The Advocate

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It is the daily; it is the small; it is the cumulative injuries of little people that we are here to protect....If we are able to keep our democracy, there must be one commandment: THOU SHALT NOT RATION JUSTICE.

-- Learned Hand

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

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

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FROM THE EDITOR...

Jeff Sherr

"Section Ten of the Kentucky Constitution and the Sixth and Fourteenth Amendments to the United States Constitution guarantee the right to counsel for persons charged with crimes.**"** This statement begins a recently adopted resolution of the KY Bar Association's Board of Governors. The Resolution urges Kentucky lawmakers to recognize the constitutional obligation of the Commonwealth to provide counsel to those who cannot afford an attorney and whose liberty is threatened with a criminal charge. The entire **KBA Resolution** is reprinted in this edition.

Should the General Assembly fully fund Kentucky's public defender system the reasonable caseload would allow public defender staff to be involved in creating solutions for the criminal justice system that would reduce recidivism for our clients. Recently, Roger Gibbs, Eastern Region Manager, and several other public defenders from that region visited the Knox County Public Defender's Community Law Office in Tennessee. This office leads the nation in providing holistic representation that benefits not only indigent client but the entire community. Roger Gibbs shares his experiences and thoughts from that visit in **The Whole Client: A New Vision.**

Another component of a fully funded public defender system for Kentucky would be a social worker in each DPA field office. Post Trials Division Director Rebecca Diloreto writes on one of the positive impacts of the addition of social worker to a defense team in **Building an Effective Defense Team Capable of Delivering Quality Representation to the Client Who Grew Up in a Home Shaped by Domestic Violence.**

Melanie Lowe, *Kentucky Innocence Project* attorney, outlines some of the collateral consequences of conviction facing our clients in **Punishing the Poor: Federal Benefit Guidelines Make Indigent Clients Another Casualty of 'The War on Drugs.'**

Rob Sexton, Central Region Manager, provides an overview of **Presentence Investigation Reports** with practice tips for defense attorneys. ■

A RESOLUTION RECOGNIZING THE EXCESSIVE CASELOADS BEING HANDLED BY KENTUCKY PUBLIC DEFENDERS AND REQUESTING THE GENERAL ASSEMBLY TO INCREASE SIGNIFICANTLY FUNDING IN ORDER TO LOWER THE CASELOADS OF KENTUCKY'S PUBLIC DEFENDERS.

WHEREAS, Section Ten of the Kentucky Constitution and the Sixth and Fourteenth Amendments to the United States Constitution guarantee the right to counsel for persons charged with crimes and the courts of Kentucky and the United States recognize it is the obligation of the state to provide counsel to those who cannot afford counsel and whose liberty is threatened with a criminal charge.

WHEREAS, the Commonwealth of Kentucky has established the Department of Public Advocacy as the state entity responsible for providing counsel to indigents accused of crimes.

WHEREAS, Kentucky public defenders cannot limit their caseloads to ethical, manageable levels in the same way that private lawyers can, since public defender caseloads result from Court-ordered appointments rather than voluntary selection of new clients.

WHEREAS, caseloads for public defenders have gone up by 37% over the past five years and the Department of Public Advocacy handled 134,584 cases in FY05, causing individual public defenders to open 483 cases each at the trial level in FY05, an amount that is 189% of nationally recognized standards and giving Kentucky public defenders only 3.8 hours to spend on each case.

WHEREAS, the Public Advocacy Commission has found that excessive caseloads are affecting the quality of representation being rendered by Kentucky public defenders, compromising the reliability of verdicts, even threatening the conviction of innocent persons and causing ethical ramifications that are of deep concern to the Kentucky Bar Association.

WHEREAS, the Public Advocacy Commission found that Kentucky continues to fund indigent defense at the bottom of the nation in terms of cost-per-case, that other parts of the criminal justice system, including judges and prosecutors, are affected and concerned by excessive public defender caseloads and the criminal justice system is less efficient and less effective whenever any part of the system is under funded, making it vital that there be parity among the different parts of the criminal justice system, including indigent defense.

WHEREAS, the Kentucky Bar Association has a significant interest in the quality of representation being provided by Kentucky lawyers to indigents accused of crime.

WHEREAS, the Public Advocacy Commission has called for full funding of the public defender system, requiring an increase in the numbers of public defenders to reduce overall trial level caseloads to no more than 400 new cases per year per lawyer and has recommended that a minimum of $10 million be added to the Department of Public Advocacy's funding level in order to bring Kentucky into the mid-level area in comparison with other programs across the country.

NOW, THEREFORE,

Be it RESOLVED that the Board of Governors of the Kentucky Bar Association Calls Upon the Commonwealth of Kentucky to:

I. Fully fund the Kentucky public defender system in order to reduce excessive caseloads to no more than 400 new cases per year per lawyer to enable Kentucky's public defenders to provide competent and ethical representation to indigents accused of crimes and to provide adequate administrative support to public defender lawyers;.

II. To provide sufficient funding for private lawyers handling conflict cases to make the compensation significant rather than minimal.

III. To provide parity of resources among the different components of the criminal justice system in order to achieve a system that is balanced, efficient, and fair.

THIS 18th day of November 2005.

KENTUCKY BAR ASSOCIATION

BY: _____
DAVID SLOAN
PRESIDENT

ATTEST: _____
BRUCE K. DAVIS
EXECUTIVE DIRECTOR

THE WHOLE CLIENT: A NEW VISION

by Roger Gibbs, London Directing Attorney and Eastern Regional Manager

Recently, the Department of Public Advocacy has been discussing how to embrace a whole client approach to our practice. The Eastern Region set the exploration of what that really means and how can it be done in our communities as one of its Strategic Planning Goals this year. In pursuit of that goal, we visited the Knox County Public Defender's Community Law Office as it leads the nation in realizing the potential of the whole client concept in practice.

Prior to our visit, I had a conversation with Mark Stephens who directs the Knoxville office. He advised that the program was in a period of transition. They are undergoing a process of transition that involves an assessment of where they are and where they want to go. I felt that this was a tremendous opportunity for us to see what had worked for them and what had brought the office to re-assess the program. Mark readily offered to share their experiences with us.

We found a wonderful facility filled with dedicated people including many partners from the University of Tennessee, including student interns from the Social Work program, the psychology program and the law school. One good example of the office's mission to be open to the whole community was that the local firefighters were setting up for a meeting in the gym. This looked very different from any Public Defender office in Kentucky.

Both the facility and the composition of the staff were markedly different from our Kentucky experience. In addition to twenty-two attorneys, the staff included a Job Placement Coordinator, Social Service staff including fulltime social workers and a juvenile court specialist. These staff members interacted with clients in many of the traditional Public Defender capacities including alternative sentencing, all aspects of juvenile court including disposition recommendations, but also many non-traditional aspects such as helping the clients to obtain valid driver's licenses. Another interesting facet to their operation was that services were available to those community members that do not have court appointments that arise from a criminal case. One example of these services is assistance for persons with mental health issues. A lot of work is also done with clients on probation to assist them with housing, jobs, and a productive return to the community.

We found that they serve about 10,000 clients a year who have about 22,000 cases. (The Tennessee definition of a case is different from the DPA definition so the numbers are not comparable.) The caseload breakdown is very similar to what we see in Kentucky in terms of felony circuit court versus district court. The office covers one metropolitan county. One innovation that we discovered is that the attorneys have one week in court followed by one week with no court. This helps attorneys to meet their obligations to keep their clients informed by allowing them to schedule meetings and also to make phone calls that are nearly impossible to undertake when covering court on a daily basis. The Knoxville caseload is high and has been climbing steadily as it has for us in Kentucky. Their attorney pay scale is slightly higher than ours and turnover is rare (a welcome difference from the historical DPA experience).

Roger Gibbs

Our discussions with their staff did reveal a similarity that I recognize from Defender offices everywhere: they communicated to us a dedication easily recognizable in Public Defender offices everywhere. They put high value on the work they do and in fact often referred to it as a "calling." They were able to relate many instances where they truly have made a difference in the lives of the people they serve.

As noted above, Mark related they are in the process of a re-evaluation. They have been without a Social Work program director for several months. The major reason is that many of the grants that allowed the programs to begin are now expiring. The challenge for the office is to continue to fund the programs in the future, deciding which ones to fund, and how to seek out additional money for other areas that have been identified and need new resources.

The history of this office is a wonderful story of ideals brought to life. When they decided to pursue whole client, there was no real national model to emulate so they created their own. In the words of one of the staff, they "jumped into the deep end of the pool." They set out to try a lot of things all at the same time. They dealt with mental health issues, homelessness, lack of jobs and job skills, lack of drivers' licenses, alternative sentencings, juvenile issues including life skills, after school art programs, and mental health assessments. Facilities were one area that was successful, but innovative and successful programs was another. Many of the programs began with grants to pay for them. Unfortunately, many of the grants began at the same time and are now ending at the same time. Another issue being reviewed is one of early decisions the office made to not be a treatment provider. Rather, they partnered with existing public and private agencies to secure treatment. They provide support and space for programs to use for the delivery of services. This has created successful

interactions with many agencies and the current reality is pointed out with pride that other state agencies now work from within the PD office. They call when bed space is available for treatment, when a job is available, when someone needs services, and when it mutually benefits both agencies. They have gone a long way towards meeting their goal of being a community partner. However, they have found instances where the treatment options do not meet the current needs and it may be time to take on the role of a provider as well as a partner. That is part of the future assessment now going on in the office.

So what lessons did we bring back from Knoxville? Our new friends gave us several suggestions for tailoring our practice to the whole client approach.

1) Take the parts that work from their model as well as other models but keep in mind that their success in an urban environment may not directly apply in our rural offices.
2) To avoid their current predicament, seek to ensure that long term funding is in place.
3) Build our program in incremental steps. A solid foundation of smaller but attainable goals may prove to be the better route over the long term versus their "kitchen sink" approach.
4) Have clearly defined goals, objectives, plans and job descriptions for whatever program we develop.
5) Realize that there are limits to grant opportunities as a government entity. Think outside the box and consider creating non-profit corporations to seek funding grants to fulfill the program goals that may not be attainable as a government agency.
6) Be a real community partner. Understand that better communications and real relationships take time and cooperation. Being an integral part of the community service-delivery network is absolutely essential.
7) Seek information on approaches taken elsewhere and see what can be brought to our Kentucky situation.
8) Recognize our keeping a keen eye out for what our clients need that might be beyond traditional law practice will create opportunities to find the right service delivery organization to replace provide what is missing. We just have to find a way to make it happen.

Driving back from Knoxville, the conversation among our travelers was predictably about all we had seen, heard and felt about the program. The realization that this would be a long-term and deeply involved process became even more evident to all of us. We celebrated the day we spent with our new friends in Knoxville. We admire their success and hope that the future is kind to them.

Our trip demonstrated ideals brought to life. It also showed us that this is a long-term process that is best accomplished within the fabric of our own communities. As the old saying goes, a journey of a thousand steps begins with the first one. Our trip to Knoxville got Step 1 under way.

