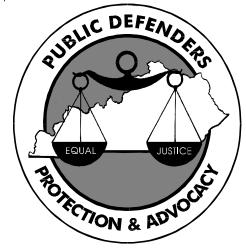


# The Advocate



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

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## BUILDING A RELATIONSHIP WITH YOUR CLIENT

### JUVENILE SEXUAL OFFENDERS: SHOULD THERE BE CHANGES IN THE LAWS?

**ROSA PARKS**  
**1913-2005**



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"Actually no one can understand the action of Mrs. Parks unless he realizes that eventually the cup of endurance runs over, and the human personality cries out, 'I can take it no longer.'"

— Dr. Martin Luther King, Jr.

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

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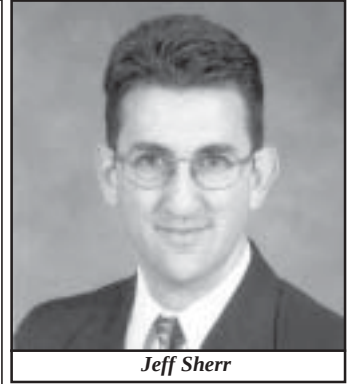
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**Department of Public Advocacy**

Education & Development  
 100 Fair Oaks Lane, Suite 302  
 Frankfort, Kentucky 40601  
 Tel: (502) 564-8006, ext. 236  
 Fax: (502) 564-7890  
 E-mail: Lisa.Blevins@ky.gov

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**FROM**  
**THE**  
**EDITOR...**



*Jeff Sherr*

Jon Rapping, the Training Director for the Georgia Public Defender Standards Council and a recent faculty member at the DPA's Litigation Persuasion Institute, explores both basic and advanced techniques in **Building a Relationship With Your Client**. Included in this article is Jon Rapping's approach to the age-old question facing criminal defense lawyers: In your first meeting with the client, do you ask the client to tell you what happened? The author takes the position that this is not the best approach. A sidebar by Jay Barrett, DPA Trial Division Director, suggests that more often than not you do want to ask what happened.

In recent months, sweeping changes to adult and juvenile sexual offender statutes have been recommended and bills are being pre-filed in the days prior to the next session of Kentucky's General Assembly. In **Juvenile Sexual Offenders – Should There be Changes in the Laws**, Gail Robinson an attorney in DPA's Juvenile Post Dispositional Branch, addresses proposed revisions to juvenile statutes and cautions against making changes to a process which has lead to the Department of Juvenile Justice reporting 97% of committed sexual offenders successfully complete the treatment program.

Robert E. Hubbard's **Welcome To My World: Outside Looking In** column returns with a focus on the programs offered by Kentucky's Department of Corrections to prepare inmates for reintegration into society.

On October 25, during the Public Employee Recognition Week, Public Advocate Ernie Lewis sent a letter thanking DPA staff for their efforts on behalf of our clients. This inspiring email is reprinted in this edition. ■



## BUILDING A RELATIONSHIP WITH YOUR CLIENT

by Jonathan Rapping, Training Director  
Georgia Public Defender Standards Council

One of the most important facets of the defense attorney's practice is the ability to develop and foster a good relationship with her client. The energy required to build an advantageous attorney/client relationship is even greater for the public defender than it is for retained counsel. Our clients don't choose us, they have little reason to trust us, and they have likely heard tales about the inadequacies of court appointed counsel. At best, our clients are often inclined to see us as far inferior lawyers to our retained counterparts. At worst, they are disposed to believe we don't much care about them or their case. To overcome the attitudes our clients often have of us we have to demonstrate competence as attorneys, commitment to their case, and concern for their well-being. Earning the trust and confidence of our clients requires that we do our best to view the world from their shoes. It calls for us to have patience, compassion, and a dedication to developing the relationship. It requires positive interaction.

A healthy relationship will facilitate the representation of your client in many ways. It will make it easier for you to obtain reliable information from the client that can assist in every aspect of the case. It will instill in the client confidence in the advice you give thereby saving tremendous time and effort getting the client on board with a recommended course of action. It will minimize the client's need to have you constantly reassure him that you are working on his case, a process that can otherwise be very time consuming. The time and thought you put into the development of your relationship with the client will also transform the client's negative image of the public defender and allow him to realize that he has a zealous advocate upon whom he can count. While this last consequence may only be a psychological benefit to you as the lawyer, empowering the disenfranchised in our criminal justice system is a worthy aspiration standing alone.

As vital as it is to our practice that we cultivate a productive relationship with our clients, very few of us devote the time and thought required to maximize our ability to do so. Some of us ignore the import of the attorney/client relationship. Even worse, others may view the client as a hindrance that makes it more difficult to do "our" work. The lawyer that holds this point of view creates an impediment to achieving a successful outcome in the case. More importantly that lawyer does a great disservice to the person he has committed to represent, his client.

Developing your relationship with your client must begin with the first meeting. You must continue to nurture your relationship with your client in subsequent meetings. You must be cognizant of how your behavior outside the context of attorney/client meetings might impact your client's perception of you and, therefore, your relationship with your client. We must view the process of relationship building with our clients as occurring at every phase of the case and with everything that we do in the case. This is necessarily a time-consuming and thought-intensive process.

While the time it takes to develop a rapport will necessarily vary among clients, it will never happen immediately. Fostering this bond will take time on your part. In order to effectively forge this relationship you will have to appreciate your client's perspective of you, the allegations against him, and the criminal justice system. Taking the time to familiarize yourself with your client's attitudes in these areas will be time well spent. However, there are a couple of generalizations upon which you can likely rely.

First, understand that your client will not likely take on faith that you are truly on his side. That is a trust that you will have to earn. Your client probably sees you, along with the prosecutor who is trying to send him to prison and the judge who ultimately might place him there, as an insider in "the system." On the other hand, your client will certainly see himself as an outsider to that system. Until he identifies you as standing with him on the outside fighting those on the inside, he will be reluctant to trust you. This reluctance will impact the degree to which he cooperates with you on the preparation of his case and to which he relies on the advice you provide him.

Second, consistent with the adage "you get what you pay for," your client probably harbors doubts that you will really work hard for him. He's apt to think you don't really care about him or his case. He's prone to be skeptical that you are doing any work on his case beyond the times he sees you in court or during attorney/client meetings. He almost surely assumes that you are paid by the case and therefore resigned to ultimately coaxing him to take a plea. This attitude will certainly undermine your ability to persuade him that a recommended course of action is really in his best interest.

Therefore, demonstrating to your client that you are on his side and his side only and that you are committed to putting in the time and effort to which he is entitled is of paramount importance. Since your ability to earn your client's confidence

and respect will be the result of actions, not words, you will not completely earn the confidence and respect of your client during your first meeting. However, understanding that your client likely feels this way will allow you to begin to establish a mutually beneficial attorney/client relationship from your first meeting. The following are some things to consider as you begin the process of relationship building with your client and as you continue to develop that relationship. You must keep these things in mind from the outset of the case and consider them throughout.

**a. Know your trade, educate your client**

As you prepare to meet your client for the first time, keep in mind that what he is going through is likely foreign to him. Even people who have prior records can be very ignorant to how the criminal justice system works. The process is likely both terrifying and confusing to your client. Before you first meet with your client, do your homework. By demonstrating competence and knowledge at your first meeting with your client, you will do much to ease his mind.

You will be responsible for ensuring that your client understands the charges against him, the possible penalties, and potential defenses. Explain the attorney/client privilege and the importance of his not speaking to anyone about the facts of the case without first consulting you. Provide your client with the names of people who may be contacting him on your behalf. Obtain copies of any reports or documents available, such as police reports and charging documents, and review them with your client.

It is your job to ensure that your client knows the procedural progression of the case and the law governing upcoming hearings. Explain to him what he can expect at the next hearing and what will happen thereafter. As best you can, give him a timeline so he understands the potential life of his case and the chronological order of important events.

For clients who are incarcerated, make sure you are familiar with the legal criteria for determining pretrial release and the various pretrial release conditions your client may expect if released. You should also be familiar with procedures available for reviewing a bail determination.

As the case develops you must also keep client abreast of any legal issues relevant to his case and factual developments as they occur. By doing all of these things, in addition to fulfilling your duty to your client to provide him certain information, you will begin to demonstrate your competence as a lawyer. The greater your command of law and procedure, the more headway you will make towards establishing your client's confidence in you.

However, it is not just what you say and what you do that will shape your relationship with your client. How you "say and do" will be equally important. Keep in mind the message you send your client from your words and deeds.

**b. Show your client that you are willing to presume he is innocent . . .**

As you work to convince your client that you are on his side, you must remain conscious not to convey the message that you think he is guilty. Your client will likely initially see you as another person in the system who does not believe in him. He will see you as an insider who he will have to convince of his innocence. He probably holds the attitude that you will work harder for him if you believe in his innocence than if you think he is guilty. You must work to help him realize that how hard you fight for him is independent of his guilt or innocence. However, until that time comes, there is a great risk that your client will withdraw from the relationship if he senses that you assume he is guilty.

At first blush, there can appear to be a tension between your desire to learn everything that the client knows and your ability to appear as though you don't assume he was involved in the alleged offenses. How do you solicit from your client names of witnesses without implying that you believe he was present at the crime scene? How do you ask your client about physical evidence without insinuating that you think he was involved?

Keep in mind that your goal is to get the information. You don't need an admission from your client to do this. A technique that will allow you to elicit the information you need, without making the client feel that he has to make an admission to you, is by simply rewording the question. Rather than asking, "who saw you do this?" consider asking, "who will say they saw you do this?" Instead of "in which pocket did the police take the gun?" ask, "in which pocket will the officer claim he found the gun?" Built into your question is an assurance that you don't necessarily credit these witnesses.

This technique will allow your client to give you the information you need, if he knows, without admitting his involvement. To the first question he may respond, "man, I think it's that dude Junebug who is trying to say I did it, me and him never got along." To the second question he might answer, "that lying cop is saying the gun was in my inside coat pocket . . . that guy is always trying to set someone up." Notice that these answers provide you the information you need without requiring your client to admit his guilt to you, a stranger who he has no reason to trust at this point.

Equally important, it allows you to seek the information you desire without appearing to have assumed his guilt. It leaves the client an out so he need not choose between giving you accurate information and maintaining the appearance of innocence – something he may feel he needs to do at this stage to ensure that you advocate zealously for him. While you must seek to assure your client that the zealotry of your advocacy will not be impacted by any personal opinions about his guilt or innocence, it will take time before your

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client is convinced of the sincerity of your pledge. At least until that time, you must avoid sending the message that you believe the allegations against him.

**c . . . while you ensure your client that how zealously you advocate for him is independent of your personal assessment of his guilt or innocence**

That your personal assessment of your client's guilt or innocence is independent of how zealously you advocate for him is axiomatic to your role as a criminal defense attorney. You must believe this and you must work to convey this to your client. Your client must come to believe this if he is to maintain confidence that you will continue to zealously advocate for him as the evidence against him develops. Consider explaining to your client at the outset that determining whether he did the things with which he is accused is not your role. You should explain to your client that your role as his lawyer is not to attempt to determine guilt or innocence. Let your client know that whether he did the things he is accused of or not, your sole mission in this case is to help him reach an outcome that he desires.

Along these lines, consider explaining to your client that if there is a trial, whether or not he is guilty will be determined by the fact-finder's assessment of the evidence presented. Therefore, you must figure out what evidence will be presented by the government and the strengths and weaknesses of that evidence. Explain that what actually happened may or may not be accurately presented through the evidence. Make clear that you personally have not drawn any conclusions about what actually happened and that your opinion in that regard is irrelevant. Therefore, your sole concern is with the evidence that is available and your assessment of how the fact-finder will view that evidence. Explain that a witness who is not being truthful, but who comes across as honest and reliable, must be cause for concern. Likewise, a truthful witness, who has credibility issues that render him unbelievable, might not help the government make its case against him. By having this conversation you can begin the process of discussing damaging evidence as concerns that you and he must consider without your client feeling you have personally formed an opinion about the quality of the evidence and, therefore, his guilt.

You should use subsequent meetings to help your client understand that what the evidence might suggest to the fact-finder is your sole focus. Refrain from expressing your beliefs about the evidence and instead discuss your opinion about how the fact-finder will view the evidence.

Assume you interview a very reliable, disinterested government witness who knows your client well. The witness is confident that she saw your client commit the charged offense. When you meet with your client to discuss what you have learned think about how you will characterize this

evidence. Resist saying, "the witness saw you commit the crime and she sure is believable." Consider saying, "this witness will say that she is confident that she saw you commit the crime." You might add, "in my opinion this witness is going to appear very credible to the jury." You may want to throw in, "this is a problem we need to consider." Now you can discuss this witness and how she might impact how you and your client proceed without conveying that you personally think she is telling the truth or that your client is guilty. By discussing evidence in this manner you also reinforce your earlier assurance to the client that your concern is the evidence and how it will be perceived by the fact-finder, not your personal assessment of the quality of that evidence.

As another example, imagine that you receive laboratory results from the government indicating that DNA found at the crime scene matches a DNA sample from your client, very damaging evidence given that until this point your defense was likely mis-identification. It is not necessary to say to your client, "your DNA was found at the crime scene." This suggests that you are now convinced of his guilt, something that you have explained to him is irrelevant to how you carry out your duties as his lawyer. Rather consider having the following discussion:

The lab results indicate that DNA found at the crime scene matches your DNA. With this evidence it is going to be very difficult to convince a jury that you were not at the crime scene. We have to really reconsider whether sticking with a mis-identification theory is the best strategy. Let's talk about your options in light of this evidence.

The client invested in your believing in his innocence may continue to insist that the lab results are wrong. Avoid having a discussion about the accuracy of the results. It could appear that you are convinced of your client's guilt due to these results. Such a discussion is not necessary. Consider responding to his assertions as follows:

I don't know if the lab results are right or not. What is important to me is how these results will be viewed by the jury. We can look into whether an expert might disagree with these results but, if we are unable to find one, we have to deal with this evidence. I fear that it will be very difficult to convince a jury that the DNA at the crime scene did not come from you. Therefore, we need to discuss our options.

Using this technique you can have the same discussion about the impact of the evidence without implying that you personally have drawn any conclusions based on it. By relating to your client this way you will reinforce your pledge that you are on his side and that you will not waiver from that position in the face of harmful evidence. This will allay his concerns that you are constantly trying to figure out if he is guilty and that the zealotness of your advocacy will

depend on your conclusion. This will allow you to earn your client's trust and allow him to consider your advice without skepticism that you may have an ulterior motive other than his welfare.

**d Do you really want to ask your client what happened?**

As should be apparent from the discussion in the above two sections, you should avoid having a conversation with your client about what he claims happened, at least until you are sure you have sufficiently developed a relationship with him. While there is disagreement among defense attorneys about whether we should ever ask our clients to tell us what happened, it is certainly an unwise strategy early in the development of our relationships with our clients. There is little, if any, benefit to making this inquiry early on, if ever. There are serious dangers to forcing the client to commit to a version of events prior to establishing a relationship with his lawyer. The thoughtful defense attorney should consider techniques for obtaining the information she needs, without putting the client in this position.

Our clients have little reason to trust us when we first meet and have no way of knowing how the information they provide will affect the zealousness of our representation. As discussed above, initially your client likely believes that the energy you put into getting him out of his predicament will be directly related to your belief in his innocence. Therefore, when you first meet your client, if given the opportunity, the client has a great incentive to try to paint a picture of innocence for you. This is true both with respect to the factually guilty client as well as the innocent client. With respect to the innocent client, there is some version of facts out there that point to his guilt. Otherwise he would not have been arrested. There is a risk that the innocent client will lean towards "fudging" the facts to more clearly paint a picture of his innocence.

Either way, there is a strong likelihood that if forced to give you a version of events at that first meeting, it will not be an accurate version. The dangers inherent in this conclusion are obvious. First, you will likely be relying on unreliable information as you begin to prepare your client's case. Second, your client may become wed to this version. As you learn new information that suggests your client's initial version was inaccurate, your client may develop a stake in convincing you that he did not lie to you initially. He may fear that once he loses your trust you will cease to zealously advocate for him. You may find yourself in a predicament where your client insists on you pursuing an untruthful account of events that are inconsistent with the developing evidence.

By insisting on your client providing you a version of events at the initial meeting, you may cause your client to commit to an untruthful account that you will have difficulty getting him to retract. You may also negatively impact your ability to acquire truthful information from him in the future.

*Rapping Continued on page 8*

## **The Narrative Interview as a Foundation to Client Relationships**

**by Jay Barrett, DPA Trial Division Director**

In reviewing client complaints pursuant to DPA Policy 14.09 Complaints about Client Representation, it appears that the vast majority have to do with communications in the attorney client relationship, including too few meetings with the client and not enough information sharing (discovery review, progress of investigation, etc.). Following Jon Rapping's advice about relationship building is a great approach to improving those communications, and will benefit both our attorneys and their clients. This column is intended to give you one other tool in improving client relations and address the question **Do you really want to ask your client what happened?**

I suggest that more often than not you do want to ask the client what happened, for a very simple reason: more often than not, the client **wants** to tell you what happened. You have structured the interview to gain the background information that will both put your client at ease and give you information that is essential to bail advocacy and understanding your client. You have explained to them the purpose and importance of attorney client confidences. The detained client has anxiously awaited this meeting and has likely either thought about or rehearsed (mentally or verbally) what they want to tell you about the charges, whether that involves denial, admission, or explanation.

Despite our stern advice not to speak with anyone else about the case, experience teaches that our clients will tell their story to others. They will tell it to cellmates who have incentives to retell it to prosecutors. They will tell it to friends and family, in conversations in monitored visiting rooms, on phone lines that are recorded, and in mail that is subject to inspection. By listening to their story in a way that clients feel they have been heard we can minimize the risk that our clients are telling others what should be within our confidential relationship because they feel they have not been heard by their own attorney.

The legal profession's interviewing skills have long been criticized, both in manner (use of legal jargon in an attempt to come across as knowledgeable) and in substance. The client has information we don't which may be critical to the case, and even to the immediate decision about what investigation to undertake. A common problem for lawyers is premature issue identification (immediately identifying a legal issue and developing it at the expense of building rapport and fully developing all the facts). How can we blame clients who we interrupt or press for details every minute for feeling that they have not had a chance to express themselves to us? The response to these concerns that is spreading to all areas of the legal practice is the narrative interview.

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When you do want to know what happened, employing a narrative interview technique allows the client to be heard. Begin with an open ended question such as "What happened that led to your being charged?" Allow the client to answer fully while you listen and maintain eye contact. Take notes on details after the client finishes the narrative story. The techniques you learned for direct examination at the DPA Litigation Persuasion Institute, such as active listening and "looping," were borrowed from studies of effective interviewing. Nod frequently and use other open body language to show you are paying attention. When you go back to ask for details, incorporate part of the client's last answer in your question, e.g. "What happened after the blue car sped away from the liquor store?" rather than "What happened next?" This assures the client you heard them.

This initial fact interview is not the time to express skepticism about some parts of the clients' story or tell them a jury may not believe that. As Jon suggests, that is best done once you have done investigation and discovery and can explain the difficulty of confronting the specific evidence that makes part of the story implausible, not at this stage while you are trying to build a relationship of mutual trust. Similarly, pressing for details the client isn't comfortable going into at this first fact interview is counterproductive to the relationship. Once you have shown your client you are working zealously by sharing discovery and investigation, you can explain the importance of the facts you are asking about in a way that persuades the client to share them then. You certainly don't want to wait to learn them midtrial when deciding whether the client testifies or (God forbid) when the client is on the stand.

Knowing or sensing when a client wants to tell you their story isn't a science, it's a human ability we have (though perhaps impaired to some degree by our legal training). In each case, how to conduct the interview is a decision entrusted to your good judgment. Although I agree with Jon's points that we should not insist on or force clients to tell their side of the story (much less "the truth") at the first interview, I find that most clients prefer to. Affirmatively preventing a client from communicating the facts they want to inform you of does not enhance the attorney client relationship, and increases the risk that you will hear the client's story at trial through other witnesses. The information gained may also assist you in conducting an early investigation of the defense version of events, not just the prosecution's.

*Rapping Continued from page 7*

For example, suppose you represent a client who is charged with a shooting. In fact your client did shoot the complainant but did so in self-defense. At the first meeting you ask your client for "the truth." He insists that he was not present when the shooting occurred and the witnesses are mistaken about the shooter's identity. He tells you he doesn't know who any of the witnesses are since he was not present. As you begin to learn more information that suggests that your client has a strong self-defense claim you discuss this option with your client. Your client may be so wed to his first story, and afraid that you will think he is a liar, that he continues to insist that he was not present.

By asking him to tell you what happened at the first meeting you have caused your client to be committed to an untruthful account that is not your best defense theory. You have also eliminated your client as a source of useful information. Although in reality he likely knows who was present at the time of the shooting, because he is wed to his initial version he may continue to insist that he does not know who the witnesses are.

In order to assure that you avoid this dilemma, you may want to affirmatively keep your client from committing to a version of events at the initial meeting. If you are going to have that discussion at all it may be more productive once you have developed a relationship with your client and after you have both had a chance to evaluate the evidence against him. However, in order to avoid getting in the predicament described above, you may consider having the following discussion with your client at the first meeting:

We have discussed the attorney/client privilege and what that means. For one thing, the attorney/client privilege means that you are not stuck with anything you have told me. Unlike other people, I can not be forced to reveal discussions we had about the case. Therefore, if you ever tell me something, and later find it necessary to change what you told me, you are free to do that. I understand that there are many reasons why you might tell me something that is inaccurate and that you may later want to change. I understand that we have not developed a relationship and that you may not trust me right now. I also understand that people can remember things differently as time passes. Whatever your reason for needing to tell me something different from what you may have said before, understand that you maintain that flexibility with me.

Having said that, I don't want to talk about what you remember happening just yet. What I'd like to do is to read the affidavit in support of the arrest warrant to you so you have an idea of what the government is saying happened. Understand that some of what the government says may be untrue. But I still want to make sure you know what they are saying happened because that is what we have to deal with.

After I read you the government's version, I want to talk to you about who you think the government's witnesses might be and reasons why you think they might be saying what they are saying. It is very important that we locate and interview all of these witnesses. It is especially important that we find the most damaging witnesses even if they are lying. By finding them and talking to them, they may say things that will be different from what they say at trial. Then we can show they are lying.

