralegals, or interns. ■

METH MANUFACTURING: THE DEFENSE ATTORNEY'S NOTEBOOK

By Brian Scott West, Murray Directing Attorney

Manufacturing Methamphetamine has been the fastest growing crime in the Commonwealth of Kentucky. The offense is new enough that the word "methamphetamine" is still not included in the latest word processing spell checkers; yet "meth" has received much national and local attention. Caseloads of public defenders and prosecutors across Western Kentucky are doubling, and even tripling, as compared to numbers only a few years ago, largely because of meth.

In response to this growth, and in apparent belief that the old methamphetamine manufacturing statute and related laws as written were insufficient to quell this growth and/or protect the public, the legislature has acted to amend the manufacturing statute in the following ways:

The New "Meth" Bill

(1) First, the legislature has made it more difficult to acquire one of the key ingredients (ephedrine or pseudo-ephedrine). The substance must now be "behind the counter," and dispensed only by a pharmacist or pharmacist's intern or technician. The purchaser must show an I.D. and sign a log. And the amount dispensed must be nine (9) or fewer grams. This defense attorney applauds these restrictions placed upon the sale and purchase of ephedrine or pseudo-ephedrine. Ephedrine *should* be behind the counter. A person taking the pills for allergies or colds should have no problem with this restriction; and a Mom and Pop convenience store, or department store, that sells boxes and boxes to an individual who has neither a cold nor an allergy is being unjustly enriched off the meth-making enterprise. Better to have less precursor out on the streets in the first place, than to enact all the legislation in the world designed to prosecute the possession of it once it has found its way into the street.

(2) Second, the General Assembly has created the offenses of Controlled Substance Endangerment in four degrees, ranging from an A felony in case of death, down to a D felony in case of mere endangerment. In all degrees of CSE, the Commonwealth must prove that a person knowingly caused or permitted a child to be present during manufacturing of methamphetamine. If the child dies as the result of being present, the person would be guilty of an A felony. If the child is seriously injured, it would be a B felony. If the child is physically injured, but not seriously, it would be a C felony. And if the child were merely present, not injured at all, the crime would be a D felony.

Brian Scott West

Although arguably the creation of this offense makes it easier to prosecute persons for exposing children to the dangers of meth labs, it is difficult for this attorney to see how the General Assembly has added much to the existing litany of offenses that normally would have already applied to the facts of any particular case. As a practical matter, most juries would find that the intentional exposing of a child to the dangers of a meth lab to be wanton conduct, manifesting extreme indifference to the value of human life, and the chemicals or equipment to make meth to be dangerous instruments. Thus, in the case of a death of a child, the defendant would be facing a wanton murder charge. In the case of serious physical injury, the defendant would face a first degree assault charge, and in the case of mere physical injury, a charge of second degree assault. Where a child is exposed to a lab, but not injured at all, CSE in the fourth degree replaces the old wanton endangerment in the first degree. Thus, Class A, B, C, and D felonies already exist to cover the factual situations contemplated by the newly created CSE offenses.

True, the statute does not leave to chance that a jury might not find wanton conduct "manifesting extreme indifference to the value of human life," eliminating, perhaps, the chance of a jury finding a lesser included offense for wanton conduct without such indifference. But, in exchange, the new statute requires a "knowing" mental state which is not required for conviction of the existing applicable homicide, assault, or endangerment statutes. Under first degree wanton endangerment, it is not a defense to conviction that the meth maker did not know that a child had wondered into the garage or tool shed during the meth making. Under CSE fourth degree, however, the Commonwealth must prove that the meth maker "knowingly" caused or permitted the child to be there.

(3) It is the third statutory enactment of the General Assembly which this defense attorney finds troubling and with which this article is primarily concerned. The manufacturing

statute has been amended to allow conviction where a defendant intending to manufacture meth possesses only two (2) chemicals or two (2) pieces of equipment necessary to manufacture meth. Competent, effective, and zealous representation requires that the defense attorney be ready to defend a meth manufacturing case under either the old or new statutes, and in the case of the latter, stand ready to attack the new statute to the fullest extent allowed by the U.S. and Kentucky Constitutions.

I. The OLD Manufacturing Methamphetamine Statute

The old manufacturing statute codified at KRS 218A.1432 provides:

(1) A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully:
   (a) Manufactures methamphetamine; or
   (b) Possesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.

(2) Manufacture of methamphetamine is a Class B felony for the first offense and a Class A felony for a second or subsequent offense.

"Competent, effective, and zealous representation requires that the defense attorney be ready to defend a meth manufacturing case under either the old or new statutes, and in the case of the latter, stand ready to attack the new statute to the fullest extent allowed by the U.S. and Kentucky Constitutions."

"Methamphetamine" means "any substance that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers." KRS 218A.1431(2).

According to the statute, there are two ways a person can be convicted of "manufacturing." The first is *actually manufacturing meth*, which implies that the manufacturer has a finished product. The second is possession with intent to manufacture. Note that methamphetamine is the only drug where manufacturing it – or simply having the materials to manufacture it – carries a higher penalty than merely possessing the finished product or trafficking in it. (Possession of, and Trafficking in, Methamphetamine will not be discussed in this article.)

A. Manufacturing by the actual manufacture of methamphetamine.

A defendant is guilty under the first prong of the statute when he "manufactures methamphetamine." The present tense language of the statute is more confusing than it has to be. To defense lawyers, it seems clear that the statute requires an actual, finished product in order for the offense to have been completed. However, there are prosecutors who disagree, and argue that the statute requires only that the defendant is in the *process* of making methamphetamine. They maintain that a finished product is not required and that, if the legislature intended to require a finished product, the statute would have provided: "A person is guilty when he has *manufactured methamphetamine.*"

1. A Finished Product is Required.

The prosecutor may use an analogy such as the following: "Judge, suppose I'm building a house. Right now, all I am doing is pouring the foundation, using blocks and cement. But if someone asks me what I am doing, and I say 'I am building a house,' no one will look at me funny because I am, after all, in the early stages of building a house. No, I don't have a completed house, but I am nevertheless 'building' a house. I am guilty of building a house, if that's how you want to say it. The meth statute is the same way, when I begin the process of actually making methamphetamine, I am "manufacturing methamphetamine," even if I have not yet got the finished product."

In so arguing, the prosecutor will point to the definition of "manufacture," codified at KRS 218A.1431(1): "Manufacture" means "the production, preparation, propagation, compounding, conversion, or processing of methamphetamine…." "Processing," it is argued, implies that a finished product is not required.

As persuasive an argument as that might be, so far the Supreme Court of Kentucky has ruled otherwise, In *Kotila v. Commonwealth*, 114 S.W.3d 226, 245 (Ky. 2003), the Court gave an example of what would constitute an attempt to manufacture methamphetamine. (Attempt, of course, is a lesser included offense of manufacturing.) The Court stated:

> [A] defendant who possessed less than all the necessary chemicals to manufacture methamphetamine could be convicted of criminal attempt to violate KRS 218A.1432(1)(a) **if he had already begun the manufacturing process.** *United States v. Smith*, 264 F.3d 1012, 1016-17 (10th Cir. 2001))(though possessing less than everything needed to manufacture methamphetamine, defendant had begun the initial step in the manufacturing process, *i.e.*, soaking the ground-up pseudoephedrine tablets in water). [Emphasis added.]

Then, in *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003), the Supreme Court was more specific: The definition of "manufacture," *i.e.*, "the production, preparation, propagation, compounding, conversion, or processing of methamphetamine," obviously contemplates a finished product." Thus, "pouring the foundation," is not equivalent to "building the house." Beginning the process of manufacturing is

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not manufacturing. "Processing" methamphetamine still implies a finished product.

2. What is a finished product?

Methamphetamine is defined as "methamphetamine, its salts, isomers and salts of isomers." Methamphetamine, of course, is the final product that the consumer uses to get high. The Supreme Court in *Commonwealth v. Hayward*, 49 S.W.3d 674 (Ky. 2001), using Skinner's "Methamphetamine Synthesis Via Hydriotic Acid/Red Phospohorous Reduction of Ephedrine," 48 Forensic Science 1, 123-134 (1990), accurately identified the chemical structure of the finished methamphetamine:

C6H5 – HCH – CH3NCH – CH3

Compare this to the chemical structure of ephedrine:

C6H5 – HCOH – CH3NCH – CH3

The only difference between the two chemicals is that the Oxygen atom has been removed, or "reduced" from the ephedrine.

As for the meaning of the rest of the terms that follow "methamphetamine" in the definition, these definitions have been derived from various chemical glossaries located on the internet, and are used here without a reference to a specific dictionary or glossary. If the definition of "methamphetamine" becomes an issue at trial, defense counsel will need to have either (1) an expert who can speak credibly about the definitions, or (2) a chemical text which is recognized by the court as a "learned treatise" and which defines the terms.

"Salt" – Ionic compounds that can be formed by replacing one or more of the hydrogen ions of an acid with another positive ion. [Basically, the result of a reaction between a base and an acid.] For us, this means that methamphetamine hydrochloride is "methamphetamine." Methamphetamine hydrochloride is a salt of methamphetamine which occurs when methamphetamine free base is exposed to hydrochloric acid. This occurs during the "smoking off" process, usually the last step.

"Isomer" – In chemistry, one of two or more compounds having the same molecular formula but different structures (arrangements of atoms in the molecule). [To use a verbal metaphor, "POTS", "TOPS", "OPTS", and "STOP" are all isomers of each other, along with all other combinations of the letters "O", "P", "S" and "T." In the drug code, however, only one kind of isomer is intended with respect to methamphetamine. KRS 218A.010 (12) provides that "isomer" means the "optical isomer," (as opposed to the geometric or positional isomer). This means that only the "mirror image" of the methamphetamine compound qualifies. [Using the verbal metaphor above, if "POTS" represents the methamphetamine molecule, then "STOP" would be the only isomer that would qualify.]

Obviously, you will need to hire an expert in the event the defense of the case becomes whether a substance is methamphetamine or something close, but not, methamphetamine.

3. Jury Question based on "manufacturing methamphetamine"

Instruction No.___
Manufacturing Methamphetamine

You will find the Defendant guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt that in this county on or about _____, 2005, and before the finding of the indictment herein, the Defendant manufactured methamphetamine.

Instruction No. ___
Definitions

"Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of methamphetamine, or possession with intent to manufacture, either directly or indirectly by extractions from substances of natural origin or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, except that this term does not include activities:

(a) By a practitioner incident to administering or dispensing of a controlled substance in the course of his professional practice; or
(b) By a practitioner, or by his authorized agent under his supervision, for the purposes of, or incident to, research, teaching, or chemical analysis; or
(c) By a pharmacist incident to dispensing of a controlled substance in the course of his professional practice. [KRS 218A.1431(1)]

B. Manufacturing by possession of the chemicals or equipment to make methamphetamine.

Under the old statute, many cases of alleged manufacturing of methamphetamine used to go to juries where the prosecution had evidence of only a few of the items (whether chemicals or equipment or both) necessary to actually make methamphetamine. Defense lawyers had argued that all of the chemicals or equipment necessary to manufacture meth must be in evidence, because the definite article "the" used by the statute. This argument in circuit courts fell on deaf ears, and the juries would be asked to find guilt based on only a few of the items necessary to make meth. Then came the *Kotila* opinion, now widely known to prosecutors and defense attorneys throughout the state.

1. *Kotila* – Possession of All the Chemicals OR All the Equipment is Required

The *Kotila* Court interpreted KRS 218A.1432 as follows:

> [The statute] does *not* read "possesses chemicals or equipment," or "possesses *some of* the chemicals or equipment" or "possesses *any of* the chemicals or equipment." It reads "possesses *the* chemicals or equipment for the manufacture of methamphetamine." "The presence of the article "the" is significant because, grammatically speaking, possession of some but not all of the chemicals or equipment does not satisfy the statutory language… [Emphasis supplied by the Court.]
>
> We construe "the chemicals or equipment" to mean all of the chemicals or all of the equipment necessary to manufacture methamphetamine. *Id. at 237.*

Prior to this ruling, the Commonwealth was able to procure convictions under the possession prong of the statute where only some of the chemicals and some of the equipment necessary to manufacture methamphetamine were present. In fact, Kotila himself was convicted for possessing six boxes of antihistamine tablets, 2 batteries, 1 glass vial, 1 Kerr Mason jar, 1 glass jar/lid, 6 cans of starting fluid, a black cooking pot, a small glass jar, a weighing scale, 3 pieces of hose, a funnel, a wooden spoon, and glove with rock salt and a cotton ball. Absent was the anhydrous ammonia (necessary under the ephedrine reduction method of making methamphetamine) and any apparatus for "cooking off" or "smoking off," the meth.

2. *Varble v. Commonwealth* – Circumstantial Evidence of Possession is Okay (but all must be possessed at the same time).

The *Kotila* case had held that possession of all the chemicals or all the equipment necessary to make methamphetamine was required. "Possession" as defined in the Model Penal Code requires "actual physical possession or otherwise to exercise actual dominion or control over a tangible object." KRS 500.080(14). Because "possession" is undefined in the drug code, KRS Chapter 218A, the Penal Code definition has been widely employed in jury instructions for drug possession and trafficking cases. Thus, the defense to any possession charge has been that the police must either find the item possessed *on* the defendant, or within his "constructive" possession – somewhere he can reach it, or somewhere that he can exercise control over it. Always implicit in these concepts was the idea that the substance possessed *currently exists* at the time of possession.

In *Varble v. Commonwealth*, 125 S.W.3d 246 (Ky. 2004), the Supreme Court added a new dimension to possession, which can be described as implicit possession, or circumstantial evidence of possession. In that case, the Supreme Court upheld a conviction for manufacturing methamphetamine even though the police did not find or seize all of the equipment or all of the chemicals used in the process:

> The search did not yield any coffee filters [equipment], which, as indicated at trial, are commonly used in the manufacturing process to separate soluble pseudoephedrine from the insoluble binding agents in Sudafed tablets. Nor did the officers find a discernible quantity of anhydrous ammonia (a methamphetamine precursor [chemical]). However, [the officer] testified that the odor of anhydrous ammonia was emanating from both air tanks. He also testified that exposure to anhydrous ammonia most likely caused the discoloration on the brass fittings. *Id. at 250.*

However, after acknowledging that there was a lack of at least one piece of equipment and one chemical, the court salvaged the conviction by finding sufficient "circumstantial evidence" to support a conviction:

> The indictment charged Appellant with possessing the necessary chemicals or equipment "on or about November 12, 1999." Testimony that the odor of anhydrous ammonia was emanating from the two air tanks and that the **discoloration of the brass fittings** was likely caused by exposure to anhydrous ammonia was circumstantial evidence that Appellant had, in fact, possessed anhydrous ammonia in the recent past. *United States v. Morrison, 207 F.3d 962, 966 (7th Cir. 2000)*(odor of anhydrous ammonia emanating from cooler found in defendant's residence was circumstantial evidence that defendant had used anhydrous ammonia to manufacture methamphetamine.) Appellant's argument is akin to claiming that his possession of twenty-two blister packs would not support his conviction because the **blister packs were empty**… He was found in possession of all of the other chemicals necessary to manufacture methamphetamine, and it was for the jury to decide whether he possessed those same chemicals at the time that he possessed the anhydrous ammonia (and the Sudafed). ***The requirement is that the chemicals or equipment be possessed simultaneously, not that they be possessed at the time of arrest.*** *Id.* at 254. [Emphasis and bold added.]

The Court then went on to find that while coffee filters can be used, cotton balls or dust filter masks were as effective, and that, therefore, it was the jury's province to determine whether all of the chemicals or all of the equipment were possessed at the same time.

On the one hand, *Varble* provided the state with an additional prosecutorial

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tool, the concept of "circumstantial evidence" of possession, but also added a new hurdle to prosecution: possession of all the chemicals or all the equipment necessary to make methamphetamine must be possessed at the same time.

Clearly, under both *Kotila* and *Varble*, in order to defend effectively a charge under the possession prong of the old statute, counsel must know exactly what chemicals are necessary to make meth, and what equipment is necessary to make meth. This can be complicated since there are various methods of making methamphetamine (the ephedrine reduction or "Nazi" method is one, the red phosphorous method is another), and there are variations within even these methods. Counsel must also know how the chemical processes work; in other words, how meth is made.

3. Chemicals and Equipment

Initially, the Supreme Court declined to attempt to list the chemicals and equipment to make meth. In *Kotila v. Commonwealth*, 114 S.W.3d 226, 249 (Ky. 2003) the court said that making a list would be "pointless," make the statute "unwieldy," and would "preclude extension of the statute's proscription to new manufacturing methods if and as they are discovered." Then, in the case of *Fulcher v. Commonwealth*, 149 S.W.3d 363 (Ky. 2004), the Supreme Court listed with specificity the chemicals and equipment needed for the so-called "Nazi" or ephedrine reduction method:

Based on the…evidence introduced at trial, the following chemicals would normally be required to manufacture methamphetamine by the "Nazi method":

(1) ephedrine or **pseudoephedrine**, found in common antihistamine tablets;

(2) anhydrous ammonia, commonly used in agriculture as a fertilizer and obtained (usually stolen) from farms or farm supply stores where it is kept outside in pressurized tanks;

(3) sodium metal or, more commonly, **lithium**, which can be removed from commercially sold lithium batteries;

(4) denatured alcohol, commonly found in commercial products such as "Coleman Fuel," or methanol, commonly found in automobile anti-freeze products;

(5) ether, commonly found in automobile starting fluid products;

(6) sulfuric acid, commonly found in commercial drain-cleaning products; and

(7) common **salt**.

As for the red phosphorous method, or "Red-P" method, the precursors are iodine, ephedrine and red phosphorous. Other necessary chemicals include muriatic or equivalent acid, distilled water, and hydrogen peroxide.

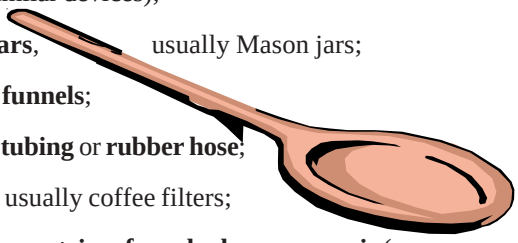
The *Fulcher* Court also listed the equipment necessary to make methamphetamine:

The required equipment includes:

(1) mixing **bowls**, including at least one heat-resistant bowl;

(2) a **device to crush** the antihistamine tablets into powder form (the videotaped demonstration used a blender but, presumably, a hammer would suffice);

(3) a **stirring device**, *e.g.*, a wooden or plastic spoon (though the videotape did not rule out the use of other similar devices);



(4) **glass jars**, usually Mason jars;

(5) **plastic funnels**;

(6) **plastic tubing** or **rubber hose**;

(7) **filters**, usually coffee filters;

(8) a **storage container for anhydrous ammonia** (usually a modified propane tank);

(9) if lithium is used instead of the more volatile sodium metal, vice grips or **pliers** or some similar device to pry open the lithium batteries; and

(10) a **plastic or glass container** for use as a hydrogen chloride "generator."

4. Putting the Chemicals and Equipment Together: The Manufacturing Process

Depending upon the way the methamphetamine is manufactured, substitutions for the chemicals or equipment may be employed. Thus, at trial, you will either have your own expert, who will establish that methamphetamine could not be manufactured with the chemicals seized, or equipment seized, being careful to state exactly which chemical(s) is/are lacking, and what equipment, or you will have to convert the state's expert to one of your own. The latter can only be done by knowing in advance what to use and how to use it.

My source of information is the book *Secrets of Methamphetamine Manufacture*, the revised and expanded Sixth Edition by "Uncle Fester." The true identity of Uncle Fester is unknown to me, but it is apparent that he has chemistry credentials of some sort because it is a very technical manual. Nevertheless, it is extremely useful. Sample chapters include "Chemicals and Equipment" and "Methamphetamine from Ephedrine or Pseudoephedrine," published by

Loompanics Unlimited. The book is available on-line from the major booksellers, and can be used as a learned treatise, provided it is recognized as such by the Court. (You may have to hire an expert to lay an appropriate foundation for admission, because the credentials of Uncle Fester are not listed, and one not well-versed in chemistry would have absolutely no clue as to whether the recipes inside are legitimate. If you disagree with anything I say in this writing regarding chemistry or manufacturing, take it up with Uncle Fester!)

Another perhaps less controversial source of education is the Kentucky State Police. In some prior methamphetamine prosecutions, the state has presented a "learned treatise" for the benefit of a jury, which was played into the record of the trial. The treatise they use is in fact a "how-to" step-by-step video prepared by the Drug Enforcement Agency. This "treatise" is available through the discovery process; if your prosecutor intends to play it, you are entitled to it in advance. Otherwise, you may have to obtain a copy through the appellate record of a case in which the treatise was played into the record.