*Special thanks to Steve Geurin, Traci Hancock, Peyton Reynolds, and Kristen Bailey for being a part of this effort and trusting me to get us all there. ■

For more information about the Knox County Public Defenders Community Law Office go to http://www.pdknox.org

The Community Law Office (CLO) model is designed to achieve five (5) primary goals:
1. To prevent crime
2. To reduce recidivism
3.To empower clients to live a fuller, more meaningful, independent life
4. To increase community involvement in the criminal justice system
5. To demonstrate an innovative, effective service model

In achieving those five (5) primary goals, the CLO model will produce three (3) secondary cost benefits:

1. Reduce judicial administration costs by decreasing the number of people offending and, consequently, decreasing the number of cases initiated in the jurisdiction
2. Reduce institutional costs associated with pre and post trial detention of individuals accused/convicted of criminal violations
3. Reduce institutional costs associated with crime prevention and detection as the number and frequency of offenders and offenses are reduced

- *Knoxville Pubic Defender Community Law Office Concept Paper*

DPA Welcomes Three New Commission Members

In the fall of 2005, DPA welcomed three new Public Advocacy Commission members, Ava Crow, Joyce Cummins,a +nd Iversy Velez.


Ava Crow

Ava Crow graduated from the University of Kentucky Law School and has practiced law for 25 years. She was employed as a staff attorney for Northeast Kentucky Legal Services for four years and spent eleven years at Protection and Advocacy, supervising the legal section and providing legal representation to children and adults with disabilities. She also worked for the Office of Education Accountability in the Legislative Research Commission, investigating allegations of waste, fraud and mismanagement in Kentucky school districts, and she ended her state government career with the Kentucky Department of Education, handling special education complaints, coordinating the state's due process hearing procedure for students with disabilities, and providing general administrative representation for the Department. She currently is providing private consultation services for agencies involved in special education services for students with disabilities.


Joyce Cummins

Joyce Cummins is a native Kentuckian. She grew up in rural Laurel County with her seven siblings. With so many brothers and sisters, she learned early on the skills of collaboration, negotiation and compromise that would serve her well in her career.

Joyce received her bachelor's degree in Child and Family Studies and master's degree in Community Counseling from Eastern Kentucky University. She is employed by the Cabinet for Health and Family Services where she serves as a Social Services Clinician in the Rockcastle County Protection and Permanency Office. Joyce has served in varying capacities on boards and committees with the Rockcastle County School system. She chaired the Rockcastle Association for the Gifted and Talented, and the Rockcastle County High School Parent Association. She also assisted in grant writing for the Alternative School and for the Century 21 Learning Center, both of which were fully funded. Joyce worked in a truancy diversion program in Rockcastle County Schools and is currently the chair person for the Mt. Vernon Elementary Family Resource Center Advisory Council. Joyce truly believes that she has made a positive difference in the lives of others through her work in the school system and with the Cabinet.

Joyce is dedicated to serving the needs of the homeless, the unemployed, victims of domestic violence, the sexually and physically abused, individuals with mental health issues, those with substance abuse issues and young people with truancy issues.

Joyce is a member of Bible Baptist Church in Mt. Vernon where she serves in a variety of capacities. She and her husband of 29 years, Joe, have two married daughters, twin grandsons and are expecting a third grandson in March.


Iversy Velez

Iversy (Ivy) Velez is an attorney from San Juan, Puerto Rico. She graduated from the University of Puerto Rico with a major in Economics, and got a Juris Doctor Degree at the Law School of the InterAmerican University of Puerto Rico. She is currently admitted to the practice of law in Puerto Rico, Washington D.C., and Kentucky. She moved with her family to the Commonwealth of Kentucky in 1994, but arrived to the Northern Kentucky area in 1998. Since then she has been a resident of Florence, Kentucky, where she also has her office of legal practice.

Due to the amazing increase of Hispanics into the Northern Kentucky area, she saw a need to address their needs for which got involved in activities and with organizations that could help to develop programs specifically address to the Hispanic community. Through a program from Northern Kentucky University, she joined Lt. Tim Chesser from the Florence Police Department to establish the very successful Latino Police Academy Program. This program educates Hispanics to understand the differences in culture, and to learn about the rules and customs of their adopted area of residence. She also volunteers with different non-profit organizations to provide legal defense and interpretation services pro bono. She translates into Spanish publications from different non-profit organizations and is often called as speaker upon diversity issues as it pertains to Hispanics. Her main goal in life is keep giving her best to bridge gaps between Hispanics and Americans. ■

PUNISHING THE POOR: FEDERAL BENEFIT GUIDELINES MAKE INDIGENT CLIENTS ANOTHER CASUALTY OF 'THE WAR ON DRUGS'

by Melanie Lowe, Post Conviction Branch

Clients who are convicted of drug felonies or have histories of drug use are subjected to a variety of punitive policies including barriers to immigration, licensing, voting, banking services, and employment. In addition, Congress has created several statutory bans that restrict access to federally funded social program benefits. Provisions of federal law allow or require that certain federal benefits be denied to individuals who have been charged or convicted of drug offenses in both state and federal court. Poor persons, particularly those who have been incarcerated, and their families need the aid provided by the spectrum of public assistance. The federal benefits include Temporary Assistance for Needy Families (TANF), food stamps, federal housing assistance, postsecondary education assistance and federal contracts and licenses. Considering the sizeable and growing population of drug offenders in the United States and the ever-increasing set of criminal laws created in the "war on drugs," the action of this federal provision is an important consideration for attorneys who represent the segment of the population for whom these benefits were structured.

In September of 2005, the United States Government Accountability Office (GAO) released a report, "Drug Offenders: Various Factors May Limit the Impact of Federal Laws That Provide for Denial of Selected Benefits."[1] The GAO reviewed data for selected years, created statistics for the number / percentage of drug offenders denied benefits and analyzed variables affecting offenders' eligibility to receive benefits. A number of factors, including state of residence, income and family situation, affect which drug offenders are eligible to receive the federal benefits included in the ban. Federal law allows individual states to alter or opt out of the portions of the ban. Under the federal scheme, individual states can affect the ban in almost any way; adopting portions and altering the ban or opting out completely. According to the GAO report, there are 32 states which exempt some or all drug felons from the TANF ban and 35 states have passed laws affecting the ban as it relates to food stamps. Of the states where the federal ban remained fully implemented, approximately 15 percent of the drug offenders released from prison in the calendar year 2001 met sufficient requirements to be in the pool of affected drug felons.

Not surprisingly, these "collateral consequences" disproportionately affect clients of color and women. African-Americans comprise approximately 13% of the population as a whole and approximately the same percentage of drug users. However, more than half of the individuals convicted of drug offenses are African-American.[2] The GAO study also found that proportionately more female drug offenders were affected by the ban. In fact, during the ten-year period from 1986 to 1996, U.S. Department of Justice Statistics indicated the number of women sentenced to state prison for drug offenses increased exponentially from 2,370 to 23,700.

In order to understand the federal ban and the effect upon needy clients, it is important to understand the benefits which may be denied. Temporary Assistance for Needy Families, commonly known as TANF, provides a cash benefit to meet a needy family's ongoing basic needs. The food stamps program provides food payments to low income families. Post-secondary educational assistance includes a variety of loan and grant programs (Federal Pell Grants, Stafford Loans and work-study programs). Federal housing assistance provides public housing for low-income families with children as well as vouchers for private housing for families with very low income levels. The Denial of Federal Benefits Program includes federal postsecondary student loans, federal licenses (such as physicians, pilots, etc.) and procurement contracts.[3]

TANF & Food Stamps

The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)[4] of 1996 requires that individuals convicted of felony drug offenses are banned for life from receiving TANF or food stamps benefits. Section 115 of PRWORA provides that the ban applies to any conviction (under federal or state law) of an offense which is classified as a felony in the jurisdiction in which the law is codified and has as an element of possession, use, or distribution of a controlled substance. The law applies to any conviction for conduct which occurred after August 22, 1996.[5] The ban on TANF assistance includes cash payments, vouchers and other forms of benefits.[6] The ban does not extend to "nonassistance" benefits[7] which may include drug treatment, job training, emergency Medicaid services[8], emergency disaster relief, prenatal care and some public health assistance.

As previously noted, individual states may "opt out" of enforcement or alter the affect of the ban. Without alteration, the federal law imposes a lifetime ban for individuals convicted of drug offenses on receipt of TANF and food stamps. Many states have modified the ban by creating exceptions for individuals who complete treatment programs, apply the ban strictly to trafficking offenders or have limited the length of ineligibility. This policy has harshly impacted women of color as a segment who is disproportionately represented in the welfare system.[9]

Continued on page 10

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Post-Secondary Educational Benefits

After a conviction of either misdemeanor or felony offense involving a controlled substance, students lose eligibility for federal post-secondary education benefits. The 1998 Higher Education Act Amendment barred individuals with a drug conviction from receiving federal financial aid.[10] The ban includes convictions for possession and sale ultimately affecting grants, loans and work study programs. Clients seeking federal post-secondary education assistance face varying periods of ineligibility based upon the number and type of offense. For example, a first offense of possession results in a one-year period of ineligibility while a second offense results in a two-year period and a third offense results in lifetime ineligibility. On the other hand, first offense trafficking conviction requires a two-year period of ineligibility with a second offense leading to a lifetime ban. Obviously, the ban will not apply if the student is able to have the conviction reversed or set aside.

It is important to note eligibility periods may be shortened if clients complete drug treatment. Eligibility for postsecondary educational benefits may be restored upon completion of a drug treatment program satisfying the federal criteria which includes two unannounced drug tests. Reportedly, Congressman Mark Souder (R-IN) authored the bill to apply exclusively to students who were convicted while enrolled in school rather than those who were convicted prior to enrollment. However, that intention is reflected in neither language nor implementation. The result is tens of thousands of drug offenders have been denied the ability to improve their socio-economic standing through education.

Housing

The ban for housing benefits is even broader and covers the individual, relatives residing in the household, or guests under a tenant's control and may apply regardless of whether the drug-related criminal activity results in a conviction.[11] Housing authorities at the local level who administer federal housing benefits retain discretion to determine ineligibility or loss of federal benefits. The Housing Opportunity Program Extension Act of 1996 allows the agency to access criminal records and records from drug treatment facilities to determine if the applicant or tenant is currently engaged in the illegal use of a controlled substance.[12]

The housing benefit ban allows for a range depending upon the type and number of drug activities. The minimum period is three years while the maximum is a lifetime ban. For instance, certain methamphetamine offenses carry a mandatory lifetime ban. Other than methamphetamine offenders, individuals who successfully complete treatment may shorten the period of ineligibility for housing benefits. It is important to note that reversal or complete lack of conviction may not improve a client's standing for benefits.

Additionally, the public housing agencies' leases may contain eviction language based upon the "one strike" policy. This policy allows for discretionary eviction based upon drug activities occurring on or off the housing premises by the tenant, member of household or guest.[13] Further, *U.S. Department of Housing and Urban Development v. Rucker*[15] upheld a local housing agencies' ability to evict without regard to the knowledge of the leaseholder.

Conclusion

The GAO report reviewed the legislative history of the ban provisions to determine whether they were designed to do more than simply deny the benefits (serve as a deterrent). Floor debate indicated some members of Congress proposed that even casual drug use should result in loss of federal benefits. On the other hand, Congress believes the ban as it relates to housing is tied directly to the federal government's duty to provide safe housing. Most states, including Kentucky appear to be locked in a continuing debate about the appropriate implementation of the spirit of the ban.

In the mean time, these consequences continue to erect barriers to rehabilitation and recovery which disproportionately affect poor individuals and their families. Understanding the broader effects of these policies can help criminal defense practitioners limit the pattern of discrimination which undermines the efforts of client recovery.