It is also important that we learn as much as we can about any bad evidence against you because we want to think of ways to try to keep that evidence out of the trial. The sooner we learn about bad evidence and damaging witnesses, and the more we learn about them, the better prepared we can be to try to keep that evidence out of the trial. It will be much harder to keep the evidence out of the trial, or show that it is unreliable, if we learn about it later rather than sooner. So I am really going to need your help in trying to figure out who these witnesses might be and why they would be saying what they are saying.

This conversation achieves several objectives: 1) it helps the client to understand that he is not wed to anything he tells you should he happen to give you unreliable information that he later wishes to correct; 2) it helps the client to appreciate that the focus of the discussion is on what the government is alleging, regardless of the truthfulness of the alleged facts, and that you don't necessarily credit that evidence; 3) explains to the client why it is important for him to help you learn what the evidence against him may be. This will make it easier for your client to talk about the damaging evidence without feeling defensive. He will better understand that he can provide you witness names, and discuss the evidence against him, without conceding that the government's theory is accurate. He better understands that you will not draw any conclusions about the accuracy of this evidence based on your discussions with him. This will greatly enhance your ability to have your client provide you useful information.

#### **e. The "plea" discussion**

One undercurrent that usually exists in every case you will have is that the client wonders if you will try to force a plea on him. Some clients will be more overt about their suspicions than others. However, most, if not all, clients who are appointed a lawyer that they do not know, either from past experience or reputation, are concerned that they have a "plea lawyer." Deal with this issue during your first in depth meeting with you client. Let your client know at the outset that inevitably there will be a plea offer made and that it will then be your duty to tell him what it is. Tell him that does not mean you think he should take a plea. Then assure your client that you are willing to try his case and that you will be preparing for trial unless and until he tells you to do otherwise.

There will inevitably come a time that the government gives your client a plea offer. At that point you will need to have a discussion with your client about that plea. The further into the case you are when the discussion occurs, the greater the chance that it may appear that you are trying to push a plea on him based on your assessment of the evidence. Your client will wonder why you are now, all of the sudden, talking to him about a plea.

If your client suspects that you are afraid to go to trial or that you want him to take a plea because it will make your life easier, he will never follow your advice regarding a plea. Every client wants to be assured that he has a "trial lawyer." Consider laying the groundwork for that inevitable discussion at the initial meeting in the following manner:

Mr. X, do you know what a plea offer is? It is where the government agrees to let you plead guilty to a less serious offense and in return promises not to go forward with the more serious charges. Now Mr. X there are some lawyers who are considered "plea lawyers". They try to get their clients to take plea offers because they don't want to go to trial. Mr. X, I AM NOT ONE OF THOSE LAWYERS. I do this work because [I like fighting for folks who otherwise wouldn't be able to afford a good lawyer], [I don't like the way the government goes after people and I like fighting them], [any other reason]. I like going to trial and unless you tell me to do otherwise, I am preparing as though we will go to trial.

However, understand that at some point the government is going to come to me with a plea offer for you. This offer is not mine, it is yours. It is my job to tell you what the plea offer is when one is made. So, at some point I will have to come to you to tell you that the government wants to offer you a plea. When that happens, do not think that I am trying to get you to take that plea. It is my duty to you to tell you when the government makes you a plea offer. When that day comes, if you want to discuss the plea offer I will be glad to do that. If you don't want to, simply tell me that you have no interest and we will continue to prepare for trial. You can always come to me at any time if you want me to look into a plea offer for you but until that happens I will be preparing for trial.

By having a discussion like the one above you will help to prepare your client for the inevitable day when you will have to relay a plea offer. You will increase the chances that when that day comes he will not assume that you are trying to force a plea on him because you are discussing a plea with him. You have also assured him that you are willing and preparing to go to trial and helped him understand that your willingness to go to trial is not inconsistent with your duty to relay a plea offer to him. The message that you are willing and prepared for trial, a message you reinforced throughout your

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relationship with your client, will instill confidence even if he ultimately wishes to take a plea.

**f. Show concern about your client as a person**

Another factor you must overcome is that your client will likely see your world as one that is completely disconnected from his. This view will enforce his notion that you and he are on different sides of the criminal justice divide. While you and your client likely come from very different backgrounds and mostly experience dissimilar life experiences, you are likely to share some commonalities. Show concern about the things that are important to your client and demonstrate an interest in learning who your client is. Take the time to ask about his family, his interests, and his life experiences – obviously being sensitive not too overstep your bounds by delving into sensitive areas too early in the relationship. Make sure to follow up these discussions by continuing to touch on these areas throughout the relationship. For example, if your client tells you his mother is ill, think to ask about his mother at future meetings. If he tells you he is a Georgia Bulldogs fan, comment on a recent game at some future visit. This technique conveys to your client that you have an interest in him as a person.

**g. Be Yourself!**

Another obvious issue that will likely alienate your client from you is that you are a lawyer and he likely is not. He probably sees you as a member of a professional class with which he can't identify. This difference almost certainly also adds to his doubt that you can identify with him. Be cautious not to exacerbate the perception of this divide by speaking in legalese or talking "like a lawyer." Be yourself! Talk to your client the way you talk to any regular folks you meet on the street. Just as you don't talk to the clerk in the grocery store in a manner that conveys that you are "above" him, don't do so with your client. Some lawyers think that language will convey that you are a professional and thereby comfort your client. Most of our clients are not that shallow. You will have to convey professionalism through your work and not your words.

Having said that, be equally careful not try to be something you are not because you think that is what will connect you to the client. Don't try to feign an accent or speak slang if that is not who you really are. Our clients will see through the veneer and lose faith in the relationship. Again, be yourself!

**h. Be mindful of differences**

Be conscious of differences between you and your client such as race, gender, age, sexual orientation, and culture. Do not assume you can predict how these differences will impact your client. Some clients will have concern about

having a young lawyer. They will assume youth means a lack of experience. Others may feel that older lawyers are more likely to be burned out or cynical. Many of our clients harbor biases and prejudices about race, gender, and culture, although we may be surprised at which way these feelings cut.

Calling an older client by his first name may strike the client as disrespectful. Comments about religion can be offensive to some clients. Do not presume to know a client's sexual orientation or how comments along these lines may touch your client.

How a client reacts to you based on these differences will vary from case to case. You must be sensitive to the potential for these differences and deal with any issues as they arise.

**i. Be sensitive to potential limitations**

Many of our clients have limitations that are not obvious. Be sensitive to cognitive limitations that might be based on your client's age, mental health, or educational limitations. Be sensitive to potential issues surrounding emotional or physical abuse your client has suffered. Do not assume your client understands basic concepts. Sometimes a client may nod as you speak to convey that they understand you when, in fact, they are sensitive to their own limitations and embarrassed to reveal them.

Some of our clients are illiterate. Explore that possibility before asking a client to read a document. Make certain to obtain mental health, neglect or special education records where they exist. Understanding your client's history may help you to communicate with him. It may also be of assistance in preparing your client's case for trial or sentencing.

**j. Never make promises you can't keep / make some that you can**

Few things will cause your client to lose confidence in you more than for you to make him a promise that you don't keep. Your client is probably looking for you to prove that he can trust what you say. Any promise you make, no matter how small, that you don't keep, will hinder your efforts to earn that trust. Given the unpredictable nature of the work we do, there is very little you will be able to promise about the case. This is certainly going to be true with respect to the issues that will initially matter most to your client: can we win this case? Will you get me released?

Resist the temptation to promise a desirable outcome because you think it will help you gain the client's confidence. If you can't follow through with the promise the long-term damage to the relationship will far exceed any perceived short-term benefit. If you do feel certain of an outcome there is no downside to saying, "I am as certain as I can be that X will occur, but given that this outcome depends on some forces beyond my control I need to stop short of making you a

guarantee.” By couching your prediction in this way you have protected yourself from going back on your word should the unexpected occur.

The flip side of this coin is that few things will earn your client’s trust more than following through on promises that you know you can keep. Promise to visit your client at the jail by a certain date and make sure to follow through. Ask your detained client if you can call anyone for him to let them know how he is doing and then be sure to do so. Let your client know that you will bring him certain documents or look into a specific issue for him and keep your word. These token gestures will slowly earn you the trust of your client and will help to build your relationship with him.

#### **k. Keep your client updated and maintain regular contact**

One issue that can be most concerning to a person who is appointed an attorney is that the attorney will have more cases than she can handle. Your client will surely harbor doubts that you will give his case the care and attention that it deserves. Until your client is dispelled of this notion, his attempts to ensure that you are giving his case adequate attention can really impact your efforts to manage your time. This is especially true with a detained client. The client who does not have confidence that his lawyer is working on his case will turn to others for advice about what should be done on the case. Many of the people from whom the client will seek advice will be his incarcerated colleagues or others equally untrained in the law. Your client will then bombard you with calls to see if you have done those things.

Much of the advice may not be productive or may not be relevant to your client’s case. You will now have to spend extra time explaining to the client either why the requests may not pertain to his case or why it would not make sense to pursue those tasks. You will be in a position of having to change your client’s mind, an endeavor that will vary in time consumption depending on how set your client is on having these tasks accomplished and the degree of confidence he has in you as a lawyer. Other requests may relate to tasks that, while you are sure will not reap a positive contribution to the case, you are unable to convince the client that they are not worth the time. Your inability to talk the client out of pursuing these tasks will be directly related to your client’s lack of confidence that you are adequately preparing his case.

Your client’s decision to turn elsewhere for advice on how his case should be prepared will often be the result of his not having confidence that you are sufficiently focused on his case. His insistence that you spend time on tasks that are not productive, despite your advice, is likely because he does not have trust that you are invested in his case and seeks reassurance that you will put in the requisite time. Your client needs to be convinced that his case is a priority for you.

The energy you will spend trying to undo damage that has resulted from your client’s skepticism about your commitment to his case will surely exceed that which you could have spent preventing this problem from occurring.

Two things you can do to prevent the fallout described above are to maintain regular contact with the client and to keep him apprised of developments in his case. In every case there can potentially be stretches of time in which not much is happening. If your client neither sees nor hears from you during these stretches he can begin to wonder why he hasn’t. To the client, his case is likely the most important event in his life at the time. Thinking about the case may consume him. He may not understand why it does not equally consume you. Just knowing that you have not forgotten him can go a long way towards helping him understand that a decrease in activity on his case is a function of the course of the case’s life and not of your commitment to his cause. Regular meetings will certainly help your client understand this.

For detained clients, consider putting aside a few hours every couple of weeks to check on all of your detained clients. You can often achieve this with one visit to the jail. Spend fifteen minutes with each client just to say hello and see if they have any concerns you might address. This “reminder” that they have not fallen off your radar screen can really help you avoid the issues discussed above.

For clients who are not detained, give them regular calls inviting them to meet with you to discuss any concerns they might have. Most will not take you up on the invitation, but the thought alone will help them understand that you are thinking about them and their cases.

Along these lines, keep your client apprised of developments in his case. During these regular visits discuss with him any investigative efforts that have been made since you last met. Even if you can only relay that you have made three trips to a certain witness’ home and they were not in, this shows that you are working on the case. During your regular visits reassure your client that you looked into a legal issue that you may have previously discussed. Consider bringing him a case or two that relates to the issue. Leaving a client with tangible items such as paperwork will serve as a reminder that you are working on the case. Even if you simply relay to your client that you called his mother as he requested to tell her he was thinking about her and she wanted to pass along that she is also thinking of him, this will go a long way towards cementing your relationship.

#### **l. Show that you are a fighter**

How you acquit yourself outside of client meetings can equally affect how your client relates to you. Many of our clients believe that court appointed lawyers are afraid of judges. They believe that our incomes depend on our maintaining a good relationship with judges. They have

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concern that we are unwilling to fight for them before judges. Telling your client that you are a fighter will not do the trick. You must show him. The bright side is that this is easy to do. Most of our clients aren't evaluating the legal rationale of every argument you make in court. They are looking to see if you are assertive for them. They want to be convinced that you are not timid in court. Do not pass upon an opportunity to advocate for your client. This is especially true when the relationship is new. The stakes are increased significantly when the argument has to do with the client's release.

Bond hearings are ideal arenas to prove to your client that you will fight for him. There may be times that it is obvious to everyone in the courtroom that your client is going to be denied bond, or given a bond he can't possibly make. You may be at a loss for an argument that will change the judge's mind. SAY SOMETHING!! Say it forcefully. Say it as though your client's release is the most important thing in the world to you (it should be at that moment). Even if your arguments cause people in the courtroom to laugh at you, your client will be impressed with your willingness to take on anyone who wants to deny him his freedom.

You should rarely, if ever, submit without argument, and never submit when it comes to your client's freedom. Even if your argument is short, make it. Even if the judge knows that the only possible reason for your argument is for the benefit of your client, say something. A submission indicates to your client that you are not a fighter. You can try to explain later that there were not arguments to be made or that the result was a foregone conclusion, but your explanations will never achieve what a two-minute argument before the judge would have.

**m. Be conscious of how you relate to others around your client**

One thing that concerns our clients is that we are part of a system that wants to take their life from them. They imagine that we hang out with the judges and prosecutors who they see as responsible for their predicament. They see us all as part of a clique that has little concern for them. This view obviously impacts their confidence in our willingness to fight for them. To avoid adding to your client's concerns in this regard, be conscious of how you relate to others around your client.

Obviously as lawyers we need to be professional. This necessarily includes having professional relationships with everyone associated with the criminal justice system. Some of us may even have personal relationships with judges, prosecutors, and others in the criminal justice system.

Consider how the conduct of your personal relationships with those in the system who your client identifies as his opponents. Don't let your client, or his family, hear you

discuss personal plans with a prosecutor on your client's case or a law enforcement officer who was involved in the arrest of your client.

There may be times after a contentious court hearing the prosecutor approaches you to shake hands. Consider letting the prosecutor know that, while it is not personal, you are uncomfortable shaking his hand in front of your client or his family, who may be in court. This may help to avoid a situation that causes your client to question "whose side you are on."

Another option is to discuss with your client how you interact with judges and prosecutors as a professional. Explain to him how maintaining a professional relationship with these people may help you achieve positive outcomes for your client. Reassure him that these relationships in no way impact your commitment to him or his case.

While there are various methods for handling these situations, it is important that you remain conscious of how your relationship with others in the criminal justice system may be perceived by your client and that you take steps to avoid potential fallout.

**n. Dealing with an abbreviated initial meeting**

You will begin to accomplish much of what has been discussed above in the initial meeting with your client. Ideally this is a meeting without time constraints. However, for many of us, a private meeting without time constraints is not possible when we first meet our clients. For those of you who meet your clients for the first time in court, soon before you are to appear before a judicial officer, do not let the hurried nature of that first meeting throw you off. You do not want your client to lose confidence in you because you seem frazzled and nervous. You will obviously be hampered in your ability to develop your relationship with your client at this meeting since you may only have ten or fifteen minutes with him. Much of what has been discussed in this memo will have to wait until you have a more in-depth meeting with your client within the next day or two.

Stay focused on what you ultimately need to accomplish in that meeting: 1) acquire any information that is necessary for that first day in court, 2) make sure your client has an understanding of what is happening that first day and when he will have a chance to talk to you at length. Your client likely has many things he'd like to talk about that day. He may want to blurt them all out. You will not have time to answer all of his questions at this short meeting. You must control the meeting. Let your client know that what you need to focus on at that meeting, explain why it is important that you get the information you need from that meeting, assure him that you will meet with him soon to discuss the case in much more detail, and tell him when that next meeting will be. You want to make sure your client understands the attorney/client privilege and that you explain to your client that he

should not talk to anyone about the case. Make sure your client knows what he can expect to happen in court today. Tell the client that during this meeting you need to concentrate on getting information necessary to deal with the immediate task at hand, which is likely his release. Explain to the client that you are very interested in what he has to say and that you have a lot more that you need to talk to him about, but that you have very limited time right now.

If you are not alone with the client explain the dangers of speaking in that setting, which can easily be done in the context of explaining the attorney/client privilege. Promise that you will meet with him within a certain period of time and at that meeting you will listen to everything he has to say. The time frame you set will vary with the circumstances but should never exceed 48 hours. **WHEN YOU TELL YOUR CLIENT YOU WILL SEE HIM BY A CERTAIN TIME, KEEP YOUR PROMISE!!!**

An example of a possible introduction leading into a discussion of information needed that day follows:

Mr. X, I want to introduce myself to you. My name is \_\_\_\_\_, and I am going to be your lawyer. I want to give you this card [hand client a business card] that has all of my contact information. Keep this card with you so you always know how to reach me if you need to. The first thing I want to discuss with you is something called the attorney/client privilege. Do you know what that means? [allow your client to try to explain if he wants to]. That means that you and I have a very special relationship. As your lawyer, you can say anything you want to me and I am not allowed to tell anyone what you tell me without your permission. It is very important that you understand this because you also need to understand that you don't have that same privilege with anyone else. You don't have it with the guys back here who you're locked up with, you don't have it with your girlfriend, you don't have it with your family. If you say anything about this case to anyone other than me, or around anyone other than me and they hear you, they can be forced to come to court to testify about what you said. It is important that you take this privilege seriously both to protect you, and the people you care about. It protects you because you can talk about whatever you want to with me and know that it goes no further than us. It protects your loved ones because if they are ever forced to testify and asked if you ever said anything they can honestly say, "No, he told me if I want to know about the case I should call his lawyer." So if anyone asks you about this case, tell them that your lawyer instructed you not to talk about the case and that they can give me a call. Do you have any questions about that?

Now for the reasons I just described, I want to make sure we don't talk about the facts of your case with all these people around. I want to wait until we have some privacy. So I don't want to discuss the facts of your case right now. Also, we don't have much time to talk today and I really want to focus on the things that will help us get you out of here today. We need to meet tomorrow so we can discuss your case in much more detail. If you are released today I ask that you come to my office. If you are not released today I will come to see you tomorrow.

Now, let's turn our attention to what will happen today. Today's hearing is called a first appearance hearing, have you ever heard of that . . . [have a discussion to make sure your client understands what today's hearing is and what issues are decided at that hearing]. After his hearing, if you are released we will wait to see if the government indicts you, and we will discuss that whole process tomorrow. If you are not released your next hearing will be a preliminary hearing, and, if we need to, we will discuss what that is tomorrow.

Today I really want to focus on information I need to argue for your release today. Any questions before we get started? [start discussing information relevant to his release] . . .

. . . Any questions about any of that? OK, is there anyone I can contact for you if you are not released – family, employer, etc.?

This is a very hurried discussion, as dictated by the circumstances. However, note several things you have accomplished: 1) you have conveyed the information to your client that he needs to know today: that he should not talk to anyone about his case and what the process will be today, 2) you have explained to him why you have to limit your discussion to certain information and explained that information is necessary to achieve what is likely his primary objective, his release, 3) you have promised to meet with him by a date certain and to have a much more in depth discussion at that time, 4) you have conveyed that you are competent lawyer by explaining legal concepts and procedures, and by appearing confident and organized, 5) you have given him a chance to ask questions although you've limited the conversation to the task at hand, and 6) by asking if you can contact anyone for him you have both shown that you care about him and you have begun the process of making promises that you CAN keep – perhaps the first building block in your relationship.

Now, go to court with him and show him you are a fighter! You will be well on your way to building a good relationship with your client. ■

## JUVENILE SEXUAL OFFENDERS – SHOULD THERE BE CHANGES IN THE LAWS?

by Gail Robinson, DPA Juvenile Post-Dispositional Branch

The Kentucky Coalition Against Sexual Assaults hosted forums throughout the state about possible changes to the adult and juvenile sexual offenders statutes. This article will address proposed revisions to the statutes concerning juvenile sexual offenses discussed at those forums as well as recommendations of the Kentucky Criminal Justice Council on the same topic and the recent Report of the Department of Juvenile Justice concerning the Department's success in treating juvenile sexual offenders.

### A. Current Law Concerning Juvenile Sexual Offenders

A juvenile sexual offender is an individual who was under 18 at the time of the offense, not actively psychotic or mentally retarded, and adjudicated guilty of a sexual offense. KRS 635.505(2). If a juvenile is age 13 or older and found guilty of a felony sexual offense, the court must – “shall” – find him to be a sexual offender. KRS 635.510(1). If he is age 12 or younger, or found guilty of a misdemeanor, the court “may” find him to be a sexual offender. KRS 635.510(2). A juvenile sexual offender assessment is performed to provide the court information about whether to find a child to be a sexual offender and to provide treatment recommendations for DJJ. KRS 635.510(3).

DJJ is required to provide treatment for committed sexual offenders in the least restrictive alternative and to send written reports to the court every 60 days. KRS 635.515(5). A sexual offender may receive a maximum of three (3) years treatment and remain in DJJ's care until age 21. KRS 635.515(1). If the offender does not comply with the treatment program, including failure to acknowledge responsibility for sexually inappropriate behavior, he may be held in contempt and sentenced to time in detention. KRS 635.515(6).

A juvenile who is age 14 or older and charged with a Class A or B felony sexual offense (rape 1<sup>st</sup> degree or sodomy 1<sup>st</sup> degree) may be transferred to circuit court. KRS 635.020(2). Additionally, a juvenile who has been adjudicated guilty of a previous felony, is age 16 or older and is charged with a felony sexual offense, may be transferred to circuit court. KRS 635.020(3). If a youth is transferred to circuit court, he is treated as an adult with respect to sentence and he participates in sexual offender treatment with DJJ until age 18 and then with Corrections once he becomes an adult. KRS 640.030. Moreover, such youthful offenders are subject to registration requirements pursuant to “Megan's Law.” KRS 17.495-17.991.

### B. Kentucky Criminal Justice Council Recommendations

In August 2000, at the request of Governor Paul Patton's Sexual Assault Task Force, the Juvenile Justice Committee of the Kentucky Criminal Justice Council (KCJC) initiated a comprehensive study of juvenile sexual offenders. That Committee was comprised of representatives from many groups including DJJ, the Cabinet for Families and Children, AOC, the Department of Mental Health and Retardation, DPA, Attorney General's Office, Commonwealth's Attorneys, County Attorneys, District Judges, the Restorative Justice Fellowship and others. The Committee heard presentations from many groups including DJJ and other sexual offender treatment providers, the Kentucky Association of Sexual Assault Programs and the Office of the Jefferson County Commonwealth's Attorney. The Committee then made comprehensive recommendations which were adopted by the KCJC by a vote of 23-1. Among those recommendations were the following:

(1) The Committee believes that juvenile sex offender prevention is primary sexual abuse prevention, since a significant number of juvenile sex offenders have also been victims of sexual abuse themselves. A majority of juvenile sex offenders can be treated and their future behavior managed through appropriate early treatment and intervention. The Committee therefore recommends that statewide efforts in prevention, early intervention and treatment for child victims of sexual abuse should continue to be a priority for the Commonwealth.