One such case is the *Fulcher* case, *supra*, a case that I tried in Logan County in August 2002. The case was tried pre-*Kotila*, but the *Kotila* objections were preserved and so the Supreme Court reversed the methamphetamine convictions while affirming on possession of anhydrous ammonia. In its opinion, the Supreme Court summarized the DEA video and gave step by step instructions how to make methamphetamine using the so-called "Nazi" method:

> [T]he primary precursors of methamphetamine are ephedrine or pseudoephedrine, anhydrous ammonia, and sodium metal or lithium. Ephedrine and pseudoephedrine are active ingredients in common antihistamine tablets. To separate the ephedrine or pseudoephedrine from the corn starch and cellulose, binding agents used to hold the active ingredients together in tablet form, the tablets are first ground into powder and soaked in denatured alcohol or methanol. The ephedrine or pseudoephedrine dissolves in the alcohol, leaving the binding agents as a kind of "sludge," or "pill dough," that sinks to the bottom of the container. The alcohol mixture is then funneled through coffee filters into a heat-resistant glass bowl, usually "Corningware" or "Pyrex." The "pill dough" remains in the coffee filters and is discarded. The glass bowl is then heated until the alcohol evaporates, leaving a pure ephedrine or pseudoephedrine powder.
>
> Sodium metal or lithium strips are then mixed into the powder. A wooden or plastic spoon is usually used for mixing because a metal utensil might cause an undesired chemical reaction. Anhydrous ammonia is then funneled into the mixture from, typically, a propane tank through a plastic tube or rubber hose. Application of the anhydrous ammonia to the mixture causes a chemical reaction that converts the ephedrine or pseudoephedrine into base methamphetamine. After the anhydrous ammonia evaporates, water is added to the mixture which reacts with the residual lithium and converts it into sodium hydroxide (lye). Ether is then added to dissolve the base methamphetamine and separate it from the sodium hydroxide. The methamphetamine/ether mixture is then funneled through coffee filters into another glass container, leaving the sodium hydroxide (and some methamphetamine residue) in the filters. The jar containing the methamphetamine/ether mixture is then connected by plastic tubing to a homemade hydrogen chloride gas "generator," usually a plastic gasoline container or a container of the type in which ketchup or dishwashing liquid is commercially sold. Sulfuric acid and common salt are mixed in the "generator" to create hydrogen chloride gas that passes through the tubing into the glass container and causes the methamphetamine to separate from the ether into a powdery form that sinks to the bottom of the container. The liquid ether is then drained off through coffee filters to leave the finished product of methamphetamine.

If the method of meth making alleged by the Commonwealth is the "Nazi" method, the Court may take judicial notice of the recipe and allow you to read it and argue it to a jury. (In fact, this may be the only way to get the recipe from the videotape into evidence, if either side objects to the video being played. In *Fulcher*, in a footnote, the Court stated that the audio of the tape would have been inadmissible hearsay. This seems to be an erroneous conclusion – books can be learned treatises but not videos? After *Fulcher*, it would seem that the sponsoring party would need either a sponsoring witness, or a stipulation of admissibility from the other side.)

Armed with the above, you should be able to make a checklist of chemicals and equipment and processes involved, and compare it to the anticipated evidence in your case. If possible, find out at the preliminary hearing or suppression hearing exactly what was seized. Get an exhaustive list, either through testimony, or an inventory of items seized. It helps to have the return of a search warrant, if there is one, which lists the items. *But you must also find out what items were destroyed there at the scene by HAZMAT personnel*. In short, get the entire universe of what was seized. You must establish that at least one chemical is missing, and at least one piece of equipment is missing. Do not rely upon the officer's knowledge to fill in the gaps. If you ask the question "what chemicals are lacking, here," you are unlikely to get the answer "anhydrous ammonia and lithium batteries."

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5. The *Kotila* Jury Instruction

The *Kotila* opinion gave a sample jury instruction for manufacturing methamphetamine, and presumably, all circuit courts will follow this instruction. It is definitely an improvement over the usual instructions – where the items have been particularly listed, and the jury is in effect instructed that the listed items *are* the ones put in the list. However, as will be discussed below, there are problems with the *Kotila* instruction as well, and defense counsel should preserve some objections to it. Nevertheless, here is the *Kotila* model instruction:

> Instruction No._____
> Manufacturing Methamphetamine
>
> You will find the defendant guilty of manufacturing methamphetamine under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt that in this county, on or before _____, 2005, and before the finding of the indictment herein, Defendant knowingly:
>
> A. Had in his possession all of the chemicals or all of the equipment necessary for the manufacture of methamphetamine;
> AND
> B. Did so with the intent to manufacture methamphetamine.
>
> [*Kotila*, p. 242]

II. The NEW Manufacturing Methamphetamine Statute

KRS 218A.1432 as amended by Senate Bill 63 provides:

> A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully (a) manufactures methamphetamine or (b) with intent to manufacture methamphetamine **possesses two (2) or more chemicals or two (2) or more items of equipment** for the manufacture of methamphetamine." [Emphasis added.]
>
> Prong (a) of the old statute has been preserved, and therefore a finished product is still required.

Prong (b) is the portion that has been drastically changed, and which will present the most problems for the defense attorney. It is far easier to prove the offense of manufacturing under the new language, which may even allow for the conviction of persons who have no intent to manufacture, or who may have the intent to manufacture, but have done nothing yet to act upon this intent.

A. Possession of Two or More Chemicals or Pieces of Equipment

We know already from the *Fulcher* case what seven chemicals are necessary to produce methamphetamine employing the ephedrine reduction of "Nazi" method: ephedrine (pseudoephedrine), anhydrous ammonia, lithium (or sodium metal), ether, sulfuric acid (commonly found in drain cleaner), denatured alcohol, and salt. Of these, many people will have salt and drain cleaner.

"Between my garage and pantry back home, I have seven of these items. I would venture to guess that any reader of this article would have at least three of these items."

We also know what ten pieces of equipment are necessary using the same method: glass jars, mixing bowls, wooden or plastic stirring implements, a blender or coffee grinder, coffee filters, a plastic or glass jug, rubber tubing or hose, pliers, a container with which to keep and apply anhydrous ammonia, and a plastic funnel. Of these, many people might have all but the anhydrous container. Between my garage and pantry back home, I have seven of these items. I would venture to guess that any reader of this article would have at least three of these items.

B. Intent to Manufacture

It is the "intent to manufacture" requirement that is supposed to save otherwise innocent persons from being wrongfully prosecuted and convicted under this statute. The new statute provides a definition.

> "Intent to manufacture" means any evidence which demonstrates a person's conscious objective to manufacture a controlled substance or methamphetamine. Such evidence includes, but is not limited to statements, a chemical substance's usage, quantity, manner of storage, or proximity to other chemical substances or equipment used to manufacture a controlled substance or methamphetamine.

In some cases, finding an intent to manufacture might not be difficult. Some defendants who turn out to be guilty don't have the various chemicals or equipment spread throughout the house where such items might be expected to be kept. The coffee filters aren't next to the coffee machine, the pliers aren't in the tool box, the funnel and ether aren't in the garage next to the anti-freeze and motor oil. Rather, such an individual might have funnels, bowls, wooden spoons, pliers, hose, a gas can, mason jars, ether, salt, Drano, camera batteries and powdered ephedrine in a cardboard box shoved under the bed. In that event, this statute serves the prosecution well, because manufacturing will be proven even though no anhydrous ammonia or an NH3 container is present.

But this definition of "intent to manufacture" is also going to result in the conviction of people who do not fall into that category, and who in fact are not going to manufacture at all.

"Statements" – Whose statements? The statements of a snitch who is facing his or her own prosecution unless they can provide the Commonwealth with the names of the person(s) who manufactured the methamphetamine with which they were caught? The so-called "confession" of someone charged, who, in the course of arrest, admitted that they had "smoked methamphetamine in the past?"

"A chemical substance's usage" – What is a "chemical substance?" Does it mean if the smell of ether is in the house, and not in the garage where it should be, that intent is established? Does it apply to drug usage also? Does this mean that if meth has been used, or is even possessed by a person, that this establishes an intent to manufacture?

"Manner of storage, or proximity to other chemicals" – Certainly, the box of chemicals and equipment described above illustrates one polar end of how chemicals and equipment can be stored. But where is the line drawn? If Drano, engine starter fluid (ether), and highway salt are all stored on the same shelf in the garage, is that enough? Certainly, in the kitchen, one might find mixing bowls, mason jars, wooden and plastic spoons, and a blender all located close to each other. Is that enough?

"…includes, but not limited to,…" – In other words, there is no limit to the evidence. Imagine the other methods of proving intent available to the prosecution:

- **KRE 404(b) evidence:** If the suspect has *ever* been convicted of manufacturing, possession of, or trafficking in methamphetamine, the prosecution will try to use the prior conviction as proof of "intent." A former manufacturer out on parole might be spot checked and, if he is living at grandma's, where she has mixing spoons and bowls on the kitchen counter, next to washed and drying Mason jars, the prosecution would claim probable cause to arrest and, under the statute, convict.

- **Possession of a recipe:** As defense counsel, I have a copy of Uncle Fester's book on how to manufacture methamphetamine. If I am also in possession of two or more pieces of equipment, why couldn't I be charged, arrested, indicted, and convicted?

Naysayers would argue, "But no one would actually be convicted under those circumstances. A prudent prosecutor would never push a prosecution of a case like that." Well, they might, but that is not the only issue. The issue is that an overzealous police officer will claim probable cause to arrest, and then search someone incident to arrest, and have them spend a night or two in jail before they are released. Someone known to have been previously convicted and on probation or parole can be searched in his or her own home, where the police otherwise have no probable cause to search. The use of the new statute can be imposed by the police selectively and arbitrarily without any repercussions, because of the low threshold provided by the new statute.

"The issue is that an overzealous police officer will claim probable cause to arrest, and then search someone incident to arrest, and have them spend a night or two in jail before they are released."

In other words, the new statute creates an environment where the police can arrest first, then selectively prosecute later, based on whether they think a jury will convict.

What is a defense attorney to do?

C. Challenge the Constitutionality of the Statute

The constitutionality of the old methamphetamine statute, which was ultimately interpreted to mean possession of *all* the chemicals or *all* the equipment to manufacture methamphetamine, was challenged by defense attorneys on the grounds that it was vague, overbroad, and violative of the due process clause of the United States Constitution. It was too easy for innocent persons to be convicted. It was argued that the fact that the statute contained an "intent to manufacture methamphetamine" requirement was insufficient to keep innocent persons from being arrested, charged, and convicted.

The Kentucky Supreme Court was not moved by this argument though, and in *Kotila v. Commonwealth*, 114 S.W.3d 226, 248, reaffirmed the constitutionality of the statute:

> [T]he void-for-vagueness doctrine only requires that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement (quoting prior case law)." *See also Caretenders, Inc. v. Commonwealth*, 821 S.W.2d 83, 87 (Ky. 1991).
>
> Further, where a statute does not involve a first amendment right, a facial challenge based on vagueness cannot be made; only a challenge to the application of the statute can be made. (*Kotilia*, at 248, quoting *U.S. v. Evans*, 318 F.3d 1011, 1016 (10th Cir. 2003)).

Because the meth manufacturing statute in no way involves the first amendment, the Court ruled there could be no facial challenge, and instead held that the statute must be examined on an "as applied" basis. "Nevertheless," the Court continued, "because of the volume of convictions and appeals emanating from the application of this statute, we choose to address the issue directly rather than on a case-by-case basis." *Kotila*, at p. 248. *Continued on page 12*

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Following that pronouncement, the Court analyzed the facts of the case which produced the holding set out more fully above, that is, that Kentucky's meth manufacturing statute was not void for vagueness as applied. The main thrust of the argument was that no one *except* a manufacturer would possess the chemicals or equipment necessary for manufacturing, because they are not normally possessed collectively by anyone *other* than a manufacturer.

Appellant's primary claim of vagueness relates to the fact that the statute criminalizes the possession of otherwise innocent household items, all of which except anhydrous ammonia can be purchased at almost any retail department store. . . .

> **The argument might have more merit if we interpreted the statute as permitting a conviction for the possession of any, rather than all, of the chemicals or equipment necessary to manufacture methamphetamine. As we noted in *Commonwealth v. Hayward,* [49 S.W.3d 674 (Ky. 2001)], 'there is no reason other than the manufacture of methamphetamine for having a combination of pseudoephedrine, lye, rock salt, iodine crystals, red phosphorus, toluene, sulfuric acid, and hydrochloric acid in one place.' The same is true with respect to the chemicals and equipment necessary to manufacture methamphetamine by the ephedrine reduction method.**
>
> * * *
>
> **As noted in *Hayward* [49 S.W.3d 674 (Ky. 2001)], it is unlikely that anyone would possess the right combination by coincidence… and the requirement that the defendant possess all of the chemicals or all of the equipment constituting the right combination virtually eliminates the possibility of arbitrary or subjective enforcement.** *Id.,* at 249 (emphasis added).

Thus saying, the Supreme Court upheld the constitutionality of the old statute. Now, the legislature, by enacting the "two or more" standard, has removed the very underpinning of the old statute's constitutionality. True, "any," means "one," and two is more than one. But given that at least five chemicals (salt, Drano, starting fluid, camera batteries, sudafed) are legal to obtain and common to many households, and that all but one of the ten pieces of equipment are legal and common to obtain, the difference between one and two chemicals or items of equipment is inconsequential. The Supreme Court relied upon the fact that possessing all of the chemicals or all the equipment in the right combination "virtually," if not totally, "eliminates the possibility of arbitrary or subjective enforcement."

In this author's opinion, the General Assembly has rendered a constitutional statute unconstitutional, and the statute should not only be stricken as void for vagueness, but should also be stricken as violative of due process, given that intent, as defined, is so easily proven it is meaningless, and will result in anyone ever convicted of any meth crime having the intent prong automatically established in advance of any future prosecution.

Do not forget to serve the state attorney general, even though this is an unconstitutional "as applied" challenge. *See Jacobs v. Commonwealth,* 947 S.W.2d 416 (Ky.App. 1997).

D. Challenge the Statute as an "Intent Only" Crime

The new manufacturing statute also should be challenged as creating an "intent-only" crime. With so many of the chemicals and equipment commonplace in the household, a person who truly has an intent to manufacture can be convicted of manufacturing even though he or she has truly taken no steps in furtherance of that intention. Mere intent to commit a crime is not normally punishable absent some act clearly made in furtherance of the intent. This was certainly true at common law (*see Vinson v. Commonwealth,* 248 S.W.2d 430 (Ky. 1952)), and was codified at KRS 501.030 by the legislature for Model Penal Code offenses:

> A person is not guilty of a criminal offense unless:
> (1) He has engaged in conduct which includes a voluntary act or the omission to perform a duty which the law imposes upon him and which he is physically capable of performing; and
> (2) He has engaged in such conduct intentionally, knowingly, wantonly or recklessly as the law may require, with respect to each element of the offense…

There is no reason to believe it would be less true for Drug Code offenses, since *Vinson v. Commonwealth* would be good law in the absence of a penal code application.

However, under the new statute, possession of only two items is necessary for conviction, and the language of the statute does not indicate that these chemicals or equipment cannot be innocuous, everyday household items. The built-in safeguard that "only a manufacturer would have these items" is gone. Thus, once a person has the requisite intent to manufacture, as proven by the statement of a snitch or the possession of a recipe, the state will not normally be without the means to find an act in furtherance of the intent.

"Who cares?" may be the response. "So what if we catch and convict manufacturers before they actually manufacturer? That's more meth off the streets, isn't it?"

But that's not the way we prosecute in this Commonwealth. No other penal code crime is punishable by intent only. Not murder, not assault, not a sex offense, not theft. It is not against the law to contemplate a crime – an act in furtherance must be taken before we convict and imprison someone. The new meth manufacturing's first prong makes it

tautological that someone with "intent" will be guilty, unless they take all the salt, coffee filters, etc. out of their home, and be sure not to live with anyone who has those items.

Likewise, since the constitutional argument in this challenge is a violation of the Due Process Clause, do not forget to serve the attorney general.

III. Lesser Included Offenses (With Jury Instruction Forms)

If the state cannot prove that the defendant is guilty of manufacturing methamphetamine, it will try to establish guilt of a lesser-included offense. Or, perhaps defense counsel is the one seeking to establish an even lesser included offense, because the prosecution believes it has all the chemicals or all the equipment necessary for a conviction of manufacturing.

A. Attempt

In *Kotila, supra,* defense counsel had argued that having less than all the chemicals and less than all the equipment should warrant an instruction for attempt to manufacture. The *Kotila* court, however, foreclosed such an attempt instruction:

> This argument [for an attempt instruction] fails for the same reason as the Commonwealth's argument that possession of some but less than all of the necessary chemicals would support conviction of the primary offense. As noted…, the 2002 enactment of KRS 218A.1437(1), possession of a methamphetamine precursor, created a Class D felony that is a lesser included offense of the Class B felony manufacturing methamphetamine. Criminal attempt to manufacture methamphetamine by possession of some but less than all of the necessary chemicals or equipment, however, would be a Class C felony. KRS 506.010(4)(c). It thus would be incongruous to interpret this statutory scheme as creating a Class D felony for possession of a methamphetamine precursor, but a Class C felony for possession of, *e.g.*, lithium batteries, starting fluid, a Mason jar, a wooden spoon, or a cotton ball. *Kotila*, at p. 243.

Thus, an attempt instruction based merely on possession of less than all the chemicals or all the equipment will fail. However, the *Kotila* court did identify two scenarios where a charge of criminal attempt to manufacture methamphetamine may properly lie:

1. Where the manufacturing process has begun. One example of an attempt to manufacture methamphetamine has already been given above – where a person has less than all of the equipment or all of the chemicals, but has already begun the manufacturing process. *Id.* at p. 245.

Instruction No.____
Criminal Attempt to
Manufacture Methamphetamine

If you do not find the Defendant guilty under Instruction No. ____, you will find him guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about _____, 2005 and before the finding of the indictment herein, Defendant, with the intent to manufacture methamphetamine, either (1) possessed some, but not all, of the chemicals necessary for the manufacture of methamphetamine, or (2) possessed some, but not all, of the equipment necessary for the manufacture of methamphetamine;
AND

B. That Defendant had already begun the process of manufacturing methamphetamine by _____(Identify process)_____;
AND

C. That under the circumstances as he believed them to be, the Defendant's actions constituted a substantial step to a course of conduct planned to result in the manufacture of methamphetamine;
AND

D. That Defendant did not thereafter abandon his effort to manufacture methamphetamine under circumstances constituting a voluntary and complete renunciation of his criminal purpose.

2. Where a "defendant attempt[s], but fail[s], to obtain possession of all of the chemicals or equipment necessary to manufacture methamphetamine." *Id.*, at p. 246. For instance, where a person arranged to purchase from an undercover agent a complete lab contained in a U-Haul. *U.S. v. Leopard*, 936 F.2d 1138 (10th Circ. 1991). Note that the Supreme Court, not this writer, placed the emphasis on the word "all." Thus, an attempt to get some of the chemicals or some of the equipment will not suffice for attempt. See Jury Instruction Form "Attempt (Failure to obtain)."

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Instruction No.____
Criminal Attempt to Manufacture Methamphetamine

If you do not find the Defendant guilty under Instruction No. ____, you will find him guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about _____, 2005 and before the finding of the indictment herein, Defendant, with the intent to manufacture methamphetamine, attempted to obtain all of the chemicals and / or all of the equipment necessary for the manufacture of methamphetamine, but did not do so;
AND
B. That under the circumstances as he believed them to be, the Defendant's actions constituted a substantial step to a course of conduct planned to result in the manufacture of methamphetamine;
AND
C. That Defendant did not thereafter abandon his effort to manufacture methamphetamine under circumstances constituting a voluntary and complete renunciation of his criminal purpose.

B. Possession of Precursor

As mentioned, possession of ephedrine or pseudoephedrine or any of its salts, isomers, or salts of isomers is illegal when such possession is made with the intent to manufacture meth. KRS 218A.1437. It is a Class D felony for a first offense, and Class C for a second offense. Note, however, that the *Kotila* point opined that if the pills are ground up and soaking in water, the manufacturing process will have begun and the greater offense of "attempt" will be available to the Commonwealth as a lesser included of manufacturing.

Instruction No.____
Unlawful Possession of Methamphetamine Precursor

If you do not find the Defendant guilty under Instruction No. ____, you will find him guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about _____, 2005 and before the finding of the indictment herein, Defendant knowingly and unlawfully possessed a drug product, or combination of drug products containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers;
AND
B. That in so doing it was the Defendant's intention to use the drug product or combination of drug products as a precursor to methamphetamine or other controlled substance.

C. Unlawful Distribution of a Methamphetamine Precursor

If the evidence against a defendant is only that he possessed ephedrine (whether or not soaking in water), with the intent to sell it to someone who may or may not be making meth, ask for a lesser included instruction on the unlawful distribution of a methamphetamine precursor, codified at KRS 218A.1438. Unlawful distribution is a Class D felony for a first offense and a Class C felony for each subsequent offense.

Instruction No.____
Unlawful Distribution of
Methamphetamine Precursor

If you do not find the Defendant guilty under Instruction No. ____, you will find him guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about _____, 2005 and before the finding of the indictment herein, Defendant knowingly and unlawfully sold, transferred, distributed, dispensed, or possessed with the intent to sell, transfer, distribute or dispense, a drug product, or combination of drug products containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers;
AND
B. That in so doing the Defendant knew that the purchaser [or transferee, etc.] intended that the drug product or combination of drug products would be used as a precursor to methamphetamine or other controlled substance, or was acting in disregard as to how the drug product or combination of drug products would be used.

D. Conspiracy

This is technically not a lesser *included* offense, but is in fact a lesser *different* offense. Nevertheless, the Commonwealth may dismiss the manufacturing charge and re-indict on conspiracy if there are more than one co-defendant. A conspiracy charge is a C felony. To prove this offense, the Commonwealth must prove an actual agreement to manufacture, and an overt act on behalf of one or more of the co-conspirators in furtherance of the conspiracy. KRS 506.050.

Where no actual methamphetamine has been made, the Defendant will have a renunciation defense only where the methamphetamine was not made because of his act of prevention. If it is a matter of simply not having enough time or materials to accomplish the manufacture, voluntary renunciation is not a defense.