Endnotes:

1. Full report may found at http://www.gao.gov/cgi-bin/getrpt?GAO-05-238.
2. "Collateral Consequences: Denial of Basic Social Services Based Upon Drug Use" by Robin Levi & Judith Appel; June 13, 2003 at www.drugpoicy.org/docUploads/Postincarceration_abuses_memo.pdf.
3. Section 5301 of the Anti-Drug Abuse Act of 1988 (codified at 21 U.S.C.§ 862).
4. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified at 21 U.S.C. §862a).
5. See 21 U.S.C. § 862a(d)(2).
6. See 45 C.F.R. § 260.31. The federal prohibition does not extend to assistance from state's own separate assistance funds.
7. As defined at 45 C.F.R. § 260.31(b).
8. Including benefits provided under Title XIX of the Social Security Act.
9. See also "Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses" located at www.sentencingproject.org/pdfs/9088.pdf
10. Codified at 20 U.S.C. 1091(r)(l).
11. The term "drug-related criminal activity" means the illegal manufacture, sale, distribution, use or possession with intent to manufacture, sell, distribute, or use a controlled substance – as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802), 42 U.S.C. § 1437d(1).
12. Codified at 42 U.S.C.A. § 1437d(s) and 1437d(t).
13. Codified at U.S.C. 1437d(1)(6).
14. 535 U.S. 125, 122 S.Ct. 1230 (U.S. 2002). ■

PRESENTENCE INVESTIGATION REPORTS

by Rob Sexton, Owensboro Directing Attorney and Central Regional Manager

A presentence investigation report (PSI) can have a very large impact upon a client's life, especially if the client is committed to Corrections. The PSI is used by the Court to determine whether to accept the Commonwealth's recommended sentence upon a plea, or whether to make a downward departure on the jury's recommended sentence after a guilty verdict. The Court will also use the PSI to determine the client's eligibility for probation. After conviction, Corrections will use the PSI to determine the client's classification, to admit or exclude him from certain programs, and to determine his suitability for parole. Because of the importance of this document, practice concerning it should not be casual. There is nothing merely ministerial about the rendition of this document.

The PSI Requirement and its Scope

KRS 532.050 states that "no court shall impose sentence for conviction of a felony… without first ordering a presentence investigation and giving due consideration to a written report of the investigation." Given the Circuit Court's exclusive jurisdiction over felony cases, it follows that a PSI need only be rendered in Circuit Court felony prosecutions.

The PSI is to be prepared and presented by the Probation officer. KRS 532.050 (2). It must include an analysis of the defendant's history of delinquency or criminality, physical or mental condition, family situation and background, economic status, education, occupation, personal habits, and any other matters that the court directs to be included. *Id*. The PSI also shall identify the counseling, treatment, educational, and rehabilitation needs of the defendant, and identify community-based and correctional-institutional based programs and resources to meet those needs or shall identify the lack of programs and resources to meet those needs. KRS 532.050 (5).

In addition to the PSI, the Court is empowered to order the client to submit to psychiatric observation and examination for a period not to exceed 60 days. KRS 532.050(3). The client can be remanded for that purpose to any available clinic. The Court can also appoint a qualified psychiatrist to make the examination. *Id*.

Waiver

The language of KRS 532.050 appears to be quite mandatory. On the other hand, the Supreme Court has held that the defendant may make a knowing, intelligent and voluntary waiver of the rendition of a PSI. *Alcorn v. Commonwealth*, Ky., 557 SW2d 624 (1977); RCr 11.02. In *Alcorn*, the Court reasoned that the General Assembly adopted KRS 532. 050 primarily to benefit the accused, and that the accused, if fully cognizant of his right to a PSI and its potential advantages, may elect to waive that right. If a waiver is undertaken, counsel should fully advise the client of the advantages and disadvantages of such a step, and should document that fully in the client's file. It is not stated in the statute, but best practice might indicate that the Court should also engage in a colloquy with the client prior to accepting a waiver of a PSI. This can pose certain difficulties, for a well-counseled client would only undertake to waive his right to a PSI in order to place himself at a tactical advantage at final sentencing. There may be times, therefore, where the client would hope the court would not ask too many questions as to his reasons for waiving the PSI. Both counsel and client should therefore exercise some caution, for the Court is doubtless entitled to ask, and to require the defendant to answer, whatever questions it deems necessary before accepting a waiver of a PSI, provided the questions relate to the voluntariness of the waiver.

The law does not clearly state whether a Court must accept a waiver of a PSI. The language of RCr 11.02 sets out the client's right to waive in unqualified terms. It could be argued therefore that, once the Court determines that the waiver is knowing and voluntary, the Court must accept the waiver.

At least in this end of the state, it has been probation's stated practice for two or three years that they will do a PSI even when we and the court waive it. It may never make it to the court file, but it follows the client to the institution and the parole board. When we waive PSI, we waive the opportunity to make corrections to the document that will be used by others. There are still times it makes sense to waive, as when the court just imposed sentence on the same defendant for a plea subsequent to this offense occurring and the PSI that we waive will be a one paragraph update, but we do need to be aware the PSI will exist whether we waive it or not.

Confidentiality

The law does not require that the client receive or even see a copy of the PSI. KRS 532.050 (6); see also *Commonwealth v. Bush*, Ky., 740 SW2d 943 (1987). Instead, the Court has a duty to advise the defendant, or his counsel, of the factual contents and conclusions of any presentence investigation. KRS 532.050(6). The court is also required to provide a copy of the report to the defendant's counsel. *Id*.

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Interestingly enough, the law does not state that the Commonwealth is entitled to receive a copy of the PSI, to see a copy of the PSI, or even to know of its contents. Even more surprisingly, no statute states that Corrections is entitled to retain a copy of the PSI, although the Court of Appeals has read that entitlement into KRS 439.510. *See Aaron v. Commonwealth*, Ky. App., 810 SW2d 60 (1991). Because KRS 439.510 has really nothing whatsoever to do with the rendition of a PSI, it could be therefore argued that *Aaron* is wrongly decided. *Aaron* itself contains logic contrary to its holding. It classifies a PSI as a court record, of which the Court is custodian, and goes on to state that a PSI is, for that reason, is exempt from any legislative control. If, as is quite plausible, a PSI is a court record, it is therefore not a bit clear why Corrections is entitled to a copy of the document. Although this practice does not seem likely to change any time soon, it is more a practice read into the law than set forth in the law.

The law is also silent as to whether counsel may retain the copy of the PSI that the Court is required to provide. It could be argued that counsel, having obtained the PSI from the court, must return the PSI to the Court. It could also be argued that as long as Corrections is going to receive a copy of the document and use it, potentially, against the client's interest, then counsel should be entitled to keep a copy and to answer any of the client's lingering questions about the document. Counsel probably should not provide the client with a copy of the document, although this question, too, may be open to argument.

The purpose of the confidentiality requirement is to protect confidential sources of information from any retaliatory impulse the defendant may have. *Commonwealth v. Bush*, *supra*. Where, as is now typical, the defendant himself is the probation officer's sole source of information in rendering the PSI, this prudential consideration vanishes. *Bush* does not give a great deal of attention either to the Fourteenth Amendment or to Section Eleven of the Kentucky Constitution as principles governing the rendition and reception of a PSI. An attorney is perfectly justified in raising these issues by motion and inviting the Court to consider them. On the other hand, the attorney may not undertake simply to ignore the law as it now stands. If an attorney wishes to provide a PSI to his or her client, the attorney should ask the court by motion before so undertaking.

Given the law on confidentiality, the practice of giving the client a copy of the PSI to read in the holding cell while surrounded by other prisoners is not justifiable on any terms. Illiterate clients should also receive assistance in digesting the contents of the PSI. All clients, in light of the heightened confidentiality concern, receive the opportunity and sufficient time to review their PSI in a confidential setting.

Origins of the PSI

The origins of the modern presentence investigation began in the 1840s with the crusading efforts of Boston shoemaker John Augustus (1841-1859). It was Augustus' belief that the "object of the law is to reform criminals and to prevent crime, and not to punish maliciously or from a spirit of revenge." In his efforts to redeem selected offenders, Augustus gathered background information about the offender's life and criminal history. If he determined that the person was worthy, Augustus provided bail money out of his own pocket. If he succeeded in winning the person's release, he helped them find employment and housing. Later he appeared at the sentencing hearing and provided the judge with a detailed report of the person's performance. Augustus would then recommend that the judge suspend the sentence and release the person to his custody.

Considered the father of modern probation, Augustus's leadership led the Massachusetts legislature to establish the nation's first probation law in 1878. By authorizing the Mayor of Boston to appoint a member of the police department to serve as a paid probation officer, this statute formalized the practice of extending probation to "such persons as may be reasonably be expected to be reformed without punishment." The law was expanded in 1891 with the creation of an independent state-wide probation system. By the time that the National Probation Act was passed in 1925 creating a Federal probation service, the majority of states had probation statutes.

The evolution of the presentence investigation was given further impetus by the reformatory movement of the 1870s. Because reformatory movement proponents advocated an individualized approach towards the redemption of the criminal, indeterminate sentencing became a popular sentencing reform throughout the later half of the 19th century and became the standard form of sentencing throughout the United States until the 1980s.

Simultaneous to the development of probation and the indeterminate sentence, the evolution of the social sciences gave rise to the medical model of corrections during the 1920s and 1930s. The medical model was founded on the belief that crime was the result of individual pathology that could be diagnosed and treated like a disease. Judges simply needed to know the problem in order to prescribe treatment.

As these systems and approaches evolved, the need for more information about the defendant became critical. By the 1930s, one of the primary tasks of probation officers throughout the country was the preparation of the presentence investigation report.

The History of the Presentence Investigation Report found at http://www.cjcj.org/pubs/psi/psireport.html

Notice and the Opportunity to be Heard

After being informed as to the contents of the report, the client must be given a fair opportunity and reasonable amount of time to controvert them. KRS 532.050(6). It appears to follow that a continuance of the sentencing date is called for if reasonably necessary to controvert the contents of the PSI. Significantly, it is reversible error for a judge to prepare a judgment prior to a sentencing hearing. *Edmonson v. Commonwealth*, Ky., 725 Sw2d 595 (1987). The Court held there, rather inevitably, that such a practice denied the defendant a meaningful opportunity to be heard.

Substantive Attacks on a PSI

A PSI is incomplete if it does not include all the information called for by KRS 532.050 (2). It is also incomplete and subject to objection if it does not include the discussion of available treatment programs in the community and in prison called for in KRS 532.050(5). If the PSI is silent as to treatment alternatives, the Court may not properly make a finding that the defendant is in need of treatment best provided in a correctional institution. A PSI is also incomplete if it contains information taken out of context. If the insertion of additional information would correct an adverse inference suggested by a PSI, counsel should request insertion of the additional information.

A PSI in unfair as over inclusive if it includes information that is not true or is not substantiated by a source. A PSI is also over inclusive if it contains stale information, or information not called for by the statute or by court order. Counsel should object both to incomplete and over inclusive PSI reports.

Procedural Objections

If the Court is not willing to go over the contents of the PSI with the client, it must afford counsel sufficient time, and a confidential setting in which to do so. The client should not be required to read his PSI in a holding cell. The client should be given a continuance of reasonable duration if necessary to respond to defects in the PSI. ■

KRS 532.050 Presentence procedure for felony conviction.