(7) The Committee recommends that the Penal Code/Sentencing Committee work with the Juvenile Justice Committee to amend the penal code or the Juvenile Code to consider the age difference between a victim and a perpetrator in determining whether a sexual offense should be a felony when no force is involved. Under current statutes, juveniles often end up with felony charges because of the age of the victim, without regard to the age of the perpetrator. The Committee also recommends consideration of



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establishing a minimum age under which a juvenile perpetrator cannot be changed with a Class A felony.

(9) Under current law, certain juvenile sex offenders prosecuted as Youthful Offenders are not eligible for probation. The Committee recommends that the Penal Code/Sentencing Committee consider whether juvenile sex offenders who are prosecuted as youthful offenders should be eligible for probation (See KRS 640.040).

(13) The Committee recommends conducting a study to explore the possibility of providing automated notification information to victims of juvenile sex offenders.

(17) The Committee heard testimony pertaining to unintended consequences resulting from the application of adult laws to juveniles. As an example, the Committee learned that Megan's Law (KRS 17.495-17.991) includes a requirement that a sex offender not live within 1000 feet of a school or daycare, yet Youthful Offenders who are probated and deemed to be low risk may in fact be living at home with their parents and attending school. The Committee recommends that the Commonwealth proceed cautiously in any future considerations of applying adult laws to juveniles.

Quite a few of the other recommendations of the KCJC concerning statutory revisions, such as revising the "mental health assessment" which was undefined by KRS 655.510(3), to be a "sexual offender assessment" with required components, were implemented. Others have not yet been considered.

In 2003, the Juvenile Justice Committee proposed legislative changes on a variety of topics including juvenile sexual offenders. Again the Committee focused on the problem with charging children whose age gap is not large with felony offenses for consensual sexual activity. A revision in the laws concerning sexual offenses as applied to young offenders was proposed:

A new section of KRS Chapter 610 would be created to read as follows:

If a child, who is less than fifteen (15) years of age at the time of the commission of the offense, is prosecuted for a violation of KRS 510.040(1)(b)(2), KRS 510.070(1)(b)(2), or KRS 510.110(b)(2) and the court finds that the victim consented to the act but lacked the ability to consent because of age and that the victim was not more than three (3) years younger than the defendant, the court shall amend the offense to sexual misconduct.

Or

If a child, who is less than fourteen (14) years of age at the time of the commission of the offense, is prosecuted for the violation of KRS 510.040(1)(b)(2), KRS 510.070(1)(b)(2), or KRS 510.110(1)(b)(2) and the court finds that the victim consented to that act but lacked the ability to consent because of age and the that victim was not more than two (2) years younger than the defendant, the court shall amend the offense to sexual misconduct.

The Commentary to the proposed revision was as follows:

Accepting the premise that while neither society nor government wishes to encourage sexual promiscuity between young persons, such contact occurs. Also, existing laws treat similarly aged youth in an extremely inequitable fashion. The specific offenses impacted by this proposal are Rape 1<sup>st</sup> degree, Sodomy 1<sup>st</sup> degree and Sexual Abuse 1<sup>st</sup> degree, all of which are designated as felony offenses, and this proposal is specifically limited to the issue of a consensual act between similarly aged youth.

Under current law consensual sexual contact between two youth, age twelve (12), would be classified as sexual misconduct, a class A misdemeanor. This same law, however, can make consensual sexual contact between two youth, ages eleven (11) and twelve (12) a class A felony. This proposal does not impact any other inappropriate sexual conduct, *i.e.* use of force, being physically helpless, or mental retardation. This proposal will, if enacted, classify consensual sexual contact between similarly aged youth as sexual misconduct. It should be noted that his proposal does not impact a juvenile court's dispositional abilities, *i.e.* counseling would continue as a dispositional alternative.

The Kentucky Criminal Justice Council again adopted the Juvenile Justice Committee's recommendations. This much-needed revision in the law has not yet been considered by the legislature. Therefore, a 13 year old who has oral sex - "deviate sexual intercourse" - with an 11 year old can be charged with sodomy in the first degree, a Class A felony. The Committee also recommended once again that KRS 640.030 be revised so that all youthful offenders can be considered for probation on their 18<sup>th</sup> birthday in the Judge's discretion regardless of the nature of the charges.

The legislative changes concerning juvenile sexual offenders which should be implemented are those which were recommended by the Juvenile Justice Committee after careful study and adopted by the KCJC.

### C. DJJ'S 2005 Report

On February 15, 2005, the Department of Juvenile Justice published a report required by KRS 635.545 concerning

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participants in DJJ's juvenile sexual offender program. DJJ must include an analysis of further criminal activity by participants as both juveniles and adults. That report reveals that only about 6% of the youth released from the juvenile sexual offender program between 1996 and 2004 were later convicted of additional sexual offenses after reaching adulthood. Moreover, 97% of the youth committed to DJJ and placed in a sexual offender treatment program successfully completed that program. DJJ concluded that the data indicates Kentucky's treatment of juvenile sexual offenders is "effective."

#### **D. Kentucky Coalition Against Sexual Assaults**

The Coalition was formed in July 2005 and will recommend legislative changes to the 2006 General Assembly. The Coalition is comprised of the DJJ Commissioner, the Kentucky State Police Commissioner, the Commissioner of the Kentucky Department of Corrections, the president of the Commonwealth's Attorneys Association, the Fayette County Commonwealth's Attorney, two victim advocates, the Fayette County Sheriff, Lieutenant Governor Steve Pence, a retired judge and a journalist who represents the public. At the forums many victims, law enforcement personnel and prosecutors as well as several DJJ and DPA staff have spoken. The following radical legislative proposals appear to be under consideration:

1. Opening juvenile records;
2. Expanding which juvenile sexual offenders are eligible for transfer to adult court.
3. Requiring registration for juvenile sexual offenders;
4. Requiring a longer period of treatment or consequences if treatment is not completed in 3 years.

Any of these proposed legislative changes should receive careful study and consideration before legislation is drafted, particularly since the Coalition may not always have had accurate information. DPA staff and former KCJC members attended the forums across the Commonwealth. Staff spoke about the Committee's recommendations and presented copies of the 2001 report to members of the Coalition. Staff also spoke about the need for legislative revisions to prevent consensual sexual behavior by children who are near the same age from being treated as a felony offense. One panel member asked about the records of juvenile sexual offenders being closed. The panel was advised that the law clearly permits the public to view the essential records for Class A, B, and C felonies and any offense involving a deadly weapon. Panel members seemed unwilling to acknowledge these provisions currently in effect. At another forum, a DJJ psychologist indicated that all records of juvenile sexual offenders are sealed and advocated that they be open. In fact, KRS 610.320(3) effective July 15, 1998 provides that the petition, adjudication and disposition for Class A, B, and C felonies and offenses involving deadly weapons are open

to the public now. Additionally, all court records of youthful offenders who are transferred to adult court are open. Thus, there is no need to change the law concerning confidentiality of juvenile records for sexual offenses since the records concerning serious sexual offenses – Class A, B, and C felonies which remain in juvenile court and any felony transferred to circuit court – are already open.

As far as transfer to circuit court, the current law already permits transfer of youth 14 or older charged with Class A or B felonies as well as those 16 or older charged with any felony if the youth has previously been adjudicated guilty of a felony. Juvenile court judges currently have appropriate discretion to transfer youth charged with serious sexual offenses to circuit court and there is no need to expand the class of juveniles eligible for transfer. Instead, KRS 640.040 should be amended to permit circuit judges to consider probation at age 18 for any youthful offender, including sexual offenders, currently barred from probation. The Department of Juvenile Justice is operating a successful sexual offender treatment program. If a youthful offender is making progress in that program before he turns 18 a circuit judge should have the discretion to place him on probation to continue treatment instead of sending him to prison where his progress in treatment may be undermined or reversed. Any lay person evaluating what awaits an 18 year old youth heading into an adult prison would have concerns about the impact of that experience on a youth who previously made significant advances in improving his behavior in a treatment facility.

Moreover, expanding registration requirements to include juvenile sexual offenders is not appropriate. The most serious offenders – those transferred to circuit court – are already required to register. Our Juvenile Code focuses on treatment and rehabilitation of juvenile offenders. DJJ data confirms that its treatment program for juvenile sexual offenders is successful. Requiring juvenile sexual offenders to register is inconsistent with the rehabilitative purpose of the Code since the public branding associated with registration constitutes a statement that the youth will never be rehabilitated and will undermine rehabilitation. Moreover, a registration requirement for juveniles would support the claim that juveniles charged with sexual offenses are entitled to a jury trial. The United States Supreme Court held in *McKeiver v. Pennsylvania*, 430 U.S. 528 (1971) that juveniles were not entitled to a jury trial because the focus of juvenile court was on treatment rather than punishment. Juvenile sex offenders in Kentucky already face the most onerous consequences of any juvenile offenders because of mandatory commitment to DJJ for those 13 or over found guilty of a felony, as much as 3 years of sexual offender treatment and contempt/detention a possible consequence for non-compliance. If a registration requirement were added that could be the tipping point toward punishment which activates the right to a jury trial.

We should also consider the reliability of the fact finding process in juvenile court. A judge, not a jury, is the finder of fact. While proof beyond a reasonable doubt is required in juvenile cases, many experienced practitioners believe that judges are more likely to find guilt based on less evidence in juvenile court. As far as sexual offenses, frequently the only evidence is testimony of a young child. Physical evidence or other witnesses are rare. However, even if the accused youth denies the offense, the court may well find him guilty when a jury probably would not. Should a youth be subject to registration when the fact finding process is less reliable than the one for adults?

Finally, any proposal to expand the maximum treatment time for juvenile sexual offenders beyond 3 years or to implement consequences for those who have not completed treatment in 3 years should proceed with caution. In the life of a young person 3 years is a very long time. Since DJJ has reported that 97% of committed sexual offenders successfully complete the treatment program, those who do not succeed are a relatively small number. No program has a 100% success rate. We as citizens of the Commonwealth should be proud that DJJ's sexual offender treatment program is successful and we should be reluctant to tinker with that success. The legislature does not need to fix what isn't broken. ■

### JUVENILE FACTS

R.E.A.C.H. of Louisville, Inc. has done a comprehensive crime analysis for the Kentucky Juvenile Justice Advisory Board as required by federal law. The final report is yet to be published. However, the data shared with the board has a lot of interesting figures to consider.

A. The top ten juvenile court "delinquent" charges in 2004 in order from highest to lowest were:

1. Contempt of Court !
2. Disorderly Conduct
3. TBUT Under 300
4. Possession of Marijuana
5. Criminal Mischief 3<sup>rd</sup>
6. Terroristic Threatening 3<sup>rd</sup>
7. Assault 4<sup>th</sup>
8. Possession of Drug Paraphernalia
9. Alcohol Intoxication
10. Harassment

B. The top five successful CDW diversions by offense category from highest to lowest success rates were:

1. Theft by Unlawful Taking Misdemeanor
2. Possession of Alcoholic Beverage by Minor
3. Harassment
4. Habitual Truant
5. Alcohol Intoxication in a Public Place
6. Assault 4<sup>th</sup> Degree

C. In 2004, 70.9% of the youth committed for placement to DJJ were White while 23.5% were Black.

Of those placed in youth development centers, 65.5% were White, 29.4% were Black. Of the youth placed receiving substance abuse treatment, 100% were White, while zero were Black. 8% of the total population statewide was classified as Black.

## KACDL: MEMBER BENEFITS STRIKE FORCE TO THE RESCUE

One of the greatest benefits of membership in KACDL is having access to the Strike Force. The Strike Force was established to assist KACDL members who have been threatened with Contempt, or other oppressive orders of Court or from prosecutors. The Strike Force has also assisted when bar complaints have been filed against KACDL members.

If you are threatened with any oppressive action, as a result of your defense of your criminal clients, the first thing you should consider is calling Jerry Cox, chairman of the KACDL Strike Force. Cox, or one of the other Strike Force Members in your area, will respond to represent you or assist you in resolving the situation. The only cost to you for this service is your membership dues to KACDL.

When the Strike Force responds to your aid, rest assured that you will be well represented. Strike Force Chair Jerry Cox is a veteran advocate, in practice since 1968, whose record of honors and accomplishments includes being a Life Member of KACDL and NACDL, and serving as a board member for both organizations. In 2002, he received the prestigious DPA Nelson Mandela Lifetime Achievement Award for his commitment to criminal defense. In 2003, 2004, and 2005, NACDL Presidents recognized Cox for his significant contributions to the members of NACDL. In 2004, he was awarded the President's Special Service Award by the Kentucky Bar Association. He has served on the Kentucky Criminal Justice Council, Public Advocacy Commission and Kentucky Bar Foundation. Cox also lectures on criminal justice issues for KACDL, DPA, and UK Law School. He is also a Certified Trial Specialist by the National Board of Trial Advocacy.

"When you talk to Jerry, when you listen to what Jerry says at board meetings, when you see Jerry in action, it is clear that helping people is what he cares about" says Ed Monahan, describing Cox. "He is a skilled practitioner who has chosen to spend much of his time and energy on making

Kentucky a better place to live by helping people who need someone to speak for them, work for them, plead for them... noble work in the best tradition of the bar."

Cox says, "Most of the time, if you can get an advocate involved who is detached from the Judge and the lawyers involved, most things can be resolved with some communication."



*Jerry Cox*

In the past twelve months, Jerry Cox has represented individuals in the following Strike Force capacities: through hearings and before the Board of Governors regarding a complaint filed by a former client; at a lawyer's hearing regarding a bar complaint; assisted assistant public advocates in resolving disputes regarding representation; and in Contempt hearings filed by a Judge against a KACDL member.

Again, the only cost to you for this service is your annual membership dues to KACDL. Membership fees are only \$50 for DPA Bar members 1-5 years, and \$100 DPA Bar members 5+ years.

To join, contact Charolette Brooks, KACDL 444 Enterprise Drive, Suite B, Somerset, KY 42501, (606) 677-1687, fax (606) 679-3007, or [kacdl2000@yahoo.com](mailto:kacdl2000@yahoo.com). ■

**Each person must live their life as a model  
for others.**

**-Rosa Parks**

## CAPITAL CASE REVIEW

by David M. Barron



David M. Barron

### U.S. Supreme Court

#### ***Schriro v. Smith*, 126 S.Ct. 7 (2005) (per curiam)**

After acknowledging that the application of state procedures for enforcing the constitutional restriction against executing the mentally retarded are subject to constitutional challenges, the Court held that the 9th Circuit exceeded its limited authority on *habeas* review by ordering a jury trial on mental retardation when the state courts had not had an opportunity to apply its chosen procedures to Smith's mental retardation claim.

*Note:* [Despite Smith not presenting his mental retardation claim in state court, the Court upheld the 9th Circuit's ruling that Smith was entitled to a mental retardation determination. Thus, *Smith* implicitly recognized that an *Atkins* claim (mental retardation as a bar to execution) cannot be procedurally defaulted.]

*Note:* [The Court did not reach the underlying constitutional issue of whether the 6th Amendment requires a jury determination of mental retardation. This issue is ripe for review in a case where the state court refused to grant a jury determination of mental retardation.]

*Note:* [Arizona's mental retardation statute was enacted prior to *Atkins*, and was cited in *Atkins* as one of the states barring the execution of the mentally retarded. Yet, by recognizing that the procedures for implementing the constitutional restriction against executing the mentally retarded are subject to constitutional challenges, the Court stated (contrary to the Kentucky Supreme Court's ruling in *Bowling*—see the July 2005 *Advocate*) that *Atkins* should not be interpreted as an approval of state mental retardation statutes solely because *Atkins* mentioned the statutes.]

#### ***Dye v. Hofbauer*, 126 S.Ct. 5 (2005) (per curiam)**

In this non-capital case, the 6th Circuit held that Dye's claims were not properly presented because the state court only addressed the claim on state law grounds and because the claims were too vague and general to be considered fairly presented. The Supreme Court reversed, and reaffirmed that whether a state appellate court mentions a federal claim in its opinion cannot be the determining factor as to whether a claim is properly presented because this would allow a state court to forever prevent federal court review of a federal

claim solely by ignoring the claim. The determining factor is whether the petitioner presented the federal constitutional claim in a manner that put the state court on notice that a federal constitutional issue was being raised. Here, this was done in a specific manner by petitioner's brief claiming a due process and fair trial violation that cited the Fifth and Fourteenth Amendments to the United States Constitution, cited federal cases concerning alleged federal due process violations, and made clear and repeated references to a supporting brief filed in accordance with Federal Rules of Civil Procedure, Rules 81(a)(2) and 10(c).

#### ***Barnette v. United States*, 126 S.Ct. 92 (2005)**

*Certiorari* granted, judgment summarily vacated, and remanded for further consideration in light of *Miller-El v. Dretke*, 125 S.Ct. 2317 (June 13, 2005), which addressed conducting a comparative analysis between jurors peremptorily challenged and those who were not to determine if peremptories were used on the unconstitutional basis of race.

### U.S. Supreme Court *Certiorari* Grants

#### ***Day v. Crosby*, No. 04-1324, case below, 391 F.3d 1192 (11th Cir. 2004)**

1. Does a state waive a limitations defense to a *habeas corpus* petition when it fails to plead or otherwise raise that defense and expressly concedes that the petition was timely?
2. Does *Habeas* Rule 4 permit a district court to dismiss a *habeas* petition *sua sponte* after the State has filed an answer based on a ground not raised in the answer?

#### ***Holmes v. South Carolina*, No. 04-1327, case below, 605 S.E.2d 19 (S.C. 2004)**

Whether South Carolina's rule governing the admissibility of third-party guilt evidence violates a criminal defendant's constitutional right to present a complete defense grounded in the Due Process, Confrontation, and Compulsory Process Clauses.

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**United States Court of Appeals for the Sixth Circuit**

**Clark v. Mitchell, 425 F.3d 270 (6th Cir. 2005)**

(Rogers, J., joined by, Gilman, J.; Merritt, J., dissenting)

**Counsel was not ineffective for failing to employ a neuropsychologist and a pharmacologist to testify at a suppression hearing about the effect of Clark's organic brain syndrome and drug addiction on his ability to knowingly and voluntarily waive his rights against self-incrimination:** Clark's expert at the post conviction hearing testified that Clark's condition "is one where the lay person, and even a psychologist not trained in psychology . . . could and likely would overlook the deficits." Based on this testimony, the state court held that a lawyer not trained in psychology was not reasonably expected to have Clark neurologically tested. The 6th Circuit agreed, reasoning that the expert's testimony established that there was nothing to suggest that counsel ignored known leads that might have helped them to prepare their case in mitigation. But, even if counsel was deficient, prejudice has not been established. At the suppression hearing, Clark introduced testimony from a psychiatrist who concluded that Clark was suffering from depression, suicidal tendencies, and brain impairments that would have made him less able to understand his choices and to resist pressure from individuals. Thus, it was reasonable for the state court to hold that evidence about Clark's drug addiction and brain disorder did not differ in a substantial way from the evidence actually presented at the suppression hearing. Further, Clark has not established that his low I.Q. or organic brain syndrome would have shown that Clark's confession was unknowing and unintelligent.

**Counsel was not ineffective for failing to introduce expert evidence of Clark's organic brain syndrome, drug addiction, and troubled childhood as mitigation:** At the post conviction hearing, Clark presented 1) evidence that his father was an alcoholic womanizer; 2) more details about his father's death; and, 3) evidence that Clark had disciplinary problems and spent time in jail after his father's death. The state post conviction court found this evidence cumulative of the trial testimony. In determining whether counsel was ineffective at the sentencing phase for failing to introduce evidence, the focus must be on whether the investigation supporting counsel's decision not to introduce mitigating evidence of the defendant's background was reasonable. To decide this, the quantum of evidence known to counsel must be considered as well as whether that evidence should have led a reasonable attorney to investigate further. Because much of the evidence presented at the post conviction hearing was similar to that presented at trial, and because neither expert retained by trial counsel suggested that Clark suffered from organic brain damage, it was reasonable for counsel to rely on the opinions of these experts and not have Clark neurologically tested.

**Merritt, J., dissenting,** would hold that counsel was ineffective for failing to have Clark examined by a neuropsychologist and for not presenting evidence of a congenital brain defect to the sentencing jury. The report from the expert used by trial counsel says that Clark's patient history and test data demonstrate deficiencies and indicate the need for psychological testing. This report put counsel on notice of an organic brain impairment and should have caused them to investigate further, particularly since the ABA Guidelines say that counsel's own observations of a client's mental status are not sufficient.

**Moore v. Parker, 425 F.3d 250 (6th Cir. 2005)**

(Cook, J., joined by, Boggs, C.J.; Martin, J., dissenting)

**No prejudice exists from trial counsel's failure to present mitigating evidence:** The court held that Moore could not establish prejudice because Moore's counsel presented some mitigating evidence, and thus this case is distinguishable from *Wiggins v. Smith*, 539 U.S. 510 (2003), where, according to the court, counsel failed entirely to seek or present mitigating family-background evidence.

*Note:* [Arguably, the 6th Circuit erred in this regard. *Wiggins'* trial attorneys presented some mitigating evidence. Yet, the United States Supreme Court found their performance deficient. In addition, the United States Supreme Court has never ruled that presenting some family background evidence insulates counsel from being ineffective. Rather, a court must consider the unrepresented mitigating evidence in conjunction with the presented mitigating evidence and the aggravating evidence to determine if the unrepresented mitigating evidence might have influenced the jury's appraisal of the defendant's moral culpability. *Wiggins v. Smith*, 539 U.S. 510 (2003). If so, reversal is required.]

**Counsel's investigation of mitigating evidence was not deficient:** Because introducing more evidence of Moore's background likely would have made Moore look worse to the jury, the court held that counsel was not deficient in 1) spending only 3% of their preparation time on the penalty phase; 2) remaining unaware of 95 letters sent to the first trial court supporting Moore, which could have led them to more mitigating evidence; and, 3) not having another psychologist examine Moore after the first one they selected proved to be a fraud.

*Note:* [The 6th Circuit got the legal standard wrong. The United States Supreme Court has ruled that strategic decisions are unreasonable (requiring reversal) when counsel fail to conduct an adequate investigation before making a strategic decision, and when counsel's strategic decision is contrary to prevailing professional norms. In addition, the United States Supreme Court has recognized that the possibility that mitigating evidence could open the door for the prosecution to present damaging evidence in rebuttal is not a justification for failing to conduct an adequate

investigation. Finally, the Court has held that failing to review records that the prosecution likely will use as an aggravator constitutes deficient performance. Logically, failing to review documents from a client's first trial for the same offense also would be deficient performance.]