Instruction No.____
Conspiracy to Manufacture Methamphetamine

If you do not find the Defendant guilty under Instruction No. ____, you will find him guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about _____, 2005, and before the finding of the indictment herein, Defendant entered into an agreement with Identify Co-defendant(s) to manufacture methamphetamine, and that if he did so, such action would constitute a substantial step in a course of conduct intended to result in the manufacture of methamphetamine;
AND
B. That in so doing it was the Defendant's intention that the group of them would manufacture methamphetamine;
AND
C. That pursuant to, in furtherance of, and during the continued existence of such agreement, Defendant and/or Co-Defendant did the following overt act in furtherance of the conspiracy: _____;
AND
D. That Defendant did not thereafter prevent the manufacture of methamphetamine under circumstances manifesting a voluntary and complete renunciation of his criminal purpose.

E. Facilitation to Manufacture Methamphetamine

There is a fine line between "facilitation" (KRS 506.080) to manufacture methamphetamine, and "complicity" (KRS 502.020) to manufacture methamphetamine. In both, a defendant must aid and/or abet someone who is charged with manufacturing methamphetamine. The basic difference is that an accomplice shares in the intention to manufacture methamphetamine, whereas the facilitator knows that the principal is going to manufacture methamphetamine, but otherwise does not share in the intention to make methamphetamine.

For example, consider the girlfriend who loans her boyfriend some money, knowing that he is going to use it to buy some materials to make methamphetamine at another person's house. So far, she has just facilitated the manufacture of methamphetamine. If, however, she intends that he is going to give her some of the finished product in exchange for her money, she is an accomplice. Or so one could argue to the jury.

Instruction No.____
Facilitation to Manufacture Methamphetamine

If you find Defendant not guilty under Instruction No. ___ and Instruction No. _____, you will find her guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about _____, 2005, Defendant committed the act of __(Identify action)_____;
AND
B. That when she did so she knew that others intended to manufacture methamphetamine;
AND
C. That when she did so she knew her actions would enable other to manufacture methamphetamine;
AND
D. That she did not make a substantial effort to prevent the others from manufacturing methamphetamine.

F. Trafficking of a Controlled Substance (Methcathinone)

An alternative to methamphetamine that is starting to make its presence known, at least in Western Kentucky, is methcathinone, or "Cat." Like methamphetamine, methcathinone is made from ephedrine or pseudoephedrine. Whereas methamphetamine is made by reducing the ephedrine, thereby eliminating the oxygen atom, methcathinone is made by oxidizing ephedrine, that is, removing two hydrogen atoms from the ephedrine. The chemical structures look like this:

C6H5 – HCOH – CH3NCH – CH3
Ephedrine

C6H5 – HCH – CH3NCH – CH3
Methamphetamine

C6H5 – CO – CH3NCH – CH3
Methcathinone

KRS218A.1432 concerns the manufacture of *methamphetamine*, not *methcathinone*; "cat" is not a salt or isomer of methamphetamine, but is a wholly different Schedule I controlled substance. Methcathinone manufacturing is covered by KRS 218A.1412 (Trafficking in CS 1st Degree). "Trafficking" is defined as "manufacture, distribute, dispense, sell, or transfer. . . ." Trafficking in Methcathinone is a Class C felony for the first offense, not a Class B; so, remember to ask for it if your only defense to manufacturing methamphetamine is that it was cat, not meth.

Look for Chromium (used for chrome plating). It is the chemical used for oxidizing. Uncle Fester's book has a chapter on making methcathinone.

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A trafficking instruction can be found in Cooper, *Kentucky Instructions to Juries* (Criminal), Chapter Nine, Part 2.

IV. Lack of a Unanimous Verdict

To be convicted of a crime, there must be unanimous verdict; that is, all twelve jurors in a felony case must agree beyond a reasonable doubt that the Commonwealth has proven each and every element it is required to prove. Kentucky Constitution, Section 7. Typically, this is not a problem because most crimes are defined such that the jurors only have to answer "yes" or "no" as to whether any particular element has been proven. But what happens if the jury question has alternative elements from which the jurors must choose, and the instructions do not require the jury to agree unanimously on any one particular alternative element? The result could reflect the lack of a unanimous verdict, and since the prosecution has the burden of proving guilt by unanimous verdict, the conviction should be thrown out.

There is a frequent danger of a lack of unanimous verdict in drug trafficking cases, because the crime of "trafficking" can be completed in several different ways.

In *Commonwealth v. Whitmore*, 92 S.W.3d 76 (Ky. 2002), the Kentucky Supreme Court reviewed a jury instruction where the jury – in a cocaine trafficking case – had been instructed to find guilt only if the defendant possessed cocaine with the "intent to distribute, dispense, sell or transfer" it to another person. (Apparently, the instruction also allowed a finding of guilt if there was an intent to manufacture the drug.) In reversing the conviction, the court found that there was no proof of a unanimous verdict, because there was no evidence that the defendant had "dispensed" or "manufactured" the drug."

In so holding, the court relied upon *Burnett v. Commonwealth*, 31 S.W.2d 878 (Ky. 2000):

> [A] defendant is denied a unanimous verdict when the jury is presented with alternate theories of guilt in the instructions, and one or more of those theories, but not all, are unsupported by the evidence. The majority in [*Burnett*] held that such error, when preserved, was not subject to a harmless error analysis….
>
> Any instruction which permits a conviction on the basis of alternative theories that are not supported by the evidence runs afoul of the due process requirement that each juror's verdict be based on a theory of guilt in which the Commonwealth has proven each and every element beyond a reasonable doubt.

What about the context of manufacturing methamphetamine cases? This issue of lack of unanimous verdict was raised in the context of a methamphetamine case in two cases recently decided by the Kentucky Supreme Court.

A. Manufacturing Prong or Possession Prong

Suppose, for example, a defendant is caught "smoking" off meth in his barn. The prosecution argues that there is a finished product, but also, that all of the chemicals are present with which to manufacture methamphetamine. The defense argues first, that there was no finished product, at least not yet, and that key chemicals necessary to make meth were not present. After the evidence is closed, the jury instruction is submitted whereby the jury may find guilt if they believe ***either*** that the defendant was actually manufacturing methamphetamine (prong (a)), ***or*** that the defendant possessed all of the chemicals to manufacture methamphetamine, with intent to manufacture (prong (b)). Half of the jury believes that there was a finished product, while the other half believed that all of the chemicals were present. The twelve cannot agree on either prong. Having been given an either/or choice, however, they do agree that defendant is guilty under at least one of the prongs, and return a conviction.

In this scenario, the defendant is convicted even though there was no unanimous verdict; the jury instructions allowed a conviction without requiring the jury to agree upon all elements.

Those were the facts in *Johnson v. Commonwealth*, 134 S.W.3d 563 (Ky. 2004). The jury instruction allowed the jury to alternatively find guilt if they found that he had "manufactured methamphetamine" under prong (a) of the statute, OR, if they found that he had possessed the chemicals or equipment to manufacture, under prong (b). The Supreme Court considered whether there was sufficient evidence to convict under prong (a), and having found that there was, held that there was no lack of a unanimous verdict:

> A necessary inference from proof of actual manufacture is that, at some point in time, he must have had possession of both all the equipment and all the ingredients necessary to manufacture methamphetamine. In other words, just as you can't make an omelet without breaking some eggs, you can't make methamphetamine without having possession of the necessary chemicals and equipment. Nor, as demonstrated in the next section, is it likely that someone would inadvertently combine the chemicals and use the equipment to manufacture methamphetamine by accident. Thus, intent to manufacture can be inferred from the act of manufacturing as well. Therefore, **we hold that there was sufficient evidence to convict Johnson under both versions of the manufacturing instruction**. [Emphasis added.]

(Note that the outcome likely would have been different had the situation been reversed, *i.e.*, had the defendant been found in possession of all of the chemicals and equipment, but there was no finished product. A finished product may imply possession of all that is necessary to make the meth, but the converse is not true.)

Three months after the *Johnson* opinion was decided, in *Fulcher, supra,* the court came to the opposite result on seemingly similar evidence.

> As noted in Part I of this opinion, *supra*, although the evidence was sufficient to support convictions of manufacturing methamphetamine under KRS 218A.1432(1)(a) [the manufacturing prong], it was insufficient to support convictions under KRS 218A.1432(1)(b) [the possession prong]. Because the instructions were worded in the alternative, *i.e.*, "he manufactured methamphetamine *or* possessed starting fluid, etc.," (emphasis added), Appellant correctly asserts that the instruction deprived him of his right to a unanimous verdict. *Commonwealth v. Whitmore*, 92 S.W.3d 76, 81 (Ky. 2002) ("[A] defendant is denied a unanimous verdict when the jury is presented with alternate theories of guilt in the instructions, and one or more of those theories, but not all, are unsupported by the evidence.") (citing *Burnett v. Commonwealth*, 31 S.W.3d 878 (Ky. 2000)). With respect to each charge, the jury simply found Appellant guilty of manufacturing methamphetamine without identifying the theory under which guilt was found. Thus, Appellant is entitled to a new trial on the charges of manufacturing methamphetamine in violation of KRS 218A.1432(1)(a).

The cases are irreconcilable, since in both cases: (1) a jury instruction was tendered which asked the jury to find guilt or innocence under either the manufacturing prong ***or*** the possession prong, (2) there was sufficient evidence to support a conviction under the manufacturing prong, (3) there was insufficient evidence to support a conviction under the possession prong, and (4) counsel apparently objected on grounds of lack of unanimous verdict both times. Does *Fulcher*, being the more recently decided case, overrule *Johnson?* Or is there some distinction I am not seeing. Read and decide for yourself.

B. Possession of Chemicals or Possession of Equipment.

A remaining unanswered question is the situation where the *Kotila* instruction is used ("possessed all of the chemicals or all of the equipment to manufacture methamphetamine"), but where, according to the evidence, the defendant possessed all of the chemicals, but not all of the equipment, or all of the equipment, but not all of the chemicals. Provided that the instruction is not worded so that the jury must decide unanimously *which one* – chemicals or equipment – they find the defendant to have possessed, reversible error on grounds of lack of unanimous verdict will exist.

But only if the defense lawyer objects.

V. Double Jeopardy Issues

In *Commonwealth v. Burge*, 947 S.W.2d 895, 809-11 (Ky. 1996), the Kentucky Supreme Court held that a person can be charged with two offenses arising out of one criminal transaction so long as each offense requires proof of an element that the other offense does not, and this is not a violation of the constitutional protections against a defendant being placed in "double jeopardy." The law of double jeopardy is still developing in the area of manufacturing methamphetamine, but some of the common potential charges have been already been addressed.

A. Manufacturing Meth & Possession of Precursor

Where manufacturing is based upon possession of all the chemicals, and one of these chemicals is ephedrine, the Commonwealth may not procure convictions on both offenses. However, if the manufacturing charge is based on possession of equipment, possession of ephedrine will constitute a separate offense because ephedrine is a chemical, not equipment. *Kotila*, at p. 240.

B. Manufacturing Meth & Possession of a Controlled Substance (Meth)

Where the possession of a controlled substance charge under KRS 218A.1415 is based upon the possession of the same methamphetamine that was the product of the manufacturing charge, there is a double jeopardy violation. However, where the methamphetamine is proven not to be the result of manufacturing process (*e.g.*, where methamphetamine residue is found on a piece of aluminum foil), there will not be a double jeopardy violation. *Beaty v. Commonwealth*, 125 S.W.3d 196, 212-213 (Ky. 2003).

C. Manufacturing Meth & Possession of Anhydrous Ammonia

Kotila held that manufacturing methamphetamine would not preclude a charge of possession of anhydrous ammonia in an unlawful container, because each requires proof of an element the other does not. Where a charge of manufacturing is based upon possession of chemicals, the statute requires possession of ALL of the chemicals, whereas the anhydrous statute requires only possession of the one chemical. Likewise, the anhydrous statute requires possession in an unlawful container, whereas the manufacturing statute makes no reference to containers. Thus, double jeopardy as defined by the *Burge* case does not exist, for now. ■

DPA Annual Conference & Award Winners

by Shannon Means, Executive Advisor

In June, the Department of Public Advocacy hosted a record-sized crowd to its 33rd Annual Public Defender Conference at the Galt House in downtown Louisville. The event offered a wide variety of education opportunities for public defenders and other criminal defense attorneys. Nearly 500 participants attended the conference, which featured updates on recent changes to Kentucky's criminal justice statutes and on new case law from the state and federal courts.

During this year's awards banquet, special guests were recognized for their support and contributions for indigent defense in Kentucky. Award recipients included State Senator Charlie Borders and State Representative Jesse Crenshaw for their efforts in providing resources to complete the full-time public defender system and for reducing excessive caseloads, as well as Dean Allan Vestal of the UK College of Law, and Dr. Joe McCormick of the KY Higher Education Assistance Authority, for their work in providing loan assistance to public service attorneys. State Senator Gerald Neal was also recognized for a lifetime of work for social justice.

Dr. Joe L. McCormick, Executive Director and CEO of KHEAA, accepting the Public Advocate's Award

David Tandy,a Louisville Metro City Councilman, accepting the Nelson Mandela Lifetime Achievement Award for Senator Gerald Neal from Ernie Lewis

Several full-time defenders received special recognition during the awards ceremony:

Shannon Means

Rob Riley, DPA's Northern Regional Manager, was presented with The *Professionalism & Excellence Award. The award was established in 1999. Each year, the President-Elect of the Kentucky BarAssociation receives nominations and selects the individual among them* who best emulates Professionalism and Excellence as defined by the 1998 Public Advocate's Workgroup on Professionalism and Excellence: *"Prepared and knowledgeable, respectful and trustworthy, supportive and collaborative. The person celebrates individual talents and skills, and works to insure high quality representation of clients, and takes responsibility for their sphere of influence and exhibits the essential characteristics of professional excellence."* KBA President-Elect David Sloan presented Rob with his award.

Rob Riley accepting the Professionalism and Excellence Award from KBA President-Elect David Sloan

Tom Griffiths accepting the In Re Gault Award from Ernie Lewis

Tom Griffiths, Directing Attorney of DPA's Maysville office, was presented with the *In Re Gault* Award. This award honors a person who has advanced the quality of representation for juvenile defenders in Kentucky. Tom has distinguished himself by selfless representation of thousands of juveniles in the Paducah and Maysville offices and in numerous efforts to improve the quality of representation of juveniles throughout the Commonwealth.

Jessie Luscher, Administrative Specialist in the Post Trial Division of DPA, was presented with the 2005 *Rosa Parks Award*. The *Rosa Parks* Award was established in 1995 to honor a non-attorney who has galvanized other people into action through their dedication, service, sacrifice, and commitment to the poor. After Rosa Parks was convicted of violating the Alabama bus segregation law, Martin Luther King said, "I want it to be known that we're going to work with grim and bold determination to gain justice . . . And we are not wrong . . . If we are wrong justice is a lie. And we are determined . . . to work and fight until justice runs down like water and righteousness like a mighty stream."

Jessie Luscher accepting the Rosa Parks Award

Jay Lambert of the Louisville-Jefferson County Metro Public Defenders office was the 2005 recipient of the Gideon Award. In celebration of the 30th anniversary of the U.S. Supreme Court's landmark decision in *Gideon v. Wainwright*, DPA established the Gideon Award in 1993. It is presented to a person who has demonstrated commitment to equal justice and who has courageously advanced the right to counsel for poor people in Kentucky. ■

Jay Lambert accepting the Gideon Award

Ed Monahan accepting the Furman Capital Award on behalf of the Juvenile Death Penalty Effort

Risk of Federal Prosecution for a Defense Attorney and the Forensic Expert When Viewing and Receiving Images of Child Pornography in Preparation for Criminal Defense

By Will Martinez, DPA Information Resources Law Clerk

I. Introduction

A cursory review indicates that there has been no active prosecution of a defense attorney (or the forensic expert) for possessing images of child pornography in connection with the representation of a client. Although there is only a dearth of relevant case law, litigation in this area has generally rested on two grounds. The first, and most important, issue addresses whether the defense counsel's possession of the illicit material in and of itself constitutes an act in violation of either federal (18 U.S.C. §§ 2252, 2252A) or state statutes prohibiting child pornography. The second issue arises when a prosecutor, who typically has access and control of the illicit material, attempts to restrict the defense from reviewing the images in preparation for a criminal trial. Both concerns will be discussed.

II. The Criminality of a Defense Attorney's Possession of Child Pornography

In terms of assessing the issue of whether a criminal violation occurs when a defense counsel reviews material deemed to be child pornography, there appear to be no federal cases on point. While several federal cases (which will be discussed in the following section) have inherently presumed that no statutory violation occurs under these circumstances, only three state courts, in California, Arizona, and Nevada, have directly answered the question.

In *Westerfield v. Superior Court*, 121 Cal.Rptr.2d 402 (2002), the defendant was charged with misdemeanor possession of child pornography in violation of Cal. Pen. Code § 311.1 (2005). *Id.* at 403. Before arresting the defendant, the police searched his home and seized his computer which allegedly contained thousands of obscene images prohibited by California state law. *Id.* Considering that many of the items would most likely be used in his prosecution, the defendant requested that the deputy district attorney provide copies of the items and images that were confiscated by the police. *Id.* However, the deputy district attorney countered that California's child pornography statute explicitly exempted only the "activities of law enforcement and prosecuting agencies in the investigation and prosecution of criminal offenses." *Id.* (citing Cal. Pen. Code § 311.1 (b) (2005)). According to the prosecution, duplicating the images and distributing them to the defense would itself constitute an act in violation the child pornography statute. *Id.* Nevertheless, the prosecution allowed the "defense counsel to view the images at the FBI's computer crimes office in the presence of law enforcement representatives who remained in the room and monitored their activities." *Id.*

Apparently dissatisfied with the prosecutor's conditions as a serious impediment to the his right to a speedy trial and effective assistance of counsel, the defendant moved the district court to order the prosecution to produce the obscene materials so that "his attorneys could view them privately, have them examined by experts, and talk confidentially." *Id.* at 403-404. The trial court denied the motion, noting that the prosecution had loosened its restrictions by allowing the defense counsel to have "unfettered access" to the materials by removing the law enforcement presence from the room. *Id.* at 403. Further, the trial court agreed with the prosecution that copying and distributing the materials to the defense attorneys would violate the statute. *Id.*

The California Court of Appeals, however, was less convinced by the prosecution's interpretation of the statute. First, the California Court of Appeals noted that it was the responsibility of courts to "look[ ] to the plain meaning of the statutory language and, if further analysis is necessary, apply a reasonable and common sense interpretation and avoid absurdity." *Id.* at 404. According to the Court, the California legislature enacted the child pornography statute to prevent materials depicting children in sexual scenarios from being published and distributed. *Id.* An exemption was made for prosecutorial and law enforcement authorities so that these agencies could effectively enforce the statute without being violative of the statute. *Id.* (stating, "[i]f the statute extended to the criminal action itself, however, there would be no conceivable way for the state to try these cases . . .). Inherent in this statutory exemption was the ability for defense counsel to likewise use the materials to present a competent defense in a court of law. As the Court of Appeals stated,

> [n]othing in the plain language of § 311.1 prohibits the copying of images for use by the defense in preparing for trial. The [prosecution's] interpretation of the statute—that the deputy district attorney would violate that law if he copied the images for the defense –not only defeats the purpose of the law and exalts absurdity over common sense, but is also logically flawed. If the exemption in § 311.1 (b) allows the prosecutor to duplicate and distribute the images for prosecution purposes as the [prosecution] readily concede, then the prosecutor can duplicate and distribute the images with impunity to any of the players in the criminal action—to the court pretrial as the prosecutor did on the motion here, to the jury at trial and/or to the defense as part of the prosecutor's discovery duties. In addition, to the extent there is a genuine concern about the disposition of the material provided to the defense, the court can issue a protective order limiting disclosure to counsel and their agents or order the return of the images to the court for destruction at the conclusion of the case.... *Id*. at 404-405.

In Arizona, the state Court of Appeals has likewise determined that a defense counsel's use of child pornography solely for the purpose of providing a defense does not subject counsel to criminal liability. *Cervantes v. Cates*, 76 P.3d 449, 457 (2004) (stating, "where there is no evidence either that the defense attorney or the defendant will use or distribute the material other than in preparation for and at trial or any other harm as required by Rule 15(a), the court should order the materials requested to be reproduced."). In *Cervantes*, the seized child pornography came in the form of photographs and videotape. *Id*. at 452. When the defendant requested that copies of the materials be provided to defense counsel in discovery, as opposed to only allowing the defense to have limited access under prosecutorial and police supervision, the government raised the issue of criminality. *Id*. at 456. The prosecution in *Cervantes* argued that, unlike the statute in California, the Arizona child pornography statute provided no exemptions, and therefore the prosecution's dissemination of the illegal materials to the defense would violate the law. *Id*. To the Arizona Court of Appeals, however, the lack of an exemption statute, like the one in *Westerfield*, actually undermined the prosecution's case. According to the court,

> Arizona's child pornography laws were not aimed at prohibiting defense counsel from preparing for trial, but to prohibit the spread of child pornography. . . . Accepting the State's argument would require this Court to hold that because [Arizona's child pornography statute] does not provide any immunity for law enforcement officials, police possession of contraband, be it drugs or child pornography, would be illegal. Similarly, the State's showing of the pornography at trial and even this Court's receipt and possession of the pornographic materials on appeal would be illegal. Provided that defense counsel, like the police, prosecutions and court personnel use the material solely for the investigation, prosecution, defense and resolution of the case at hand, neither their possession of it nor the State's copying of it solely for the purposes should expose them to criminal liability. *Id*. at 456-457.

As the California Court of Appeals did in *Westerfield*, the Arizona Court of Appeals added that the trial court could place "sufficient restrictions," such as protective orders, to ensure the materials were not used for any other reasons than building and asserting a defense. *Id*. at 456.