(1) No court shall impose sentence for conviction of a felony, other than a capital offense, without first ordering a presentence investigation after conviction and giving due consideration to a written report of the investigation. The presentence investigation report shall not be waived; however, the completion of the presentence investigation report may be delayed until after sentencing upon the written request of the defendant if the defendant is in custody and is ineligible for probation or conditional discharge.

(2) The report shall be prepared and presented by a probation officer and shall include an analysis of the defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, personal habits, and any other matters that the court directs to be included.

(3) Before imposing sentence for a felony conviction, the court may order the defendant to submit to psychiatric observation and examination for a period not exceeding sixty (60) days. The defendant may be remanded for this purpose to any available clinic or mental hospital or the court may appoint a qualified psychiatrist to make the examination.

(4) If the defendant has been convicted of a sex crime, as defined in KRS 17.500, prior to determining the sentence or prior to final sentencing for youthful offenders, the court shall order a comprehensive sex offender presentence evaluation of the defendant to be conducted by an approved provider, as defined in KRS 17.550, the Department of Corrections, or the Department of Juvenile Justice if the defendant is a youthful offender. The comprehensive sex offender presentence evaluation shall provide to the court a recommendation related to the risk of a repeat offense by the defendant and the defendant's amenability to treatment and shall be considered by the court in determining the appropriate sentence. A copy of the comprehensive sex offender presentence evaluation shall be furnished to the court, the Commonwealth's attorney, and to counsel for the defendant. If the defendant is eligible and the court suspends the sentence and places the defendant on probation or conditional discharge, the provisions of KRS 532.045(3) to (8) shall apply. All communications relative to the comprehensive sex offender presentence evaluation and treatment of the sex offender shall fall under the provisions of KRS 197.440 and shall not be made a part of the court record subject to review in appellate proceedings. The defendant shall pay for any comprehensive sex offender presentence evaluation or treatment required pursuant to this section up to the defendant's ability to pay but no more than the actual cost of the comprehensive sex offender presentence evaluation or treatment.

(5) The presentence investigation report shall identify the counseling treatment, educational, and rehabilitation needs of the defendant and identify community-based and correctional-institutional-based programs and resources available to meet those needs or shall identify the lack of programs and resources to meet those needs.

(6) Before imposing sentence, the court shall advise the defendant or his counsel of the factual contents and conclusions of any presentence investigation or psychiatric examinations and afford a fair opportunity and a reasonable period of time, if the defendant so requests, to controvert them. The court shall provide the defendant's counsel a copy of the presentence investigation report. It shall not be necessary to disclose the sources of confidential information.

ROLE OF DEFENSE COUNSEL IN JUVENILE DELINQUENCY PROCEEDINGS[1]

by the North Carolina Office of the Juvenile Defender

Editor's note: In November of 2005, the North Carolina Office of Indigent Defense Services approved the below statement providing guidance to defense counsel on their ethical responsibilities to their juvenile clients.

An attorney in a juvenile delinquency proceeding or in an order to show cause proceeding against an undisciplined juvenile shall be the juvenile's voice to the court, representing the express interests of the juvenile at every stage of the proceedings. The attorney owes the same duties to the juvenile under the Rules of Professional Conduct, including the duties of loyalty and confidentiality, as an attorney owes to an adult criminal defendant.

The attorney for a juvenile is bound to advocate the expressed interests of the juvenile. In addition, the attorney has a responsibility to counsel the juvenile, recommend to the juvenile actions consistent with the juvenile's interest, and advise the juvenile as to potential outcomes of various courses of action.

The attorney for a juvenile shall meet with the juvenile as soon as practical; communicate with the juvenile in a manner that will be effective, considering the juvenile's maturity, physical, mental and/or emotional health, intellectual abilities, language, educational level, special education needs, cultural background and gender; educate the juvenile as to the nature of the proceedings; determine the objectives of the juvenile; and keep the juvenile informed of the status of the proceedings. The attorney should move the court for appointment of an interpreter if the primary language of the juvenile or the juvenile's parents or guardian is other than English and the attorney has difficulty communicating with them.

If the attorney determines that the juvenile is unable to understand the proceedings or otherwise cannot assist the attorney in representing the juvenile, the attorney shall move the court for an evaluation of the juvenile's capacity to proceed and otherwise proceed according to Rule 1.14 of the Rules of Professional Conduct.

The attorney for a juvenile should consider moving the court to appoint a guardian if it appears to the attorney that the juvenile does not have a parent or other adult to provide assistance in making decisions outside the scope of the attorney's representation.

Decisions whether to admit to allegations of a petition and whether to testify are those of the juvenile, after consultation with the attorney. Decisions regarding the method and manner of conducting the defense are those of the attorney, after consultation with the juvenile.

An attorney for the juvenile should be knowledgeable of dispositional alternatives available to the court. The attorney should inform the juvenile and the juvenile's parents or guardian of those alternatives, of possible recommendations to the court, and of the possible outcome of the hearing. At the dispositional hearing, the attorney shall provide the court with reasonable dispositional alternatives, if desired by the juvenile.

Endnotes:

1 This statement of the role of defense counsel in juvenile delinquency proceedings was derived from a number of sources. *See, e.g.*, National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* (2005); American Council of Chief Defenders, National Juvenile Defender Center, *Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems* (2005); Amy Howell & Brook Silverthorn, Southern Juvenile Defender Center, *Representing the Whole Child: A Juvenile Defender Training Manual*, § IV (2004); California Administrative Office of the Courts, *Effective Representation of Children in Juvenile Delinquency Court* (2004); Juvenile Justice Bulletin, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Access to Counsel* (2004); Katherine R. Kruse, Washington University Journal of Law and Policy, *Lawyers Should be Lawyers, But What does that Mean? A Response to Aiken & Wizer & Smith* (2004); Frank E. Vandervort, Michigan Bar Journal, *When Minors Face Major Consequences: What Attorneys in Representing Children in Delinquency, Designation, and Waiver Proceedings Need to Know* (2001); National Association of Counsel for Children, *Recommendations for Representation of Children in Abuse and Neglect Cases*, Part IV (2001); Barbara Butterworth, Will Rhee & Mary Ann Scali, American Bar Association Juvenile Justice Center, *Juvenile Defender Delinquency Notebook*, Chapter 2, § 2.2 (2000); Massachusetts Committee for Public Counsel Services, *Assigned Counsel Manual: Policies and Procedures*, Parts III. A.4 & J 1.2 (2000); Kentucky Department of Public Advocacy, *Juvenile Law Manual*, Chapters 1 & 3 (1999); IJA/ABA Juvenile Justice Standards, *Standards Relating to Private Parties*, Standard 3.1 (1996); Stephen Wizner, 4 Columbia Human Rights Law Review 389, *The Child and the State: Adversaries in the Juvenile Justice System* (1972) ■

CAPITAL CASE REVIEW

by David M. Barron, Capital Post-Conviction Branch

Supreme Court of the United States

***Bradshaw v. Richey*,**
2005 WL 3144332 (Nov. 28, 2005)
(*reversing grant of habeas relief and remanding for review under correct standard)*

Transferred intent is applicable to aggravated felony murder under Ohio law: Even if a state court's interpretation of state law is only dictum, that interpretation binds a federal court in *habeas* proceedings. The Court rejected the Sixth Circuit's ruling that the Ohio Supreme Court's interpretation of transferred intent announced on direct appeal of Richey's conviction should not apply to Richey because it constitutes an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. Thus, the Sixth Circuit's ruling that Ohio's transferred intent law does not apply to this case was erroneous.

The Sixth Circuit misapplied the Anti-Terrorism and Effective Death Penalty Act: The Court reversed the Sixth Circuit's grant of sentencing relief of an ineffective assistance counsel claim because the Sixth Circuit 1) relied on evidence that was not properly presented to the state *habeas* courts without first determining whether Richey was at fault for failing to develop the factual bases for his claims in state court, or whether Richey satisfied the requirements for an evidentiary hearing in federal court; 2) disregarded the state *habeas* court's factual conclusions without analyzing whether the state court's factual findings had been rebutted by clear and convincing evidence; and, 3) relied on grounds that were apparent from the record but not raised on direct appeal without determining whether Richey's procedural default could be excused by a showing of cause and prejudice or by the need to avoid a miscarriage of justice. Because the Sixth Circuit failed to analyze Richey's claims under these standards, the Court remanded to the Sixth Circuit to apply the proper standard.

Some claims do not arise until the court rules on a claim: The Court recognized that claims sometimes arise out of a court's ruling in a case and since the asserted error in this circumstance was neither based on something that occurred below or an argument made by one of the parties, a challenge to such an issue is not defaulted. But this type of error should be raised in the first instance before the court that made the error.

***Certiorari* Grants**


David M. Barron

***Clark v. Arizona*,**
No. 05- (granted 12/5/05) (non-capital)

(1) Whether Arizona's insanity law, as set forth in A.R.S. § 13-502 (1996) and applied in this case, violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment?

(2) Whether Arizona's blanket exclusion of evidence and refusal to consider mental disease or defect to rebut the state's evidence on the element of *mens rea* violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment?

***Sanchez-Llamas v. Oregon*,**
No. 04-10566, (granted 11/7/05) (non-capital)

1. Does the Vienna Convention convey individual rights of consular notification and access to a foreign detainee enforceable in the Courts of the United States?

2. Does a state's failure to notify a foreign detainee of his rights under the Vienna Convention result in the suppression of his statement to the police?

***Bustillo v. Johnson*,**
No. 05-51 (granted 11/7/05) (non-capital)

Whether, contrary to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-101, state courts may refuse to consider violation of Article 36 of that treaty because of a procedural bar or because the treaty does not create individual enforceable rights?

***Washington v. Recueno*,**
No. 05-83, case below, 110 P.3d 188 (Wash. 2005)
(granted 10/17/05) (non-capital)

Whether error as to the definition of a sentencing enhancement should be subject to harmless error analysis where it is shown beyond a reasonable doubt that the error did not contribute to the verdict on the enhancement.

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Kentucky Supreme Court

St. Clair v. Commonwealth,
174 S.W.3d 474 (Ky. 2005)
(4-3 decision reversing conviction and death sentence because of violation of marital communications privilege) Lambert, C.J., for the court, joined by Cooper, J., and Johnstone, J.:

St. Clair and Reese escaped from an Oklahoma prison, broke into the house of Vernon Stephens in Oklahoma, stole his truck and gun, and headed to Texas. St. Clair's wife, Bylynn, met up with them in Texas and provided them with money and clothing. Reese was arrested months later and confessed that he and St. Clair traveled to Colorado where they kidnapped Keeling, stole his truck, and murdered him in New Mexico. Then, they drove Keeling's truck to Louisiana, Arkansas, and Tennessee before arriving in Kentucky. While in Kentucky, St. Clair kidnapped and killed Brady after stealing his truck.

At trial, despite St. Clair invoking the marital communications privilege, St. Clair's wife was allowed to testify to the following: 1) that she felt something in St. Clair's belt when she met him in Texas and was told by St. Clair that the bulge was a gun he stole from Stephens in Oklahoma; 2) St. Clair told her that he and Reese had to leave their belongings and stole a truck; 3) St. Clair called her from Louisiana while Reese was in the bathroom, and told her that he had to leave things in a truck and was in Louisiana; and, 4) St. Clair told her that that he was in Louisiana and had been in Oklahoma since December 17, 1991, which was later used to contradict Reese's testimony that St. Clair arrived at his farm in October 1991. The Court held that the introduction of these statements violated the marital communications privilege. After reversing on this ground, the court addressed issues that were likely to reoccur at trial.