**A defendant has no constitutional right to discuss his testimony with counsel during a short recess in the middle of that testimony.**

**Moore is not entitled to a separate sentencing jury despite the fact that the guilt phase jury learned that he was previously convicted and sentenced to death for the same offense:** Because no clearly established Supreme Court law entitles a defendant to a new jury for the sentencing phase when the guilt phase jury learns of a prior conviction for the same offense, the Kentucky Supreme Court's ruling that Moore was not prejudiced by the jury learning of his prior conviction for the same offense was not contrary to or an unreasonable application of clearly established law.

**Cumulative error analysis is impermissible:** The court held that because no Supreme Court precedent obligates the state court to consider alleged trial errors cumulatively, the Anti-terrorism and Effective Death Penalty Act (AEDPA) precludes the court from doing so.

*Note:* [This part of the court's ruling has not been consistently followed in the circuit and is contrary to all other circuits that have addressed this issue. It also is contrary to what the United States Supreme Court has done in numerous ineffective assistance of counsel and failure to disclose material exculpatory evidence cases.]

**Martin, J., dissenting:** Martin would hold that "when counsel chooses to go the mitigation route, prevailing professional norms require counsel to retain a mitigation specialist." Martin also notes that the court has never held that counsel is ineffective only when wholly failing to investigate or present any mitigating evidence and that case law belies such a conclusion. After an extensive comparison between the lack of investigation and the available but undiscovered mitigating evidence in Moore's case to similar cases decided by the United States Supreme Court and the 6th Circuit, Martin concludes that counsel was ineffective requiring reversal.

*Note:* [The dissent goes through great length discussing United States Supreme Court and 6th Circuit ineffective assistance of counsel case law and the application of the ABA Guidelines. Reading Martin's dissent provides an excellent overview of how a penalty phase should be handled. Attorneys handling capital trials should definitely read it.]

**United States v. Young, 424 F.3d 499 (6th Cir. 2005)**

(Guy, J., joined by, Batchelder, J., and Gilman, J.)

(reversing trial court empaneling separate jury for sentencing phase)

In this federal capital case with major implications for Kentucky capital trials, the trial court intended to empanel a non-death-qualified jury to determine guilt – or – innocence and, if convicted, intended to empanel a separate death-qualified jury to determine whether to impose a death sentence. The trial court ruled that the provision of the Federal Death Penalty Act authorizing a separate jury for sentencing if the jury that determined guilt was discharged for "good cause" had been satisfied because 1) judicial time and resources would be saved in this and related cases by proceeding without a death-qualified jury because the court could avoid both extensive voir dire and the need to resolve the pending disputes concerning the aggravating factors asserted by the government before trial; 2) a sentencing hearing is unnecessary if Young is acquitted of the capital offenses; 3) it is likely that prospective African-American jurors would be disproportionately excluded for cause due to the higher rate of opposition to the death penalty among African-Americans; 4) 49.2% of death-qualified jurors make the sentencing decision before the penalty phase; and, 5) death-qualified jurors are less likely to believe in the presumption of innocence and more likely to convict. The government sought a writ of *mandamus* and also appealed under the collateral order doctrine.

**Review is proper under the collateral order doctrine:** Under the collateral order doctrine, an interlocutory order is immediately appealable as a final decision "when the order conclusively determines an important legal issue completely separate from the merits of the action, which is effectively unreviewable on appeal from a final judgment." Because this case involves an issue that will likely recur in other cases and because it is an issue that is effectively unreviewable after final judgment, the important issue of whether the Federal Death Penalty Act allows empanelling separate juries on a pre-trial finding of good cause is proper subject matter for review under the collateral order doctrine.

**Mandamus is an appropriate avenue of relief:** In determining whether to grant *mandamus* relief, five factors must be considered: 1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief needed; 2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal; 3) whether the district court's order is clearly erroneous as a matter of law; 4) whether the lower court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and, 5) whether the district court's order raises new and important problems, or issues of first impression. For the same reasons making the collateral order doctrine applicable in this case and because the prosecution will suffer prejudice

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from having to present the case to separate juries that cannot be corrected on appeal, *mandamus* is an appropriate remedy to seek in this case.

**The Federal Death Penalty Act does not permit empanelling a separate penalty phase jury until after the guilt – or – innocence phase has concluded:** The Federal Death Penalty Act permits empanelling a jury solely for the penalty phase if the jury that determined the defendant's guilt was discharged for good cause. Applying the plain meaning rule, it is clear that discharge for good cause refers to events arising after the guilt phase has been concluded. Thus, the district court had no jurisdiction to make a pre-trial determination that a separate jury would determine whether to impose a death sentence.

**The district court's inherent powers cannot be used to empanel a separate jury:** A federal court's inherent powers may not be exercised in a way that conflicts with federal statutes or rules. Because the reasons the district court believed good cause had been satisfied exist in all federal capital cases, no extraordinary case specific reasons exist justifying the court's exercise of its inherent powers.

**A defendant cannot waive the unitary jury requirement:** Because the Federal Death Penalty Act intentionally includes waiver mechanisms in some portions of the statute, but not in the unitary jury provisions, the statute must be interpreted to reflect the legislature's intent that a unitary jury could not be waived unilaterally by the defendant.

***In re Lott*, 424 F.3d 446 (6th Cir. 2005)**

(Merritt, J., joined by, Cole, J.,; Boggs, C.J., dissenting)

The district court held that Lott implicitly waived the attorney-client and work product privileges by asserting a claim of actual innocence. Accordingly, the district court authorized the state to depose Lott's trial counsel and ordered trial counsel to disclose to the state any information concerning whether Lott is guilty of the murder and whether Lott confessed. Lott sought *mandamus* relief.

***Mandamus* is an appropriate avenue of relief:** The court concluded that *mandamus* is available because 1) the case presents an issue of first impression; 2) no other readily available means of relief exist to protect against disclosure of privileged information

**Actual innocence claims do not waive the attorney-client privilege:** Implied waivers must be construed narrowly – they can be no broader than necessary to ensure the fairness of the proceeding. Typically, this means the attorney-client privilege is waived when alleging ineffective assistance of counsel, but only to the extent necessary to defend against the allegation of ineffectiveness. Because the confidential attorney-client relationship is not the subject of the

constitutional inquiry when the claim involves innocence, a petitioner does not waive the attorney-client privilege by asserting actual innocence. Thus, the court granted Lott's petition for a writ of *mandamus*.

**Boggs, C.J., dissenting:** believes asserting actual innocence waives the attorney-client privilege because the court must determine factual innocence not legal insufficiency so all evidence essential to achieving a just resolution of the case must be considered.

***In re Bowling*, 422 F.3d 434 (6th Cir. 2005)**

(Gibbons, J., joined by Gilman, J.; Moore, J., dissenting) (denying authorization to file a successor habeas petition on a mental retardation claim and construing 60(b) motion as a successor habeas petition).

**Requirements for filing successive habeas petition on mental retardation:** In order for a federal circuit court to grant permission to file a successor *habeas* petition, the applicant must make a *prima facie* showing that the application to file a successor presents a claim that relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously available, or that the factual predicate for the claim could not have been discovered previously through due diligence and the facts would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. A *prima facie* showing requires the presentation of sufficient allegations of fact together with some documentation that would warrant a fuller exploration by the district court. In the context of mental retardation, the key substantive question before the court is whether the applicant was mentally retarded at the time of the offense.

*Note:* [Underlying offense is not limited to the crime. It should be construed to include any factor making a person eligible for the death penalty.]

*Note:* [Arguably, the 6th Circuit's statement on the issue before the court is legally incorrect for two reasons. First, an application to file a successor *habeas* petition is a limited threshold inquiry that only addresses whether some evidence in support of the claim has been presented. Whether the applicant will likely prevail on the underlying merits goes beyond the threshold inquiry, and thus the court was acting beyond its limited jurisdiction in ruling that Bowling was not mentally retarded. Second, mental retardation is a static condition that remains for life. Thus, a finding of mental retardation at any time should end the inquiry. There is no reason to analyze whether a person was mentally retarded at the time of the offense. In fact, the United States Supreme Court has ruled that no nexus between the crime and mental retardation needs to be established before the prohibition on executing the mentally retarded is triggered. See *Tennard v. Dretke*, 542 U.S. 274 (2004).]

**Bowling is not mentally retarded:** The court recognized that Bowling had an I.Q. score of 74, failed ninth grade three times, had multiple head injuries, was slow to walk and in becoming toilet trained, and that Bowling was a follower. Yet, the court denied Bowling's application to file a successor because the "evidence before this court strongly suggests that Bowling is not mentally retarded." In support of this ruling, the court noted that Bowling 1) had I.Q. scores of 86 and 87; 2) did not justify the five-point margin of error with any explanation; 3) failed to present evidence that the psychologists who administered the I.Q. test did not already consider the adequacy and accuracy of the testing mechanisms in calculating his scores; and, 4) presented his mental retardation claim for the first time in the months preceding his execution date. The court also noted that Bowling's problems may be indicative of a low level of intellectual functioning, but it was equally indicative of personality disorders, and that if Bowling is mentally retarded, he likely would not have waited fourteen years to present his argument only in connection with a request for permission to file a successive petition.

**Kentucky's mental retardation statute is consistent with the constitutional restriction on executing the mentally retarded:** Because the test enunciated in *Atkins v. Virginia*, 536 U.S. 304 (2002), for defining who is mentally retarded is similar to the Kentucky definition in that both require significantly sub-average intellectual functioning, limitations in adaptive functioning, and an onset before adulthood, *Atkins* did not alter Kentucky death-sentenced prisoners' ability to present a mental retardation claim.

*Note:* [There are many significant problems with Kentucky's mental retardation statutes. The Kentucky Supreme Court's decision in Bowling's mental retardation case failed to resolve many of these issues, while also creating new ones. That opinion also created new issues. Trial, appellate, and post-conviction counsel representing death-eligible or death-sentenced offenders with potential mental retardation claims (or mental retardation claims that have already been presented) are encouraged to consult with the capital post conviction unit on the application of *Atkins*, and *Bowling*.]

**Bowling 60(b) motion is a successor habeas petition:** Without explaining why, the court held that the district court properly construed Bowling's 60(b) motion as a successor habeas petition. Bowling had argued that the court should reopen his habeas petition because of intervening case law and new evidence that could not have been discovered earlier that calls into question the underlying law and facts that the court relied upon in denying his habeas petition.

**Moore, J., dissenting:** Moore would authorize the filing of a successive petition for two reasons: 1) there is "considerable evidence that irrebuttable IQ ceilings are inconsistent with current generally-accepted clinical definitions of mental retardation and that any IQ thresholds that are used should

take into account factors, such as a test's margin of error, that impact the accuracy of a particular test score;" and, 2) the district court and the 6th Circuit should "consider whether Kentucky's definition of mental retardation and its procedures for evaluating such a claim encompass the whole range of mentally retarded offenders about whom there is a national consensus."

**Post v. Bradshaw, 422 F.3d 419 (6th Cir. 2005)**

(Batchelder, J., joined by, Siler, J.,; Cole, J., dissenting)  
(construing 60(b) motion as successor habeas petition).\*

The court's opinion and Cole's dissent should be analyzed in detail by any attorney practicing criminal defense in the federal court system and all attorneys filing federal habeas petitions. The majority opinion is discussed in abbreviated fashion below.

The federal district court granted Post's motion for discovery in connection with his habeas petition. Post's counsel, however, never conducted the discovery, and the habeas petition was denied. After appealing the denial of a certificate of appealability, Post filed a Federal Rules of Civil Procedure, Rule 60(b) motion for relief from judgment because of counsel's failure to conduct discovery. The district court ruled that counsel's failure to conduct discovery was "inexcusable neglect." Thus, the court stated its intention to grant the motion. Post, then, sought a limited remand from the 6th Circuit to allow the district court to grant the 60(b) motion. The 6th Circuit refused to grant the remand and denied the 60(b) motion, holding that it was a successor habeas petition barred under 2254(i) because it alleged the ineffectiveness of post-conviction counsel.

**Procedure for filing 60(b) motion when habeas appeal is pending:** A petitioner must file any 60(b) motion in federal district court. If the district court indicates that it will grant the motion, the petitioner should make a motion in the circuit court for a limited remand so the district court can grant the 60(b) motion.

**60(b) motions premised on counsel's failure to conduct discovery must be reclassified as a habeas petition:** A successor habeas petition advances or seeks vindication of one or more claims. A claim is an asserted federal basis for relief from a state court's judgment, and a motion brings a claim if it attacks the federal court's previous resolution of a claim on the merits. A 60(b) motion asserts that a previous ruling that precludes a merits determination was in error (procedural default, failure to exhaust, statute of limitations, etc.)

Post's 60(b) motion seeks discovery that might provide new evidence that he could present in support of claims previously denied. Thus, Post seeks to advance, through new discovery, claims that the district court previously

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considered and dismissed on substantive constitutional grounds (*i.e.* on the merits). In addition, his theory of “inexcusable neglect” attacks *habeas* counsel’s effectiveness, despite no right to the effective assistance of post conviction counsel. Thus, Post’s 60(b) motion must be reclassified as a *habeas* petition and dismissed since he has already filed a *habeas* petition and the motion does not satisfy the requirements of 2244 (new right applied retroactively, or new evidence that establishes by clear and convincing evidence that the petitioner is innocent of the underlying offense).

*Note:* [Post does not preclude 60(b) relief where the federal court failed to apply *de novo* review to claims not addressed on the merits in state court, as required under United States Supreme Court and 6th Circuit law. A 60(b) motion addressed to this situation is proper because it only asks the court to reach the merits of claims it improperly refused to reach when it originally decided the *habeas* petition.]

***Biros v. Bagley*, 422 F.3d 379 (6th Cir. 2005)**

(*Gibbons, J., joined by, Siler, J., and Sutton, J.*) (reversing lower court’s grant of relief)

**Application of the Anti-terrorism and Effective Death Penalty**

**Act:** Since the *habeas* petition was filed after the effective date of the AEDPA, the court reviewed the district court’s legal conclusions *de novo* and its factual findings for clear error. Because the district court made no independent determination of fact, its factual findings are also reviewed *de novo*.

**Standard for determining if claim is procedurally defaulted:**

Federal *habeas* review is precluded where a state court does not address a petitioner’s claim on the merits because the petitioner has failed to satisfy a state procedural requirement that is independent of the federal question and adequate to support the judgment. To determine whether a claim was procedurally defaulted, a federal court must consider 1) whether there is a procedural rule applicable to the petitioner’s claim and whether the petitioner failed to follow this rule; 2) whether the state court actually enforced the state procedural rule; and, 3) whether the state procedural rule is an adequate and independent state ground to foreclose relief. The adequacy of a state procedural bar turns on whether it is firmly established and regularly followed. For a claim to be defaulted, the state court must rely on the procedural rule to preclude reviewing the claim on the merits. If a claim is defaulted, the default is excused if the petitioner can establish cause for failing to follow the rule and prejudice resulting from the constitutional error, or that a miscarriage of justice will occur.

**Insufficient indictment claim is procedurally defaulted:**

Because *Biros* failed to timely object to the insufficient indictment, the state supreme court reviewed the claim for

plain error and rejected it. Since Ohio’s contemporaneous objection rule is an adequate and independent state ground barring federal review, and the application of plain error constitutes enforcement of that rule, *Biros* claim was procedurally defaulted.

**Insufficient indictment and improper juror instructions**

**were harmless:** The federal district court held that these claims were structural errors that are not subject to harmless error analysis. The 6th Circuit disagreed and applied the harmless error test applicable in *habeas* cases, “whether the error had substantial and injurious effect or influence in determining the jury’s verdict.” Because there was no question that *Biros* acted alone in committing the murder, the court held that the error was harmless, and thus reversed the district court’s grant of *habeas* relief.

**No *Miranda* violation:**

*Miranda* rights were not required since the following facts establish that *Biros* was not in custody when he confessed: 1) he traveled voluntarily to the police station; 2) the interrogation door was open; 3) the police gave no indication that *Biros* was under arrest or not free to leave; 4) *Biros*’ freedom was not limited and his movement as not restrained; and, 5) during the interview, *Biros* was told he was free to leave and not required to answer questions.

**The Constitution permits exercising peremptory challenges on jurors who voiced general objections to the death penalty.**

***Baston v. Bagley*, 420 F.3d 632 (6th Cir. 2005)**

(*Boggs, C.J., joined by Rogers, J.; Merritt, J., dissenting*)

The court failed to address whether constitutional errors occurred when the state court 1) considered victim impact evidence; 2) failed to consider *Baston*’s lack of criminal history as a mitigating circumstance; and, 3) improperly considered the nature and circumstances of the offense. Instead, the court held that the reweighing of aggravating and mitigating circumstances by the state appellate court corrected any error that may have occurred.

**Merritt, J., dissenting:** Relying on an essay written by Justice Scalia, Merritt would only uphold the appellate court’s reweighing of aggravators and mitigators when it is clear from their opinions that they understand and take sole responsibility for the resulting death sentences by knowingly making what is largely a moral judgment, not by just refusing to set aside the actions of others.

*Note:* [Whether the 6th Amendment allows errors by the sentencing body in weighing aggravating and mitigating factors to be cured by appellate courts reweighing aggravators and mitigators is an open issue. Arguably, *Ring v. Arizona*, 536 U.S. 584 (2002), requires the reweighing to be conducted by a jury. But because *Ring* is not retroactive and was decided after *Baston*’s conviction became final on

direct appeal, the 6th Circuit did not have to confront this issue.]

***Abdus-Samad v. Bell*, 420 F.3d 614 (6th Cir. 2005)**  
(*Cole, J., joined by, Gilman, J., and Cook, J.*)

**The Tennessee Supreme Court correctly applied the harmless error test to the erroneous inclusion of felony murder as an aggravating circumstance:** On direct appeal, the Tennessee Supreme Court held that an aggravating factor must be something more than the mere elements of the particular homicide in order to narrow the class of death eligible offenders. But, the court held that resentencing is not required if the reviewing court concludes beyond a reasonable doubt that the sentence would have been the same had the jury given no weight to the invalid felony murder aggravating factor. The 6th Circuit held that this was the equivalent of the federal constitutionally mandated harmless error test - - whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Reviewing the state court's harmless error analysis, the 6th Circuit held that it was not unreasonable to find the inclusion of an improper aggravator harmless because the improper aggravator did not convey new information to the jury, was not stressed by the prosecutor, and because the remaining aggravator was significant.

**The *Brady* and *Giglio* claims were procedurally defaulted:** The court held that Abdus-Samad's claims that the state withheld material exculpatory evidence and knowingly presented false testimony were procedurally defaulted because the claims were presented after the expiration of Tennessee's three-year statute of limitations for asserting a claim for post conviction relief. After analyzing the facts of each claim, the court also held that Abdus-Samad cannot satisfy the actual innocence exception to procedural default because the evidence does not establish by a preponderance of the evidence that no reasonable juror would have convicted him.

**The failure to provide a lesser included offense instruction was harmless:** Because the jury convicted Abdus-Samad of felony murder rather than second-degree murder, the failure to provide an instruction on the lesser offense of voluntary manslaughter was harmless.

**IAC of post conviction counsel is not cause to excuse a procedural default.**

**The court also denied Abdus-Samad's claim that his prior murder conviction was invalid and therefore should not have been used as an aggravator.**

## United States District Courts of Kentucky

***Matthews v. Parker*,**  
**No. 3:99 CV-P91-H (W.D. Ky. Oct. 7, 2005)**

**Standard for granting an evidentiary hearing in federal court:** The AEDPA section 2254(e)(2) only bars an evidentiary hearing if the applicant has failed to develop the factual basis of a claim in State court proceedings. "Failed to develop" means a lack of diligence or some greater fault attributable to the prisoner or the prisoner's counsel. Thus, the issue is not whether the factual basis could have been discovered but instead whether the prisoner was diligent in his efforts. To satisfy this requirement, a petitioner usually must, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law. Even when 2254(e)(2) prohibits an evidentiary hearing, under 6th Circuit law, federal district courts have the inherent authority in a *habeas* case to grant an evidentiary hearing. An evidentiary hearing can only be granted if 1) the petitioner alleges sufficient grounds for release; 2) relevant facts are in dispute; and, 3) the state courts did not hold a full and fair evidentiary hearing.

**Matthews is entitled to a federal evidentiary hearing:** Because Matthews sought, but was not granted an evidentiary hearing in state court on his ineffective assistance of counsel at guilt - or - innocence and penalty phases of his trial, 2254(e)(2) poses no obstacle to granting Matthews an evidentiary hearing. As to the merits of Matthews' request for a hearing, Matthews alleged that counsel failed to investigate, prepare, and present evidence at both the guilt and penalty phase of his trial to support his defense of extreme emotional distress and ultimately to mitigate punishment. Without discussing the facts, the court held that since the record before the court is inadequate for a meaningful review of the ineffective assistance of counsel claims and because Matthews put forth "some evidence" to support this claim, an evidentiary hearing must be held.

## Kentucky Supreme Court

***Skaggs v. Commonwealth*,**  
**2005 WL 2314073 (Ky. 2005) (final-no rehearing petition)**

The Court held that Skaggs did not procedurally default his mental retardation claim because Kentucky's mental retardation statute did not exist when he was tried, and because he requested, but was denied, a mental retardation hearing at his penalty phase retrial. As for the merits, the Court held that I.Q. scores of 64 (which the examiner attributed to malingering), 65 (reported on Skaggs school records), and 73 is some evidence creating doubt as to whether Skaggs is mentally retarded, necessitating an evidentiary hearing.

*Note:* [The court noted that procedures for implementing *Atkins* did not exist prior to the court's decision in *Bowling*  
*Continued on page 26*

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*v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005). Thus, counsel should argue that it is impossible to procedurally default an *Atkins* claim prior to the *Bowling* decision because no procedures existed for adjudicating the claim. If currently in federal court, counsel should argue that the state court's procedural default is not an independent and adequate state law ground since the procedures did not exist until a few months ago. In cases where the trial court found the defendant not retarded, counsel should argue that the mental retardation determination must be made anew without any reliance on the prior court determination because it is nearly impossible to determine if the trial court applied the correct procedures and standards (*e.g.*, preponderance of the evidence burden).]