The most recent state court to render a decision on this issue was the Supreme Court of Nevada. *State v. Second Judicial Dist.Court ex rel. County of Washoe*, 89 P.3d. 663 (2004). As in *Cervantes*, the dispute in *Second Judicial* arose over the defense's access to child pornography contained on videotape. *Id*. at 665. However, as opposed to *Cervantes*, where there were several tapes and more than 23 hours of recorded child pornography, in *Second Judicial*, the illicit material was contained only on a single videotape with the alleged acts of child pornography lasting less than one hour. *Id*. After viewing the videotape and reading the briefs filed by the government and the defense, the trial court in *Second Judicial* granted the defense's discovery motion on the restriction that the videotape "be viewed by those only necessary for the preparation of said defense." *Id*. The government filed a writ of mandamus, asserting that following the district court's order would violate the Nevada child pornography statute. *Id*. at 666. Like California law, the Arizona child pornography statutes, Ariz. Rev. Stat. Ann. §§ 200.710-200.730, included an exemption for law enforcement officials investigating alleged offenses of child pornography. *Id*. (citing Ariz. Rev. Stat. Ann. §200.735). Since the exemption did not include defense attorneys, the Nevada prosecutors in *Second Judicial*, like the California prosecutors in *Westerfield*, argued that defense attorneys were merely "private citizens [who] have no right to possess child pornography." *Id*. Following the examples of the California and Arizona courts, the Nevada Supreme Court stated, [b]ecause nothing in the [Nevada child pornography statutes] precludes child pornography from being copied for the purpose of defending criminal charges, we hold that the district court did not abuse its discretion in ordering the State to provide the [ ] defendants with a copy of the videotape to adequately prepare for their defense." *Id*. at 668. After interpreting the meaning of the Nevada child pornography statutes, the Nevada Supreme Court went even further by injecting a constitutional basis for its decision. According to the Court,

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> "[a]lthough NRS 200.735 does not specifically list defense attorneys, the United States Constitution and its amendments protect a defendant's ability to prepare for trial. The Fifth Amendment to the United States Constitution protects a defendant's due process rights. Due process requires the State to disclose material evidence favorable to the defense. Evidence is material when there is a reasonable probability that had the evidence been available to the defense, the result of the proceeding would have been different." *Id*. at 666.

The Court believed that the defense planned to use the videotape in a legitimate manner "to show identity and consent [since there were also allegations of sexual assault,] by slowing [the videotape] down and enhancing the video and audio tracks." *Id*. at 668. Therefore, the Court held that the "defendants' constitutional rights trumped any prohibition of [the Nevada child pornography statutes]." *Id*. In sum, the Nevada Supreme Court provides the strongest language upholding a defense attorney's right to have access to disputed child pornography in connection with the defense of a client. Not only did the Court assert that child pornography statutes do not preclude defense attorneys from obtaining the material, but it also noted that rules of criminal procedure and the United States Constitution itself demand that the prosecution hand them over when litigation is pending. *But see*, *State v. Ross*, 792 So.2d 699 (2001) (Florida appellate court holding that neither the United States Constitution nor the Florida Rules of Criminal Procedure entitled a defendant to receive copies of disputed child pornography in order to necessarily prepare for trial.).

III. Limiting a Defense Counsel's Access to the Disputed Child Pornography Due to its Classification as "Contraband."

Federal Rule of Criminal Procedure 16(a)(1)(E) provides:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i): the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; (iii) or the item was obtained from or belongs to the defendant.

Most tangible and computer-generated data, including items defined as child pornography, are considered to fall under the umbrella of Rule 16(a)(1)(E). However, Rule 16(d)(1) allows the court to regulate discovery, stating, "[a]t any time the court may, for good cause, deny restrict, or defer discovery or inspection, or grant other appropriate relief." As was true in the aforementioned state cases, disputed child pornography is usually in the hands of the prosecution when federal litigation is pending. While not necessarily the case under varying state laws, under federal law, contraband, such as child pornography, can be generally exempted from possessory discovery by the defense. *See*, *U.S. v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995) (stating, "[c]hild pornography is contraband."); *But see*, *Cervantes v. Cates*, 76 P.3d 449 (2003) (Arizona Court of Appeals stating, "[n]othing in [Arizona Rules of Criminal Procedure] 15.1 or 15.4 exempts contraband from being copied for use in defending criminal charges."). Therefore, in federal litigation, the issue turns on whether the Federal Rules of Criminal Procedure permit, or even mandate, a trial court to order the prosecution to give the defense copies of the illegal contraband it plans to use to prosecute the defendant.

At this juncture, the federal circuits are split on this issue. The Courts of Appeals for the Fifth and Eight Circuits have held that it is not always necessary for a prosecutor to provide the defense with copies of the illicit materials. *See*, *U.S v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995) (upholding the district court's denial of a defendant's motion to compel production of a copy of a video containing child pornography); *U.S. v. Horn*, 187 F.3d 781 (8th Cir. 1999) (upholding the district court's refusal to order the government to produce copies of videos alleged, and later found, to contain child pornography); *See also*, *U.S. v Husband*, 246 F.Supp.2d 467 (E.D.Va. 2003) (finding *Kimbrough* and *Horn* as persuasive authority in refusing to "order that contraband be distributed to defendant or his counsel."). In *Kimbrough*, the Fifth Circuit failed to reach the question on whether Rule 16 actually provides that "contraband can be distributed to, or copied by, the defense." *Kimbrough*, 69 F.3d. at 731. Rather, the Court stated that, even if a Rule 16 violation was present, the defendant failed because the "[g]overnment's offer to make the materials available for inspection but not allow them to be copied was reasonable." *Id*. Therefore, without any showing of actual prejudice, the Court refused to find any violation of the defendant's due process rights. *Id*. In *Horn*, the Eight Circuit used a similar analysis. 187 F.3d at 792-793. The Eight Circuit noted that since child pornography was *prima facie* contraband, Rule 16(d)(1) permitted the trial court to limit the defendant's discovery of the illegal materials. *Id*. at 792. Further, since the defendant suffered no actual prejudice and he asserted a different rationale on appeal for wanting access to the illegal materials, the Eight Circuit upheld the lower court decision. However, it is also noteworthy that both the *Kimbrough* and *Horn* courts refused to promulgate an absolute rule barring a defense counsel from obtaining copies of child pornography in preparation for a defense. Indeed, the Eight Circuit went far enough to state, "[i]n a proper case, and perhaps after a preliminary showing, such a rationale might well have required the trial court to grant [the defendant's] discovery motion." *Id*. at

792. "In both opinions, the circuit courts did not hold that the district courts were *required* to reject the defendant's motion. Rather, they simply held that the district courts had not abused their discretion by doing so." *U.S. v. Frabizio*, 341 F.Supp.2d 47, 50 (D.Mass. 2004).

While no federal appellate Court has reached the opposite conclusion of the Fifth and Eighth Circuits, two district courts have held that a defendant was entitled to obtain copies of illegal, child pornographic materials that were seized by law enforcement and in the possession of the prosecution. *See*, *U.S. v. Hill*, 322 F.Supp.2d 1081 (C.D. Cal. 2004); *U.S. v. Frabizo*, 341 F.Supp.2d 47 (D. Mass. 2004). In *Hill*, the prosecution intended to introduce "over 1,000 images of child pornography and/or child erotica which it discovered on two 100 megabyte diskettes taken from the defendant's home." *Hill*, 322 F.Supp.2d. at 1091. While the government was willing to allow the defense's forensic expert to "analyze the media in the government's lab at scheduled times, in the presence of a government agent," the prosecution was not willing to allow the defense to make copies of the materials. *Id*. The prosecution noted that child pornography was "contraband," and like narcotics, any inspection of the illegal materials by the defense should be made in a government lab under government supervision. *Id*. The district court, however, disagreed with the prosecution's analogy to narcotics. *Id*. While an examination of a narcotics sample is generally a "straightforward, one-time event," sifting through thousands of images on a zip disk would take "hours, even days," to carefully analyze. *Id*. The court believed that it would be infeasible for the defense's forensic expert, who was located outside the state of California, to be able to make a complete analysis under the conditions presented by the government. *Id*. at 1092. Further, without full access to the materials "at the heart of the government's case," the court also believed that the defendant would be prejudiced because his attorney would be unable to provide competent representation. *Id*. Therefore, the *Hill*court held that, without evidence that the defense attorney could not be trusted with the materials, a detailed court order delineating how the defense should handle the materials would be a sufficient safeguard in the case. *Id*.

The District Court of Massachusetts found the *Hill* rationale persuasive in its decision on the issue last year. *U.S. v. Frabizo*, 341 F.Supp.2d 47 (D. Mass. 2004). As was the issue in *Hill*, the district court in *Frabizo* had to decide whether the government should produce copies of the images to the defense, or whether the defense's viewing of the images at the FBI building was sufficient. Again, the prosecution asserted the "contraband" exception, and added that inconvenience to the defense could not justify "the re-victimization [through repeated viewing] of the children depicted." *Id*. at 49. However, following in the footsteps of the *Hill* decision, the *Frabizo* court likewise asserted that the potential for prejudice to the defendant was too great to limit discovery in such a manner proposed by the government. The court felt that, with a protective order in place, there was no reason to assume that the defendant's counsel or her expert could not be trusted not to further disseminate the illegal materials. *Id*. at 51. Furthermore, any "concern about re-victimization would be implicated regardless of whether the defendant's counsel and her expert viewed the images" or not. *Id*.

"The genuine issue driving the wedge between prosecutors and defense attorneys is *how much* access may a defense attorney have to the allegedly illegal materials,..."

IV. Conclusion

No federal or state court, trial or appellate, has held that a defense counsel's possession of, or access to, disputed child pornography for the purposes of providing a defense is a *per se* violation of any child pornography statute. Inherent in all of the federal court decisions, even the ones that limit the defense counsel's access to the illegal material, is the fact that no criminality is implied when the defense counsel (or his expert) uses the images in preparation for the defense of criminal charges. The genuine issue driving the wedge between prosecutors and defense attorneys is *how much* access may a defense attorney have to the allegedly illegal materials, not whether it is criminal on its face for the defense attorney to actually view and disseminate the materials. Even in the state cases where the prosecutors raised the issue of criminality in relation to a defense attorney having access to the disputed child pornography, the prosecutor was still willing to allow the defense attorney to access the materials under certain conditions. Three state courts have explicitly stated that attaching criminal conduct when defense attorney views child pornography while defending a client is an absurd interpretation of child pornography statutes. The federal courts have already moved past that basic premise, and are now focusing on the issue of what conditions should be placed on the defense attorney (and his or her expert) in accessing such materials. ■

Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has.

— Margaret Mead

THE SUPERVISED PLACEMENT REVOCATION PROCESS IN KENTUCKY

By Londa Adkins, DPA Juvenile Post Dispositional Branch

Justice should remove the bandage
from her eyes long enough to distinguish
between the vicious and the unfortunate
— Robert Green Ingersoll

Youth within the criminal justice system challenge the commitment of the government to protect individual rights. Over the last 100 year history, the juvenile court has undergone two (2) major reforms, resulting in the conclusion that juveniles are entitled to the same constitutional protection as adults and that the juvenile system has failed to deliver on its promise of rehabilitation for delinquent youth.[1] Often, courts assert the best interest of the child standard with little attention given to a juvenile's basic rights of life. Our juvenile code combines the historical *parens patriae*[2] doctrine with sanctions as illustrated in KRS Chapter 635.[3] Often, a juvenile's liberty interest and due process considerations are sacrificed to "save the child". Hence, the juveniles are the "unfortunates" that are subject to this system of supervised placement revocation. Currently, there are approximately 600 children committed to the Department of Juvenile Justice and placed in the community. All of those individuals are subject to revocation.[4]

The Process

505 KAR 1:090 specifies the Department of Juvenile Justice (DJJ) administrative regulations governing the Supervised Placement Revocation procedure (SPR).[5] The committed[6] juvenile is subject to a contract with the Department of Juvenile Justice, which delineates the conditions of his/her probation. The supervised placement revocation process is triggered when the juvenile violates one of the contract conditions, escapes custody, is arrested, or is charged with a felony offense. SPR is divided into two (2) distinct hearings, probable cause and revocation. The process is similar to adult probation, the basic likeness being the liberty concern of the juvenile. However, a neutral and detached hearing body, the parole board, makes the final decision regarding adults facing parole revocation[7], thereby affording adults a greater level of protection against arbitrary decision making. With Youth, the commissioner for the Department of Juvenile Justice makes the final decision regarding youth facing revocation.

Does the Juvenile Pose a Community Risk?

The DJJ probation officer initiates the supervised revocation process for a DJJ-committed youth who is in a community placement. The officer may seek probation if the youth is charged with a new felony offense or commits acts creating safety concerns for the youth or the community. According to DJJ policies, youth who display such tendencies require immediate attention and are placed in detention facilities.


Londa Adkins

The Juvenile Service Worker (JSW) has a great amount of discretion concerning the probated juvenile's behavior. For instance, although felony charges require immediate placement, the decision to begin the revocation process is not automatic. The JSW may decide to avoid the revocation if there are extenuating circumstances. In that case, the JSW is required to report the circumstances that have influenced her decision to avert revocation to the Regional Manager. This choice is one of the many examples of authority the JSW holds over the juvenile. The subjective nature of this relationship is not always defined in the supervised placement contract, therefore, it is important to examine the contract and challenge the alleged violation if the juvenile's terms are not clearly defined or exceed reasonable expectations.

Once a safety concern is established, the juvenile is taken to detention.[8] The absence of a safety concern allows the juvenile to stay at home pending the scheduling of the probable cause hearing. However, if the juvenile is a safety risk, he/she is taken into custody and will remain pending the final hearing.

Next, the JSW prepares the Supervised Placement Violations Report, which includes a written statement supporting her request for Commissioner's Warrant.[9] This request is sent to the Juvenile Services District Supervisor. KRS 635.100 establishes the process of supervised placement revocation and the effect of escape, absence without leave, or violation of conditions of placement.[10] The individuals subject to the statue are those juveniles who are either: committed to DJJ or in placement (foster care, residential, group homes, hospital, assessment center, detention); or committed to DJJ and placed on supervised placement (in the community or foster placement). The Juvenile may be taken into active custody by any juvenile probation officer or any peace of-

ficer. Time requirements begin at the time the child is picked up. Custody triggers the 5-day time requirement for preliminary hearing (probable cause hearing). At this point, DJJ notifies the juvenile, the parents, and DPA of the hearing and alleged violations.

Probable Cause Hearing

This initial hearing is the first step in a two-part process. The hearing officer is required to determine the validity of the allegations against the juvenile using the probable cause standard of proof. The child's safety risk is determined during the probable cause hearing. The Juvenile Service Worker, the client, the client's attorney, his/her parents (or guardian), any witnesses, DJJ personnel, and the hearing officer are present. The Hearing Officer is a DJJ- contracted attorney, usually located in the county where the detention facility is located. During the procedure, evidence is presented to establish violations of the supervised placement contract. The proceedings are informal and hearsay evidence is allowed. The Hearing Officer is required by statute to mechanically record the proceedings. The hearing normally takes place in the detention facility or local DJJ office within 5 days (excluding weekends and holidays) of the youth being taken into custody.[11] Although, the juvenile or his attorney may waive the time requirement, it is essential that the waiver is voluntary.

The Juvenile may testify or refuse to testify during this portion of the hearing. The Juvenile may examine and cross-examine witnesses and present negating evidence.

The hearing examiner summarizes the allegations; the evidence presented, and issues a decision. The Juvenile Service Worker must present evidence of the alleged violations and represent the Department of Juvenile Justice.

The hearing examiner determines probable cause of the alleged violations and the safety risk. If probable cause is found as to both, the juvenile remains in custody. If probable cause is found regarding the violations, and no safety risk exists, then the juvenile is released and the revocation hearing is scheduled. If no probable cause is established on either, the juvenile must be released. Usually, a new probation contract will be initiated by the JSW and the supervised placement is restored.

This hearing allows the youth and her attorney to challenge the alleged violations. This is definitely the time to defend any actions that have been deemed violations by the JSW. Here, the contract terms must be scrutinized and carefully examined. Often, the alleged violations do not correspond to the youth's contract. Often, the hearing examiner will decide that an allegation has not been proven adequately or is beyond the scope of the supervised placement contract. The allegation will be removed from the record and the subject matter of the final hearing will be limited to only the other, remaining allegations, on which the hearing officer did find probable cause.

Supervised Placement Revocation Hearing - The Final Hearing

When the juvenile is in custody pursuant to a Commissioner's warrant, the supervised revocation hearing must occur within 10 days (excluding weekends and holidays) of the probable cause hearing. A continuance may be granted upon request.

The Hearing Officer must notify the juvenile and parents of specific alleged violations and their right to counsel. The notice includes the time and the hearing location. Additionally, the Officer must notify DJJ staff that they shall, upon written request, provide copies of all revocation documents to the juvenile's attorney within 5 working days of the receipt of request.

The Officer conducts the hearing by reading the terms of the Supervised Placement allegedly violated. These violations are the parameters of the hearing. Object to the discussion of any information that has not been addressed during the probable cause hearing. The juvenile service workers are not attorneys and frequently attempt to include unrelated information or stricken allegations.

The Officer administers the oath, takes testimony from witnesses, and mechanically records the hearing. All parties are allowed to establish pertinent facts and circumstances relative to the allegations, bring witnesses, and cross-examine witnesses. The standard of proof is the preponderance of evidence presented at the hearing.

The Hearing Officer determines if violations exist and submits written findings of fact within 3 working days. This recommendation regarding revocation is forwarded to the DJJ Regional Director. Thereafter, the DJJ Regional Director (or Designee) makes the final decision and tenders a decision letter within 5 working days. The juvenile remains in custody if revoked. A placement decision is requested from the DJJ Centralized Intake/Classification Branch. Although DJJ policy states that placement is to occur within 10 days, this rarely happens. There is no statutory placement time period. However, excessive periods may be challenged. It is difficult to expedite the placement of a youth in a residential facility, but not impossible. Urge the JSW to move the youth quickly in order to begin his treatment, thereby, minimizing the duration of his detention, which is thought of as "dead time,"[12] and thus protecting the youth's liberty interest by not allowing the child to be detained unnecessarily.

Appeals- The Review by the Commissioner of DJJ

The appeals procedure is broad and loosely defined within 505 KAR 1:090. Appeals must take place within 10 days and include all justification for reversal. There is a 2-page limit

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and appeals are written to the DJJ Commissioner. The Commissioner must respond within 5 days.

Judicial Review of the Administrative Decision

After all administrative remedies have been exhausted, an Original Action may be filed in Franklin Circuit Court. The Original action must include: a motion to proceed without payment of filing fees,[13] the Petition for review, all procedural history, a motion to seal, and the appendix. The right to appeal the decision to Franklin Circuit Court is based on *American Beauty Homes Corporation v. Louisville and Jefferson County Planning Commission, et. al*., the court held that "there is an inherent right of appeal from orders of administrative agencies where constitutional rights are involved, and Section (2) of the Constitution prohibits arbitrary power."[14]

Flaws within the Process

The supervised placement revocation procedure is arbitrary and violates the 14th Amendment to the US Constitution, and Sections 2,11, &14 of the KY Constitution. The taking of evidence concludes with the Hearing Officer, who is a licensed attorney, issuing findings and a recommendation. Yet, it is the DJJ Regional Manager who makes the final revocation decision after the Hearing Officer issues findings and a recommendation. The DJJ Regional Manager is not present during the hearing, nor does he/she examine testimony or weigh the gravity of the evidence presented. This Regional Manager supervises the JSW who originally requested revocation. In essence, DJJ staff initiates the revocation by requesting a Commissioner's Warrant, contracts the Hearing Officer to conduct the hearings, and finally, makes the final revocation decision. The obvious conflict of interest makes a balanced decision impossible.

505 KAR 1:090 violates due process by denying juveniles equal protection under law. The Hearing Officers are contracted by DJJ and thus employed by DJJ. Their employment relationship challenges their objectivity and weakens any claim that they are "neutral and detached" as required by *Morrissey v. Brewer*, 408 U.S.471 (1972).

The equal protection problem is seen in the contrast between the two different systems used for incarcerated adults and for committed youth. The adult parole revocation decision is made by a neutral/detached parole board without monetary ties to the Department of Corrections staff who advocate for revocation. 501 KAR 1:040. But, the juvenile revocation decision is made by personnel tied administratively and monetarily to the DJJ staff who push for revocation during these adversarial proceedings. And, the ability of DJJ administration to overrule the hearing officer's decision denies juveniles equal protection.

The JSW has a familiar relationship with the probated juvenile. Frequently, the JSW has monitored the juvenile's behavior from his first contact with the court system. Therefore, the JSW may have encountered instances of problem behavior previously. The JSW is trained to use graduated sanctions and other methods of behavior management. It is important to note the age of the alleged violations based on the amount of time the JSW has worked with the youth and the nature of the relationship. Essentially, the JSW is assigned to police the probated youth's daily behavior. Object to any alleged violations over 90 days after the discovery of the JSW. KRS 533.040(3) governs adult probation and parole revocation. This statute notes that revocation shall take place prior to the expiration of sentence or within 90 days after the grounds for revocation come to the attention of the Department of Corrections. The juvenile should be equally protected under this section and failure to apply standard to juveniles would deny them equal protection contrary to the 14th Amendment, US Constitution and Sections 2 &14, KY Constitution.

The basic rules of evidence are not used. The hearing officers admit hearsay evidence and frequently the JSW who testifies presents nothing but hearsay. As advocates for the youth, counsel should argue that hearsay is impermissible at the final hearing. Although 505 KAR 1:090 Section 2(6)(g) allows hearsay in probable cause hearings, 505 KAR 1:090 Section 2(2)(g) does not mention hearsay evidence in supervised placement revocation hearings. Where language appears in one section of a statute, but the legislature omits that language from another section of the same Act, it is presumed that the legislature's omission was intentional and purposeful. *Palmer v. Commonwealth*, KY. App.,3 S.W. 3rd 763, 764(1999). Therefore, the practice of allowing hearsay evidence at the final hearing should be objected to vigorously.