St. Clair's wife was not involved in joint criminal activity within the meaning of the joint criminal activity exception to the marital communication privileges: The marital communications privilege allows an individual to prevent anyone from testifying to any confidential communication made by the individual to his or her spouse during their marriage. A communication is confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person. But the privilege does not apply in three circumstances, one of which is that the spouses conspired or acted jointly in commission of the charged crime.

The court held that St. Clair's wife's assistance with St. Clair's flight after his prison escape is not part of conspiring or acting jointly in the commission of the charged crimes (receiving stolen proper, murder, arson, kidnapping), and thus the exception does not apply.

Confidential nature of the marital communications statements: Confidential statements need not be given behind closed doors. "A hushed or whispered statement from one spouse to another may be considered confidential depending on the circumstances of its disclosure." Because the first statement took place at a fair and was apparently made in full view of the public, the court remanded to the trial court to hear evidence and make factual findings on whether this statement was intended to be confidential. The court did the same with the fourth statement. But the court held that the second and third statements were intended to be confidential and required reversal because the statements corroborated Reese's testimony that St. Clair was the ringleader and shooter, and because the statements contained St. Clair's only admission of guilt.

Kidnapping aggravator: K.R.S. 532.025 requires a trial judge to instruct the jury on any aggravating or mitigating circumstance otherwise authorized by law. But K.R.S. 532.025 also states that death cannot be imposed unless the jury finds that one of the enumerated statutory aggravating circumstances exist. The court previously resolved this conflict by holding that the murder of a kidnapping victim is an aggravator allowing the jury to impose death, because kidnapping is a capital offense and murder is an aggravating circumstance otherwise authorized by law. Thus, a defendant is death-eligible for capital kidnapping if the defendant murdered the kidnapping victim. But the victim not being released is not an aggravating circumstance. Thus, upon retrial the jury shall be instructed that death cannot be imposed unless the jury finds that St. Clair murdered the victim during the course of the kidnapping.

Note: The conflict between the two sections of K.R.S. 532.025 can be better resolved by recognizing the difference between aggravating factors used for eligibility and aggravating factors used for selection - - the two portions of the sentencing phase of a capital case. The statutory aggravating factors in K.R.S. 532.025 serve the narrowing function required by United States Supreme Court case law to ensure that death is reserved for the worst of the worst. At least one of the statutory aggravating factors must be found beyond a reasonable doubt. If not, the jury never reaches the stage where it considers the aggravating and mitigating circumstances to determine whether to impose death. It is at this stage that additional aggravating circumstances otherwise authorized by law are admissible. Thus, the two sections of K.R.S. 532.025 do not conflict. To ensure that the two portions of the capital sentencing process serve its proper function, trial counsel should argue that the sentencing phase should be broken down into two parts: 1) the jury hears evidence and makes findings of whether a statutory aggravating circumstance has been proven beyond a reasonable doubt; and, 2) if they make that

finding, the jury then should hear evidence about any other aggravating circumstances otherwise authorized by law and mitigating circumstances and based on a consideration of these factors, determine if the prosecution has proven that death is the appropriate sentence.

Indictment does not need to specify the aggravating circumstances: Aggravators are sentencing considerations not elements of the offense so they need not be alleged in the indictment.

Victim's statements about his daughter and wanting to go home were inadmissible hearsay: The trial court permitted Reese to testify, as a dying declaration, that the victim told St. Clair and Reese that he had a daughter in college and wanted to go home. Since neither of these statements involved the impending cause of the victim's death and because it is not clear that the victim was aware of his impending death, the court held that these statements were not admissible as a dying declaration. The court also noted that these statements were not admissible to show the victim's state of mind.

Roach, J., concurring: would hold that the third statement from St. Clair's wife was harmless.

Cooper, J., concurring in part and dissenting in part: Cooper concurs in reversing St. Clair's conviction because of violations of the marital communications privilege, but dissents from the majority opinion permitting the use of a conviction pending on appeal at the time of the original trial as an aggravating circumstance. According to Cooper, a conviction pending on appeal is a valid aggravating circumstance, but applying this change in law retroactively to St. Clair violates the "fair warning" aspect of the due process clause, which prevents retroactive application of an unforeseeable change in the construction of a state to subject a person to criminal liability or increased punishment for past conduct.

Wintersheimer, J., joined by Graves, J., and Scott, J., dissenting: They would have affirmed the conviction and death sentence, holding that the marital communications privilege does not apply because 1) the communications involved aiding St. Clair in patently criminal activity; 2) the communications in question were likely intended to be shared with a third party; and, 3) St. Clair's wife's testimony has substantial probative value thereby outweighing the minimal prejudicial effect.

***Taylor v. Commonwealth*,**
2005 WL 1185521 (final decision to be published)
Lambert, C.J., for the court, joined by, Graves, J., Scott, J., and Wintersheimer, J.)

In this Cr 60.02 motion the court addressed the co-defendant's recantation, a juror's false statements on voir dire, and the constitutionality of Kentucky's DNA statute. The court also *sua sponte* addressed the admissibility of the co-defendant's statements in light of *Crawford v. Washington*, 541 U.S. 36 (2004).

Co-defendant's recantation does not warrant a new trial: At Taylor's RCr 11.42 evidentiary hearing, Taylor's co-defendant recanted his trial testimony that Taylor was with him when he kidnapped, sodomized, and killed two teenagers. Taylor filed a CR 60.02 motion based on this testimony. In denying relief, the trial court held that the co-defendant's 11.42 testimony that contradicted his trial testimony was not enough to entitle Taylor to a new trial because recanted testimony is viewed with suspicion and does not normally warrant a new trial. The Kentucky Supreme Court agreed, noting that the recantation came eleven years after Taylor's conviction and only after the Parole Board denied the co-defendant parole.

Co-defendant's statement to the police was inadmissible hearsay because Taylor had no opportunity to cross-examine the co-defendant, but the statement was cumulative and harmless: At trial, the co-defendant's statement to the police that Taylor was the shooter was admitted as a statement against penal interest despite Taylor not being able to cross-examine the co-defendant due to his invocation of his privilege against self-incrimination. On direct appeal, the court upheld the admission of this statement because it possessed "adequate indicia of reliability demonstrated by particularized guarantees of trustworthiness." But in 2004, the United States Supreme Court ruled that out-of-court statements are inadmissible as a violation of the Confrontation Clause unless the witness was unavailable to testify, and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S 36 (2004). In light of *Crawford*, the Court reconsidered this issue despite neither party raising it, and held that the co-defendant's statement should not be admitted at trial.

But the court held that the statement was cumulative and harmless because 1) if reversed on this ground, the statement would be admissible for impeachment purposes as an inconsistent statement if the co-defendant testified inconsistently at the retrial; and, 2) "no reasonable juror could acquit Taylor of his deplorable crimes even if half the evidence was stricken from its deliberations."

Note: The majority seems to apply an incorrect harmless error standard. The correct harmless error standard does not ask whether there is a reasonable probability that the jury would have acquitted, but rather asks whether there is a reasonable probability that the evidence complained of might have contributed to the conviction. Also, the burden of establishing that an error is harmless is on the state.

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RCr 10.04 does not prevent juror testimony that the juror answered a question falsely on voir dire: RCr 10.04 says that "[a] juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." This rule, however, is not the clear-cut exclusionary rule that its language suggests because interpreting the rule in that manner would violate various constitutional requirements, including due process. Thus, a defendant is free to use a juror's testimony to establish that a juror did not truthfully answer a question on voir dire as long as the testimony is not about anything that occurred in the jury room.

Standard for obtaining a reversal because of a juror's false statements on voir dire: The three requirements are: 1) a material question must have been asked on voir dire; 2) the juror must have answered the question dishonestly; and, 3) a truthful answer to the material question would have subjected the juror to being stricken for cause.

The juror did not falsely answer a question on voir dire: Taylor easily satisfies the first requirement because "[a] question about whether a potential juror believes she can consider the full range of penalties upon a conviction for murder is about as material as they come." But the juror's statement in post conviction proceedings that "God's word does say that the death penalty is appropriate for murderers" is not inconsistent with her statements on voir dire that there are situations where the death penalty is appropriate and others where it is not. Thus, the juror answered honestly on voir dire and was capable of considering all available punishments.

K.R.S. 422.285 (the DNA statute) violates separation of powers, however is enforceable by way of comity**:** K.R.S. 422.285 allows a person sentenced to death to request DNA testing of any evidence in the possession of the Commonwealth. Because the statute is procedural in nature, neither adding nor removing elements necessary to convict or alter the penalty for a conviction, the statute invades the Kentucky Supreme Court's authority under the Kentucky Constitution to provide rules, and thus violates the separation of powers provision of the Kentucky Constitution. Nevertheless, the Court upheld K.R.S. 422.285 under the principles of comity.

Cooper, J., joined by, Johnstone, J., concurring in part and dissenting in part: Concurred in denial of relief based on newly discovered evidence, but would hold that the co-defendant's statement is neither cumulative nor harmless, and that the court should not have addressed cumulativeness or harmlessness because neither party raised that issue when the claim was previously addressed by the court or on appeal. But they would not grant relief because the confrontation clause issue was not raised by either party.

Keller, J., dissenting: would hold that the confrontation clause violation that occurred when a statement from a co-defendant who was unavailable for cross examination saying that Taylor was the shooter was entered into evidence was not harmless error.

***Bowling v. Lexington-Fayette Urban County Government,* 172 S.W.3d 333 (Ky. 2005)**
(county government did not willfully violate Open Records Act)

Bowling filed an open records request for numerous documents, including police documents, in the possession of the Lexington-Fayette Urban County Government (LFUCG). The open records request was denied on the basis that the document were exempt since Bowling's federal *habeas* proceedings were still ongoing, thereby meaning that the criminal investigation remained ongoing. Bowling filed suit claiming that LFUCG wrongfully refused to comply with the open records law. The circuit court originally agreed to hold an evidentiary hearing, but cancelled the hearing after quashing subpoenas issued to representatives of the Fayette County Commonwealth's Attorney's Office. On appeal, Bowling challenged 1) the quashing of the subpoenas; 2) the failure to hold an evidentiary hearing; and, 3) the lower court's ruling that LFUCG had not willfully violated the Open Records Act.

The circuit court properly quashed the subpoenas: Because records within the possession of the Commonwealth Attorney's Office or the Attorney General's Office pertaining to criminal investigations are exempt from disclosure under the Open Records Act no matter how the records got there, the circuit court properly quashed subpoenas served on members of the Commonwealth Attorney's Office.

Standard for obtaining hearing on whether agency has denied the existence of records that do exist: The party requesting the documents must make a *prima facie* showing that the records exist. Inadmissible hearsay evidence is insufficient to satisfy the *prima facie* standard. Applying this standard to the evidence submitted by Bowling, the court held that the trial court did not err by refusing to hold an evidentiary hearing. ■

The future does not belong to those who are content with today, apathetic toward common problems and their fellow man alike, timid and fearful in the face of bold projects and new ideas. Rather, it will belong to those who can blend passion, reason and courage in a personal commitment to the great enterprises and ideals of American society.