*Note:* [The court reiterated its inaccurate belief, first articulated in *Bowling*, that mental retardation can recede between the offense and execution. This belief resulted in the *Bowling* court requiring proof of mental retardation at the time of the offense, which the court ruled would always outweigh I.Q. scores obtained during the developmental period. These requirements conflict with all scientifically recognized definitions of mental retardation. Counsel should preserve this issue in the trial court, raise it the United States Supreme Court, and argue in federal court that any mental retardation ruling in state court is an "unreasonable application of" *Atkins v. Virginia*, 536 U.S. 304 (2002).]

**Wintersheimer, J.**, dissenting, would hold that Kentucky's mental retardation statute is not retroactive, and that the resentencing hearing held after the 6th Circuit granted sentencing phase relief was a resumption of Skaggs 1982 trial.

***Mills v. Commonwealth*,  
170 S.W.3d 310 (Ky. 2005)**

**Only the civil rules listed in RCr 12.02 apply to criminal appellate procedures**

**The filing of a CR 59.05 motion does not toll the time for filing a notice of appeal:** Because the civil rule that suspends the running of the time for an appeal -- CR 73.02(1)(e) -- is not listed in RCR 12.02, it does not apply to criminal cases. Thus, although a CR 59.05 motion can be filed in a criminal case, it does not toll the statute of limitations for filing a notice of appeal. But because of prior confusion on this issue, the filing of a CR 59.05 motion tolls the statute of limitations for filing a notice of appeal for all litigants who filed a CR 59.05 motion prior to date this opinion became final (Sept. 22, 2005).

**Requirements of RCr 11.42 motions:** An RCr 11.42 motion is limited to issues that were not and could not be raised on direct appeal. An issue rejected on direct appeal may not be re-litigated in an RCr 11.42 motion by claiming that it amounts

to ineffective assistance of counsel. RCr 11.42 exists to provide the movant with an opportunity to air known grievances, not an opportunity to conduct a fishing expedition for possible grievances. The motion need only "state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds." Thus, the motion must contain "more than a shotgun allegation of complaints." The movant has the burden to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceeding. But extrinsic evidence is not necessary, and discovery is not permitted.

**Standard for obtaining an evidentiary hearing on RCr 11.42 motions:** The movant must show that he is entitled to relief under the rule. This can be done by showing that there has been a violation of a constitutional right, a lack of jurisdiction, or such a violation of a statute as to make the judgment void and therefore subject to collateral attack. Then, the movant must show that "the motion raises an issue of fact that cannot be determined on the face of the record."

**Only one request for an evidentiary hearing is necessary:** Once the movant requests an evidentiary hearing (either in the original RCr 11.42 motion or in a separate pleading), the movant preserves the request for an evidentiary hearing throughout the entire proceedings. A request for an evidentiary hearing will not be found procedurally defaulted solely because the movant failed to renew the request for a hearing at a later time.

**Mills is entitled to an evidentiary hearing on his IAC claim regarding failing to present evidence of an alternate suspect and failing to request exculpatory information from the prosecution:** In determining whether Mills was entitled to an evidentiary hearing, the 11.42 court improperly focused on whether the record supported the allegations rather than whether the record refuted the allegations. Because Mills' alternate killer claim and exculpatory evidence claim involving an alternate suspect cannot be determined on the record, the court remanded for an evidentiary hearing. If the evidence at the hearing shows "any truth" to these claims, there is a reasonable probability that presenting this evidence to the jury could have changed the outcome, and trial counsel would have been ineffective.

**Mills is entitled to an evidentiary hearing on his IAC claim regarding failing to present mitigating evidence:** An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence. To determine whether counsel satisfied this duty, the 11.42 court must determine if a reasonable investigation would have uncovered the mitigating evidence presented in post conviction proceedings and whether the failure to present that evidence at trial was a tactical decision. Although the brevity and lack

of detail of the mitigating evidence presented at trial likely rendered the sentencing phase useless and suggests counsel's ineffectiveness, a hearing must be held to determine and delineate the mitigating evidence, and then to decide whether counsel made a strategic decision or abdicated his responsibility.

**Mills was not entitled to a missing evidence instruction:** A missing evidence instruction requires the jury to presume the missing evidence would have favored the defendant. This instruction applies when the government has lost or destroyed evidence. It also applies when the government fails to collect evidence if the failure to collect or preserve missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed. Here, the police failed to collect the moonshine in Mills' house that he allegedly was drinking on the day of the crime. Because there was no bad faith by the police in failing to collect the moonshine as evidence, Mills was not entitled to a missing evidence instruction so counsel was not ineffective for failing to request the instruction.

**Counsel was not ineffective for failing to move to recuse the trial judge:** Opinions formed by the judge on the basis of prior proceedings do not constitute bias or partiality unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. A judge is required to recuse himself when he has personal knowledge of disputed evidentiary facts concerning the defendant. Here, Mills' criminal history was not a disputed fact. Thus, the judge's outside knowledge from presiding over Mills' prior juvenile commitment is not a disputed evidentiary fact and does not support a claim of bias so recusal was not required.

*Note:* [The court also denied the following IAC claims: 1) not seeking assistance of neuropharmacologist, psychiatrist, or psychologist; 2) not seeking the assistance of a medical doctor, metallurgist, and an expert on treatment options available in Kentucky prisons; 3) failing to obtain an expert in support of the defense of intoxication; 4) failing to investigate and present an EED defense (court notes that Mills does not connect his family history of mental illness, abuse as a child, and his suicide attempts to his mental state at the time of the murder); 5) failing to impeach a witness with the witness' prior felony convictions and agreement to testify against another defendant; 6) failing to pursue competency to stand trial and mental retardation (76 I.Q. is high enough above 70 that not pursuing is not ineffective); 7) failing to suppress evidence from Mills' home and his videotaped statement; 8) failing to advise Mills of the possibility of an *Alford* plea; and, 9) failing to refute evidence of robbery and burglary.]

***Stopher v. Conliffe,*  
170 S.W.3d 307 (Ky. 2005)**

Stopher filed a writ of *mandamus* challenging the RCr 11.42 court's refusal to grant an ex parte hearing on his request for funds for an expert pursuant to K.R.S. 31.185.

**Canon of statutory interpretation:** The plain meaning of a statute must be presumed to be what the legislature intended. When the meaning is plain, courts cannot base their interpretation on any other method or source.

**K.R.S. 31.185 does not permit funds for experts in RCr 11.42 proceedings:** Because K.R.S. 31.185 refers to "defending attorney," and because counsel in an 11.42 proceeding is not a defending attorney (since the defendant in an 11.42 proceeding is the moving party and has the burden of proof), the Court held that 31.185 does not apply in 11.42 proceedings, and thus state funds for experts in 11.42 proceedings are not available.

**Experts in collateral attacks on convictions exceed bounds and purpose of RCr 11.42:** The court held that hiring an expert for use in a collateral attack on a conviction exceeds RCr 11.42 because 11.42 only provides a forum for known grievances, not the opportunity to search for grievances.

*Note:* [The court bars funds under K.R.S. 31.185. It does not bar funds under any other statute or situation. Thus, 11.42 courts retain the inherent power to appoint an expert in cases where the court feels that it is appropriate. Where funds for such an expert would come from remains an open issue.]

**No constitutional right to funds for an expert in post conviction:**

*Note:* [The court referenced case law that cites U.S. Supreme Court law holding there is no constitutional right to counsel in capital post conviction proceedings. But in light of changes in the standards of decency, the validity of the case law the Kentucky Supreme Court relies upon is questionable. Thus, if the constitutional right to counsel in post conviction proceedings is established, the constitutional right to funds for an expert should follow.]

*Note:* [Federal procedural due process and the Eighth Amendment require state courts to allow death row inmates to collaterally challenge their conviction and sentence. Counsel should argue that they are essentially denied these rights when they are not given the necessary resources, experts, to support their claims.]

*Note:* [Nothing in *Stopher* addresses experts that are for the benefit of the court. Thus, funds for experts should be permissible in the following circumstances: *Daubert* hearings, and when the court believes an expert is necessary

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to aid its understanding of a legal claim or its application of the law to the facts. Funds for experts should also be available when an appellate court rules that the trial court improperly denied a hearing that required expert testimony (e.g., mental retardation) or funds for an expert at trial. Finally, funds for experts should be available for claims that do not directly implicate the collateral proceedings on the merits, but focus on procedural aspects or issues that can arise at any time (i.e. competency to proceed).]

*Note:* [Because Kentucky refuses to grant funds for experts in post conviction proceedings, counsel in federal court should argue that the Anti-Terrorism and Effective Death Penalty Act (AEDPA) does not apply to their claims (impossible to adjudicate on the merits because the factual basis for claims could not be fully presented), and that they are entitled to an evidentiary hearing in federal court even if one was granted in state court since the failure to grant funds for an expert means that no full and fair hearing was conducted in state court.]

***Salinas v. Payne,*  
169 S.W.3d 536 (Ky. 2005)**

Salinas was convicted of capital kidnapping and murder, and was sentenced to life without parole. In 2002, Salinas' convictions were overturned because the jury had not been properly instructed on the capital kidnapping charge. After the Commonwealth announced its intention to seek death at retrial, Salinas filed a motion arguing that double jeopardy barred imposition of a death sentence. The motion was denied, and Salinas sought a writ of prohibition in the Kentucky Supreme Court.

**Double jeopardy is an appropriate subject matter for a writ of prohibition:** Because the issue is well-framed by the facts in the case, the court deemed it appropriate to exercise its discretionary authority to address the issue now rather than wait until a possible appeal.

**Death can be sought at retrial as long as the jury finds an aggravating circumstance at the first trial:** The court reaffirmed its holding in *Commonwealth v. Eldred*, 973 S.W.2d 43 (Ky. 1998), that the Commonwealth is not precluded from seeking the death penalty on retrial if, in the original sentencing phase, the jury had indicated in writing the finding of an aggravating circumstance beyond a reasonable doubt, even though it did not choose to impose the death penalty.

**A finding that no aggravator circumstance exists is an acquittal of the death penalty:** Because the sentencing body must find an aggravating circumstance before the death penalty may be imposed, a finding by the jury or the court that no aggravating circumstance exists is an acquittal of the death penalty barring the imposition of a death sentence at a retrial.

*Note:* [Although the court does not expressly recognize the distinction in *Salinas*, it is important to distinguish between statutory and non-statutory aggravating circumstances. A jury could find a non-statutory aggravator, but not a statutory aggravator. In this circumstance, death would be prohibited at retrial because statutory aggravators are used to narrow the class of death eligible offenders while non-statutory aggravators only come into play in determining whether a death-eligible offender should be sentenced to death.]

***Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), does not require overruling *Eldred*:** *Sattazahn* held that double jeopardy did not bar seeking death at retrial when the trial judge imposed a life sentence at the original trial because the jury had deadlocked on the appropriate sentence without reaching a decision regarding the existence of aggravating circumstances. According to the Kentucky Supreme Court, the crucial inquiry "in determining whether a defendant is subject to the death penalty on retrial when the first jury did not impose death, is whether the jury made findings of fact in the first trial that constituted an acquittal of the aggravating circumstances." An implied acquittal of the death penalty occurs only where the jury or reviewing court affirmatively finds that the Commonwealth has failed to prove the existence of an aggravating circumstance. If the jury finds that an aggravating circumstance was proven beyond a reasonable doubt, but nonetheless imposes less than death, the Commonwealth is not precluded on double jeopardy grounds from seeking the full range of penalties on retrial.

**Imposing death on Salinas at retrial does not violate double jeopardy:** Because there was sufficient evidence for the jury to find the aggravating circumstance of murder committed during the course of kidnapping, no implied acquittal existed. Thus, double jeopardy does not bar imposing death on Salinas at his retrial.

*Note:* [The Kentucky Supreme Court's ruling appears inconsistent with *Sattazahn*. Counsel should argue, particularly in a non-weighting state, like Kentucky, that imposing less than death is a factual finding that after considering the aggravating and mitigating factors, death is not the appropriate sentence. It is also important to note that *Sattazahn* had been sentenced to death at his retrial. It is unlikely that the United States Supreme Court will address this issue unless death is imposed at retrial because otherwise the issue could be rendered moot by the jury's sentencing decision.]

***Bowling (Ronnie) v. Commonwealth,*  
168 S.W.3d 2 (Ky. 2004)**

At the end of Bowling's trial, the court issued a verbal order forbidding all parties from contacting or interviewing the jurors. Bowling did not appeal that order. After Bowling's convictions and sentences were affirmed on direct appeal, Bowling filed a motion in the circuit court to lift the no-

contact order. The trial court denied the motion on grounds that it was without jurisdiction to rule on any motions until Bowling filed an RCr 11.42 motion. The trial court's ruling was affirmed. After the 11.42 motion was filed, Bowling again filed a motion to lift the non-contact order. While that appeal was pending, the Kentucky Supreme Court rendered a decision in another case, holding that a trial court is without jurisdiction to control access to jurors after conclusion of trial-level proceedings. Relying on this case, Bowling interviewed his trial jurors. The interviews were completed more than eight months before the opinion refusing to lift the no-contact order was affirmed. Based on information learned during these juror interviews, Bowling filed a motion for a new trial on grounds of newly discovered evidence.

**Bowling's motion for a new trial based on the juror misconduct is untimely:** CR 60.02 has a one-year statute of limitations on moving for a new trial based on newly discovered evidence. But CR 60.02 does not have a provision for extending the time limit past one year. Under RCr 10.06, a motion for a new trial based on newly discovered evidence must be made within one year after the entry of the judgment or at a later time if the court for good cause permits. The trial court order barring contact with the jurors only provides grounds to support a motion to extend past one year the time for filing a motion under RCr 10.06. Because Bowling never made a motion in the trial court to extend the time for filing his RCr 10.06 motion, his current motion is time barred. Even if the no-contact order tolled the time for filing the motion, Bowling still is time barred because he filed his RCr 10.06 motion more than one-year after the Kentucky Supreme Court ruled that a trial court has no jurisdiction to control access to jurors after conclusion of trial-level proceedings.

**A juror affidavit saying that Bowling had to prove his innocence in order to receive a not guilty verdict is insufficient grounds to reverse Bowling's conviction:** Under RCr 10.04, a juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot. Thus, the juror's statement cannot be used to impeach the verdict by showing misconduct on his part during deliberations.

The statement also does not establish that the juror gave false answers during voir dire. To prevail on such a claim, a party must demonstrate that a juror failed to answer honestly a material question on voir dire and then show that a correct response would have provided a valid basis for a challenge for cause. The juror stated during voir dire that he would presume Bowling innocent "as he sits here" before any evidence is presented; that he would find Bowling not guilty if the Commonwealth presented no evidence; and that he would find him not guilty if the Commonwealth did not prove him guilty beyond a reasonable doubt even if Bowling presented no evidence. But, the juror never said that he would not expect Bowling to present evidence of his innocence if the Commonwealth presented sufficient evidence of his guilt to otherwise support a conviction. Thus, the evidence does not support a finding that the juror lied during voir dire.

**RCr 10.04 permits juror testimony about exposure to improper outside influences even if it occurred during deliberations:** Any other interpretation of RCr 10.04 would violate the 6th Amendment right to confrontation, because the jury would be exposed ex parte to evidence that was not subject to cross-examination. Any private communication, contact or tampering directly or indirectly, with a juror during a trial is presumptively prejudicial. But, a hearing is required only when the alleged contact presents a likelihood of affecting the verdict. Here, that is not the case. One of the jurors raised a window in the jury room and observed one of Bowling's relatives staring at the jury window. This caused some of the jurors to become uncomfortable so they asked the sheriff to have the man move away from the window. The same result occurs with the judge's post-trial meeting with the jurors.

**The court also denied Bowling's claim that due process and a fair sentencing proceeding was denied because, in the presence of the prosecutor, the trial judge met with the alternate jurors after they had been dismissed and that he met with the rest of the jurors after they imposed a death sentence and told them that they had "done the right thing," and then divulged evidence excluded at trial. ■**

I would like to be known as a person who is concerned about freedom and equality and justice and prosperity for all people....

-Rosa Parks

## PLAIN VIEW . . .

Author's Note: I have been unable to review the Kentucky Supreme Court opinions for search and seizure cases over the past few months. Please refer to the slip sheets for any recent search and seizure cases in the Kentucky Supreme Court.

***United States v. Navarro-Diaz***  
**420 F.3d 581, 2005 Fed.App. 0351P (6th Cir. 2005)**

Gildardo Navarro-Diaz was arrested in a hotel room in Zenia, Ohio, while the police were investigating reports of a strong smell of marijuana. During the course of their investigation, the police discovered that Navarro-Diaz had given them a false name. Ultimately, he was charged with being an alien who had been deported and was found in the United States without permission of the Attorney General. He moved to suppress his identity, which he alleged had been discovered only by violation of the Fourth Amendment. The district court denied his motion, and Navarro-Diaz appealed to the Sixth Circuit.

In an opinion by Judge Gilman, joined by Judges Nelson and Donald, the Sixth Circuit affirmed the lower court. Relying upon *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Court held that even if information regarding his identity was obtained in violation of the Fourth Amendment, that evidence of identity was not subject to suppression.

The Court was careful to note that their holding was not unlimited. Where the violation of the Fourth Amendment is egregious, relief may be granted. In this case, however, the "record reveals that he was not accosted by the police in a random attempt to determine whether he was an illegal alien. His encounter with law enforcement was precipitated by his being present in a hotel room in the middle of the day with four other local men, at least one of whom was smoking marijuana. All of the men in the room, not just the Hispanic men, were asked to identify themselves. Navarro-Diaz did so by providing the police with a false name, and then one of his companions was found to be in possession of a loaded handgun. A search of the hotel room led to discovery of another gun in the bathroom. Under these circumstances, the police officers decision to detain Navarro-Diaz until he provided his real name can hardly be said to have 'transgress[ed] notions of fundamental fairness.'"

Of particular importance to the Court was the fact that the crime was a continuing one. "If the government were forced to drop its prosecution of Navarro-Diaz, the police could simply approach him on his way out of the courtroom door

and demand that he identify himself...Should Navarro-Diaz refuse to answer, he could be arrested under a state 'stop-and-identify' statute, and his identity could then be discovered during the course

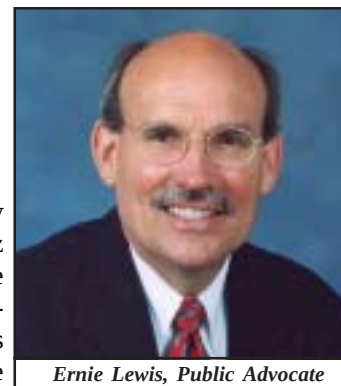
of the normal booking procedure...Because Navarro-Diaz could simply be reindicted for the same offense, suppressing his identity would have little deterrent effect upon the police who questioned him during his allegedly unlawful detention."

***United States v. Frazier***  
**423 F.3d 526, 2005 Fed.App. 0378P (6th Cir. 2005)**

Police in Morganfield, Kentucky began to investigate a group of 25 people who were dealing in drugs out of a federal housing project in Morganfield. After an investigation, Agent Steward went to US Magistrate Judge Robert Goebel seeking six different search warrants, including one against Christopher Frazier. The affidavit seeking to search Frazier's house was defective in that it did not specify particular information contained in the other five affidavits. After Frazier was indicted, he sought to suppress the evidence, drugs and firearms, found during the execution of the warrant. The district court denied the motion to suppress, holding that Agent Steward had acted in good faith reliance upon the issuance of the warrant.

The Sixth Circuit affirmed the trial court in a decision written by Judge Batchelder and joined by Judges Suhrheinrich and Gibson. The Court rejected the government's assertion that in evaluating probable cause the Court should consider evidence given by Agent Steward that was not contained in the four corners of the affidavit. The Court found that the affidavit did not support a finding of probable cause. "Where, as here, the warrant affidavit is based almost exclusively on the uncorroborated testimony of unproven confidential informants (none of whom witnessed illegal activity on the premises of the proposed search), the allegation that the defendant is a drug dealer, without more, is insufficient to tie the alleged criminal activity to the defendant's residence."

The Court then considered whether the good faith exception would save the illegal search. While stating that they would not go beyond the four corners of the affidavit in considering probable cause, the Court relied upon Supreme Court precedence in saying that they could look at evidence not in



Ernie Lewis, Public Advocate

the affidavit but presented to the judge in determining whether the good faith exception should apply. The Court held “that a court reviewing an officer’s good faith under *Leon* may look beyond the four corners of the warrant affidavit to information that was known to the officer and revealed to the issuing magistrate.” Based upon this holding, the Court found that the “affidavit was not so lacking in probable cause as to render official belief in its existence unreasonable,” one of *Leon*’s exceptions. Accordingly, the Court held that the trial court had not erred in overruling the motion to suppress.

***United States v. Puckett***

**422 F.3d 340, 2005 Fed.App. 0377P (6<sup>th</sup> Cir 2005)**

Officer Vess saw a white Mercury in Knoxville, Tennessee that appeared to be similar to a car that had been involved in a recent shooting so he began to follow him. After a few blocks, he pulled over Martece Puckett. When Puckett had no driver’s license, Vess arrested him. Because he also smelled marijuana and saw a plastic bag with marijuana in the front seat, he also searched the car, finding a gun, ammunition, and 117 grams of marijuana. Puckett was indicted on being a felon in possession of a firearm, possession of marijuana with intent to distribute, and possession of a firearm during a drug-trafficking crime. Puckett’s motion to suppress was denied, and he entered a conditional plea of guilty and appealed to the Sixth Circuit.

In an opinion by Judge Siler and joined by Judge Reeves, the Sixth Circuit affirmed. Because the officer and the defense expert agreed that Puckett was speeding at the time of the stop, the Court held that there was probable cause for the stop. Thereafter, “Vess smelled and saw in open view the marijuana in the seat. Therefore, there was probable cause to search the car at that point. Thus, the search was reasonable and the court correctly denied the motion to suppress.” The Court rejected the defendant’s contention that speeding was not the real reason for the stop, saying that the reason for the stop is irrelevant so long as there is probable cause for some crime.