The most basic rules of evidence are often overlooked based on the reference, in 505 1:090, to "informal" proceedings. The right to cross-examine witnesses, confront and question does not regularly occur. Often, the JSW presents reports drafted by other individuals who have had contact with the probated youth. Usually, the letters and memorandum do not support your client and are damaging. The JSW will try to admit reports, letters, or internal e-mails or notes from the juvenile's former teachers or counselors. Most often the documents do not get beyond the hearsay exception and contain vague and indefinite language but, regardless, are admitted based on the "informal" nature of the proceeding. The Supreme Court held that confrontation and cross-examination was a minimum in parole revocation.[15] Object to the admission of the materials into the record. Insist upon the presence of the document or report author for examination.

Problems in cases involving stale allegations. The juvenile may have already received a consequence for the alleged violations that are the subject of revocation proceedings. The JSW has the duty to impose sanctions for any violation

of the contract. Generally, the juvenile has violated some portion of their contract and the revocation is prompted by the latest infraction. Object on the basis of equitable *estoppel*. The JSW could have requested revocation at the time of the violation, but chose not to take action. Therefore, the juvenile relied to his/her detriment upon the JSW's implicit promise not to revoke. Additionally, the JSW requires enhanced or new conditions after a juvenile breaches his contract.[16] Hence, the juvenile is subject to a new contract initiated upon revision of the old probationary conditions.

Problems in cases involving drug screens. Failed drug screens are the basis of numerous revocations. The objection should be based on the lack of due process, the lack of reliability of the results and should be used only for the JSW's information in making treatment decisions.[17] Usually, the JSW is the person administering the drug screen. Question the JSW's training and understanding of the process used to detect substances. The JSW is not a chemist and is likely to be unable to describe the chemistry underlying the testing process or chain of custody. Often, the tests are not sufficiently reliable to be admitted in court, as noted in DJJ Drug Screens policy.[18] The JSW must complete certification offered by the drug screening company in order to perform the testing.[19] Albeit, the JSW does not qualify as an expert to perform or explain drug testing. The new DJJ policy states that the result of a failed drug test can only be used in conjunction with other violations to revoke.[20] Further, the testimony of the JSW can be objectionable under KRE 702.[21]

Conclusion

How many of you can remember the first time you were away from home? Did you go to camp or visit a relative? Even a voluntary leave from your home evokes a degree of fear, sadness, or helplessness. The liberty interest of juveniles should not be taken lightly, nor should it be given away. As zealous advocates, the supervised revocation process allows another opportunity to have our clients' voices heard.

Endnotes

1. *See* Grisso, Thomas. Forensic Evaluation of Juveniles. (1998). The author describes the history of the juvenile justice system beginning with the first special system of justice for juveniles in the U.S. established in Cook County (Chicago), Illinois, in 1899. The first reform, U.S. Supreme Court cases of the 1960's, *Kent v. U.S. (*1966*)* and *In re Gault* (1967) provided that the juvenile justice system would not continue to act without consideration of constitutional protections. The second reform, in response to a wave of violent offenses that took place in the 1990's, resulted in legislative changes throughout the country. In particular, asserting a punitive objective as primary in cases involving extreme violence by juveniles.
2. The authority of the state to act as a parent who provides for the needs and welfare of a youth.
3. KRS Chapter 635 shall be interpreted to promote the best interests of the child through providing treatment and sanctions to reduce recidivism and assist in making the child a productive citizen by advancing the principles of personal responsibility, accountability, and reformation, while maintaining public safety, and seeking restitution and reparation; KRS 600.010(2)(e).
4. Open records request, May 2005.
5. 505 KAR 1:090 became effective June 12, 2000. The Department of Juvenile Justice was established in December 1996. Revocations began to take place in approximately 1998, without established procedures as required by KRS 635.100. This deficiency prompted the filing of an original action in Franklin Circuit Court entitled *L.M. v. Kelly*, Franklin Circuit Civil Action No. 99-CI-00469, Opinion and Order entered February 9, 2000.
6. Commitment means an order of the court which places a child under the custodial control or supervision of the Cabinet for Families and Children, Department of Juvenile Justice, or another facility or agency until the child attains the age of eighteen (18) unless the commitment is discharged under KRS Chapter 605 or the committing court terminates or extends the order. KRS 600.020(12).
7. The Supreme Court found the minimum requirements for due process is the following: 1. Written notice of the claimed violations of parole; 2. Disclosure to the parolee of evidence against him; 3. Opportunity to be heard in person and to present witnesses and documentary evidence; 4. The right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation; 5. A "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and 6. A written statement by the factfinders as to the evidence relied on and reasons for revoking parole. *Morrisey v. Brewer*, 408 U.S. 471(1972).
8. The safety concern is defined by the behavior that places the juvenile or community at risk for physical injury.
9. A commissioner's warrant is a document issued by the Department of Juvenile Justice directing that a juvenile be taken into custody, pursuant to 635.100
10. KRS 635.100 addresses children committed to or in custody of DJJ. The section delineates the procedures for revocation, administrative hearings and regulation promulgation.
11. DJJ operates 10 detention facilities statewide with housing capacity of approximately 526 juveniles.
12. DJJ residential programs use the "phase system" to gauge progress within the program. Both behavioral or treatment goals and time spent at the facility count towards progress in the program. Youth do not get "credit" for time spent in detention. "Dead time" is detention time that does not expedite the child's release from custody.
13. KRS 31.110(4) states: a person, whether a needy person or not, who is a minor under the age of eighteen (18) and who is in the custody of the Department of Juvenile Justice and is residing in a residential treatment facility or detention center is entitled to be represented on a legal claim related to his or her confinement involving violations of federal or state statutory rights or constitutional rights.
14. *American Beauty Homes Corporation v. Louisville and Jefferson County Planning Commission, et. al.,* Ky., 379 S.W.2d 450, 456(1964).
15. *Morrissey v. Brewer*, 408 U.S.471 (1972).
16. DJJ policy 607 defines the Juvenile Services Workers duties and responsibilities regarding probation.
17. DJJ policy 4 A-7
18. DJJ policy 4 A-7 (III)(G).
19. DJJ policy 4 A-7 (III)(A).
20. *Id*.
21. The JSW cannot qualify as an expert; therefore, her testimony should be omitted. ■

INTERVIEW SUCCESS

By Warren Allred, Investigator, DPA Maysville Office

Interviews are a key component of communication. Whether it is a conversation with a witness or a meeting with a client, interviews can play an important role in successful representation of the client. If not conducted in the proper way, an interview can be a waste of time and can lead to a negative cloud being placed over all future contact with the interviewee.

Those problems can be averted or reduced by following some basic guidelines to assist in preventing a difficult interview.

- ***Plan for the interview.*** Prepare ahead of time. Read discovery materials, review records, and develop questions to assist you in gaining the information needed. Try to come up with general questions to keep the interview flowing. Specific, detailed questions may be needed at a certain point during the interview, but to start an interview with a direct question may limit the type or amount of information you receive and may shorten the interview process.
- ***Do not be argumentative.*** Put the subject being interviewed at ease. Any uncomfortable feelings may make for a difficult interview. Always remain calm and make the subject feel calm. This type of environment is more conducive to a successful interview.
- ***Privacy.*** Try to conduct the interview with as much privacy as possible. Make the subject feel comfortable. If you conduct an interview in a person's residence, you may begin a conversation by remarking about something that you notice in the home, a photograph, a collection of some sort, or even the weather. This may make the person feel more comfortable. No bright lights or rubber hoses are needed. Usually, the defense goal is to obtain pertinent information, not obtain a "confession".
- ***Let them talk.*** Let the subject of the interview do the talking. This does not mean that you do not control the interview- you do. But, do not dominate it, just control it with well timed questions and comments. Talking makes the subject feel more at ease during the interview and allows for more information to be recalled and shared more easily. The point is that minor details that may have been forgotten may be recalled back to memory giving you more possibly important information.
- ***Timing and type of questions.*** Time important questions properly to keep the interview flowing. Keep the interview balanced with direct questions but also veil the interview with friendly, non-offensive, non-argumentative talk. Make the questions easy to understand. A question that is hard to understand can ruin a train of thought and can slow down the flow of the interview. Try to steer away from closed-ended questions that call for simple yes or no answers. Short answers do not assist in encouraging conversation. On the other hand, open-ended questions aid in elaboration and assist in helping the thought process flow more freely. Try to "lead the questioning" but without asking "leading questions". By this, I mean try to direct questioning to obtain an answer you may need but do not ask a question with the answer already included. You may have an idea of what a witness may say from reading discovery or from other sources, but allow the subject to tell you the information themselves. You can lead the subject toward that information but do not ask a question showing that you already know what they will tell you.
- ***Be a good listener.*** Make eye contact. Keep the flow of the interview going with statements such as, "and then what did you see?" or "and what was next?" This encourages more conversation and a greater chance for more information. Use interviewing techniques that will stimulate memory. Having the subject recall events in a chronological order is one good way to promote the recalling of events. If necessary, begin with what the subject did after waking up that morning and have the person recall what happened during the day leading up to the event in question. Starting with the beginning of the day can help create a path for the subject to follow and get the memory activated. If possible, conduct interviews at the scene of the event.
- ***Note taking.*** Take notes but do not write a life story during the interview. Taking time out to write down every item causes a loss of eye contact and may make the subject slow down to let you keep up with what they are saying.
- ***Ending.*** End the interview properly and on a good note. You may have to interview the person multiple times. Be polite. Ask the subject if they have anything else to add or if they have any questions for you.
- ***Reporting.*** Read your notes after the interview and write a summary as soon as possible, including any statements that you recall were made.

Remember that multiple versions of the truth may exist. The defendant, the victim, and witnesses may all have varying versions of what happened. The goal of the interview is to obtain the witness' honestly-remembered version of the truth, with an eye toward proving the best defense. Aim to obtain statements of fact that are consistent and verifiable. If the attorney knows what a witness will say, it allows for better trial preparation.

If the interview is a success, you have gained the upper hand. This will make the subject more receptive to subpoena service or for further follow-up interviews. These guidelines will not solve every problem or difficulty that you may encounter, but hopefully they will assist you in making your interviews more successful. ■

PLAIN VIEW . . .

Ernie Lewis, Public Advocate

Commonwealth v. Mobley
160 S.W.3d 783 (Ky. 2005)

On July 22, 2001, a Lexington police officer saw a truck parked with its lights off in Martin Luther King Park. The officer stopped and found three men sitting in the truck. He got out and asked the men what they were doing in the park, since it was closed. He got varying and unsatisfactory answers, so he asked for backup. The officer asked the driver for consent to search. The driver initially agreed, but then declined. The officer asked the three men to get out of the truck "to conduct a weapons search." As they got out of the truck, the officer saw a crack pipe on the floorboard of the truck on the passenger side near where Mobley was sitting. The officer arrested all three men on possession of drug paraphernalia, and proceeded to search the truck incident to arrest. The search resulted in seizure of three push rods and .2 grams of crack cocaine. Once at the jail, an additional .36 grams of crack cocaine was found on Mobley.

Mobley was indicted for possession of a controlled substance, promoting contraband, and possession of drug paraphernalia. He moved to suppress the evidence seized on July 22 from the truck and from his person. The motion was overruled by the trial court, which ruled that the crack pipe had been found in plain view, and that there had been probable cause to arrest all the people in the truck. Mobley entered a conditional plea of guilty and received concurrent sentences totaling one year.

The Court of Appeals reversed Mobley's conviction. The Court held that there was insufficient evidence that Mobley possessed the crack pipe and thus the arrest was illegal because the misdemeanor had not been committed in the presence of the officer as required by KRS 431.005(1). Therefore, the evidence seized incident to the arrest was illegally seized. "'Since Mobley's physical proximity to the crack pipe was his only connection to the pipe in the present case, there was not sufficient evidence that Mobley committed the misdemeanor offense of possession of drug paraphernalia in the presence of the police.'"

The Supreme Court granted discretionary review. In an opinion written by Chief Justice Lambert, the Supreme Court reversed the Court of Appeals. The issue posed by the case was "whether Mobley possessed the crack pipe, solely or jointly with the other occupants of the car, in the presence of the officer. If a police officer may reasonably infer from the circumstances that the occupants of an automobile have knowledge of, or exercise dominion and control over contraband, an arrest for a misdemeanor offense committed in his presence is proper."

To answer this question, the Court relied heavily upon *Maryland v. Pringle*, 540 U.S. 366 (2003). In *Pringle*, the Court had addressed a similar situation where the officer could not tell who in a car possessed contraband. The Court held that the officer could "reasonably infer from the circumstances that the occupants had knowledge of, and exercised dominion and control over the contraband." Relying upon *Pringle*, the Court held that it was reasonable for the officer "to believe that Mobley was in constructive possession of drug paraphernalia, and was therefore committing a Class A misdemeanor in the officer's presence…Therefore, the misdemeanor was committed in the presence of Officer Abbondanza and the arrest was proper." In doing so, the Court overruled *Mash v. Commonwealth*, 769 S.W. 2d 42 (Ky. 1989).

Moore v. Commonwealth
159 S.W.3d 325 (Ky. 2005)

The police in Fayette County obtained a search warrant to search Moore's apartment. The affidavit in support of the search warrant provided information from a bank that Phillip Moore had created a fraudulent bank account using the social security number from a person in Las Vegas, Nevada. The account was funded with a computer-generated check from a company in Harold, Kentucky. Two car purchases were also made using the fraudulent bank account by obtaining a loan from a third bank. The warrant issued by the magistrate allowed for a search of Moore's home, specifically for "'computer graphic files which depict Social Security Cards, State Drivers License, and Federal, State or Local issued documents in a manner that could be used in the production of counterfeit documents…[plus] computer hardware, or computer software which can collect, analyze, display, store, transmit or print electronic or magnetic data used in the production of counterfeit documents." The defendant was arrested following the execution of the search warrant. He moved to suppress, and while the judge agreed that the affidavit failed to demonstrate probable cause, the judge allowed the evidence in, based upon the good faith exception to the warrant requirement, citing *Crayton v. Commonwealth*, 846 S.W. 2d 684 (Ky. 1992). The defendant entered a conditional guilty plea and was sentenced to 20 years in prison.

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In an opinion written by Justice Wintersheimer, the Court upheld the decision of the trial court. The Court agreed with the trial court that the good faith exception should apply. "Considering all of the circumstances, including information known to the police officer and not set forth in the affidavit, it is readily apparent that the officer acted in good faith and in accordance with the exception. The officer testified at length in the suppression hearing and indicated that prior to preparing the affidavit, she had visited the premises and conducted both surveillance and investigation into the situation. The landlord had advised her that Moore rented an apartment there and she observed a repossession of his vehicle outside the residence. She testified that she had no reason to believe that Moore lived or worked anywhere else other than the address that she was investigating."

It is unclear from the opinion whether that information was part of the affidavit presented to the magistrate. However, the Court explicitly states that the "trial judge properly considered matters outside the affidavit. *Crayton* tolerates consideration of matters outside the affidavit in a good-faith determination." Thus, under this holding, the 4-corners rule does not apply to a good-faith determination. *Crayton*, however, does not seem to go that far. "We are troubled that the judge to whom the affidavit was presented may have been provided information which did not appear on the face of the affidavit. It is the duty of the judicial officer to issue or deny the warrant based solely on the facts contained within the four corners of the affidavit. Here we must assume that the warrant was issued solely on that basis or that such was the judicial determination so far as the officer was aware. The error in the assessment of the affidavit was a judicial error and any error in receipt of information extrinsic to the affidavit was likewise a judicial error." *Crayton*, at 689.

The Court also held, contrary to the trial court, that the affidavit contained sufficient facts to constitute probable cause. "The facts stated in the affidavit made it clear that Moore was conducting criminal activity, and the nature of that activity involved the production of fraudulent instruments…The trial judge ruled that the warrant lacked probable cause, but based on the other testimony of the detective, did not suppress the evidence under the *Leon* exception for good faith. Given that the evidence is admitted either way, we affirm the trial judge for the correct result, albeit for the wrong reasons."

Justice Keller dissented. In a brief opinion, he stated that he dissents "because the affidavit in support of the search warrant for Appellant's apartment did not establish probable cause that evidence of counterfeiting would be present in the apartment."

Sowell v. Commonwealth
2005 WL 736250, 2005 Ky. App. Lexis 87 (Ky. Ct. App 2005)

In March of 2002, several Louisville police officers were staking out a crack house. One of them saw a person, who he recognized as a wanted person, get out of a red Toyota and go into the house. The officer recognized the individual as a person whose photograph he had seen in a "warrant pack." The person came back out of the house and drove away. The officers followed the Toyota and pulled it over. A search of the two people in the car revealed plastic bags containing crack cocaine. Both were charged with trafficking in cocaine. A motion to suppress was denied by the trial court, holding that "the police had conducted a lawful investigative stop of the vehicle based on their awareness of Sowell's outstanding arrest warrants." Sowell entered a conditional plea of guilty.

The Court of Appeals affirmed in a decision written by Judge Combs, joined by Judges Dyche and Knopf. The Court held that the officers had a reasonable suspicion of Sowell's having outstanding arrest warrants based upon having seen the picture in the warrant pack. The Court rejected the defendant's position that, because the police had destroyed the warrant pack, the officer's testimony could not be relied upon.

Letterlough v. Commonwealth
2005 WL 1056382, 2005 Ky. App. Lexis 105 (Ky. Ct. App 2005)

Detective Mike Brackett of the Jefferson County Sheriff's Office was contacted in 2003 by a "confidential informant" that he had used once before and considered reliable. The informant stated that Letterlough was selling drugs from a room at InTown Suites, a place Brackett knew was a source for drug sales. The informant described a car that Letterlough would be driving. Brackett and four other officers went to the InTown Suites and found that Letterlough was registered there. Brackett also found that Letterlough had drug convictions and was on parole. They then began to watch the room for which Letterlough was registered. Eventually, a car matching the description pulled up near the room and a person matching Letterlough's description got out. The police approached and began to talk to Letterlough. When Letterlough consented to a pat down search, a gun was discovered. A more thorough search incident to the arrest for being a convicted felon in possession of a firearm revealed cocaine and marijuana. Letterlough was indicted and, after losing his motion to suppress, entered a conditional guilty plea.

The Court of Appeals affirmed in an opinion by Judge Johnson and joined by Judges Buckingham and Schroder. The Court held that there was, at the time of the stopping, a reasonable suspicion that Letterlough was engaged in crimi-

nal activity, and thus the *Terry* stop and frisk was legal. "While it is correct that information from an anonymous tipster that is not predictive of a person's conduct and is not corroborated is not sufficient to support a *Terry* stop and that information obtained from a confidential informant may be insufficient to establish probable cause to support a search warrant or a warrantless arrest, it is not correct that information obtained from a reliable, confidential informant when coupled with some independent verification from a police investigation cannot be sufficient to support a *Terry* stop."

United States v. Hudson
405 F.3d 425, 2005 U.S. App. Lexis 6956,
2005 Fed.App. 0188P (6th Cir. 2005)

A warrant went out for the arrest of Scotty Lee Hudson on a charge of an August 21, 2000, robbery of a One-Stop market in Gallatin, Tennessee. After receiving a tip that Hudson would be with a girlfriend in her Taurus going to her job at the Pantry, the police went to the Pantry and staked it out. The Taurus arrived, and the police approached it at 3:00 p.m. All the occupants of the car were patted down and placed in handcuffs. During the pat-down of Scotty Lee Hudson, crack cocaine wrapped in plastic baggies was found in Hudson's pocket. After the arrest, the officer permitted Hudson's girlfriend to go to a residence where Hudson stayed and where the girlfriend stored some things. She signed a consent to search, although she denied living there or having authority to consent to search. The officers asserted that she consented to search voluntarily. During the search of the residence, a gun was found. Hudson was charged with being a felon in possession of a handgun and with possession of crack cocaine. After losing a motion to suppress, Hudson entered into a conditional guilty plea.

The Sixth Circuit reversed in an opinion written by Judge Clay and joined by Judge Cole. The Court found that, because it had taken a year to execute the warrant, the question was whether the anonymous tip had given the police reasonable suspicion to stop the girlfriend's car in order to arrest Hudson. The court found that the anonymous tip had not linked Hudson to his girlfriend's car. "The record in this case demonstrates that the officers had no more than a hunch that one of the passengers in Potts's car was Hudson. Under the Fourth Amendment, it is clear that this is not enough; instead, for an officer's suspicion to merit description as 'reasonable' it must be 'grounded in specific and articulable facts, that a person [the officer] encounter[s] was involved in or is wanted in connection with a completed felony…A review of *Hensley* and subsequent cases instructs us that the facts relied upon by the officers in this case were not 'specific and articulable,' *Id.*; nor was the basis for the *Terry* stop of Potts's car 'particularized and objective.'" "Here, the Gallatin police officers encountered a car with Potts at the wheel and two black male passengers. Reasonably suspecting only that Potts and Hudson were once romantically involved, and knowing that Hudson is black, the officers elected to stop the car. When viewed in light of the authorities we have examined, these facts are plainly insufficient to justify the *Terry* stop. Despite having a warrant for Hudson's arrest, the officers apparently did not have his mugshot on hand, nor even his physical description (other than that he is black.)"

The Court noted that they were not ruling that Hudson's arrest on the warrant was invalid. The Court confined its holding to the evidence obtained as a result of the stopping of the girlfriend Potts' car. "[W]e hold that while Hudson may be arrested and face prosecution for aggravated robbery, the crack cocaine obtained during the illegal stop must be suppressed because it is 'the fruit of the fact that the arrest was made [pursuant to an illegal stop] rather than [a legal one].'"