— Robert F. Kennedy

6TH CIRCUIT CASE REVIEW

by David Harris, Post-Conviction Branch

DiCenzi v. Rose
419 F.3d 493 (6th Cir. 2005)

6th Circuit vacates and remands district court's finding that *habeas* petition was untimely.

Petitioner pled guilty in Ohio to aggravated vehicular homicide and aggravated vehicular assault. He was sentenced to a total of 6 1/2 years, the maximum possible sentence on these charges. Under Ohio law, the trial court was required to inform petitioner that he had a right to appeal, as he had received the maximum sentence. In this case, however, the trial court failed to advise Appellant of this right.

Two years later, Petitioner contacted the public defenders' office. At this time, petitioner learned that he had a right to appeal a maximum sentence. Within weeks petitioner filed a motion for a delayed appeal with the Ohio Court of Appeals. The court denied his motion. At this point, the public defender's office entered an appearance and asked for reconsideration, which was denied. Though the Ohio Supreme Court initially granted a motion for delayed appeal, it subsequently dismissed the case as "not involving a substantial constitutional question or a matter of great public interest."

Petitioner then filed his petition for a writ of *habeas corpus*, making the following claims: 1) ineffective assistance of counsel for failing to advise him of his right to appeal, (IAC) 2) the trial court's failure to "afford him the usual protections of Ohio law in imposing a maximum sentence" resulting in a violation of due process 3) the trial court's failure to advise him of his right to appeal constituted a due process violation, and 4) the state appellate court's denial of his delayed appeal motions violated due process. The federal district court dismissed the petition as untimely, but granted a certificate of appealability.

The 6th Circuit first addressed petitioner's due process claim regarding the state appellate courts' failure to hear his delayed appeal. Like the others, this claim was deemed untimely by the district court. After noting that the statute of limitations for filing a *habeas corpus* petition under AEDPA is one year, the 6th Circuit determined that this claim was, in fact, timely. The time limit for this claim began once the Ohio Court of Appeals denied petitioner's motion for delayed appeal, as this was the action alleged to have constituted a violation of due process. The 6th Circuit noted that the motion for delayed appeal filed with the Ohio Supreme Court did not restart the AEDPA clock, but did toll the statute of limitations while under consideration. The fact that the Ohio Supreme Court ultimately dismissed the motion on jurisdictional grounds did not affect the tolling. Thus, as this claim was timely, the 6th Circuit Court of Appeals vacated the district court's ruling on this claim and remanded it for consideration on the merits.

David Harris

The 6th Circuit next addressed the remaining three claims, issues arising from the guilty plea itself. As no appeal was filed, the AEDPA statute of limitations would normally run from the date of final sentencing. However, per 18 U.S.C. § 2244(d)(1)(D), the 1-year statute of limitations technically begins running on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Citing one of their unpublished cases, *Granger v. Hurt*, 90 Fed.Appx. 97 (6th Cir. 2004) and *Wims v. United States*, 225 F.3d 186 (2d Cir. 2000), the 6th Circuit noted that "§ 2244(d)(1)(D) does not require the maximum feasible diligence, only 'due,' or reasonable, diligence." However, no factual findings were made nor analysis done by the lower court on this point. After noting that the sentencing transcript clearly indicated that the trial court did not inform petitioner of his right to appeal, as required by Ohio law, the 6th Circuit vacated the district court's finding that the petition was untimely and remanded for factual findings.

Davis v. Straub
421 F.3d 365 (6th Cir. 2005)

6th Circuit grants writ of *habeas corpus* finding petitioner was prevented from raising a defense, denied the compulsory testimony of an exculpatory witness, and denied effective assistance of counsel.

Davis was convicted with Bell of murdering a woman and her two children, for which he received multiple life sentences. He was also convicted of home invasion, mutilation of a body, and receiving and concealing stolen property, for which he received additional time.

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Bell confessed to the murders and tried to implicate Davis. Nothing linked Davis to the murders other than Bell's statement. The only other person present at the house where the beating and subsequent murders took place was a 15-year-old boy, Jourdan.

Jourdan gave two statements to the police regarding what he saw. In the first statement, he told the cops that he saw Bell beat and "stomp" the adult victim, at which point he walked away. Jourdan further stated that Davis was not there at that time. Jourdan gave his second statement after being *Mirandized*, and while his mother was present and also informed of his rights. This time, Jourdan again denied any involvement in the murders, and was consistent with his first. Finally, approximately ten months later, Jourdan gave another statement to petitioner's investigator in which he again stated that neither himself nor Davis had attacked the victim.

During opening statement at trial, petitioner's attorney told the jury that Jourdan would be testifying, and explained that this testimony would be exculpatory to petitioner. Jourdan was called by the defense and sworn in. At this point, the prosecutor asked for a sidebar. The prosecution expressed some concern about Jourdan's 5th Amendment rights. After a few questions, the judge provided Jourdan with counsel who advised him to invoke the 5th Amendment, which Jourdan subsequently did. The trial court then allowed Jourdan not to testify at all. Bell and Davis were convicted.

After a hearing on a motion for new trial, followed by state appeals, Davis filed a petition for a writ of *habeas corpus*. The district court denied the petition, and the 6th Circuit considered three of petitioner's claims: 1) whether trial court's decision to permit a witness's blanket invocation of his 5th Amendment privileges denied petitioner a fair trial and the right to present a defense, 2) whether petitioner's lawyer rendered ineffective assistance of counsel in failing to offer into evidence that witness's prior exculpatory statements, and 3) whether the prosecution's late "concern" regarding the witness's potential 5th Amendment issues amounted to prosecutorial misconduct.

The 6th Circuit began its analysis by citing *Brown v. Walker*, 161 U.S. 608 (1986), and noting that, for the 5th Amendment privilege to apply, the danger of self-incrimination must be "real and probable" rather than "imaginary and unsubstantial." In the instant case, the trial court was required to balance the witness's real potential for self-incrimination against the defendant's right to present a defense. The 6th Circuit noted that Jourdan had already given several statements, at least one of which was properly *Mirandized* and therefore would be admissible against him should he be taken to trial. Further, the only "incriminating" statement that Jourdan had ever made was his admission that he was there when Bell attacked the victim. As this point was already established, the 6th Circuit cited *Mitchell v. United States*, 526 U.S. 314 (1999): "where there can be no further incrimination, there is no basis for the assertion of the privilege." Further, the proper action for the trial court would have been to allow Jourdan to testify, requiring him to invoke a 5th Amendment privilege prior to answering a specific question. Failing to require Jourdan to testify ignored petitioner's countervailing right to compel the non-incriminating testimony of this witness. Because much relevant and exculpatory testimony was available from Jourdan which would not incriminate him, the 6th Circuit determined that petitioner was denied his constitutional right to present a defense.

Along the same lines, the 6th Circuit determined that trial counsel's failure to introduce Jourdan's exculpatory statements constituted ineffective assistance of counsel. First, these statements were highly exculpatory as they were the account of the only witness to the crime. Next, counsel specifically told the jury during opening statement that they would hear the exculpatory testimony, and what it was. By offering the statements counsel would have, to at least some degree, kept his promise to the jurors. Thus, petitioner received ineffective assistance of counsel.

Finally, the 6th Circuit declined to find that the Michigan Court of Appeals unreasonably applied Supreme Court precedent in failing to find prosecutorial misconduct.

The 6th Circuit Court of Appeals reversed the district court and remanded with instructions to issue a conditional writ of *habeas corpus*.

Hodge v. Hurley
426 F.3d 368 (6th Cir. 2005)

6th Circuit grants *habeas* petition where prosecutor engaged in several instances of misconduct and defense counsel was constitutionally ineffective for failing to object.

Petitioner was convicted of rape of a child under the age of thirteen, and sentenced to mandatory life imprisonment.

According to the state's theory, petitioner's girlfriend was taking a bath when she heard some moaning. She went to the bedroom and saw petitioner sexually penetrating her three-year-old daughter. He told her that if she told anyone he would kill her and her kids. Petitioner, his girlfriend, and her three kids then went to a birthday party. The girlfriend's grandmother noticed the daughter acting strangely, and took her home to stay with her. When trying to give the child a bath, the grandmother noticed blood in the girl's underwear and genital area, and took her to the hospital. The police questioned the mother, who two times failed to mention what she saw petitioner do to her daughter. Finally she told a

family member who told her to tell the police. She told the police, and then was arrested for child endangering and failure to support a crime. She was not released until she testified to the grand jury, at which time the charges against her were dismissed.

The medical findings at the hospital were inconclusive. The doctor there noted that the girl sustained minor injury, but could not say that she had been sexually assaulted. The girl was also evaluated by a nurse practitioner and the nurse's supervising physician.

According to petitioner, he did nothing more than get the girl dressed to go to the birthday party. He noted that he spent a lot of time watching the kids while his girlfriend was at work, and commented that if he was going to do something like this it would make a lot more sense to do it when she was not in the next room. There was no evidence that petitioner had ever done anything like this before. Finally, petitioner suggested that his girlfriend's accusations might have come from her family, who apparently did not like him.

As pointed out by the court, petitioner's case basically came down to one question: was the girlfriend truthful and accurate when she claimed she saw petitioner penetrate her daughter. Petitioner went to trial and was convicted. Subsequent appeals and state post-conviction claims were unsuccessful. The district court denied his *habeas corpus* petition, and petitioner appealed to the 6th Circuit.

The 6th Circuit began its analysis noting that petitioner's trial, and most notably the prosecution's closing argument, was riddled with prosecutorial misconduct to which no objection was made. First, the prosecutor commented in closing argument on the credibility of several witnesses. The prosecutor told the jury that the petitioner was "lying to extricate himself from what he's done," yet the girlfriend was "absolutely believable."

Continuing along these lines, the prosecutor also misrepresented the evidence while commenting on witnesses' credibility. The prosecutor told the jury that to acquit petitioner they would have to find the girlfriend and her entire family to be nothing but "absolute liars." The prosecutor blatantly misstated the evidence in closing when he told the jury that the first hospital physician found bruises on the child consistent with handprints and/or finger tension bruises. The trial transcript, however, reveals the fact that the doctor instead testified that he did not find any bruises on the child. Next, the prosecutor effectively accused the defense's doctor, Dr. Steiner, of committing perjury during closing: "So somebody here has perjured themselves; it's either Nurse McAliley, Dr. McDavid and Dr. Jackson, or it's Dr. Steiner." Finally, the prosecutor commented on the defense attorney's closing, in which counsel pointed out that the girlfriend was being investigated by Children Services. The prosecutor told the jury that he did not hear that evidence in this trial, and that this was basically "mudslinging." Review of the record, however, indicates that the girlfriend did testify that she had been investigated by Children Services.

The prosecutor also made several improper comments regarding the character of the petitioner. In noting that petitioner looks older than his real age, 19, the prosecutor stated that petitioner "certainly could pass for a 23-year-old. I wonder how many he's had to drink…" Next, he opined that petitioner's "idea of supporting himself" was taking his (the prosecutor's) and his family's Social Security Supplemental Income. Finally, in a "Golden Rule argument," the prosecutor asked the jurors if petitioner was the type of person they would like to run into at night. The 6th Circuit determined that each of these comments was improper.