***United States v. Whitehead***

**415 F. 3d 583 (6<sup>th</sup> Cir. 2005)**

Jerome Whitehead was arrested in an abandoned house in Detroit, Michigan, on February 26, 2003. This was a house that was reportedly a crack house. Two days before, the police had sent an informant to the house, but he had failed to purchase drugs there. The police saw 5 individuals go into the house and come out of it. The next day, the police saw three persons who appeared to buy drugs successfully, one of whom showed Officer Marshall a bag with what appeared to be crack cocaine in it. Marshall obtained a search warrant. It was executed on February 26, 2003. The police found Jerome Whitehead sitting at a table with a loaded

shotgun nearby. Whitehead was arrested in the basement where he had fled to, and 37 bags of crack cocaine were found on him. Whitehead was indicted for being a felon in possession of a firearm, for possessing drugs with intent to distribute, and possessing a firearm in connection with drug dealing. His motion to suppress was denied. After a jury trial, Whitehead was convicted and appealed to the Sixth Circuit.

In an opinion by Judge Gilman and joined by Judges Nelson and Donald, the Sixth Circuit affirmed the lower court but remanded on other grounds. The Court held that Whitehead had no reasonable expectation of privacy in the crack house. Peterson, who had been arrested with Whitehead, testified that he was homeless and squatting in the house. “This court has in the past concluded that those who inhabit a residence wrongfully may not claim a legitimate expectation of privacy in the property.” The Court further looked at the fact that while Whitehead was often at the house, he had never slept there, and that the house was dilapidated and unlivable. The Court relied upon *Minnesota v. Carter*, 525 U.S. 83 (1998), to say that one who is at a residence for a short period of time to engage in illegal activity does not have a reasonable expectation of privacy there. “Because Whitehead failed to refute Peterson’s admission that Peterson was an illegal squatter, and because Whitehead presented no evidence establishing more than his own casual, business-related association with the property, the district court did not err in denying Whitehead’s motion to suppress the evidence taken from the Ashland property.”

***Knott v. Sullivan***

**418 F.3d 561, 2005 Fed.App. 0332P (6<sup>th</sup> Cir. 2005)**

This is a civil rights action filed by Diane Knott in federal court under 42 USC #1983 for the alleged illegal searches of her cars and house after her son found a body and witnesses identified him as having been near the scene. Her house was searched, as well as her son’s and her husband’s car. After her son was indicted for murder, the local trial court granted the motion to suppress evidence found in his car because the warrant had named Diane’s husband’s car rather than her son’s car. The suit was against the police who had executed the warrant. The district court granted a summary judgment for the defendant police officers. Diane Knott appealed to the Sixth Circuit. In an opinion by Judge Moore, and joined by Cole and Wiseman, the Court affirmed in part and reversed and remanded in part.

First, the Court rejected Knott’s assertion that the Court should accept that the Fourth Amendment was violated based upon collateral estoppel or issue preclusion principles.

However, on the more substantive issues, the Court held that the Fourth Amendment had been violated. The “errors in the search warrant and affidavit were so extensive that

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there was a reasonable probability that the wrong vehicle could have been mistakenly searched.” The Court went on to conclude that “in light of the profound errors contained in the search warrant and affidavit, the search of Knott’s 1988 Plymouth Horizon cannot be upheld as the lawful execution of a valid search warrant. Here, we are not presented with the mere transposition of digits in a license plate or vehicle identification number or a minor mistake in the description of one portion of the vehicle, but rather the wholesale inclusion of another vehicle’s make, model, year, license plate number, and vehicle identification number. Indeed, the vehicle described in the search warrant was not simply just another vehicle, but rather one owned by the father of a person suspected of committing a double murder. Given these circumstances, there was more than a reasonable probability that the incorrect vehicle could have been searched, notwithstanding the fact that the affiant was involved in executing the search and the warrant noted that the vehicle was stored in the Athens County Sheriff’s garage.”

Because the constitutional problems with the search warrant were clearly established at the time of the illegal search, the defendants’ reliance on the search warrants were objectively unreasonable. Accordingly, the district judge erred in granting a summary judgment in favor the defendants.

## SHORT VIEW . . .

1. *United States v. Jackson*, 415 F.3d 88, 367 U.S.App.D.C. 320 (D.C. Cir. 2005). Where the police pull over a car and find that the plates are stolen, a search of the trunk of the car is without probable cause, and thus a gun found there should have been suppressed. In this case, the defendant was properly pulled over for driving with a nonworking license plate light. He was also properly arrested when a records check revealed that the plates had been stolen. However, once the arrest occurred, only the passenger compartment could have been searched. The trunk could not be searched unless there was probable cause to believe that contraband would be found there. One of the interesting facets of this case is that Supreme Court Chief Justice John Roberts wrote a dissenting opinion, stating that because stolen cars often have stolen license plates on them that probable cause existed to search the trunk of the car.
2. *United States v. Barnett*, 415 F.3d 690 (7<sup>th</sup> Cir. 2005). The Seventh Circuit has decided that when a defendant is on intensive supervision with a condition of probation being allowing probation officers to search his house, that the Fourth Amendment is not violated when law enforcement officers enter his home and search without a warrant and without probable cause or a reasonable suspicion.

Relying upon both *Griffin v. Wisconsin*, 483 U.S. 868 (1987), and *United States v. Knights*, 534 U.S. 112 (2001), the Court held that the defendant had waived his Fourth Amendment rights through negotiating for probation release. The search condition is not without limits, however. “The purpose of the blanket waiver in this case was not to permit probation officers to harass probationers, but to excuse the officers from having to justify a search by establishing that it was based on probable cause, suspicion, or some other standard that might invite litigation. It is a reasonable assumption that the ‘contract’ implicitly forbids—equivalently, the waiver of Fourth Amendment rights does not extend to—searches that have no possible law-enforcement objective, or that so far exceed any legitimate enforcement needs as to compel an inference that the purpose and only effect were harassment.”

3. *United States v. Yuknavich*, 419 F.3d 1302 (11<sup>th</sup> Cir. 2005). The Eleventh Circuit appears to go even further than the *Barnett* case above. They have decided that a warrantless search of a computer owned by a person on probation can be accomplished even without an explicit condition of probation allowing for such. In this case, the Court held that where the trial court had placed the defendant on probation with a condition that he use his computer for work alone, that a search of the computer could occur when the officer discovered a modem attached to a telephone line. The existence of the phone line being attached to the computer constituted a reasonable suspicion. The existence of the condition of probation reduced the probationer’s expectation of privacy. This search was authorized even without an explicit condition of probation that allowed for a computer search.
4. *State v. Hall*, 115 P.3d 908 (Ore. 2005). The exclusionary rule under the Oregon Constitution has a unique purpose beyond that associated with the Fourth Amendment, which has as its purpose the deterrence of illegal activities by law enforcement. “[T]he Oregon exclusionary rule is a constitutionally mandated rule that serves to vindicate a defendant’s personal rights. In other words, the right to be free from unreasonable searches and seizures under Article I, section 9, also encompasses the right to be free from the use of evidence obtained in violation of that state constitutional provision.” In this case, the Court held that the defendant’s consent did not waive the illegal detention, and thus ruled that suppression of drugs found following consent should have occurred.
5. *State v. A Blue in Color*, 1993 *Chevrolet Pickup*, 116 P.3d 800 (Mont. 2005). Under the Montana Constitution, the police must have reasonable suspicion prior to searching trash left out on the curb. This holding, of course, goes beyond that contained in *California v. Greenwood*, 486 U.S. 35 (1998), which had held that a person has no reasonable expectation of privacy in his garbage left on the curb. However, because the defendant

- in this case left his garbage in an alley without taking any steps to keep others from looking in his garbage, there was no state constitutional violation.
6. *State v. Ressler*, 701 N.W.2d 915 (N.D. 2005). The police may not remove a package from a shipping facility in order to subject the package to a dog sniff unless there exists a warrant or probable cause supporting an exception to the warrant requirement. Reasonable suspicion is not enough to allow for the package to be removed from the shipping facility. "A seizure of a package based on reasonable suspicion affords government officials less command, dominion, or control over the package than they would possess if executing a full-fledged seizure based on probable cause or a warrant."
  7. *State v. Brown*, 117 P.3d 336 (Wash. 2005). Under the Washington Constitution, the police seize an individual when they ask him or her for their name and other personal information. Thus, the request for information requires a reasonable suspicion.
  8. *Logan v. Commonwealth*, 616 S.E.2d 744 (Va. Ct. App., 2005). The common area of a rooming house is similar to a home and a tenant has a reasonable expectation of privacy in that common area. Thus the police may not enter that area without a warrant absent exigent circumstances.
  9. *O'Boyle v. State*, 117 P.3d 401 (Wyo., 2005). A police officer violated the defendant's state constitutional right to be free from unreasonable searches and seizures when he asked 30 questions regarding the defendant's travel itinerary and other matters not related to the traffic violation when he had only been stopped for speeding. The questioning constituted a seizure which required reasonable suspicion not present in this case. Thus, evidence seized after a drug dog arrived and the defendant gave his consent to a search of his car should have been suppressed.
  10. *United States v. Martin*, 426 F.3d 68 (2<sup>nd</sup> Cir. 2005). The Second Circuit has upheld a search warrant of a home based entirely upon the owner of the home belonging to a Yahoo! e-group used to trade child pornography. Despite the fact that less than 8% of the e-mails received by the group contained visual depictions of child pornography, the Court held that common sense indicated that a person belonging to the group would possess child pornography on his computer.
  11. *Douglas v. Dobbs*, 419 F.3d 1097 (10<sup>th</sup> Cir. 2005). A person has a constitutionally protected interest in the records of the prescription drugs he is taking, according to the Tenth Circuit. "Although we have not extended the 'zone of privacy' to include a person's prescription records, we have no difficulty concluding that protection of a right to privacy in a person's prescription drug records, which contain intimate facts of a personal nature, is sufficiently similar to other areas already protected within the ambit of privacy... Information contained in prescription records not only may reveal other facts about what illnesses a person has, but may reveal information relating to procreation—whether a woman is taking fertility medication for example—as well as information relating to contraception."
  12. *United States v. Scott*, 424 F.3d 888 (9<sup>th</sup> Cir. 2005). Does the Fourth Amendment allow a trial court to require waiver of privacy rights in order to be released on bond? The Ninth Circuit has said no, that such a condition of pretrial release cannot be justified under either the special needs doctrine or the totality of the circumstances exception. In this case, the state trial court had required as a condition of pretrial release warrantless drug testing and suspicionless home searching. Law enforcement had required the defendant to give a urine sample, which resulted in a warrantless search of the defendant's home. The end result was a federal charge of possession of a sawed-off shotgun found at the home. The Court explicitly rejected the argument that the defendant had consented to the conditions of pretrial release, saying that it would be improper to construct an unconstitutional condition of release and call that a waiver. They rejected the government's assertion that this case was similar to that of *Griffin v. Wisconsin*, 483 U.S. 868 (1987), saying that pretrial releasees, as opposed to probationers and parolees, "have suffered no judicial abridgment of their constitutional rights." The Court also rejected the notion that the search conditions were constitutional because of the totality of the circumstances. "Moreover, the assumption that Scott was more likely to commit crimes than other members of the public is contradicted by the presumption of innocence... The government's interests in surveillance and control as to a pre-trial releasee are thus considerably less than in the case of a probationer."
  13. *State v. Bruce*, 2005 WL 2007215, 2005 Tenn. Crim. App. LEXIS 900 (Tenn. Crim. App. 2005). Distinguishing *Illinois v. Caballes*, the Tennessee Court of Appeals holds that holding for 18 minutes a person stopped lawfully on a traffic violation to allow a drug dog to arrive is a violation of the Fourth Amendment. The Court noted that in *Caballes* the holding of the driver did not extend the stop and thus did not offend the Constitution.
  14. *State v. Rabb*, 2005 WL 2218980, 2005 Fla. App. LEXIS 14430 (Fla. Dist. Ct. App. 2005). Taking a narcotics dog to the outside of a residence and allowing the dog to sniff constitutes a search. Distinguishing the case of *Illinois v. Caballes*, 125 S. Ct. 384 (2005), the Court stated that "the home stands strong and alone, shrouded in a cloak of Fourth Amendment protection because a home is not movable, on display to the public (at least as far as its interior), nor pervasively regulated by the government. We believe that a dog sniff at the exterior of a home should not be permitted to uncloak this remaining bastion of privacy, which is the most sacred of places under Fourth Amendment jurisprudence." ■

## KENTUCKY CASE REVIEW

by Astrida L. Lemkins, Appeals Branch



Astrida Lemkins

**James Anthony Deno v. Commonwealth of Kentucky**  
**Reversed and Remanded**  
**Rendered September 22, 2005**  
**To Be Published**

Appellant, James Anthony Deno, was indicted by a Jessamine County grand jury for rape in the first degree and for failing to register as a sex offender. The charges were tried separately, and at the rape trial, the Appellant was found guilty of first degree rape. The jury recommended a twenty year sentence.

On April 5, 2003, the alleged victim, J.M., went with her boyfriend, Kevin Elder, to visit their friends, Chris and Tim Coleman, who were living with Appellant at that time. It was the first time J.M. had met Appellant. The five of them began drinking. J.M. testified that she drank five or six beers that night, and drank four to six shots of whiskey. She became ill, vomiting, and then passing out on the couch. Boyfriend Elder testified that he thought Appellant also found a spot on the floor to sleep.

During the night, J.M. came in and out of consciousness. At one point she remembered a man on top of her penetrating her vagina. She attempted to roll over but was unable to do so. She also remembered Appellant telling her to be quiet at some point during the night.

In the morning J.M. awoke on the floor with her bra and shirt pulled up, exposing her breasts, and her pants and panties pulled down below her knees. J.M. was confused and became hysterical. Elder awoke to see J.M. in this condition. He asked Appellant, who was sitting on the couch, whether he had sex with J.M. Appellant denied it. After getting in the car with Elder to return home, J.M. confessed to Elder that she had been raped.

Later the same day, J.M. was taken to the Kentucky Medical Center. A nurse practitioner collected forensic evidence, photographing two scratches on J.M.'s back and noting a small tear near the bottom of J.M.'s vagina. Lab analysis found semen on a vaginal smear taken from J.M.

Two days later two detectives from the Jessamine County Sheriff's Department visited Appellant at his home. They requested a voluntarily biological sample for comparison. Appellant refused stating he wanted to speak to counsel first. The next day, the detectives returned with a search warrant to collect the biological specimen. The DNA of the semen found in J.M.'s examination matched that of Appellant.

On the first day of trial, Appellant made a *pro se* motion *in limine* for substitute counsel and in the alternative, a *pro se* motion to be co-counsel with present counsel. Both motions were denied.

**The trial court erred to the substantial prejudice of the defendant when it refused to grant hybrid representation; and, did not hold a *Faretta* hearing.** In chambers, before jury selection, Appellant made his request for hybrid representation. Twice, the judge told the defendant he could either represent himself at trial, or his attorney could represent him, but he could not be co-counsel with his attorney. The trial court also did not follow the requirements of *Faretta*, in that no hearing was held after Appellant requested to proceed *pro se* or with hybrid representation.

**The refusal of an individual, other than a DUI suspect, to submit to a warrantless seizure of bodily fluids may not be introduced at trial and argued as evidence of guilt.** The Appellant's refusal to voluntarily submit a biological specimen was introduced at trial and argued as evidence of guilt in the Commonwealth's closing argument. This violated Appellant's Section Ten and Fourth Amendment rights.

**The sexual misconduct statute, KRS 510.040, is intended to apply only to cases where both the defendant and victim are of a young age.** The appellant was properly denied an instruction on sexual misconduct because both the victim and Appellant were of majority age.

**David Leroy Skaggs v. Commonwealth of Kentucky**  
**Remanding**  
**September 22, 2005**  
**To Be Published**

In 1982, Appellant was convicted of murder and sentenced to death. His conviction was affirmed on direct appeal and his motion made under RCr 11.42 was denied and the denial was affirmed on appeal.

In 1994, Appellant filed a motion for a new trial, asserting he was mentally retarded and thus was ineligible for the death penalty pursuant to KRS 532.120, et seq., specifically, KRS 532.140(1.) This motion was also denied and the denial affirmed on appeal.

Appellant filed a writ of habeas corpus that was denied by the federal district court. However, the United States Court of Appeals for the Sixth Circuit reversed the denial of the petition because the expert witness who testified on behalf of the defendant was later determined to be a fraud. The case was remanded to the district court “with instructions to issue a writ of *habeas corpus* vacating Skaggs’s death sentence unless the Commonwealth conducts a new penalty proceeding within 180 days of remand.”

On April 2-17, 2002, the new penalty phase trial was conducted and Appellant was again sentenced to death. Appellant’s current appeal claims the trial court erred in not conducting a hearing prior to retrial to determine whether Appellant is mentally retarded, and thus not subject to the death penalty.

**Appellant was entitled to an evidentiary hearing prior to trial to determine whether he was entitled to the mental retardation exemption.** Sufficient evidence was presented to entitle Appellant to an evidentiary hearing and a determination of the issue by the trial court. Appellant’s original trial was held before the effective date of the exemption statutes; therefore, Appellant could not have defaulted procedurally on the mental retardation issue.

***Billy Akers v. Commonwealth of Kentucky***  
**On Discretionary Review**  
**Affirming in Part, Reversing in Part, and Remanding**  
**Rendered September 22, 2005**  
**To Be Published**

Appellant, Billy Akers, was convicted of first-degree stalking, fourth degree assault, and two counts of second-degree unlawful imprisonment. The Court of Appeals vacated the convictions of unlawful imprisonment and assault, due to a discovery violation and an error regarding to the misdemeanor charges. However, the Court of Appeals affirmed the felony first degree stalking conviction. The Kentucky Supreme Court granted discretionary review to address two issues: 1) whether the discovery violation warranted reversal of the stalking convictions; and, 2) whether Appellant was denied his right to peremptory charges because the trial court refused to excuse a juror for cause.

On an evening in June 2001, Akers’ wife, Rainie, and her fifteen year old daughter, Melissa, came home to find Appellant waiting for them. Several months earlier, Rainie had obtained an emergency protective order (EPO) against Appellant because he had choked her and threatened her life. The EPO prohibited Appellant from coming within 1,000 yards of Rainie, and prohibited him from possessing any firearms in the home. Later, a judge granted Rainie’s request to drop the provision of no contact so she could attempt to reconcile with Appellant.

Rainie attempted to call for help but the phone had been disconnected by Appellant. She noticed Appellant had a gun and attempted to flee, getting as far as the driveway where Appellant allegedly dragged her across the gravel driveway by her hair and arm. Melissa was also nabbed by Appellant in the driveway and she hit her head on the trailer as he dragged her inside. He handcuffed both women together on the bed.

In the morning, appellant claimed of chest pain. He uncuffed the women, took a shower, and the three went to the hospital. The two women returned home and found a state trooper there, who had been called by Rainie’s employer when she failed to show for work that morning.

At trial, the defense theory was that Rainie and Melissa had concocted the whole story, based, in part, on the fact that there was no physical evidence. While cross-examining the trooper, the defense tried to impeach him with the fact that the police report did not mention any injuries. The trooper testified that there was another report, unknown to the defense, where the injuries were included. Defense counsel requested a mistrial on the grounds that the Commonwealth had violated the discovery order. The trial court denied the request.

On direct appeal, the Court of Appeals held that the assault conviction must be vacated, but not the stalking or false imprisonment convictions because injury is not an element of these crimes.

**Discovery violation violated Appellant’s ability to prepare a defense on all charges.** Even though evidence of injury is not required to prove stalking or false imprisonment, Appellant’s defense to the entire situation was based on the lack of physical injury, which would have turned the case into a he said/she said situation. The Kentucky Supreme Court could not reasonably conclude that the defense would have proceeded in the same way had the assault report been provided.

***Commonwealth of Kentucky v. Joscelyn Fuartado, Et Al***  
**On Discretionary Review**  
**Reversing**  
**Rendered August 25, 2005**  
**To Be Published**

Appellee, Joscelyn Fuartado, is a citizen and native of Jamaica. Appellee pleaded guilty to second degree trafficking in marijuana and was probated for five years. Immediately after final judgment, Appellee pleaded guilty to second degree escape, and again was probated for five years. Months later, he was charged with auto theft, which resulted in his probation for marijuana trafficking being revoked.

The following year, the United States Immigration and Naturalization Service formally notified Appellee of its

*Continued on page 36*

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intention to deport him back to Jamaica because of the marijuana trafficking conviction. Approximately two years later, Appellee filed a *pro se* RCr 11.42 motion challenging the effectiveness of his trial counsel. Appellee argued that his plea was not voluntary because neither the trial court nor Appellee's trial counsel made him aware that deportation was a consequence of his guilty plea. The trial court denied relief but the Court of Appeals vacated the plea and remanded the case for an evidentiary hearing on ineffective assistance of counsel. The Court of Appeals held that the trial court was under no duty to mention deportation in its guilty plea colloquy because deportation is a collateral consequence. However, defense counsel's failure to do so may be counsel ineffectiveness of a constitutional dimension. The Kentucky Supreme Court granted discretionary review.

**Advising criminal defendants regarding the collateral consequences of a guilty plea is outside the scope of representation required under the Sixth Amendment.** A criminal defendant must be advised of the direct consequences of pleading guilty, but not the collateral consequences. A federal civil immigration hearing is collateral as to guilt. Thus, the failure of defense counsel to advise Appellee of potential deportation consequences is not cognizable as a claim for ineffective assistance of counsel.

***William McPherson v. Commonwealth of Kentucky*  
On Discretionary Review  
Affirming  
Rendered August 25, 2005  
To Be Published**

Appellant, William McPherson, was convicted on four counts of sexual abuse in the first degree. He was sentenced to four consecutive five year sentences, for a total of twenty years imprisonment. Appellant argues that the trial court erred by allowing the prosecution to amend the indictment after trial and the trial court denied his right to equal protection by the prosecution's use of peremptory challenges.

**Appellant's equal protection rights were not violated during voir dire.** The prosecutor used his eight of his nine peremptory strikes to exclude male members of the jury pool. The trial court asked for an explanation, which the court found satisfactory. With one exception, the prosecutor's questions during voir dire were directed to the panel as a whole. Thus, there was no disparity in questioning the jurors.

**An indictment amended after trial that consisted of pinpointing the exact dates of abusive incidents, which fell within the range of dates initially stated in the indictment, is permissible provided that the amended date is still prior to the return of the indictment.** Appellant argued that the amendment substantially prejudiced him because amending the dates to conform to her testimony bolstered her

credibility. However, the amendment was made during a bench conference, outside the presence of the jury, and there was no indication that the amendment caused him any prejudice.

***Commonwealth of Kentucky v. Ricky D. Leap*  
On Discretionary Review  
Reversing  
Rendered August 25, 2005  
To Be Published**

Appellee, Ricky D. Leap, was convicted of assault in the fourth degree, wanton endangerment in the first degree, and of being a persistent felony offender (PFO) in the first degree.