The Sixth Circuit sustained the district court's finding that Potts had apparent authority to consent to the search of the residence. "To recapitulate the circumstances of the present case, and crediting the officers' representation of the facts, the officers reasonably believed the following: Potts and Hudson were romantically involved and had a child; Potts, Hudson, and the child lived with Hudson's grandmother at the home at 212 East Eastland; and Potts had a key to the home. We hold that these circumstances, considered in their totality, would lead a reasonable police officer to conclude that Potts had authority to consent to the search of the residence."

Judge Siler dissented in part. He believed that, under all of the circumstances, there was reasonable suspicion for the police to detain Hudson after approaching Potts' car.

Beard v. Whitmore Lake School District
402 F.3d 598, 2005 U.S. App. Lexis 5323,
2005 FED App. 0155P (6th Cir.)

In 2000, a student reported to her gym teacher that her prom money had been stolen. Teachers and administrators responded by searching the gymnasium and students' backpacks. The male students were required to lower their pants and underwear and to remove their shirts. Twenty male students were searched in this manner. Five female students were also searched in this way. No money was discovered.

The school district, the teachers and administrators, and one police officer was sued in 42 USCA §1983 by the students and their parents. The district court denied summary judgments.

The Sixth Circuit, in an opinion by Judge Rogers and joined by Judges Guy and Dowd, reversed the district court. The Court found that the searches were unconstitutional. However, "at the time the searches occurred, the law regarding the reasonableness of a strip search under these circum-

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stances was not clearly established," and thus a summary judgment should have been granted.

The important holding for our readers is that the searches of the students violated the Fourth Amendment. The Court held that the privacy interests held by the students were great. The nature of the intrusion was also viewed as great. The Court viewed the nature of the governmental interest as not of great weight. "School administrators have a real interest in maintaining an atmosphere free of theft. But, a search undertaken to find money serves a less weighty governmental interest than a search undertaken for items that pose a threat to the health or safety of students, such as drugs or weapons." "The highly intrusive nature of the searches, the fact that the searches were undertaken to find missing money, the fact that the searches were performed on a substantial number of students, the fact that the searches were performed in the absence of individualized suspicion, and the lack of consent, taken together, demonstrate that the searches were not reasonable. Accordingly, under *T.L.O.* and *Vernonia*, the searches violated the Fourth Amendment."

United States v. Hunyady
2005 WL 1281997, 2005 U.S. App. Lexis 8682, 2005 Fed.App. 0217P (6th Cir. 2005)

Alan Hunyady was living at his deceased father's house after the estate's personal representative had denied consent. The personal representative informed the police that he had seen two machine guns and a silencer at the house, and gave consent to search the residence. The police found the guns and charged Hunyady with possession of an unregistered machine gun. After Hunyady lost his motion to suppress, he entered a conditional guilty plea.

The Sixth Circuit, in an opinion written by Judge Gilman, affirmed the decision of the district court. The Court rejected Hunyady's argument that he had a reasonable expectation of privacy because he was a "tenant by sufferance." Instead, he was viewed as a trespasser under Michigan law, with no reasonable expectation of privacy. The Court also agreed with the government that, even if Hunyady had a reasonable expectation of privacy in his father's house, the personal representative had given consent to search and thus the search was legal.

SHORT VIEW . . .

1. *State v. Peterson*, 110 P.3d 699 (Utah 2005). The police may not conduct a *Terry* frisk of an individual, and then give him a jacket in order to go outside, and frisk the jacket prior to handing it over. "Officers would need only provide a suspect with an item not relevant to the investigation that would otherwise fall outside the scope of a *Terry* frisk in order to thereby bring the item within permissible parameters so that they could perform a search of it.
2. *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962 (9th Cir. 2005). The Ninth Circuit has held that a warrant authorizing the seizure of "any indicia of gang activity" did not allow for a seizure of all such items, including expensive motorcycles, a refrigerator, in addition to shooting guard dogs outside of the clubhouse.
3. *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005). As part of the Indiana Constitution, police must have a reasonable suspicion prior to searching garbage or trash left on the curb for collection. The Court did not examine the reasonable expectation of privacy issue that *California v. Greenwood*, 486 U.S. 35 (1988) relied upon, but rather used a reasonableness analysis in arriving at their conclusion. "We believe a requirement of articulable individualized suspicion, essentially the same as is required for a *Terry* stop of an automobile, imposes the appropriate balance between the privacy interests of citizens and the needs of law enforcement. Allowing random searches, or searches of those individuals whom the officers hope to find in possession of incriminating evidence gives excessive discretion to engage in fishing expeditions." *See also State v. Galloway*, 109 P.3d 383 (Oregon 2005) reaching the same conclusion.
4. *Georgia v. Randolph*, 604 S.E.2d 835. (Ga. 2004). The US Supreme Court has granted *cert* (*Georgia v. Randolph*, 125 S.Ct. 1840 (Mem) (2005)) in this case to determine whether an occupant of a house may give consent to search when the other occupant of the house has already indicated that a search cannot occur.
5. *Commonwealth v. Charros*, 443 Mass. 752 (Mass. 2005). The police violated the 4th Amendment and the Massachusetts analogue when they stopped occupants of a residence subject to a search warrant one mile away from the house. The occupants were unaware of the search warrant at the time of the seizure. Thus, evidence seized incident to the stop should have been suppressed. This is a permutation of the rule announced in *Michigan v. Summers*, 452 U.S. 692 (1981), where the Court had allowed for the detention of occupants of a house about to be searched pursuant to a warrant.
6. *In re Jansen*, 444 Mass. 112 (Mass. 2005). A defendant charged with a crime may legitimately request a DNA swab be taken from an uncharged person without violating the Fourth Amendment. The defendant must make a showing of need. The authority for this is the Massachusetts Constitution, which gives the defendant the right "to produce all proofs, that may be favorable to him…and to be fully heard in his defen[s]e." Significantly, the Court noted that this did not mean that the prosecution could use the evidence against the third party without looking again at the Fourth Amendment issue. ■

KENTUCKY CASE REVIEW

By Astrida Lemkins, DPA Appeals Branch

Astrida Lemkins

Alley v. Commonwealth,
160 S.W.3d 736 Ky., April 21, 2005
Affirming

Michael R. Alley was convicted of murder and fourth-degree assault and was sentenced to life without the possibility of parole for 25 years. The convictions arose from an incident occurring at Sue's Handi Mart in Wayne County. Alley had become infatuated with the murder victim, who eventually took out three warrants against him for harassment. In November 1995, Alley entered the store with a .22 caliber rifle, killing the woman. Her co-worker, caught in the crossfire, was shot in the hip. Alley had a long history of mental problems since receiving a severe brain injury from a 1980 car accident. He had been hospitalized at least seven times. After a competency hearing, Alley was found incompetent to stand trial and was committed to the Kentucky Correctional Psychiatric Center (KCPC) for treatment. He was released later that year, but once again found incompetent to stand trial. Involuntary commitment proceedings followed and Alley was committed to Central State Hospital. He was released and re-indicted three months later. At a third competency hearing, Alley presented testimony from a neuropsychologist about the devastating effect his brain injury had on his ability to participate in his defense. Nonetheless, Alley was found competent to stand trial and presented an insanity defense.

Alley raised several issues including: 1) whether it was error to find the defendant competent to stand trial; 2) whether it was error to decline to hold a hearing to determine whether the defendant should be forcibly medicated; 3) whether there was sufficient notice of aggravating circumstances; 4) whether the order of the closing arguments in the penalty phase was error; and 5) whether the verdict forms were prejudicial.

There was substantial evidence to support the trial judge's finding of competency. The trial judge was allowed to find the testimony of one expert more credible than the other. The trial judge had the authority to accept the medical evidence he found the most convincing, and this evidence was sufficient to support his findings.

The trial court did not err in failing to hold a hearing on whether Alley should be forcibly medicated at trial. The medication at issue was prescribed, in part, to assist Alley in becoming competent and participating in his own defense. Defense counsel filed a motion asking the court to order Alley's medication be stopped during the trial. The grounds for the motion were that Alley was not medicated at the time of the shootings and the jury was entitled to see his actual physical and mental state on that day. Arguably, forcing the defendant to take medication that distorts his real mental state would deny his right to an insanity defense. First, the court held that the trial judge properly ruled that the proper motion was not before him, as the defendant was not under court order to take or not to take medication. Defense counsel agreed with that decision, thus the issue had been waived. Further, the court held that the appellate claim was without merit, since the issue was whether the defendant was insane at the time of the offense, not his state of mind at the time of trial. Finally, Alley's case was distinguishable from cases where judges improperly ordered defendants to take medication during trial because here, independent medical officials ordered the medication.

Aggravating circumstances do not have to be charged in the indictment. Alley argued his federal due process rights were violated because the aggravating circumstance relied on by the prosecution was not set forth in the indictment. The court held that the record indicates Alley had sufficient notice of the aggravating circumstance used to enhance his sentence eligibility. Thus no error occurred.

The trial court did not err in denying defense counsel's request to make his penalty phase closing argument after the prosecutor. Alley argued that KRS 532.025(1), which involves all cases where the death penalty "may" be imposed, requires certain procedures be followed. Specifically, subsection (a) states that "(T)he prosecuting attorney shall open and the defendant shall close the argument." Defense counsel requested this procedure be followed but the trial court declined since the prosecutor had chosen not to seek the death penalty. The court held that because the death penalty was not an option for the jury, "emphasis on the word 'may' is unconvincing." Thus, subsection KRS 532.025 (1)(a) allows a defendant to present a closing argument after the prosecution only when he is facing the death penalty.

The penalty phase verdict form did not improperly mandate a sentence. Alley argued that he was denied due process because the verdict form improperly directed the jury to fix his sentence at life without parole for twenty-five years if it found the aggravating circumstance to exist. Alley contends this was palpable error pursuant to RCr 10.26. The challenged instruction directed the jury that if it found the aggravating circumstance beyond a reasonable doubt, it shall be considered in fixing a sentence. The court held that, while the instruction could have been drafted more concisely, the jury had adequate information so as to determine the suitable and

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available penalties. Therefore, any possible error did not affect the fundamental fairness of the proceedings.

A two-justice dissent. Chief Justice Lambert and Justice Scott concurred in part and dissented in part. In the dissent, written by Justice Scott, the dissenters disagreed with the majority on the medication issues. The dissenters held the jury clearly would have benefited from insight into Alley's physical and mental state during the offense. Next, they found the trial court had jurisdiction to involuntarily commit Alley to Central State and approve the use of an anti-psychotic, thus the trial court had jurisdiction to order him taken off medication. The dissent cited Section 11 of the Kentucky Constitution: "in all criminal prosecutions the accused has **the right to be heard by Himself…"** Finally, the dissent suggested the proper solution would be to un-medicate Alley for a videotaped deposition and then re-medicate him for trial. This procedure would guarantee he would be competent for trial while allowing the jury to see the "real, un-medicated Alley."

Matthews v. Commonwealth,
___S.W.3d___, 2005 WL 1183157, Ky. May 19, 2005
Affirming

Matthews was convicted of manufacturing methamphetamine, possession of marijuana, possession of drug paraphernalia, and being a first-degree persistent felony offender. Matthews was arrested after a high-speed chase. The car he was driving turned out to be a "rolling meth lab." Before he was indicted, his parole on a federal conviction was revoked and he was sent back to prison in Illinois. After his eventual return to Kentucky, Matthews was tried and sentenced to forty-five years in prison.

Matthews raised a number of issues on appeal, including: whether an alleged violation of the Interstate Act on Detainers (IAD) required dismissal of his case; whether the trial judge abused his discretion by failing to hold an evidentiary hearing on the IAD issue; and whether the trial judge erred by failing to hold a *Faretta* hearing before making Matthews co-counsel.

When both the Commonwealth and the prisoner file documents to effectuate a speedy trial, the 180-day time limit applies. Matthews argued that the trial court erred by denying his motion to dismiss the indictment based on the Commonwealth's failure to bring him to trial within the 120 days allotted under Article IV of the IAD. Under KRS 440.450, Article IV, Section (3) of the IAD, (which deals with prosecution requests for custody of a prisoner for purposes of trial), the trial must begin no later than 120 days from the date the defendant arrives in the prosecution's jurisdiction. Under Article III (1) of the statute, if it is the defendant who requests a final disposition of detainer, the time limit is 180 days from the time of the prisoner's request. The issue before the court was what time limit applied when both the Commonwealth and the prisoner file documents to effectuate speedy disposition.

The court discussed three possible approaches adopted in other jurisdictions. The court held that when Article III and Article IV procedures are inconsistent, an Article III filing automatically waives those Article IV procedures favorable to the defendant. Thus, Matthew's affirmative act of requesting disposition under Article III constituted a waiver of any rights he may have had as the result of the state's Article IV request.

The trial judge did not err in failing to hold an evidentiary hearing on the IAD issue. Matthews contended the trial court's failure to hold an evidentiary issue on who filed first under the IAD constituted palpable error. The court held that under the approach adopted in this opinion, it is irrelevant who filed first. Further, they held there was no requirement for the trial judge to hold a hearing on this matter.

Matthews did not participate as counsel in front of the jury; thus no *Faretta* hearing was required. Matthews filed a *pro se* supplemental brief contending the trial judge erred to his substantial prejudice by failing to hold a *Faretta* hearing before appointing him co-counsel. Matthews had asked why he could not file his own motions and the trial judge told him he could not do so because he had not asked to be co-counsel. Thereafter, Matthew's only participation upon being made co-counsel was to file *pro se* motions and confer with his counsel. Further, Matthews never waived his right to counsel in any way. Thus, no *Faretta* hearing was required in this instance.

Howell v. Commonwealth* and *Commonwealth, et al. v. Stephens, et al.,
___S.W.3d___, 2005 WL 1183208, Ky., May 19, 2005

Larry Howell was convicted on October 30, 2002, of trafficking in a controlled substance in or near a school, unlawful transaction with a minor in the second degree, and being a persistent felony offender in the first degree (PFO I). He moved to dismiss the PFO indictment for insufficiency of the evidence, but that motion was overruled and Howell received a twenty-year sentence, which he appealed.

Following the conviction, the Commonwealth moved the trial court, pursuant to KRS 218A.410(1)(j), to order the forfeiture of $4,674.00 found in Howell's possession during a search of his residence. The trial court entered an order forfeiting the money and allocating its disbursement. The Commonwealth appealed the allocation of funds, on grounds that some of the money was ordered to go toward court costs, to DPA for attorney fees, and to the Finance and Administration Cabinet for reimbursement of defense expenses, rather going only to the Northern Kentucky Drug Strike Force and the Commonwealth's attorney. Defendant Howell neither appealed from the order of forfeiture nor cross-appealed after the Commonwealth's notice of appeal.

Failing to prove Howell's age at the time of the previous crimes was fatal to the PFO charge. During the penalty phase of Howell's trial, Christy Feldman of the Department of Correc-

tions attempted to establish his PFO I status. Feldman testified from Department of Corrections' records that Howell was born March 7, 1961. Further, she testified from the records of the Campbell Circuit Court that Howell was convicted of burglary in the third degree, a felony, on March 19, 1981. Feldman testified, over Howell's objection, that a document "in her file" stated the offense occurred on November 11, 1980. Feldman went on to testify that certified records of the Kenton County Court showed that Howell was convicted on January 28, 1985 of burglary in the second degree, a felony, and the date of the offense listed in the indictment was January 11, 1984. Howell's motion to dismiss for insufficiency of the evidence was overruled.

The appellate court held there was no competent evidence creating an inference that Howell was eighteen when he committed the offense that he was convicted of on March 19, 1981. Howell turned eighteen in 1979; thus he could have committed the offense as a juvenile.

Further, the court held that collateral estoppel did not bar Howell from raising this issue. The Commonwealth presumed that the 1981 conviction was used to enhance the 1985 conviction that was also subject to a PFO I enhancement. However, Feldman did not testify that the 1981 conviction was used to enhance the 1985 conviction and did testify Howell had additional prior convictions other than the two relied upon for PFO I enhancement in the case. Due to the uncertainty as to which convictions were used to enhance Howell's 1985 conviction, collateral estoppel does not bar him from challenging the issue of his 1981 conviction now. Therefore the court reversed and remanded for the penalty phase only, directing that the Commonwealth must sustain the PFO charges by competent evidence.

Forfeiture of Howell's money and who holds title thereto. Howell argued on appeal that the forfeiture order violated his rights to due process and to be free from excessive fines. But, because he had failed to appeal the order of forfeiture, the appellate court was without jurisdiction to address whether the forfeiture itself was inappropriate.

In distributing the funds the way it did, the Circuit Court relied on KRS 31.211(1), determining that Howell had the ability to pay for his legal representation pursuant to that statute. The Circuit Court allotted money belonging to Howell first to pay for his legal fees and representation, then to the Commonwealth pursuant to KRS 218A.410(1)(j).

In contrast, the Commonwealth asserted that KRS 218A.435(12) governs the distribution of all the money forfeited in this case: *"Other provisions of the law notwithstanding*, the first fifty thousand dollars of forfeited coin or currency…shall not be paid into the [asset forfeiture trust] fund but ninety percent shall be paid to the law enforcement agency or agencies which seized the property…and ten percent to the Commonwealth's attorney or county attorney who has participated in the forfeiture hearing," (emphasis added). The Kentucky Supreme Court held that the Circuit Court's distribution was based on the flawed assumption that illegal drug proceeds are a defendant's property. Under KRS 218A.410, title to the money vested in the Commonwealth at the time of the defendant's illegal act. Because the Commonwealth, not Howell, had title to the forfeited money at all times, the trial court had no option to use part of it to reimburse the costs of Howell's defense. Thus, all of the forfeited funds must be distributed in accordance with KRS 218A.435(12).

***Hilbert v. Commonwealth*, ___S.W.3d___, 2005 WL 1183183, Ky., May 19, 2005**
Reversing and Remanding

John T. Hilbert was convicted of two counts of murder for the shooting deaths of Danny Wayne Elbert and Joe Eddy Stump. He received sentences of twenty-five years and twenty-seven years, to run concurrently. The shootings occurred at the mobile home of Hilbert's estranged girlfriend, Karen Poole. On the night of the shootings, Poole and her sister asked Hilbert to be their "designated driver." While they were out, the sisters met the victims, Elmore and Stump, and invited them home. According to Poole and Hilbert, the victims danced with the sisters and tension arose. Hilbert did not testify at trial, but following his arrest he told police the victims assaulted him. Hilbert said he then "flipped out" and shot them. Neither of the sisters was present when the alleged assault occurred.

Hilbert raised a number of issues on appeal, including 1) whether the trial court erred in denying Hilbert a jury instruction on self-defense; 2) whether the trial judge's ruling that he was not entitled to a jury instruction on self-defense if he did not testify deprived Hilbert his Fifth Amendment right against self-incrimination; and 3) whether the trial court erred by denying Hilbert's requested instruction that he had no duty to retreat.

Reversible error occurred when the trial court denied Hilbert jury instructions on self-defense. Hilbert did not deny killing Elmore and Stump; instead, he hoped to justify the shootings on grounds of self-defense. During opening statements, defense counsel stated that Hilbert was "not guilty because this was self-defense." However, the trial judge found no basis from the evidence introduced at trial to support a self-defense instruction. In denying the requested instructions, the trial judge reasoned that the self-defense statute, KRS 503.050 "is based on the subjective belief of the defendant and the defendant is the only one who can testify." Thus, the trial judge deemed self-defense instructions were available only for defendants who choose to testify.

The appellate court held that a defendant need not testify in order to receive an instruction on self-defense. Admittedly, the evidence supporting Hilbert's need for the use of force was weak and contradictory. However, such evidence sufficiently raised the issue of self-defense. The court held that a

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criminal defendant is entitled to jury instructions on any defense supported by the evidence.

In general, when evidence fails to raise the issue of self-protection, the fact that a defendant must testify or forego this defense does not implicate the Fifth Amendment. Requiring a defendant to choose between taking the stand and presenting a defense has not been considered an infringement on the privilege against self-incrimination. While the court was not prepared to say the trial court's actions infringed on Hilbert's Fifth Amendment rights, they noted that at least one jurisdiction has ruled otherwise. The court cited *People v. Mills*, 267 N.W.2d 417, 419 (Mich. 1978), in which the Michigan Supreme Court stated: "A defendant need not take the stand and testify to merit an instruction on self-defense…A ruling to the contrary compromises a defendant's privilege against self- incrimination."

When the trial court adequately instructs the jury on self-defense, an additional "no duty to retreat" instruction is not required. Hilbert claimed an instruction that he had no duty to retreat was required in order to rebut the prosecution's repeated statements to the jury that he could have simply run rather than shooting the victims. However, Kentucky has never strictly adhered to an absolute interpretation of the "no duty to retreat" rule, nor did the court's predecessor require jury instructions describing the same. The court held that, if the jury had been properly instructed on self-defense, there would be no need to give an instruction on retreat. The jury could decide whether self-defense was necessary based on the circumstances of the case, rather than in light of specific facts.

***Metcalf v. Commonwealth,* 158 S.W.3d 740.**
Rendered January 20, 2005, as modified April 21, 2005
Reversing and Remanding

Kevin Wayne Metcalf was convicted of sodomy in the first degree and sexual abuse in the first degree. Metcalf's convictions stem from allegations he fondled and orally sodomized his stepdaughter, C.I. The investigation commenced when the Cabinet for Families and Children received a complaint that Metcalf had videotaped another step daughter, S.K., while she was undressing. A social worker and police detective interviewed S.K. at the Metcalf residence and she told them he had videotaped her taking off her clothes. A third stepdaughter, H.K., told the investigators he had exposed himself to her. H.K. also alleged that Metcalf had induced her to watch a pornographic movie with him. However, the grand jury only indicted Metcalf for the sexual abuse and sodomy of C.I. At trial, all three stepdaughters recanted, saying they fabricated the stories to try and "scare" Metcalf so he would stop drinking.