No objection was made to the prosecutor's comments. In evaluating petitioner's ineffective assistance of counsel claim, the 6th Circuit found trial counsel's performance in failing to object to the prosecutor's closing argument to be objectively unreasonable. No reasonable trial strategy could explain allowing the above comments, especially in light of the fact that this case did not contain overwhelming evidence, but instead primarily rested on the girlfriend's credibility. Thus, the 6th Circuit also found that this failure to object prejudiced the petitioner. The jury was presented with a lot of bolstering, misstatement of evidence, and even opinions that the defendant, his attorney, and his expert witness were perjurers and liars. Finally, the 6th Circuit determined that the Ohio state court's denial of petitioner's claims "was not simply incorrect, but was objectively unreasonable, meeting even the high threshold required by the AEDPA."

The 6th Circuit reversed the district court, and remanded with instructions to issue a conditional writ of *habeas corpus*.

Johnson v. Luoma
425 F.3d 318 (6th Cir. 2005)

6th Circuit denies *habeas corpus* petition, finding no juror bias and no IAC.

Petitioner was convicted in Michigan of two counts of kidnapping and one count of domestic violence, and was sentenced to 10-30 years. Petitioner was acquitted of first-degree sexual assault and felonious assault.

During *voir dire*, the jury was asked if anyone had been a victim of a crime; juror 457 stated that she had been assaulted. She also stated that she could keep her personal experiences separate from the evidence presented at trial. When asked if anyone had been threatened with a weapon, juror 457 stated that she had been hit in the head with a gun when she was a

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teenager. She also stated that she could disregard this experience. Juror 457 remained silent about other, less direct questions about anyone having problems with sitting on this type of case, or having extraneous issues "weighing on their mind" during trial.

After trial, petitioner learned that juror 457 was the complaining witness in a domestic violence case which was pending during his trial; the same prosecutor's office was handling that case. Petitioner filed a motion for a new trial based on juror bias and ineffective assistance of counsel (IAC), and was denied. His conviction was affirmed by the state appellate court.

Petitioner next filed for a writ of *habeas corpus* with the federal district court. This court permitted petitioner to put on more evidence which demonstrated that the juror had in fact been the victim of four other complaints. Her boyfriend was convicted on all except the first. Further, one of these, which occurred five months before trial, claimed an assault with a gun. The district court denied petitioner's *habeas*.

The 6th Circuit first noted that juror 457 answered truthfully when she stated that she "had been assaulted." The court noted that this answer does not imply that it had happened only once. Additionally, there was no evidence that juror 457 lied or concealed information. No evidence was offered suggesting that juror 457 had not in fact been hit with a gun when she was a teenager; and no proof established that she deliberately concealed the later incident rather than overlooked it. Though petitioner argued that her omission of the other incidents amounted to giving misleading information, the court determined that this was not clear and convincing evidence that amounted to concealment.

The court also pointed out the standard for whether a defendant is entitled to a new trial based on juror responses during *voir dire*, as articulated in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). This test contains two prongs: 1) the juror must have failed to honestly answer a material question, and 2) the truthful answer to this question must have provided a valid basis for a challenge for cause. The 6th Circuit noted that the state courts had determined that juror 457 honestly answered the questions posed, and further that petitioner did not show that she deliberately lied or misled the court.

As to the second prong, the petitioner did not claim actual bias. After openly questioning whether the implied-bias doctrine was still viable, the 6th Circuit determined that petitioner failed to show how this case is "extreme" or "exceptional" (per *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997)) enough to conclusively presume that juror 457 was biased. Thus, the 6th Circuit concluded that the petitioner failed to show that the state court's decision was contrary to clearly established federal law.

Turning to the IAC claim, the 6th Circuit evaluated the state court's application of the Strickland standard. Because juror 457 said repeatedly that she thought she could be impartial, the failure to investigate this juror further did not constitute deficient performance. Additionally, as petitioner could not show that juror 457 was biased against him, he therefore was unable to demonstrate that the performance of counsel prejudiced his case.

The 6th Circuit affirmed the district court's denial of petitioner's *habeas corpus*.

Maples v. Stegall
427 F.3d 1020 (6th Cir. 2005)

6th Circuit revisits case which had been remanded for IAC prejudice finding; after finding petitioner's underlying speedy-trial claim to have merit, court finds IAC and grants writ of *habeas corpus*.

In *Maples I* (*Maples v. Stegall*, 340 F.3d 433 (6th Cir. 2003)—see *Advocate*, Volume 26, No. 1, January 2004), petitioner sought *habeas* relief due to ineffective assistance of counsel. Trial counsel advised petitioner that a guilty plea would preserve his speedy trial claim for appeal. It did not. The 6th Circuit agreed that counsel's performance was deficient per *Strickland v. Washington*, 466 U.S. 688 (1984). Turning to *Hill v. Lockhart*, 474 U.S. 52 (1985) for the guilty plea prejudice analysis, the 6th Circuit noted that *Hill* required a review of the merits of the underlying claim. In this case, to find that petitioner indeed "but for counsel's errors, would not have pled guilty, but instead insisted on going to trial" a review was necessary of the underlying claim, *i.e.*, the speedy trial issue petitioner wanted to preserve for appeal. If this issue had merit, ineffective assistance of counsel would be proven, and petitioner's *habeas* would be granted.

The 6th Circuit remanded *Maples I* to the district court for a review and findings on the merits of petitioner's underlying speedy trial claim. The district court found that the speedy trial claim had no merit, and consequently, that petitioner had not received ineffective assistance of counsel. Petitioner appealed, and went back to the 6th Circuit in the instant case. A brief recounting of the time-related facts follows:

Petitioner and codefendant were arrested August 4, 1993 for delivery and conspiracy to distribute cocaine. The first trial date was set for Oct. 19, 1993, continued at the codefendant's request. The codefendant sought to raise an entrapment defense, at which time numerous motions were filed and hearings were conducted. Several subsequent trial dates were continued as a result of some of these pleadings. For at least some of this time, the codefendant was released on bond, while petitioner remained in custody. Petitioner finally asked to be released, as he had been held over 250 days, far beyond the 180 days permitted. The trial court ultimately granted petitioner's release; petitioner was sent immediately

to a parole revocation, sentenced to 2 1/2-5 years, and was re-incarcerated. A July trial date was continued, apparently because the codefendant was not transported to court. In November and December of 1994, petitioner's codefendant again sought to continue the trial. Petitioner did not join these motions; however, petitioner wrote the trial court *pro se* and asked for new counsel, complaining that counsel had not filed his speedy trial motion. In January 1995, petitioner filed a *pro se* motion for dismissal because he was denied a speedy trial. In August 1995, trial was continued because "plea negotiations failed." However, these negotiations had to do with the codefendant, not petitioner. On September 19, 1995, the codefendant pled guilty. On September 20, 1995, petitioner was brought in for trial. After rejecting the state's offer and again moving for a dismissal based upon a speedy trial violation, a jury was picked. After jury selection, petitioner pled guilty.

After noting that the state court had not addressed this issue, the 6th Circuit determined in *Maples I* that its review of this case was *de novo*, and not constrained by any state court decisions, per the AEDPA.

As the only remaining issue was the merit of petitioner's speedy-trial issue, the 6th Circuit turned to *Barker v. Wingo*, 407 U.S. 514 (1972) for the four factors considered in assessing a 6th Amendment speedy-trial violation: 1) whether the delay was uncommonly long, 2) reason for the delay, 3) whether defendant asserted his speedy trial right, and 4) whether defendant was prejudiced.

Per *Doggett v. United States*, 505 U.S. 647 (1992), a delay approaching one year is "presumptively prejudicial" and requires analysis of the other three factors. Petitioner's trial was delayed over 25 months.

Next is the reason for the delay. In reviewing the constitutional speedy-trial claim (as opposed to a state law speedy trial claim), the court declined to find most of the codefendant's delays attributable to petitioner. After reviewing each block of time, the 6th Circuit found some of the first 9-month delay attributable to petitioner, but found the 14-month period between July 1994 and September 1995 attributable to the state. The court determined that only being responsible for a "few" out of 25 months delay weighed in petitioner's favor.

Turning to the third Barker factor, the court looked to whether petitioner asserted his speedy-trial rights. *Citing Redd v. Sowders*, 809 F.2d 1266 (6th Cir. 1987), the court noted that a request for bail is the functional equivalent of a request for a speedy trial. Petitioner first moved for release on bond twice in April of 1994. In December 1994, the petitioner wrote the court a letter complaining that the 180-day rule had not been met. Finally, in August 1995 and on the day he pled guilty, petitioner again moved for dismissal based on speedy-trial violations. The 6th Circuit found that petitioner diligently asserted his speedy-trial right.

Finally, the court looked to prejudice. The court cited two cases in which delays of 8 years and 5 1/2 years were presumptively prejudicial. However, the court declined to review this case for presumptive prejudice, instead finding that actual prejudice was shown. Again citing *Barker v. Wingo*, *supra*, the 6th circuit noted three factors for determining whether actual prejudice is present: 1) oppressive pretrial incarceration, 2) anxiety and concern of the accused, 3) the possibility that the defense will be impaired. Of the three, the last is given the most weight. The court found that petitioner suffered all three.

First, petitioner effectively served two different pretrial incarcerations. The first, August 1993 through May 1994 was clearly incarceration pending this charge. The second period was May 1994 through January 1995. The 6th Circuit rejected the district court's finding that this was not oppressive since it was due to a parole violation and not awaiting this charge. Instead, the 6th Circuit noted that he was not imprisoned for committing a new felony, and therefore was eligible to receive a concurrent sentence. Thus, the court determined that both incarcerations negatively affected his liberty interest.

Second, the court looked at the "anxiety and concern" of the petitioner. First, the fact that petitioner raised his speedy-trial concerns multiple times demonstrated anxiety. Looking specifically to a letter petitioner sent to the trial court, the 6th Circuit noted that petitioner complained of "losing everything," and specifically stated: "This has put more than a little stress and strain on all concerned." The court found that petitioner suffered "anxiety and concern."

Last, the court looked to whether petitioner's defense was impaired. Petitioner claimed that two specific witnesses were unavailable due to the delay. The first witness was unable to be located. This witness, Roberts, was unable to be found in September of 1995. Petitioner claimed that Roberts visited him in January of 1994 and told him that he would testify on his behalf. Included in the record was a letter written by petitioner's codefendant in which he acknowledged that Roberts was present at the scene and could testify regarding what took place. The state argued that Roberts had never made any exculpatory statements, and that Roberts' attorney stated in a letter that if called, he would advise Roberts not to testify. The 6th Circuit found the state's evidence weaker, and determined that the inability to find Roberts in September of 1995 prejudiced petitioner.

The other unavailable witness was the codefendant. The codefendant's plea agreement specifically required that he not testify on behalf of petitioner, and that if he did so, he would "be facing a more severe sentence for doing so." The

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court noted that this plea condition may have violated petitioner's right to compulsory process. Further, during an entrapment hearing in February of 1994, the codefendant gave testimony that was favorable to petitioner. Petitioner was prepared to go to trial long before codefendant's plea conditions were arranged. Thus, the court found that the codefendant's unavailability to testify also prejudiced petitioner.

Thus, petitioner showed that his speedy-trial violations in fact prejudiced him. Further, the merit of this claim met the ineffective assistance of counsel prejudice prong in guilty plea situations required in *Hill v. Lockhart*, *supra*. The 6th Circuit reversed the district court's decision and remanded the case with directions for the district court to issue a writ of *habeas corpus*.

United States v. Owens
426 F.3d 800 (6th Cir. 2005)

Appellant's conviction affirmed; sentence remanded per *Booker*.

Appellant was convicted in a federal district court of thirteen counts related to a string of bank robberies. He appealed to the 6th Circuit.