Appellant met the alleged victim in a bar. The victim traveled with Appellee to another bar where they drank more and smoked marijuana. Eventually, they ended up in Appellee's mother's basement where Appellee beat the victim savagely and repeatedly. When the victim's blood level was tested it was .322.

She did not know how her clothes came off but remembers sitting in a case. The next thing she knew she was on the ground and being kicked by Appellee. She was left beaten and nude on the side of the road. She had fractures on the left side of her face and the bone was split down the middle. Her vision blurred, and her eyeball muscle was trapped in the fracture. Another fracture would not completely heal. She will never have a full recovery.

Initially, Appellant was tried for assault in the second degree, unlawful imprisonment in the first degree, and PFO 1<sup>st</sup> degree. The morning of trial, the Commonwealth dismissed the unlawful imprisonment charge. The trial ended in a mistrial due to a hung jury. A new trial was scheduled for May 8, 2002. On March 21, 2002, Appellee was indicted for first degree wanton endangerment. At retrial on May 8, 2002, Appellee was tried on both indictments. Appellee was found guilty of 4<sup>th</sup> degree assault, 1<sup>st</sup> degree wanton endangerment and as a PFO in the first degree, sentenced to ten years imprisonment.

On direct appeal, the Court of Appeals remanded Appellee's convictions for wanton endangerment and as a PFO. The Court of Appeals found that the late addition of the first degree wanton endangerment charge following the mistrial created a presumption of "prosecutorial vindictiveness."

**The prosecution has an obligation to the Commonwealth to properly charge and convict persons guilty of criminal conduct; adding an additional felony charge, which was appropriate under the facts, in order to support the charge of PFO, was its job.** The first mistrial was February 2002 and the retrial was May 8, 2002. Adding the charge on March 21, 2002 was appropriate and even necessary as anything later would have put the scheduled trial, or additional indictment, at risk. Thus, the timing is not evidence of vindictiveness.

**William Alexander Major v.  
Commonwealth of Kentucky  
Reversing and Remanding  
Rendered September 22, 2005  
To Be Published**

Appellant, William Alexander Major, was convicted of murder and tampering with physical evidence by the Boone Circuit Court and sentenced to a term of life in prison.

Appellant, and his wife, Marlene, had two children. Their marriage was failing and on October 11, 1980, Marlene disappeared. On November 29, 1981, a skull of a white female was found on a nearby farm belonging to the Waller family, where Appellant worked on occasion. DNA testing confirmed the skull belonged to a female relative of their daughter, Lalona Bramble.

Marlene had kept a diary, in which she wrote that she had witnessed Appellant molesting their son, Donald. Marlene had given her diaries to man with which she was romantically involved, and who worked with her husband and lived on their property, Glen St. Hillaire.

During the times Appellant and Marlene were estranged, he would tell others what he would do to her if she ever left him. He told St. Hillaire that he would shoot Marlene, cut her head off and knock her teeth out so identification of her remains would be difficult.

On the night of October 11, 1980, St. Hillaire became concerned. He saw Appellant around the trailer at 3:00 a.m. and asked where Marlene and the kids were. Appellant told him that Marlene had left with the kids, when in fact, Appellant brought the children to a neighbor's house around 11:00 p.m. that night and told the neighbor that Marlene had left him for St. Hillaire.

During the next few days, Appellant sold his holdings in Kentucky and prepared to move to Rhode Island. Appellant gave three weapons to his neighbor Brice: a 9mm pistol, an shotgun, and a 22 caliber rifle. On Wednesday of that week, appellant called the Boone County Sheriff's Department to notify them that Marlene was missing. He alleged they had an argument and that she had left.

St. Hillaire notified that police of his concerns and gave the police Marlene's diaries. The police also obtained the weapons Appellant had given to Brice.

After Appellant moved to Rhode Island, the abuse of Donald continued. Appellant also began abusing his daughter, Lalona. Eventually, Appellant was found guilty of abusing his children and served ten years in prison in Rhode Island, getting out around 1996. Afterward, he was brought back to Kentucky to face charges of molesting Donald while in Kentucky. During this time period, Appellant called his father and confessed the killing of his wife, Marlene.

In early 2001, the detectives were made aware of the 1996 phone conversation between Appellant and his father. They attempted to set up a phone conversation in Nova Scotia between Appellant and his father. The Appellant suspected that something was amiss and remained evasive on the phone. In July of 2001, Appellant was extradited back to Kentucky where he ultimately gave the officers his version of events.

According to appellant, he and his wife got into an argument in the Ford Pinto and she drew a gun on him. He took it from her, and "lost" it, firing the gun until it was empty. After realizing he had killed her, he left her body in the car and took the children to the neighbor's house. He then took the Pinto with Marlene's body in it to the Waller's farm where he dumped her body in a sink hole, covered it with dirt and a piece of rolled fencing. He then tossed the gun in a nearby pond.

**The sexual abuse of Lalona was not admissible under KRE 404(b).** The sexual abuse of Lalona did not begin until after her mother's death and is thus not probative of motive or any other reasonably related issue.

**Testimony related to Appellant's previous and subsequent marriages, including his abandonment of a child by a previous relationship, were not admissible under KRE 404(b).** The aforementioned events were totally irrelevant to the issues involved in the case and were prejudicial.

**Mention of polygraph test by police officer was inadvertent and did not require a mistrial.** Police officer testified that he asked Appellant whether he would submit to a polygraph test. Appellant's counsel immediately objected and nothing further was mentioned about it. No manifest necessity occurred to grant a mistrial.

**Conversation taped in Nova Scotia, where Appellant's father lived, to Appellant's home in Massachusetts, was appropriate under Kentucky law and the Fourth, Fifth, and Sixth Amendments.** Official proceedings against Appellant had not yet been instituted for the killing of Marlene, and Appellant was not incarcerated, thus no violation of Appellant's rights under the Fifth or Sixth Amendments occurred. Further, the taping was legal under Kentucky law and no state action was involved, thus there was no violation of Appellant's Fourth Amendment rights.

**Admission of Appellant's guns was not admissible because there was no evidence they were related to the crime.** The Commonwealth introduced the handgun, shotgun, and rifle owned by Appellant in October 1980. This was reversible error because these guns were unrelated to the charged crime.

**Commonwealth's crying in front of jury was not prejudicial error, and does not rise to the level of a palpable error.** The criteria to judge statements and actions by the Commonwealth during closing argument is whether the act is inflammatory, substantially prejudicial to defendant, or whether it violated defendant's constitution rights. This did not occur; moreover, crying does not qualify as a palpable error. ■

## WELCOME TO MY WORLD: OUTSIDE LOOKING IN - PART IV CORRECTIONAL PROGRAMS

by Robert E. Hubbard, Paralegal, LaGrange Post-Conviction



Robert E. Hubbard

In recent years, with the enactment of legislation, Kentucky's inmate population has faced the reality of having to serve longer and perceivably harsher sentences. An even grimmer reality is that such legislation affects us all. From a judicial viewpoint, on one end of the system the Kentucky Department of Corrections is faced with overcrowding and a continued need to build more prisons. On the other end, public defenders already understaffed and overworked face an ever increasing caseload. With limited support staff, and other necessary resources, the inability to fully address the needs of the "whole client" seems an unobtainable goal.

Fortunately, the ultimate impact of these longer sentences on the judicial system is being acknowledged. In response, various agencies across the Commonwealth are now joining forces in an effort to ensure available alternatives to incarceration are in place for many individuals convicted of lesser offenses. Still, not everyone will qualify for these services. There will continue to be a large prison population, and although many sentences may require longer service before an individual's eligibility for release, the sentence served need not be unproductive.

In those cases where incarceration is inevitable Kentucky's Department of Corrections (DOC) attempts, at least as a lofty goal, to confront many problems common in inmate populations such as alcohol/drug abuse, mental illness, geriatric inmates, inmates requiring specialized medical attention, and generally aid the inmates in preparation for reintegration into society. These real and recurring concerns are addressed by the provision of various programs.

The following overview sets out the programs as planned in the guidelines. In practice, however, the actual quality of, and the inmates ability to participate in these programs may vary based upon the number of incarcerated individuals requiring these services, the personnel involved, in administering the program, budgetary concerns, and other case specific factors affecting each individual's ability to participate. Counsel therefore may consider this overview as a guide but should always assess each individual's situation on a case by case analysis. The degree to which an individual client receives proper services may vary from one institution to another partly due to the factor of human error.

In Part IV of this continuing series, you'll learn about the programs offered at various institutions and how your client, despite the "punishment" aspect of incarceration, may also receive treatment for many of the common and not so common problems of the inmate population. In utilizing these services, the time served by the inmate population can serve them by preparing the inmate for their ultimate return to society through academic and better job related training as well as mental health and medical treatment. Unfortunately, the reality of the life many inmates lived prior to incarceration makes participation in treatment and educational programs a true necessity to help them adjust and prepare for a better life in the future.

### General Overview

In order to provide a succinct overview of the numerous educational, work and therapeutic programs offered at the various institutions across the state, following is a list of each institution and their respective programming options. Specifics related to the Governmental Services Program, Health Maintenance Services, Mental Health Treatment, Substance Abuse Treatment Program, and the Sex Offender Treatment Program follow this overview.

**Kentucky State Penitentiary (KSP):** Academic School, Adult Basic Education, Auto Body, Carpentry, Electricity, OJT, Correctional Industries (Clothing Plant), Sex Offender Counseling (SOTP), Substance Abuse Counseling, Alcohol Anonymous, Narcotics Anonymous, Group Counseling, Individual Counseling/Outpatient Services, Violent Offender Program, Pathfinders, NAACP, Arts and Crafts, Moral Recognition Therapy.

**Kentucky State Reformatory (KSR):** Academic School, Adult Basic Education, Life Management, Auto Body, Auto Mechanics, Carpentry, Drafting, Electricity, Masonry, Plumbing, Graphic Arts, Small Engine, Upholstery, Interior Finishing, OJT, Government Services Work Program, Correctional Industries (Soap Plant, Sign Plant, Metal Plant, TAG Plant), Sex Offender Counseling (SOTP), Substance Abuse Counseling, Alcoholic Anonymous, Narcotics Anonymous, Group Counseling, Individual Counseling/Outpatient Services, Substance Abuse Program (residential), Violent Offender Program, CPTU – Program Section,

Pathfinders, Audio-Video, NAACP, Arts and Crafts, Scout Program, Friends of the Library.

**Luther Luckett Correctional Complex (LLCC):** Academic School, Adult Basic Education, GED Program, College Program, Life Management, Auto Mechanics, Carpentry, Electricity, Masonry, Computer Literacy, OJT, Correctional Industries (Print Shop, DATA, Embroidery), Sex Offender Counseling (SOTP), Alcohol Anonymous, Group Counseling, Individual Counseling/Outpatient Services, Violent Offender Program, Pathfinders, Audio-Video, Veteran's Club, NAACP, Arts and Crafts, Books Behind Bars, Friends of the Library, Goal Setting, Image Club, Math Remediation, Reading Enhancement, Teacher Aide Training.

**Northpoint Training Center (NTC):** Academic School, GED Program, College Program, Carpentry, Electricity, Masonry, OJT, Farm, Correctional Industries (Upholstery Plant, Specialty Wood Shop), Alcohol Anonymous, Group Counseling, Individual Counseling/Outpatient Services, Violent Offender Program, Pathfinders, Audio-Video, Jaycees, Arts and Crafts, Anger Management, Human Kindness Organization, Life Without a Crutch, Release Preparation Program.

**Lee Adjustment Center (LAC):** Academic School, Adult Basic Education, College Program, Horticulture, Carpentry, Masonry, Upholstery, OJT, Alcohol Anonymous, Narcotics Anonymous, Group Counseling, Individual Counseling/Outpatient Services, Violent Offender Program, Parenting Program, Pathfinders, Arts and Crafts, Food Service Technology, Life Without a Crutch, Recovery Dynamics.

**Blackburn Correctional Complex (BCC):** Academic School, Horticulture, Carpentry, Electricity, Masonry, Welding, OJT, Government Services Work Program, Farm, Correctional Industries (Panel Systems, ADA Signage), Substance Abuse Counseling, Alcohol Anonymous, Narcotics Anonymous, Violent Offender Program, Parenting Program, Pathfinders, Veterans Club, Arts and Crafts, Volunteers in Corrections, AODA, Life Without a Crutch.

**Bell County Forestry Camp (BCFC):** Academic School, Adult Basic Education, GED Program, OJT, Governmental Services Work Program, Alcohol Anonymous, Narcotics Anonymous, Pathfinders.

**Frankfort Career Development Center (FCDC):** Academic School, Adult Basic Education, OJT, Governmental Services Work Program, Correctional Industries (Central Office, Warehouse), Alcohol Anonymous, Narcotics Anonymous, Pathfinders.

**Roederer Correctional Complex (RCC):** GED Program, Horticulture, OJT, Farm, Alcohol Anonymous, Narcotics Anonymous, Pathfinders.

**Western Kentucky Correctional Complex (WKCC):** Academic School, Adult Basic Education, GED Program, College Program, Life Management, Horticulture, Interior Finishing, OJT, Governmental Services Work Program, Farm, Correctional Industries (Recycling), Sex Offender Counseling (SOTP), Alcohol Anonymous, Narcotics Anonymous, Pathfinders, Arts and Crafts, AODA, Pre-Release Program, EVEN Start, Certified Teacher's Aide Program.

**Marion Adjustment Center (MAC):** Academic School, College Program, Life Management, Upholstery, Computer Literacy, OJT, Substance Abuse Counseling, Alcohol Anonymous, Narcotics Anonymous, Group Counseling, Individual Counseling/Outpatient Services, Substance Abuse Program (Residential), Parenting, Pathfinders, Arts and Crafts, Life Skills Development Program, Anger Management.

**Eastern Kentucky Correctional Complex (EKCC):** Academic School, Adult Basic Education, GED Program, College Program, Carpentry, Heating and Air, Small Engine, OJT, Correctional Industries (Furniture Refinishing, Coupon Processing, Upholstery Plant, Radio Repair Plant, Metal Fabrication), Substance Abuse Counseling, Alcohol Anonymous, Group Counseling, Individual Counseling/Outpatient Services, Violent Offender Program, Parenting Program, Pathfinders, NAACP, Wellness Program, Breaking Barriers, Cage Your Rage, Design for Living, Life Without a Crutch, Prison to Paycheck, Success with Stress.

**Kentucky Correctional Institution for Women (KCIW):** Academic School, Adult Basic Education, GED Program, College Program, Life Management, Horticulture, Auto Mechanics, Business and Office, Building Maintenance, Consumer and Family, Computer Specialists, Computer Literacy, OJT, Governmental Services Work Program, Correctional Industries (Print Shop, Mail Services, Mattress Plant, Screen Printing, Braille Transcription), Sex Offender Counseling (SOTP), Substance Abuse Counseling, Alcoholics Anonymous, Group Counseling, Individual Counseling/Outpatient Services, Substance Abuse Program (Residential), Parenting Program, CPTU – Program Section, Pathfinders, Jaycees, Arts and Crafts, Volunteers in Corrections, Books Behind Bars, Scout Program, Camera Click Club, Crafters, Recreation Planning Committee, Reflections.

**Green River Correctional Complex (GRCC):** Academic School, Adult Basic Education, GED Program, College Program, Life Management, Carpentry, Drafting, Masonry, Plumbing, OJT, Correctional Industries (Furniture Plant), Substance Abuse Counseling, Alcoholics Anonymous, Narcotics Anonymous, Individual Counseling/Outpatient Services, Substance Abuse Program (Residential), Violent Offender Program, Parenting Program, Pathfinders, Audio-Video, Veterans Club, Jaycees, NAACP, Arts and Crafts, Anger Management/Emotional Awareness, AODA, Chess

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Club, Friends of the Library, Lifer's Club, Outreach, Success After Prison, Smoking Cessation.

**Otter Creek Correctional Center (OCCC):** Academic School, Adult Basic Education, GED Program, Literacy Program, Vocational Business Program, Vocational Carpentry Program, Recovery Drug and Alcohol Program (REDAP), Alcoholics Anonymous, Narcotics Anonymous, Parenting Classes, Crochet Club. Horticulture and Girl Scouts Behind Prison Bars will be offered soon.

In addition to these institutions Little Sandy Correctional Complex has recently been opened in Sandy Hook (Elliott County) as a medium security facility. As a result although not currently in operation this facility in the near future plans to provide the below listed programs.

**Little Sandy Correctional Complex (LSCC):** Alcoholics Anonymous, Narcotics Anonymous, Wellness Club, Anger Management I and/or II, Life Without a Crutch.

#### **Governmental Services Program**

This program establishes a uniform procedure for providing inmate labor to governmental agencies and provides the assigned inmates an opportunity to acquire beneficial job skills. The GSP inmate is expected to adhere to a regular schedule with realistic production expectations.

In order to participate in the GSP the inmate must:

- a) Have a minimum or community custody classification level;
- b) have no current statutory good time loss;
- c) have no detainers; and,
- d) be closely screened by the CTO when they have an extensive history of alcohol or substance abuse or violent behavior.

Any inmate considered a safety or security risk will not be assigned to community work.

All governmental agencies participating in the GSP will make a formal request for an inmate work crew and when approved, enter into a Memorandum of Agreement with DOC officials. An individual from the requesting agency will be trained by institutional personnel as a supervisor. In addition to agency supervision, correctional staff will monitor the inmate(s) who are governed by a GSP Code of Conduct and CPP's at their work locations and conduct established and random counts to ensure the presence of the inmate(s). GSP inmates are also subject to breathalyzer or urinalysis tests and are issued a special color, laminated photo identification which will be clipped to their shirt pocket or collar and be visible at all times. In the interest of safety or security, any inmate or crew may be removed from the job, and/or a GSP supervisor with documented justification may request the removal of

an inmate(s) from the work detail. The agency is also responsible for paying DOC a per diem per inmate, which will include the cost of inmate labor and be used to defer administrative/operational costs.

Aside from regular work assignments special details may also be arranged through the warden of the institution. Such requests should be made no later than 7 days before the special detail is needed unless prohibited by unusual circumstances.

#### **Health Maintenance Services**

From reception and throughout their incarceration, all inmates have access to health care services with an emphasis placed on preventative treatment established to address the prevention of (1) death (2) disease and (3) permanent disability. In addressing inmate needs, each institution should ensure that adequate personnel are available to perform health assessments, triaging complaints and follow-up services. Medical staff consist of licensed or certified physicians, dentists, pharmacists, nurses and/or other allied health professionals; other unlicensed or uncertified health care staff who work directly under the supervision of the professional staff, may also be employed. In addition to meeting the medical needs of the inmate population within the institution, each facility works in conjunction with fully licensed community hospitals to ensure the availability of services 24 hours a day. As deemed appropriate by the Primary Care Physician (PCP), emergency services, major surgery, and specialty services may be provided. Unfortunately, as a practical reality, the quality and availability of these services vary from institution to institution and can be affected by budgetary problems.

The rules in place ideally require that at the time of their admission each inmate is provided an initial evaluation designed to identify any health problem requiring immediate medical intervention. Also, the inmate is subject to TB skin testing, testing for venereal disease, and vision screening. Following this testing, the inmate's medical status is utilized during classification in development of a total incarceration plan. Inmates over the age of 50 also receive yearly physicals.

Specifically, inmates may find themselves in 1 of 4 medical categories:

1. Any indication of a life threatening or potentially disabling condition. This would necessitate emergency action being taken;
2. The presence of a health problem that, if left untreated, would cause deterioration of the inmate's general health or result in a permanent disability. In this case, it will be up to the PCP to direct the work and activity levels of the inmate and the care necessary to maintain, at a minimum, the inmate in their current health will be provided within the institution;

3. The presence of a health problem that may limit work and recreational activity but does not threaten the inmate's general health/welfare if instructions are followed. Regular classification procedures will be followed but considering the health problem any work assignment will range from medical release to light duty. No work or activity assignment will be given that would aggravate the condition; and,
4. Good health. In this case, the work/activity level of the inmate is unrestricted.

The PCP will monitor any condition existing prior to incarceration or acquired after incarceration that does not require immediate attention and, if planned for the inmate's convenience, these are treated as elective therapy and generally will not be undertaken unless otherwise necessitated as set forth in CPP 13.2, VI, B 2(b).

Routine medical needs are addressed through "sick call" which is held at a regular location and time. Generally, while custody staff cannot deny access to medical services, the inmate is required to sign up in advance for an appointment. Unless an inmate is indigent, *See* Corrections Policy and Procedure (CPP) 15.7, they will be charged \$2.00 for each non-emergency; they will not be charged for ongoing sick call services, *e.g.*, blood tests for diabetes, blood pressure checks for hypertension, or directed follow-ups. Additionally, for use in treating cosmetic or hygiene problems, a list of over-the-counter items that are made available for purchase in the canteen or through other approved sources is maintained.

Any inmate requiring specialized treatment must receive a referral from the PCP. A specialist will be chosen from a list, maintained by each institution that is representative of various specialties. These referrals by the PCP are of 2 types:

1. A referral made for diagnostic evaluation and recommendation for treatment; and,
2. Referrals to specialists/sub-specialists for treatment of specific medical conditions.

It is the duty of the PCP to review the inmate's community consultation and findings prior to making any follow-up appointments and, when appropriate, request a second opinion from an objective source within the same specialty.

Inmates desiring a second opinion may make arrangements with a licensed physician of their choosing to conduct an examination within the institution. The inmate, or his or her family, must pay for consultation by an outside physician, with financial arrangements settled in advance. Working in conjunction with the institution, and considering the visitation procedures for inmate visits addressed by CPP 16.1, the inmate must establish a reasonable appointment time and make provision for full payment of expenses with the physician. All recommendations of the outside, visiting

physician are subject to review by the PCP who bears responsibility for following the inmate's treatment in accordance with their medical judgment. Unfortunately, due to financial constraints suffered by most inmates procuring the second opinion of an outside physician, although desirable, may be unattainable. It is both expensive and often difficult to arrange because few outside physicians are willing to come to the prisons to meet with patients. (Counsel should be aware of this factor in advising client.)

Should a medical emergency arise, staff trained in first aid procedures are available and responsible for the provision of medical care as directed by the institution's standardized written emergency plan. In part, this plan outlines the placement of first aid kits, medical emergency information/phone numbers, community emergency transportation systems/phone numbers, the method and route of transportation to the hospital, the method of coverage for weekends, holidays, second and third shifts, and in cases where more than 1 individual is involved.