Metcalf made a pretrial motion *in limine* to exclude any evidence of inappropriate acts involving S.K. and H.K. Specifically, Metcalf wanted to exclude testimony regarding the videotaping of S.K. and the allegations he exposed himself to H.K. and made her watch a pornographic movie with him. The trial court allowed the evidence of Metcalf taping S.K. The Court ruled the evidence was admissible under KRE 404 (b) (2) since it explained why the investigators had gone to Metcalf's home. The trial court excluded the evidence of the alleged indecent exposure and viewing a pornographic movie with H.K., agreeing this was irrelevant. Nonetheless, the court ruled that evidence elicited during defense counsel's cross-examination of H.K. "opened the door" to admission of both the indecent exposure and pornographic movie evidence. Metcalf appealed arguing that the admission of these uncharged acts violated KRE 404.

Evidence of the videotape was a prejudicial, collateral fact inadmissible under KRE 404(b)(2). The trial court admitted the videotaping evidence under KRE 404 (b) (2), reasoning that this evidence explained why the investigators initially interviewed the children; therefore it was "so inextricably intertwined" with the charged offense that its exclusion would critically harm the Commonwealth's ability to present its case. The court disagreed. The court opined that it would have been simple for the investigators to honestly testify they came to Metcalf's home to investigate an allegation of child abuse without mentioning the videotape. Thus, they held that this was not a case where it would be necessary to suppress facts and circumstances relevant to the offense charged in order to exclude evidence of the uncharged act. The concern that abuse of KRE 404 (b) (2) will lead to the presentation of prejudicial, collateral acts is embodied by what happened in this case. The videotaping evidence was basically proof of Metcalf's bad character by evidence of a specific instance of conduct.

Defense counsel did not "open the door" to admission of evidence about indecent exposure and pornography. During cross-examination, defense counsel asked H.K. if Metcalf had ever committed an improper act upon her. H.K. answered in the negative. After H.K. recanted the accusations of the pornography and indecent exposure, the prosecution introduced into evidence H.K.'s written statement that included those allegations. Even though H.K. conceded she had made the same allegations to the investigators, the trial court allowed the Commonwealth to recall the investigators to testify that H.K. had described the incidents to them.

The appellate court held that defense counsel did not "open the door" to curative admissibility by asking H.K. if Metcalf had committed improper acts on her. Rather, the Commonwealth "opened the door" for H.K's arguably inappropriate evidence of Metcalf's good character by using the videotape incident as evidence of his bad character. Thus, the introduction and re-introduction of this highly prejudicial evidence was unduly prejudicial.

NOTE: many of the cases listed have not been finalized, please check to ensure the case is final before citing. The Kentucky Supreme Court has granted a motion for rehearing in the case of *Ragland v. Commonwealth*, discussed in *The Advocate's* February 2005 issue. ■

CAPITAL CASE REVIEW

by David M. Barron, DPA Capital Post Conviction Branch

U.S. Supreme Court

***Medellin v. Dretke*, 125 S.Ct. 2088 (2005)**
(per curiam dismissal as improvidently granted —O'Connor, Stevens, Souter, Breyer, dissenting)

The Court granted *certiorari* to determine 1) whether a federal court is bound by the International Court of Justice's (ICJ) ruling that United States courts must reconsider a claim for relief under the Vienna Convention on Consular Relations, without regard to procedural default doctrines; and, 2) whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation, to the International Court of Justice's ruling.

After *certiorari* was granted, President Bush issued a memorandum that stated that the United States would discharge its international obligations under the *Avena* judgment by "having State courts give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by 51 Mexican nationals addressed in that decision." Relying in part on Bush's statement, Petitioner filed an application for a writ of *habeas corpus* in the Texas Court of Criminal Appeals. Because this state court proceeding may provide Medellin with the reconsideration of his Vienna Convention claim that he seeks in the present petition before the Supreme Court, the Court dismissed the writ of *certiorari* as improvidently granted.

Issues that could independently preclude federal *habeas* relief: The Court mentioned five issues that could have precluded federal *habeas* relief if the Court had chosen not to dismiss the writ of *certiorari* as improvidently granted.

1) whether a violation of the Vienna Convention is cognizable in federal *habeas* proceedings: Federal statutory rights are nonconstitutional claims that are not cognizable in post conviction proceedings unless they rise to level a fundamental defect. Thus, to be entitled to relief, Medellin must establish that Vienna Convention Rights are either not included within "federal statutory rights" or that a violation of the Vienna Convention is a fundamental defect.

2) 28 U.S.C. 2254(d)(1) "contrary to" or "unreasonable application of" limitation on granting *habeas* relief: With respect to any claim the state court adjudicated on the merits, *habeas* relief is available only if the adjudication was "contrary to" or an "unreasonable application of" clearly established federal law, as determined by the United States Supreme Court. The state court that dealt with the Vienna Convention claim - - prior to *Avena* (ICJ ruling) - - arguably adjudicated three claims on the merits when it ruled that a) the Vienna Convention did not create individual, judicially enforceable rights; b) state procedural default rules barred the consular access claim; and, c) petitioner failed to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder. Petitioner would have to overcome each of these rulings to obtain federal *habeas* relief.

David M. Barron

3) bar on enforcing "new rules" in *habeas* proceedings: Since new rules generally are not enforceable in *habeas* proceedings, before relief could be granted, the Court would have been obliged to decide whether or how the *Avena* judgment bears on the Court's ordinary "new rule" jurisprudence.

4) necessity of a certificate of appealability to pursue the merits of a claim: A certificate of appealability is necessary to pursue the merits of Petitioner's claim on appeal. A certificate of appealability may be granted only where there is a substantial showing of the denial of a constitutional right. To obtain the necessary certificate of appealability to proceed in the Court of Appeals, a petitioner must demonstrate that his or her allegation of a treaty violation could satisfy this standard.

5) federal *habeas* relief is available only for claims that have been exhausted in state court: To gain relief based on President Bush's memorandum or the ICJ judgments, a petitioner would have to show that he or she exhausted all available state court remedies.

Ginsburg, J., joined by Scalia, J., concurring: would have granted Petitioner's motion to stay further proceedings in the United States Supreme Court pending Medellin's pursuit of remedies in state court that became available as a result of President Bush's memorandum.

O'Connor, J., joined by Stevens, J., Souter, J., Breyer, J., dissenting: believes three issues deserve further consideration: 1) whether the International Court of Justice's judgment in Petitioner's favor is binding on American courts; 2) whether Article 36(1)(b) of the Vienna Convention creates a

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judicially enforceable individual right; and 3) whether Article 36(2) of the Convention sometimes requires state procedural default rules to be set aside so that the treaty can be given "full effect." Thus, they would vacate the denial of a certificate of appealability and remand to the United States Court of Appeals for the Fifth Circuit for resolution of these issues.

Souter, J., dissenting: believes that the best course of action, in light of the President's memorandum, is to stay further action for a reasonable time as the Texas courts decide what to do. Since the majority did not agree to the stay, Justice Souter believes the next best course of action would be to address the questions on which *certiorari* was granted

Souter also believes that the Court's precedent on defaulting international law claims is inapplicable to Medellin's case, because he presents a Vienna Convention claim in the shadow of a final ICJ judgment that may be entitled to considerable weight, if not preclusive effect.

Breyer, J., dissenting, joined by Stevens, J.: believes that the Court should stay further proceedings. But, in the absence of majority support for a stay, these dissenters would vacate the lower court's judgment and remand for further proceedings rather than simply dismiss the writ as improvidently granted. This is mainly because the claim that American courts are bound to follow the ICJ's ruling is substantial, and the Fifth Circuit erred in holding the contrary. Thus, by vacating its judgment and remanding the case, we would remove from the books an erroneous legal determination that we granted *certiorari* to review.

***Deck v. Missouri*, 125 S.Ct. 2007 (2005)**
(Breyer for the Court; Thomas and Scalia dissenting)
(*shackling at the sentencing phase of capital case presumptively unconstitutional)*

Historically, going back to Blackstone, shackling a defendant has been disfavored. This principle has remained deeply embedded in American law, and has become "a basic element of the due process of law protected by the Federal Constitution." Thus, the "Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." This case dealt with whether shackling a defendant at the sentencing phase of a capital case implicates the same due process concerns and principles that bar shackling during the guilt – or – innocence phase of a trial, except under extraordinary circumstances.

Shackling during the guilt phase violates three fundamental legal principles: Physical restraints on the defendant during trial implicate three fundamental legal principles: 1) the presumption of innocence; 2) the right to counsel; and, 3) a dignified legal process. Each of these principles/rights is violated when a defendant is automatically shackled. "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process," because "[i]t suggests to the jury that the justice system sees a need to separate a defendant from the community at large." Second, shackles can interfere with the defendant's ability to communicate with his or her lawyers. Third, the use of "shackles at trial affronts the dignity and decorum of judicial proceedings that the judge is seeking to uphold." For these reasons, "due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case" to determine if physically restraining the defendant is necessary to ensure safety or to prevent the defendant from escaping. This inquiry must be "case specific, that is to say, it should reflect particular concerns, say special security needs or escape risks, related to the defendant on trial" not the crime for which the defendant is accused or had just been convicted of.

Shackling a defendant at the sentencing phase of a capital case violates due process and the Eighth Amendment: "The appearance of the offender during the penalty phase in shackles . . . almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community - - often a statutory aggravator and nearly always a relevant factor in jury decision-making, even where the State does not specifically argue the point. It also almost inevitably affects adversely the jury's perception of the character of the defendant." It "inevitably undermines the jury's ability to weigh accurately all relevant considerations - - considerations that are often unquantifiable and elusive - - when it determines whether a defendant deserves death." Thus, except when necessary on a case by case basis for security needs, shackling a defendant during the sentencing phase of a capital case violates both the due process clause and the Eighth Amendment.

Note: Capital defense attorneys should argue that evidence of future dangerousness, that is not admissible as a statutory aggravator, violates the principle of individualized sentencing because it undermines the jury's ability to consider the character and background of the defendant, and that prejudice should be presumed because the harm is "unquantifiable and elusive."

Prejudice from shackling at the sentencing phase is presumed: Like compelling a defendant to wear prison clothes at trial or forcing a defendant to stand trial while medicated, the effects of shackling a defendant cannot be shown from a trial transcript. "Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove beyond a reasonable doubt that the shackling

error complained of did not contribute to the verdict obtained." This standard can never be satisfied where the record contains no formal or informal findings by the judge on the need for physical restraints.

***Brown v. Crawford*, 125 S.Ct. 2289 (2005)**
(Stevens, Ginsburg, Breyer, and Souter, dissenting from the denial of a stay of execution)

Because the state has not disputed the merits of petitioner's challenge to the chemical protocol used by Missouri to carry out lethal injections, presented no expert testimony on the likelihood that a condemned inmate will be conscious during a lethal injection, and because the State of Missouri has not released the dose of lethal chemicals administered, the dissenting justices would grant a stay of execution. Further, assuming the Prison Litigation Reform Act of 1995 applies, see 42 U.S.C. § 1997e(a), the state conceded at oral argument before the district court that there is no available remedy that petitioner has failed to invoke. Nonetheless, Petitioner's reliance on the adjudication of a grievance filed by another death sentenced inmate in the same state raising the same claim concerning the lethal injection chemicals is sufficient to satisfy the exhaustion of administrative remedies requirement under the Prison Litigation Reform Act. *See Brown v. Crawford,* — F.3d —, 2005 WL 1164043 (8th Cir. 5/17/05)(Bye, J., dissenting), which is referred to by these four USSC justices.

United States Court of Appeals for the Sixth Circuit

***Harbison v. Bell*, 2005 WL 991377 (6th Cir. April 29, 2005)**
(Siler, J., for the court; Clay dissenting)

Application of the AEDPA's limitation on relief: Because Harbison filed his petition for a writ of *habeas corpus* after the effective date of the Anti-Terrorism and Effective Death Penalty Act, the court's review is "limited" by 28 U.S.C. sec. 2254(d). Under 2254(d), an application for a writ of *habeas corpus* may be granted only if the adjudication of the claim in the state court proceeding "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or if the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

The Supreme Court has emphasized that the statutory phrase "clearly established Federal law, as determined by the Supreme Court of the United States" refers to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state court decision. A state court decision is "contrary to" clearly established federal law if the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decided a case differently than the Supreme Court has on a set of materially indistinguishable facts. A state court decision involves an "unreasonable application of" federal law when the state court identifies the correct governing legal principle but unreasonably applies that principle to the facts of the case.

Appellate counsel was not ineffective for failing to present evidence of Harbison's background: The court held that trial and appellate counsel were not ineffective for failing to present evidence that Petitioner's sister murdered her own children and committed suicide, because Petitioner failed to show how he was affected by these events. Thus, the court held that, although the state court addressed only the deficient performance prong of ineffective assistance of counsel, the state court's determination was not an unreasonable application of clearly established federal law.

Note: Capital litigators should continue to argue that the AEDPA applies only to the individual subdivisions of a claim that is adjudicated on the merits. For instance, in *Harbison*, the state court never addressed the prejudice prong of an ineffective assistance of counsel claim. Thus, as in *Wiggins v. Smith*, 539 U.S. 510 (2003), *de novo* review applies to the prejudice prong of the ineffective assistance of counsel claim.

Standard for determining whether the state violated its duty to disclose evidence: To establish that the state withheld evidence in violation of the Constitution, a petitioner must prove that 1) the evidence at issue is favorable to him; 2) the State, either willfully or inadvertently, suppressed that evidence; and, 3) prejudice ensued. Prejudice is established where the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. To determine whether this standard is satisfied, the withheld evidence must be considered collectively.

Petitioner's withheld evidence claim is procedurally defaulted: In 1992, the Tennessee Court of Appeals held, in an unpublished opinion, that police investigation files were not exempt from disclosure under the state public records law. This ruling gave Harbison constructive notice that the police files could be obtained through a public records request. Yet, he did not file a public records request until 1997. Because the records could have been acquired five years earlier, the state court found that Harbison's withheld evidence claim was time-barred. The Sixth Circuit agreed.

Clay, J., dissenting: Judge Clay believed that Harbison's three separate requests for exculpatory evidence, which the trial court granted, but which the prosecutor refused to disclose, was sufficient to establish that Harbison did not procedurally default his withheld evidence claim by failing to file a public records request until five years after the evidence became available due to a change in law based on an unpublished opinion.

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Kentucky Supreme Court

***Bowling v. Commonwealth*, 2005 WL 628968 (Ky. March 17, 2005) (final on June 7, 2005)**
(holding that mental retardation claim was defaulted)

In 1990, Kentucky passed a statute outlawing the execution of the "seriously" mentally retarded. K.R.S. 532.140. Serious mental retardation was defined as significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period. "Significantly subaverage general intellectual functioning" is defined as an intelligence quotient (I.Q.) of seventy (70) or below. K.R.S. 532.130. These statutes only applied to a mental retardation determination made at trial.

In 2002, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court outlawed the execution of all mentally retarded people. After exhausting state and federal appeals, Bowling filed a CR 60.02 motion arguing that his execution was barred because of his mental retardation. Specifically he argued that 1) a mental retardation claim cannot be defaulted because *Atkins* places a substantive restriction on the government's ability to exercise a form of punishment on a particular class of individuals; 2) if a mental retardation claim could be defaulted, mental retardation establishes a person's innocence of the death penalty, and thus satisfies the miscarriage of justice exception to procedural default; 3) Kentucky's 70 I.Q. cut-off must take into consideration the margin of error and any other variables affecting the reliability of the I.Q. score; 4) K.R.S. 532.130 violates the 8th Amendment and *Atkins* because it only prohibits the execution of the seriously mentally retarded - - thus allowing the execution of the mildly mentally retarded; 5) the 6th and 8th Amendments to the United States Constitution, the due process clause, the equal protection clause, and Kentucky's mental retardation statutes entitle a death row inmate to both a judge and jury determination of mental retardation; 6) Kentucky's legislature intended that all death row inmates receive both a judge and jury determination of mental retardation; 7) the 6th and 14th Amendments require that a defendant who presents evidence of mental retardation is ineligible for the death penalty unless the jury unanimously finds that the defendant is not mentally retarded; 8) the burden of proof cannot be on the defendant by more than a preponderance of the evidence; 9) Kentucky's mental retardation statutes do not apply in post conviction, because the statutes directly state that the mental retardation determination is to be made at trial, and no other mental retardation provisions address post conviction proceedings; and, 10) the newfound importance of low intellectual capabilities in light of *Atkins* requires a new sentencing hearing for defendants who are borderline mentally retarded.

The Fayette Circuit Court dismissed Bowling's mental retardation claim, holding that it could not be raised in a CR 60.02 proceeding and that Bowling defaulted the claim by not raising it at trial. Bowling appealed to the Kentucky Supreme Court, which granted a stay of execution to address the issue.

CR 60.02 in criminal cases: A CR 60.02 motion names the same parties as the underlying judgment, because it is a continuation or reopening of the same proceeding that culminated in the judgment under attack rather than a separate action. It is available in criminal cases to resolve issues that could not have been raised at trial, on direct appeal, or by a motion for relief under RCr 11.42. Thus, CR 60.02 is an appropriate vehicle by which to seek relief from a judgment that is no longer valid because it violates a constitutional right that was not recognized as such when the judgment was entered.

Note: The court's recognition that 60.02 is available in criminal cases and that 60.02 is a continuation of the same proceeding that culminated in the judgment under attack means that 60.02 should fall within the "state post conviction or other collateral proceedings" language of the Anti-Terrorism and Effective Death Penalty Act and that such a motion should statutorily toll the one year statute of limitations for filing a federal *habeas corpus* petition. But, be wary of the "reopening" language in *Bowling* when discussing the nature of 60.02 proceedings.

CR 60.03: CR 60.03 permits an independent action for relief from a judgment "on appropriate equitable grounds." Under 60.03, a movant must 1) show that they have no other available or adequate remedy; (2) demonstrate that the movant's own fault, neglect, or carelessness did not create the situation for which the movant seeks equitable relief; and (3) establish a recognized ground—such as fraud, accident, or mistake—for the equitable relief. Further, an independent action for equitable relief from a judgment is unavailable if the complaining party has, or by exercising proper diligence would have had, an adequate remedy in the original proceedings. But, because a 60.03 motion attacks the original judgment, the parties to the original judgment must be named in a 60.03 motion.

Misjoinder of parties: Misjoinder of parties is not ground for dismissal of any action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Thus, the court, *sua sponte*, substituted the Commonwealth of Kentucky for Warden Haeberlin as the named Respondent in the action. Since the Attorney General's Office assumed representation of Warden Haeberlin, no prejudice exists from the failure to name the correct Respondent.

Kentucky's statutory prohibition against executing the mentally retarded: Kentucky law (1) prohibits the execution of a "seriously mentally retarded" offender, defined by the same three criteria established by the AAMR and the American Psychiatric Association and approved in *Atkins*, KRS 532.130(2); (2) defines the criterion of "significantly subaverage general intellectual functioning" as an IQ of 70 or below; (3) places the burden on the defendant to allege and prove that he or she qualifies for the exemption, KRS 532.135(1), but does not establish the standard of proof applicable to that burden; (4) requires that the issue be decided by a trial judge at least ten days prior to trial, KRS 532.135(2); and (5) is not retroactive but applies only to trials commenced after July 13, 1990, the effective date of the Act.

Note: Capital litigators should argue that the requirements of KRS 532.130-140 do not apply when attempting to establish mental retardation in post conviction proceedings, because, as the court stated in *Bowling*, those statutes apply only to trials commenced after July 13, 1990. Thus, post conviction courts should be free to apply more lenient procedures and standards for determining mental retardation.

Note: Capital litigators representing death row inmates sentenced to death after July 13, 1990, who raised mental retardation and were found to not be mentally retarded should continue raising *Atkins* claims in post conviction. They should argue that the trial court's mental retardation ruling is irrelevant because, until *Bowling*, the standard of proof on mental retardation was unsettled. Thus, unless the lower court specifically stated that a preponderance of the evidence standard was used, there is no way to know whether the court held the defendant to a higher standard of proof than permitted by law. As a result, any mental retardation determination made at trial should have no bearing on an *Atkins* claim, and post conviction death sentenced inmates should have the opportunity to relitigate their *Atkins* claims in the trial court under the preponderance of the evidence standard.

***Atkins v. Virginia* - - the prohibition on executing the mentally retarded:** *Atkins v. Virginia*, 536 U.S. 304 (2002), (1) held that the execution of a mentally retarded offender is proscribed by the 8th Amendment of the United States Constitution; (2) assigned to the separate states the authority to determine who is a mentally retarded offender; (3) cited with approval the three criteria established by the AAMR and the American Psychiatric Association as necessary to prove mental retardation; (4) cited uncritically the DSM-IV's recognition that a "mildly mentally retarded" person typically has an IQ of 50- 55 to approximately 70; and (5) cited uncritically Kentucky's already-existing statutory scheme proscribing the execution of mentally retarded offenders.

Atkins did not specifically address 1) whether its holding was retroactive; 2) whether the issue can be procedurally defaulted (waived) by a failure to timely assert it; 3) the time frame, if any, at which a finding of mental retardation is relevant, *i.e.*, time of offense, time of trial, or time of execution; 4) whether the issue is to be resolved by judge or jury; 5) allocation of the burden of proof and the standard of proof applicable to that burden, *e.g.*, preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt; and 6) what showing, if any, is required to trigger entitlement to a trial or evidentiary hearing on the issue.