In keeping with DOC's intent that equitable services be made available and individual needs be met in a reasonable and responsible manner, cosmetic or elective procedures will not be undertaken except as earlier discussed. This position allows resources to be utilized for the provision of care essential to maintain basic health. However, a prosthesis or artificial device, to replace a missing body part or compensate for defective bodily functions, may be provided if deemed essential for overall health maintenance. The prosthesis will meet the minimum requirement for function and, once issued, it becomes the property of the inmate. The inmate is responsible for replacement of any lost or underutilized prosthesis or for any breakage or malfunction (excluding a defective product) during the normal service life of the product.

While organ transplants are not normally provided by DOC, there may be exceptions, made with approval of the Medical Director. If the Medical Director, after consideration of the inmate medical history, their present diagnosis, sentence status, severity of the offense, viable options for early release or furlough, cost of the procedure and any other fact that may affect the decision, confirms the inmate as a suitable candidate for a transplant needed to preserve the inmate's life or prevent irreparable harm, the transplant may be approved and/or the Parole Board may be asked to consider "early release" (501 KAR 1:030) for the inmate. Early release may also be sought for additional reasons as set forth in KRS 439.3405.

### **Mental Health**

While criminal justice professionals should be familiar with the adjudication "Guilty but Mentally Ill" (GBMI), few understand the practical effects of a GBMI determination. In reality, such a determination means only that the GBMI

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inmate will be referred to staff of the Division of Mental Health for evaluation.

The established procedure requires the Classification and Treatment Officer (CTO) to submit to the staff psychologist for the Division of Mental Health a written referral for evaluation containing observations of behavior along with other relevant historical and medical information, within 72 hours (excluding weekends and holidays) of the inmate's admission. Following receipt of that referral, a member of the Division of Mental Health will complete an initial evaluation of the inmate within 7 working days. In cases where an inmate presents an imminent danger to themselves or others, as a direct result of mental disease or defect, and cannot be held in a correctional facility until a voluntary or involuntary commitment proceeding may be initiated, an emergency transfer to Corrections Psychiatric Treatment Unit (CPTU), located at the Kentucky State Reformatory (KSR), may be deemed appropriate. Aside from this emergency placement and DOC's adherence to established evaluation procedures there is no guarantee as to diagnosis or institutional placement of the GBMI inmate. For statistical information, Offender Information Services does maintain a log of every inmate entering the system under a GBMI commitment.

While inmates with varying degrees of mental health problems may be found within the general population of institutions throughout the Commonwealth, the Kentucky Correctional Psychiatric Center (KCPC) and Corrections Psychiatric Treatment Unit (CPTU) are specifically established to meet the treatment needs of mentally ill inmates in a residential setting.

In general, KCPC is a forensic hospital managed by the Cabinet for Health Services. While KCPC is perhaps better known for its provision of pre-trial evaluation services, Kentucky's post-convicted mentally ill inmates may also, in appropriate circumstances, be housed at this facility. CPTU is the mental health treatment program provided by DOC's Division of Mental Health. This program is designed to accommodate the inmate who, because of brain damage, mental retardation, long-term illness or a mental disorder has a limited capacity with a prognosis for limited improvement and needs medical and mental health care. These units provide both specialized housing and treatment to inmates whose needs cannot be provided within a normal institutional setting.

The non-emergency referral of a male inmate, in an institution other than KSR will first be made to CPTU; for a female inmate the referral will be made to KCPC. When discharge from KCPC is appropriate, male inmates who have been transferred there will be transferred to CPTU and female inmates will be returned to KCIW. All referrals to KCPC must be made by the Medical Director at CPTU or by a

designee of the Director of the Division of Mental Health. Aside from emergency admissions, admissions to either facility may be of a voluntary or involuntary nature.

When an inmate desires to voluntarily submit to treatment, and voluntary admission is otherwise appropriate, it must first be determined that the inmate is mentally competent to sign an expressed informed consent for voluntary admission. Any voluntarily admitted inmate may request a discharge at any time however, the request will be reviewed and involuntary commitment proceedings commenced when appropriate. Any time involuntary commitment is sought, a "Vitek Hearing" (*Vitek v. Jones*, 445 U.S. 480 (1980)) will be utilized and conducted in such a manner as to provide the inmate all rights required by law including representation by staff of the Department of Public Advocacy (DPA) if the inmate cannot afford private counsel. See CPP 18.11, VI 2(c) for specific procedures. An inmate involuntarily committed may remain in that status for a maximum of 365 days. During this commitment, the inmate will be reviewed at least every 180 days to establish the continued need for hospitalization. At the expiration of 365 days, another *Vitek* Hearing must be held if continued commitment appears necessary.

### **Substance Abuse Treatment Program**

The Kentucky DOC offers a comprehensive approach to addressing substance abuse issues with a variety of treatment and intervention services designed to meet the varying needs of the inmate population.

The core program is the Intensive Residential Substance Abuse Treatment Program (IRSAT), which consists of a 6-month residential treatment program offered at designated state institutions. This treatment, based upon nationally identified models, is coordinated by the Office of Alcohol and Other Drug Abuse Programs (AODA) within Corrections' Division of Mental Health and is comprised of numerous treatment components, *e.g.*, psych-education, relapse prevention, cognitive strategies, substance abuse testing, zero tolerance, etc. Additionally, group counseling, psychiatric treatment, individual counseling, and self-help programs may also be available as ancillary treatment. Application for admittance into IRSAT is made by the inmate to the Office of AODA and submitted by the inmate's CTO, an institutional psychologist, the Parole Board or a court. In the IRSAT Program the inmate will be provided treatment as closely as possible to their expected release. Before being admitted into the program, the applicant will be closely screened and must meet established minimum eligibility requirements. Applicants with psychological problems that might render treatment efforts ineffective will be screened out. See, generally CPP 13.8, VI, 2, D regarding specific eligibility requirements. Once admitted, except for "authorized" absences, a participant may be terminated if they fail to attend 3 scheduled sessions. Each participant will be evaluated based upon their attendance, and

administratively discharged or terminated from IRSAT based upon:

1. Successful completion;
2. Failure to comply with program requirements;
3. Failure to comply with rules which results in the issuance of a disciplinary report;
4. Placement in segregation that prevents attendance;
5. Voluntary withdrawal;
6. Medical reasons that preclude participation;
7. Violation of the attendance policy;
8. Failure to complete any other designated component of the treatment plan; or
9. Testing positive for drugs.

In order to prepare the inmate for participation in the IRSAT Program, pre-treatment drug and alcohol educational programs are available within each institution. These programs provide the inmate basic information about drug and alcohol dependency and abuse. This preparatory program may also be used as a sanction for the inmate who produces a positive urine sample, a refresher for the inmate who has completed treatment but not granted parole, or upon recommendation of the Parole Board, mental health or other department staff, as a minimum level of intervention. Admittance into the Pre-Treatment Drug and Alcohol Education Program is requested through the inmate's CTO. Admission is scheduled by institutional staff who have the responsibility of conducting and administering treatment and based on the availability of services and space, the source of the referral and the inmate's parole eligibility date. Except for authorized absences, inmates may be terminated after missing 3 scheduled sessions. As the basic format for this program is instructive, participants will be evaluated for timely attendance, completion of assignments, and satisfactory completion of any pre or post-tests. In this treatment phase, an individual may be discharged for failure to comply with the attendance policy, for disruptive behavior, or for other issues that significantly interfere with attendance and participation.

Community-based treatment and intervention programs are also in place for the community based inmate. In this component, the inmate will be subject to random drug testing and may have access to a residential treatment program, outpatient counseling, a day treatment program, general aftercare/relapse prevention support groups and other ancillary programs as previously referenced. Access to Community AODA programs is upon referral of the inmate's Probation and Parole Officer. The community inmate will be referred to this program if they produce a positive urinalysis, have a documented history of substance abuse or if returning to the community from an institutional based IRSAT program. Upon return to the community or release on probation, the inmate will be assessed and placed in an appropriate program level. When receiving parole or returning to the community from prison the inmate will be considered high priority for

placement in intensive substance abuse treatment. Inmates are required to complete each level in progressing to monthly relapse prevention and aftercare groups, which are the least restrictive level of treatment. Attendance policies for this component are established by each specific community treatment provider. In this aspect of the program, the evaluation criteria is established through agreement of the Substance Abuse Offender Rehabilitation Specialist (SAORS), the supervising P&P officer and participating organizations. Discharge or termination from Community AODA programs is made only after a meeting between the SAORS, the treatment provider and the Supervising Officer. Discharge or termination may occur upon:

1. Successful completion of all requirements;
2. Failure to comply with program requirements;
3. Voluntary withdrawal;
4. Medical reasons that preclude participation;
5. A rule violation; or,
6. Failure to complete any other designated component.

During any of the above referenced phases of treatment, when termination occurs, the participant has the right to appeal. This appeal requires the participant to submit, within 7 days from the written receipt of termination, a written appeal to the licensed psychologist or Program Administrator of the Program for the Department, or his designee. A decision will be made and a written response forwarded to the participant within 21 days of the receipt of the appeal. Once rendered, the decision is final however, a participant who has been terminated may apply for readmission 90 days after the final termination date; readmission is not guaranteed.

Any information obtained during the course of an inmate's treatment is, consistent with practices within the professional mental health community, kept confidential except that staff may release information:

1. Pursuant to KRS 202A.400, if there appears to be a danger to the health or safety of inmates, staff or other persons or a threat to institutional security;
2. To prison or P&P officials regarding the fact that an inmate had a substance abuse problem in the past; or,
3. To community treatment agencies for the purpose of planning aftercare.

### **Sex Offender Treatment Program**

The aspects of the Sex Offender Treatment Program (SOTP) discussed below apply to "eligible sex offenders," all institutions and probation/parole districts within Corrections and community health facilities outside Corrections in which a specialized treatment program for sexual offenders has been operated or approved by DOC's Division of Mental Health. As used herein, the term sex offender refers to an individual who has been adjudicated guilty of any felony described in

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KRS 510 or any other felony committed in conjunction with a misdemeanor described in KRS Chapter 510, eligible sex offender means the sentencing court or Corrections' officials, or both have, determined that the sex offender:

1. Has demonstrated evidence of a mental, emotional, or behavioral disorder, but not active psychosis or mental retardation; and,
2. Is likely to benefit from the program.

The term non-admitter refers to a sex offender who does not admit guilt or responsibility for committing the sexual offense. It is important for defense counsel to explain to clients who may be pleading guilty or otherwise entering the system that failure to admit the alleged crime will result in being dropped from the course.

Upon entering a correctional institution, via Admissions and Orientation (A&O), each sex offender is sent a memorandum informing him of the Sex Offender Treatment Program and requirements of KRS 439.240. Referrals are made and forwarded to the Offender Rehabilitation Specialist by a Classification and Treatment Officer (CTO), Institutional Psychologist, Probation and Parole (P&P) Officer, or other persons. The inmate seeking or recommended for participation in the SOTP is subject to an interview/evaluation process and, if accepted for treatment, required to sign a "Program Contract." When necessary, based upon the number of individuals awaiting counseling, a waiting list may be established. While waiting placement in the program, individuals may be referred to other treatment sources. Successful completion of the SOTP does not ensure a favorable recommendation by the Parole Board or ensure release from supervision.

In the institutional program priority placement is given to:

- a. A participant incarcerated under the provisions of KRS 197.400 to 197.400 having a parole eligibility or conditional release date within the next 36 months; and,
- b. Any participant nearest his parole eligibility, or conditional release date if sooner than parole eligibility date, who is not incarcerated under the provision of 197.400 to 197.400.

In the community program priority is given to an individual:

- a. Convicted under KRS 197.400 to 197.440 who has completed the institutional component of the sex offender program; and,
- b. Referred by the probating judge or parole board.

Any sex offender who does not admit guilt or responsibility for his sexually assaultive offense shall not be accepted in the SOTP, after the initial assessment phase. However, a non-admitter may reapply for admission 180 days after

rejection and may be accepted if they are willing to admit guilt or responsibility for their sexually assaultive offense. A participant may be terminated from either the institutional or community component of the program if he fails to attend more than 1 scheduled session per calendar quarter unless the absence is authorized. The participant's P&P officer shall be notified prior to his termination from the community component. Upon completion of the application phase in the institution, an individualized treatment plan will be developed that may include:

- a. Completion of required psycho-educational courses as outlined in KRS 197.400 to 197.400. These courses, as well as group therapy tasks, are presented in a group therapy format; and,
- b. Recommendations for elective courses, individual counseling, group counseling, marital and family counseling, ancillary programs addressing other needs.

Upon completion of the application phase in the community an individualized treatment plan will be developed that may include:

- a. Completion of psycho-educational courses that are directed by the Offender Rehabilitation Specialist; and
- b. Recommendations for elective courses, individual counseling, group counseling, marital and family counseling, ancillary programs addressing other needs.

Each participant will be evaluated on their attendance, participation, attentiveness, behavior and knowledge, provided verbal feedback and given the opportunity to provide input at least every 120 days.

An institutional or community participant may be terminated from the SOTP. If termination from the SOTP is indicated, the Offender Rehabilitation Specialist (ORS) shall make a recommendation of termination to the Licensed Psychologist, Program Administrator, and notify the P&P officer, if the participant is in the community. Upon receipt of a termination request, the Licensed Psychologist, or Program Administrator shall rule on the recommendation and forward a written notice of termination to the participant in an institution or send this notice by certified mail to a community client.

If a participant is terminated from SOTP, he may reapply 180 days after the termination date. The participant may forward a written appeal to the Director of the Division of Mental Health or his designee within 7 calendar days of receipt of the decision. The Director or his designee will forward a written response to the client within 3 calendar weeks (21 calendar days) of receipt of the appeal. ■

**Memories of our lives, of our works and our deeds will continue in others.**

**-Rosa Parks**

## PRACTICE CORNER

### LITIGATION TIPS & COMMENTS

“Practice Corner” is brought to you by the staff in DPA’s Post Trial Division.

#### Am I or Am I Not a Public Defender?

One question for all DPA trial attorneys going before a jury is whether or not they will reveal that they are a public defender. I have seen some attorneys that openly reveal that they are a public defender in voir dire and attempt to spin that fact to their client’s advantage (ex: “Mr. Client cannot fight for himself and relies on you [the jury] and me to protect him from these false accusations”). Others prefer to refer to themselves simply as “an attorney from [fill in your town]” who is representing the client. These attorneys fear that the jury might assume guilt or stereotype the attorney, client, or both if it is revealed that the client is poor and the attorney is appointed.

For attorneys using the latter strategy, the court and the Commonwealth should refrain from revealing to the jury that the attorney is a public defender. Although there are no Kentucky cases directly on point, there is support for the proposition that it is error for anyone but the defense attorney himself to reveal that counsel has been appointed. If this comes up in your courtroom, please object and preserve the matter for appeal. The following cases may be used to support your argument (thanks to Tom Ransdell and Sue Martin):

*Goff v. Commonwealth*, 44 S.W.2d 306, 308 (Ky. 1931) for authority that it is improper for the prosecutor to make any reference to whether the defendant’s attorney is being paid or how much he/she is being paid

*Byrd v. State*, 489 P.2d 516 (Okl. Cr. 1971) (prosecutor’s comments that jury was paying public defender’s salary were improper. “A defendant’s financial status has no bearing on the issues to be decided by the jury.”)

*Moore v. State*, 267 So.2d 509 (Ala. Crim. App. 1972) (Improper for prosecutor to argue that it was public defender’s job to “let the man go,” but harmless in this case)

*Jackson v. State*, 698 N.E. 2d 809 (Ind. App. 1998) (where prosecutor makes improper reference to fact that defendant is represented by public defender in closing argument, judge’s admonishment to jury cured prejudice)

*State v. Farr*, 444 A.2d 593 (N.J. Super. 1982) (evidence of defendant’s indegyny should not be admitted or commented on)

#### So, When Does He Get Out? The Jury Wants to Know

In *David Robinson v. Commonwealth* ((KY 9/22/05), not final as of this writing), the Supreme Court reversed the defendant’s sentence because the probation officer testified incorrectly that “good time” credits reduce the defendant’s parole eligibility. This case highlights the need for accurate and complete information when it comes to a defendant’s potential release date.

One area where trial attorneys should be very aggressive in seeking to provide a sentencing jury with needed information is in sex cases. To have a complete picture, juries sentencing a sex offender should be told that:

a) Regardless of the parole eligibility date, the defendant will not be paroled if he has not completed a sex offender treatment program;

b) The Sexual Offender Treatment Program (SOTP) often has a waiting list, is only offered at a few state facilities, and, once begun, cannot be completed in less than two years;

c) The SOTP is not a mere formality as many prisoners are kicked out of the program regularly and not permitted to re-enroll (I do not know if statistics are kept on this, but you might talk to the probation officer in advance to see if he can elaborate on this point);

d) Any prisoner who has not completed the SOTP gets no “good time.” If the jury sentences Mr. Client to 3 years, he will serve (3 x 365) days before he is released with no possibility of early release if he does not complete the SOTP program, then gets 3 more years in jail if he does not comply with the rules after he is released.

All of these factors, to varying degrees, can be testified to by any experienced Probation and Parole Officer and there may be other methods for getting some of this information before the jury as well. In Class C and D cases, it is very important to introduce some or all of this evidence because the prosecutor will be arguing that a defendant sentenced to five years could be released in as little as one year. In a sex case, that is simply not true and the jury is entitled to know that.

*Continued on page 46*

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### Correcting the PSI?

At least once a week, one of our appellate clients writes his/her attorney seeking to have his Presentence Investigative Report (PSI) corrected. We have to tell the client that it is almost impossible to correct a PSI at the post-trial stage. The best (and sometimes only) time to correct the PSI is at the sentencing hearing. If a PSI is not corrected, false information could lead to incorrect classification, denial or deferment of parole, unavailability of prison work programs, or other negative consequences during the client's imprisonment.

A recent case, *Gary Mills v. Commonwealth* (Ky. 9/22/05, unpublished and not final as of this writing), briefly addressed the need to correct PSI reports at the sentencing hearing. In *Mills*, the report said that the defendant himself had shot the victim even though he had been convicted only of complicity. The trial court offered to write the word "allegations" next to that sentence and trial counsel agreed. On appeal, the Supreme Court declined to order the trial court to remove the sentence since trial counsel agreed to the trial court's suggested cure. Also, the Supreme Court said that it was unclear as to whether even the amended report was actually submitted to Corrections. To this, the Court recommended that trial counsel request the lower court to order that the PSI used by Corrections be amended to reflect any changes made by the court during the hearing.

In sum, when faced with erroneous or misleading information in the PSI, trial attorneys should, at a minimum, do the following:

1) Specifically identify what should be corrected in or omitted from the PSI. If the PSI was prepared from the original police reports and your client has been found guilty of only a lesser offense, object to any reference to allegations of the original charged offenses;

2) Ask for specific relief (i.e. either stricken entirely or amended to say...);

3) If Court grants your relief, make a motion that only the amended PSI may be submitted to the Department of Corrections;

4) If the Court denies your relief, make sure you have made clear on the record what you would have wanted the PSI to say.

I know that PSI's are often not given to you until your client is 5 minutes from being sentenced, but they are very important to your client's future. Make sure the facts of the present case and the criminal histories do not allege any violent or criminal activity of which your client was not convicted. While your client may be going to prison for offenses he did commit, he should not be further punished for mistakes made by a P & P officer in preparing his presentence report.

Better yet, consider contacting the parole officer who will be writing the report for the Court. DOC's director of probation and parole has told us that he welcomes our input on the PSI. Marguerite Thomas recently trained the state's new probation and parole officers on the impact of PSI's on the client, encouraging them to seek your input in their preparation of the report.

Both John Delaney, directing attorney of the Boone County Public Defender's Office and Mary Rafizadeh, directing attorney of the Kenton County Public Defender's Office, have met with their probation and parole office and pledged to send information on their clients by email to the probation and parole office so that the reports can offer a more balanced picture of our clients.

**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. ■**

## RECRUITMENT OF DEFENDER LITIGATORS

The Kentucky Department of Public Advocacy seeks compassionate, dedicated lawyers with excellent litigation and counseling skills who are committed to clients, their communities, and social justice. If you are interested in applying for a position please contact:

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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/>

To all public defenders and staff in Kentucky,

(October 25, 2005) This is the week that we have been asked to recognize public employees in Kentucky. We have tried to recognize our employees in many ways over the years. This year one of the ways that we are recognizing you is by holding a Homecoming Celebration, recognizing all of our efforts that have culminated in the building of a full-time system at the trial level. I am so grateful to so many of you for all of the work that you have done to complete this initiative that has resulted in a significant advance in justice for poor people at the trial level.

I also want to simply take this opportunity to thank each and every one of you for everything that you do for Kentucky's poor, developmentally disabled, and mentally ill, each and every day. It truly humbles me to consider what you are accomplishing. You represented 134,000 clients last year. You opened that many cases, and made sure that caseloads were accurate. You investigated thousands of cases, digging for one more piece of information that will make a difference. You made sure that you listened carefully as you transcribed a grand jury tape. You thought about being kind to that desperate person on the other end of the line as they cried out to you in despair. You delayed going home on a Friday evening so that you could swing by the jail to interview a young man who had just been arrested. You awoke in the middle of the night concerned about a capital client who is going to trial in a month. You traveled across the state to monitor a facility for the developmentally disabled. You watched hours of voir dire on a tape as you searched the record for error. You stayed alert as you listened to yet another tale of innocence from an inmate, wondering whether this one truly was. You dug for that scrap of mitigation that might save a client's life. You made sure computers were available when new employees started with the Department. You planned a recruiting fair, wrote a grant, prepared a request for a proposal for a new caseload tracking system, typed the Monthly, planned a celebration, conducted a case review. You came to this agency with \$50,000 in debt to work for \$36,000 per year to have almost double the caseload you should have. You do this on the day after Rosa Parks has died. For that, and all of the many many other things you do each day, I thank you. Lord, do you humble me.

Ernie Lewis, Public Advocate



**I have learned over the years that when one's mind is made up, this diminishes fear; knowing what must be done does away with fear.**

**- Rosa Parks**



# THE ADVOCATE

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\*\*\*\*\*

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**Macon, Georgia 31207**

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**She sat down in order that we might  
stand up. Paradoxically, her  
imprisonment opened the doors for  
our long journey to freedom.**

**— Rev. Jesse Jackson, in  
response to Rosa Parks death**