Retroactivity of *Atkins*: Because *Atkins* recognizes a new constitutional right, it must be applied retroactively. Thus, if a condemned mentally retarded offender had been tried prior to the effective date of the Kentucky statutes prohibiting the execution of the mentally retarded, *Atkins* would prohibit that death sentenced inmate's execution.

Procedural default of an *Atkins* claim: A constitutional right can be waived by the failure to timely assert it. Because, Kentucky's statute prohibiting the execution of the mentally retarded was in effect at the time of Bowling's trial, the court held that Bowling waived his mental retardation claim by not raising it at trial.

Note: The court failed to distinguish between constitutional rights that protect a defendant's interests and substantive restrictions on the government. Capital litigators should continue to argue that an *Atkins* claim cannot be defaulted because it is a restriction on the state's ability to carry out a form of punishment against anyone who falls within a particular category. In that light, it is comparable to subject matter jurisdiction or juvenile status at the time of the crime. Only Arkansas and Kentucky have held that an *Atkins* claim can be procedurally defaulted. All other courts that have addressed the issue have ruled that an *Atkins* claim cannot be defaulted.

Kentucky recognizes the actual innocence of the death penalty exception to procedural default: The court held that the "miscarriage of justice" exception to procedural default applies where a constitutional violation has probably resulted in the conviction of one who is actually innocent. In the context of a death sentence, "actual innocence" means that there was no aggravating circumstance or that some other condition of eligibility had not been met. In that circumstance, the petitioner must show by clear and convincing evidence that, but for constitutional error at his or her sentencing hearing, no reasonable juror would have found the petitioner eligible for the death penalty. If a petitioner could prove that he or she is mentally retarded, the "miscarriage of justice" exception would be satisfied. But, Bowling is unable to make that showing.

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"Seriously" mentally retarded is the same as "mildly" mentally retarded. The court rejected the claim that by exempting only the "seriously" mentally retarded, K.R.S. 532.130 unconstitutionally permitted the execution of the mildly mentally retarded. 532.130 defines mental retardation in terms of an I.Q. of 70 or below, which is the same as the American Association of Mental Retardation definition of mental retardation cited in *Atkins*. Thus, "seriously" under K.R.S. 532.130 is synonymous with "mildly" used in *Atkins* and other states. It excludes any mentally retarded individual from execution.

Note: The court did not address whether the word "seriously" requires a higher showing on the adaptive deficits prong of mental retardation than the word "mildly." Capital litigators should argue that 532.130 remains unconstitutional because it would allow some mentally retarded people to be executed, since "seriously" places too high a burden on the defendant to establish the adaptive deficits prong of mental retardation.

Despite the legislature's use of the "IQ" as opposed to "IQ score," margin of error and other variables should not be considered: The court interpreted "IQ" to mean "IQ score," thus creating a bright-line 70 IQ score requirement, despite scientific proof that any one IQ score can be reliable or unreliable. It does not matter to the Court that, at a minimum, (due to the margin of error), a person with an actual "IQ" of 70 could obtain an IQ score as low as 65 and as high as 75.

In addition, because both the margin of error and the "Flynn Effect," (a phenomenon recognizing that IQ scores increase over time until the test is renormed), existed when Kentucky adopted KRS 532.130-.140, the legislature's failure to mention those two factors means that neither of them should be considered in determining whether the bright-line 70 or below IQ requirement of Kentucky's mental retardation definition has been satisfied.

Mental retardation at the time of the offense: The court held that, because diminished personal culpability is the rationale for not executing a mentally retarded offender, logic dictates that the diminished culpability exist at the time of the offense. Thus, I.Q. scores obtained close to the time frame of the crime "clearly outweigh(s)" I.Q. scores obtained during childhood. Any other factual determination would be clearly erroneous.

Note: K.R.S. 532.135 requires establishing mental retardation during the developmental period, but *Bowling* says that I.Q. scores obtained close to the time of the crime are more reliable. This is inherently contradictory. Since mental retardation is a permanent condition, with onset during the developmental period, any I.Q. scores obtained during adulthood are inherently less reliable, or even irrelevant as long as I.Q. scores were obtained during the developmental period. Kentucky is the only state that has held that I.Q. scores at the time of the offense outweigh I.Q. scores obtained during the developmental period.

Note: KRS 532.135 does not define "developmental period." Thus, capital litigators should argue, as necessary, that the developmental period goes beyond the age of 18, particularly since there is a wealth of medical and scientific literature saying that the brain does not fully develop until the mid to late 20s.

There is no constitutional right to a jury determination on mental retardation: The court held that, because the mental retardation exemption from the death penalty neither exposes the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor imposes upon the defendant a greater stigma than that accompanying the jury verdict alone, there is no constitutional right to a jury determination on mental retardation.

There is no statutory right to a jury determination on mental retardation: The court also rejected the argument that the section of KRS 532.135 stating that "the pretrial determination of the trial court shall not preclude the defendant from raising any legal defense during the trial" creates a right to a jury determination on mental retardation. Instead, the court held that 532.135 refers to other statutory defenses presented at trial in defense, exculpation, or mitigation of criminal conduct, *e.g.*, the mental illness or retardation defense described in KRS 504.020, the subjective elements of the KRS Chapter 503 defenses and of extreme emotional disturbance under KRS 507.020(1)(a).

Burden of proof to establish mental retardation is on the defendant: Because it is constitutional to assign the burden of proof on mitigating evidence to the defendant, the Court held that it is constitutional to assign the burden of proof on mental retardation to the defendant.

Standard of proof on mental retardation: The "preponderance of the evidence" standard applies to a determination of mental retardation.

Note: In all cases where it is unclear whether a preponderance of the evidence standard was applied during prior determinations on the defendant's mental retardation, capital litigators should argue that the death-sentenced inmate is entitled to another hearing on mental retardation.

Evidentiary hearing on mental retardation required when the defendant makes a *prima facie* showing of mental retardation: To obtain an *Atkins* hearing, a defendant must make a *prima facie* showing that he or she is mentally retarded. A *prima facie* showing is established where a defendant produces some evidence creating a doubt as to whether he is mentally retarded.

Keller, J., joined by Graves, J., dissenting:

1) defendant cannot waive a claim of mental retardation because the State is constitutionally prohibited from executing mentally retarded individuals;

2) trial courts are not limited to a bright-line rule of an intelligence quotient (IQ) test score at or below 70 when determining whether an individual is mentally retarded - - the margin of error and the "Flynn Effect" must be considered;

3) default/waiver should not be presumed from a silent record, particularly here, where no evidentiary hearing has been held and some indicia of Bowling's mental retardation exist;

4) KRS 532.175, which defines the scope of the Kentucky Supreme Court's review of death sentences, prevents the waiver/default of a mental retardation claim;

5) Kentucky's mental retardation statutes are insufficient for defining mental retardation in the post conviction context, because these statutes apply only to trials;

6) the appellate court made a finding of fact, which should have been made by the trial court. It is obvious that the trial judge denied Appellant's motion for a hearing solely because she thought mental retardation was only a matter of mitigation, which is clearly contrary to the holding in *Atkins* and the purpose of KRS 532.130-.140. Thus, the trial judge never determined whether the IQ test score on which Appellant relies was a "74," as it appears, or an "84," as implicitly found by the majority. In fact, she did not even determine whether the evidence overall was sufficient to warrant an evidentiary hearing. The majority opinion inappropriately made a finding in this regard. ■

In the February issue of *The Advocate*, our "Practice Corner" column addressed how *Batson* challenges might be litigated more effectively. It was noted that, in many cases, after a prosecutor justifies a peremptory strike against a minority juror by giving a reason such as, "I once prosecuted that juror's second cousin and that's why I struck her," nobody inquires into whether (a) that assertion is factually correct or (b) the family relationship would really be reason for the prosecution to strike her. In the situation of second cousins, for example, the juror might actually detest her cousin.

On June 13, 2005, the U.S. Supreme Court issued its much-anticipated decision in *Miller-El v. Dretke*, Case No. 03-9659. The Court held that Miller-El was entitled to federal *habeas* relief on the basis of the prosecution's race-based peremptory challenges. In coming to that conclusion, the Court scrutinized the trial prosecutor's *voir dire* questioning and then quoted from a published Alabama decision: "The State's failure to engage in any meaningful *voir dire* examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination."

So, when defense counsel argues against the prosecution's proffered justifications, the lack of prosecution *voir dire* on the topic should be part of the argument. In any event, the new *Miller-El* decision is required reading when preparing for an upcoming trial in a case and/or jurisdiction where race issues can be expected during *voir dire.*

6TH CIRCUIT CASE REVIEW

By David Harris, Post Conviction Branch

***Howard v. Bouchard*,**
405 F.3d 459 (6th Cir. 2005)

The petitioner, Frank Howard, was convicted of second-degree murder in Michigan for killing a repo man named Hankinson. Three men named Gapinksi, Chorney, and Carter, were with Hankinson, to help repossess a truck, at the time Hankinson was shot. Gapinski was the victim's brother. Chorney and Carter were shown photo lineups, but neither identified the petitioner as the shooter; in fact, both made misidentifications. All three witnesses were asked to come to two preliminary hearings, which were later continued, but not before the witnesses could see the petitioner seated at the defendant's table. An hour after the second hearing was postponed, all three witnesses independently identified the petitioner from a lineup. Gapinski then testified at a preliminary hearing at which he identified the petitioner. Defense counsel moved to exclude Gapinski's in-court identification, but the trial court admitted the testimony. At trial, all three witnesses testified, and all identified the petitioner as the shooter.

Petitioner Howard first argued that Gapinski's identification denied him due process because the identification at the lineup was impermissibly suggestive and unreliable. As pointed out by the Court, the burden rests with the petitioner to demonstrate that an identification is both suggestive and unreliable. *See Manson v. Braithwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000).

Gapinski testified that he saw the petitioner briefly at the defense table during both of the previous preliminary hearings. The Court pointed out that, both times, Gapinski saw him only briefly, and was not in a position to get a good look. Thus, although acknowledging that Gapinski's viewing of the petitioner in court was suggestive, the Court determined that it was "only minimally so." (Note: the dissent found these viewings to be "highly improper.") Similarly, the Court found no problem with Gapinski's lineup identification—the difference of the petitioner's 3" height difference and faded flat-top haircut from the rest of the lineup did not render the lineup suggestive, when none of the witnesses gave descriptions about his specific hairstyle, and the height difference was minimal.

Despite possible suggestiveness, the 6th Circuit pointed out that "reliability is the linchpin in determining the admissibility of identification testimony." *Manson*, 432 U.S. at 114.

David Harris

The Court restated the factors described in *Manson*, *supra*, and *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 407 (1972), for determining the reliability of an identification: (1) the opportunity of the witness to view the defendant at the initial observation, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the defendant, (4) the level of certainty shown by the witness at the pretrial identification, and (5) the length of time between the initial observation and the identification. These factors are weighed against any suggestiveness. When analyzing each factor in turn, the Court in this case determined that Gapinksi's identification was reliable. As such, Gapinski's identification of the petitioner was proper, and its admission was not error.

Next, Petitioner Howard made a due process challenge in federal court against Chorney's and Carter's identification testimony. However, defense counsel had failed to challenge their identification at the state court trial, and the issue was not raised before the Michigan Court of Appeals. As such, the argument was procedurally defaulted, and would be considered by the federal court only if reason existed to excuse the default. Ineffective assistance of counsel and/or ineffective assistance of appellate counsel may be adequate grounds to excuse a procedural default.

The 6th Circuit began addressing this issue by reviewing the trial attorney's performance for ineffective assistance of counsel. From the record, the Court determined that trial counsel's performance was deficient; however, after analyzing the admissibility of Carter's and Chorney's identifications in a manner similar to Gapinski's, (see above), the Court determined that their identification testimony was admissible and, therefore, counsel's failure to raise the argument did not prejudice the petitioner. Similarly, appellate counsel's "failure" to raise the unpreserved issue did not prejudice the petitioner because, even if argued, the issue could not have warranted reversal. Finally, because neither IAC nor IAAC was present, the due process claim against Chorney's and Carter's identification testimony was not properly exhausted before the state courts, and the claim was not considered on its own merits by the 6th Circuit. The district court's denial of the petitioner's *habeas corpus* petition was affirmed.

District Judge Gwin delivered the opinion, in which Judge Gilman joined. Judge Moore dissented.

Ruimveld v. Birkett,
404 F.3d 1006 (6th Cir. 2005)

(*Editor's Note:* The decision in this case pre-dated the U.S. Supreme Court's recent decision in *Deck v. Missouri*, 125 S.Ct. 2007 (2005), which deals with the shackling of a defendant in the presence of a trial jury. For a review of the *Deck* decision, readers are referred to the "Capital Case Review" column in this edition of *The Advocate*. However, the Sixth Circuit's decision in *Ruimveld* deals also with other principles, including harmless error and the unreasonable application of federal law.)

The petitioner, Chad Ruimveld, was convicted of poisoning a prison guard while an inmate at a prison in Michigan. He remained shackled throughout his entire trial, in full view of the jury, including during his own testimony. (Note: The trial was held in a special courtroom inside the prison.) Michigan's appellate court acknowledged that this shackling,in view of jury was error; however, it determined that the error was harmless. The federal district court for the Eastern District of Michigan granted the petitioner's *pro se* petition for a writ of *habeas corpus*, finding that the shackling prevented the petitioner's presumption of innocence from being upheld.

The 6th Circuit began its analysis by addressing the issue of whether or not established U.S. Supreme Court precedent holds that shackling is *always* prejudicial. Reviewing *Illinois v. Allen*, 397 U.S. 337 (1970), the 6th Circuit determined that the U.S. Supreme Court has not stated clearly that shackling is so prejudicial as to preclude harmless error review. In dicta, the *Allen* court noted that shackling and gagging should be used only as a last resort. Next, the 6th Circuit reviewed *Holbrook v. Flynn*, 475 U.S. 560 (1986), and determined that the Supreme Court instead seems to indicate that this kind of a claim should undergo an analysis for actual prejudice. Thus, the 6th Circuit held that harmless error analysis is applicable to the instant case, and as such, the rulings of the state court would be analyzed with the "unreasonable application of federal law" standard.

Despite whether or not this claim meets harmless analysis, the 6th Circuit pointed to *Estelle v. Williams*, 425 U.S. 501 (1976), *Allen*, *supra*, and *Holbrook*, *supra*, as indicative of the fact that the Supreme Court has repeatedly expressed concern that practices such as shackling can have "substantial or injurious influences on jury verdicts." Clearly, the defendant's right to be presumed innocent until proven guilty "is central to our system of criminal justice," and "actions that impinge upon this presumption are to be taken only when absolutely necessary."

The Michigan appellate court had concluded that the petitioner's shackling was not prejudicial, because it was clear from the facts of the case that the petitioner was already an inmate in prison on another unrelated charge. However, the 6th Circuit noted that the state court did not analyze whether the inmate-witnesses were similarly shackled, or review whether shackling was necessary considering that the trial was conducted *inside* a maximum security prison, with plenty of security all around. The respondent's brief failed to argue any additional needs for shackling, instead relying on the state appellate court's reasoning.

The 6th Circuit also noted that the case against the petitioner was entirely circumstantial and "not an open-and-shut case." The Court further noted that the jury deliberated for over three hours, and made inquiries to the judge about presumptions of innocence, reasonable doubt, and burdens of proof.

The 6th Circuit ultimately held that "the state court's cursory harmless error analysis unreasonably discounted the prejudicial effects of shackling noted by the Supreme Court in *Allen* and *Estelle*. This is especially true given that there can be little question that a defendant's shackling in front of a jury always interferes with the presumption of innocence to some extent and can create a substantially injurious inference of guilt in the absence of any circumstances that render shackles necessary." *Ruimveld v. Birkett*, 404 F.3d at 1017. Thus, the 6th Circuit affirmed the district court's grant of a conditional writ of *habeas corpus*.

Judge Cole delivered the opinion of the court, in which Judge Clay joined. Judge Siler dissented. ■

It is one of the most beautiful compensations of this life that no man can sincerely try to help another without helping himself.

— Ralph Waldo Emerson

PRACTICE CORNER
LITIGATION TIPS & COMMENTS

"Practice Corner" is brought to you by the staff in DPA's Post Trial Division.

Y'all Come Back Now, Y'hear –
How to RSVP to the Supreme Court's Invitation

In *Crawford v. Washington*, 541 US 36 (2004), the US Supreme Court changed its prior course in interpreting the Confrontation Clause, holding that "testimonial" out-of-court statements are inadmissible unless the declarant (the person who made the statement) is unavailable at the time of trial and the defendant has had an adequate prior opportunity to cross-examine the declarant. (For a complete description of *Crawford* and the Confrontation Clause, see the handout on the annual conference CD) In its opinion, the Court declined to give a definition of "testimonial" or to clarify in what cases it would and would not apply. These questions were "left for another day."

In explicitly leaving open key elements of *Crawford*'s holding, the Court was issuing a warm invitation to you and me to litigate our cases to go back to the Court and define *Crawford's* reach. In this Practice Corner, I give tips to help you prepare your case for appeal, hopefully to the Supreme Court.

A. Use your preliminary hearing and discovery to identify out-of-court (*i.e.* hearsay) statements that the Commonwealth may want to use at trial. Pay special attention to those statements by witnesses who may not later be available to testify (for example: domestic violence victims, child witnesses, anonymous informants, frequent defendants who are likely to be in trouble by the trial date).

B. File a motion *in limine* to exclude any out-of-court statements – At the hearing on the motion, clearly lay out the facts. Argue that any damaging hearsay statements are "testimonial" and that your client must have an opportunity to confront the declarant.

C. Federalize your issues – In all motions and objections, cite the US Constitution, 6th Amendment (Confrontation Clause) and 14th Amendment, the Kentucky Constitution, Section 11, the Rules of Evidence, and *Crawford*. Failure to cite any one of these may result in forfeiture of the claim by an appellate or post-conviction court.

D. Object at trial – Your pretrial motion and hearing should provide a good record of your arguments, but in many cases, the failure to object at trial may mean the issue is unpreserved. A brief objection citing you well-crafted pretrial motion *in limine* will suffice.

E. Motion for New Trial – Should your client somehow be convicted, file a motion for new trial arguing that the admission of out-of-court statements was error and merits a new trial.

F. Tell the Story of Prejudice – This will be what separates your case from the rest. At every opportunity, explain how the admission of the hearsay statement denies your client a fair trial. Why is that statement so important? If it is cumulative, explain why the other evidence is unreliable until it is validated by the hearsay statement. If it is ambiguous, explain how a juror could interpret that statement in an unfair and prejudicial way. Whatever the statement is, make the argument that the Commonwealth's case relies on it. Otherwise, why would the Commonwealth be seeking to admit it?

G Get the Post-Trial Paperwork Straight – Step one to getting to the US Supreme Court is getting out of the local court. Make sure to file the Notice of Appeal and other post-trial paperwork properly. If you are unsure how to do this, please contact Damon Preston.

In the next two to three years, some case will be going to the US Supreme Court to clarify *Crawford*. Following these tips may help yours be the one. Even if it is not, this approach will benefit your client at both the trial and post-trial stages.

Practice Corner is always looking for good tips. If you have a practice tip to share, please send it to Damon Preston, Appeals Branch Manager, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601. ■

Great things are not done by impulse, but by a series of small things brought together.

— Vincent Van Gogh

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E-Mail: Tim.Shull@ky.gov

Further information about Kentucky public defenders is found at: http://dpa.ky.gov/

Information about the Louisville-Jefferson County Public Defender's Office is found at: http://www.louisvillemetropublicdefender.com/

KACDL Events

- KACDL board meeting will be on July 8, 2005. Location: TBA Frankfort
- 19th Annual Seminar will be held Friday, November 18, 2005 from 8:00 a.m. until 5:00 p.m. at Caesar's Palace in Elizabeth, Indiana. (Right outside of Louisville, Kentucky.) There is a room discount for anyone that calls in within 30 days of the event.

  The cost is as follows:
  $200.00 KACDL Attorney member
  $250.00 non-member attorney
  $100.00 KACDL non-attorney member
  $125.00 Full-time Public Defender
  $ 50.00 Law Student

KACDL
Charolette Brooks
Executive Director
Tel: (606) 677-1687/(606) 678-8780/(606) 679-8780
Fax: (606) 679-3007
Web: kacdl2000@yahoo.com

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THE ADVOCATE

Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

Address Services Requested

Upcoming DPA, NCDC, NLADA & KACDL Education

**** DPA ****

Litigation Practice Institute
Kentucky Leadership Center
Faubush, KY
October 9-14, 2005

Annual Conference
Northern KY
June 12-14, 2006

**** KBA ****

Annual Seminar
Northern KY
June 14-16, 2006

NOTE: DPA Education is open only to criminal defense advocates.

For more information:
http://dpa.ky.gov/education.html

For more information regarding KACDL programs:

Charolette Brooks, Executive Director
Tel: (606) 677-1687
Fax: (606) 679-3007
Web: kacdl2000@yahoo.com

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For more information regarding NLADA programs:

NLADA
1625 K Street, N.W., Suite 800
Washington, D.C. 20006
Tel: (202) 452-0620
Fax: (202) 872-1031
Web: http://www.nlada.org

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For more information regarding NCDC programs:

Rosie Flanagan
NCDC, c/o Mercer Law School
Macon, Georgia 31207
Tel: (912) 746-4151
Fax: (912) 743-0160

**** NLADA****

Annual Conference
Orlando, Florida
November 16 - 19, 2005

**** KACDL****

Annual Conference
Caesar's Palace
Elizabeth, Indiana
November 18, 2005

**** NCDC****

Trial Practice Institute
July 17-30, 2005