Appellant first claimed that the trial court improperly refused to question a juror regarding bias. The juror had sent a note to the judge asking whether appellant could be a danger to the jury because he "was staring at [the juror] uncomfortably." The court declined counsel's request to question her. Both parties agreed to have the courtroom deputy tell the jury that, to the best of everyone's knowledge, the appellant "did not pose a security risk." On review, the 6th Circuit noted that a court must conduct a *Remmer* hearing (per *Remmer v. United States*, 347 U.S. 227 (1954)) and question a juror whenever the defense raises a "colorable claim of extraneous influence." *United States v. Davis*, 177 F.3d 552, 638 (6th Cir. 1999). The court concluded that the complained-of staring was not an extraneous influence, and that the court's decision not to question the juror did not amount to an abuse of discretion.

Appellant next claimed that the prosecutors committed misconduct during closing argument in the following ways: 1) asserting that a defense witness had an incentive to "make a deal" with appellant because appellant may be a witness in her upcoming trial, thus improperly challenging the witness's credibility; 2) improper witness vouching when the prosecution referred to plea agreements signed by several of the government's witnesses in which they received federal immunity if they testified truthfully; and 3) improper pandering to jury prejudice when the prosecution speculated that some of the jurors had "probably been the victims of crimes," and suggested that the appellant's case sought to make him look like a victim himself. The 6th Circuit rejected all of these arguments, finding: 1) there was sufficient evidence in testimony to support the prosecution's comment. Evidence was presented supporting an inference of an incentive to lie, and this was the basis of the prosecution's comment; 2) though the trial court told the prosecutor that it felt the prosecution was coming "dangerously close here to vouching," the 6th Circuit found that the prosecution merely referred to the plea agreement, in response to the defense's closing, and was not ground for reversal; and 3) because no objection was made, this claim was reviewed for plain error, which the 6th Circuit declined to find, noting that it was both isolated and unclear from the record that the comment was even calculated to prejudice the jurors against the appellant.

The 6th Circuit found that the corroborated testimony of four accomplices, viewed in the light most favorable to the prosecution, was enough to defeat appellant's claim on sufficiency of the evidence. Likewise, the court found no error in the restitution order, despite the fact that the district court cited under the Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663 instead of the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A.

The 6th Circuit, though noting it would affirm the sentencing enhancement appellant received, noted *United States v. Booker*, 543 U.S. 220 (2005), and remanded for resentencing, as the U.S. Sentencing Guidelines are no longer mandatory, but advisory.

Appellant's conviction was affirmed; Remanded for resentencing in compliance with *Booker*.

United States v. Arnold
___ F.3d ___, 2005 WL 3315297 (6th Cir. 2005)

*note: replaces opinion rendered June 21, 2005—410 F.3d 895 (6th Cir. 2005)

6th Circuit finds that the fact that a gun was found under a seat in a vehicle occupied by appellant does not establish possession; thus evidence of one element was insufficient, and case reversed and remanded for acquittal.

At about 7:43 a.m. on September 19, 2002, a woman called 911. She was frantic, and explained that her mother's boyfriend, Arnold, had pulled a gun on her. The police showed up, interviewed her, and interpreted her gesticulations as describing a "black, semi-automatic handgun with a chambered round." While they were talking, a car pulled up to the house. The woman got excited again, and pointed out the car passenger as the man who had pulled the gun on her.

The officers asked Arnold to get out of the car. He was cooperative and did not attempt to run. The police searched

him, and did not find any weapons. After asking for and getting consent to search the car from the driver/owner, Arnold's mother, the police found a black semi-automatic handgun with a chambered round under the passenger seat. It was in clear plastic bag, did not contain fingerprints, and was not reported as stolen.

Prior to and during trial, the woman could not be found and did not testify. However, the trial court permitted a redacted version of the 911 tape to be played under the "excited utterance" hearsay exception. Arnold was subsequently convicted by a jury of possession of a firearm by a convicted felon. Raising several issues, he appealed to the 6th Circuit.

The 6th Circuit first looked to Arnold's sufficiency of the evidence claim, noting that, if shown, disposed of the case without further inquiry. The court noted that "we must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' *United States v. Humphrey*, 279 F.3d 372, 378 (6th Cir. 2002), quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in *Jackson*)."

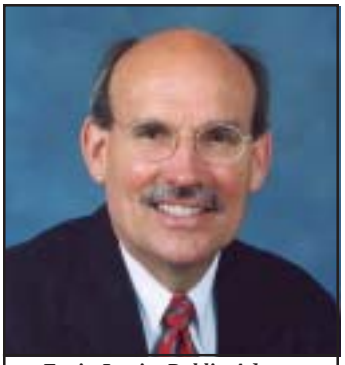
The elements for possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) are as follows: 1) prior conviction of a crime punishable by an imprisonment term of greater than one year, 2) that the defendant knowingly possessed the firearm and ammunition specified in the indictment, and 3) that the possession was in or affecting interstate commerce. On appeal, Arnold only challenged element #2.

The 6th Circuit began its possession analysis by determining if Arnold had actual possession, *i.e.*, that the tangible object was within the immediate possession or control of the party. The gun was not found on him. The police did not see him holding the gun. The only evidence that he ever actually possessed the gun came from the woman who did not testify. The court noted that this was problematic because, first, the "description" the woman gave of the gun was very generic, and second, for conviction, the possession element requires proof that appellant "possess[ed] the firearm and ammunition *specified in the indictment*." The 6th Circuit determined that no evidence had been presented showing that appellant had physical control over the firearm found in the vehicle. Thus, no rational trier of fact could have convicted appellant on the basis of actual possession.

Next, the court reviewed the possession element for constructive possession. The court defined constructive possession as "knowingly having the power and the intention at a given time to exercise dominion and control over an object, either directly or through others." The court cited many factually similar but distinguishable cases in which possession was proven: defendant was alone in the car, another occupant of the car saw defendant holding the gun, only the defendant had a key to the trunk in which the firearm was located, defendant had knowledge of a particular "quirk" of the weapon, defendant had arranged to meet with someone to sell the gun, etc. The 6th Circuit found that the prosecution in the instant case provided no evidence that Arnold had dominion or control over the weapon under his seat. As established in *United States v. Birmley*, 529 F.2d 103 (6th Cir. 1976), "mere presence on the scene" is insufficient to prove possession. Thus, the 6th Circuit "explicitly" held: "the fact that the gun was found under a seat in a vehicle occupied by [appellant] does not establish possession."

The 6th Circuit reversed and remanded for entry of a judgment of acquittal. ■

PLAIN VIEW . . .



Ernie Lewis, Public Advocate

Deno v. Commonwealth
— S.W.3d ——, 2005 WL 2317756,
2005 Ky. LEXIS 302, (Ky. 2005)

James Anthony Deno was at his trailer along with friends when J.M. and Elder, her boyfriend, came over. After a night of drinking, J.M. passed out on the couch. During the night, when she woke up and passed out several times, she discovered a man on top of her penetrating her. The next morning she and Elder left, and later reported that she had been raped. Deno was the primary suspect. The police came to Deno's house and asked him for a biological sample. Deno refused. The next day the police returned with a search warrant, the execution of which showed that the DNA in the semen found on J.M. matched Deno. Deno was tried and convicted.

On appeal, one of the issues raised was that the Commonwealth had violated Deno's Fifth Amendment rights when evidence was admitted that he had refused the seizure of his blood sample. In an opinion written by Chief Justice Lambert, the Supreme Court agreed that the Fifth Amendment was not implicated. However, the Court found that the proper analysis was one conducted under the Fourth Amendment and Section 10. "We have held on many occasions that a warrantless search is presumed to be unreasonable. An attempted warrantless search and seizure of Appellant's bodily fluids occurred in this case in non-exigent circumstances. The officers came to Appellant's home and asked him to voluntarily submit a biological specimen for comparison. Appellant refused and the fact of his refusal was used against him at trial."

The Court held that admitting into evidence Deno's refusal to submit to the seizure of his body sample violated Deno's Fourth Amendment and Section Ten rights. The Court relied upon several federal court opinions in arriving at this holding. First, in *United States v. Phillips*, 976 F. 2d 739 (9th Cir. 1992), "the Court stated that the taking of a breath test or blood sample is a search within the meaning of the Fourth Amendment and that refusal to consent to a warrantless search is privileged conduct that cannot be considered as evidence of criminality." Likewise the Court referred to *Duran v. Thurman*, 106 F. 3d 407 (9th Cir. 1997) and *United States v. Prescott*, 581 F. 2d 1343 (9th Cir. 1978). In *Prescott*, the defendant had refused to allow the police to enter her apartment to search it without a warrant, and that fact was admitted at her trial. The Court reversed, saying, "'When…the officer demands entry but presents no warrant, there is a presumption that the officer has no right to enter, because it is only in certain carefully defined circumstances that lack of a warrant is excused…One cannot be penalized for passively asserting this right, regardless of one's motivation.'" Based upon this case law, the Court held that the use of Deno's refusal to allow his bodily specimen to be seized was "a violation of Appellant's rights under the Fourth Amendment and Section 10 of the Constitution of Kentucky."

Nourse v. Commonwealth
— S.W.3d ——, 2005 WL 2313899,
2005 Ky. LEXIS 293 (Ky. 2005)

Othaniel Nourse was living at Julie Bogel's apartment on December 25, 2001 when a local gambler was murdered by Denarrius Terry. Terry came to the apartment that night and got a gun from Nourse. Nourse was not a suspect for some months. In August of 2002, a woman called Sergeant Dill of the Russellville Police Department and said that the murder weapon was either with Nourse or his new girlfriend, Heather Warden. Sgt. Dill also discovered a warrant for Nourse's arrest, and went to execute the warrant. Dill, along with several officers, went to the public housing complex where Nourse and Warden were living, which was the vacated apartment of Nourse's previous girlfriend, Julie Bogel. Bogel had moved out of the apartment but had left her furniture and had given permission to Nourse to continue living there. The Housing Director, Jack McLean, told the officers that Bogel had been evicted and that if anyone was in her apartment they would be trespassing. McLean and the officers went to the apartment and after receiving no answer to their knocking, went into the apartment. Warden unhinged the chain, and showed the officers where Nourse was. After Nourse was arrested, Warden and McLean gave consent to search the apartment, resulting in the seizure of the murder weapon. At trial, Nourse moved to suppress the gun evidence. The motion was overruled, with the trial court finding that the officer was reasonable in relying upon Warden and McLean's consent to search and that Nourse and Warden were "squatters" in the apartment. Nourse was convicted and appealed.

In an opinion by Justice Graves, the Kentucky Supreme Court affirmed. The Court found that it was reasonable for the officer "to believe that Heather Warden was a cotenant of the apartment," and thus the search of Bogel's apartment was constitutional. The court analyzed this under the third-party consent doctrine, which essentially says that such consent is valid when "a reasonable police officer faced with the prevailing facts reasonably believed that the consenting party had common authority over the premises to be searched."

The Court did not decide whether the landlord, McLean, had authority to consent to the search or not. Rather, the court relied upon the consent of Heather Warden.

In analyzing the third party consent of Heather Warden, the Court relied upon the seminal case of *United States v. Matlock*, 415 U.S. 164 (1974), in which the Court "explained that the concept of common authority is meant to rest on the premise that any cohabitant 'has the right to permit the inspection [of his living space] in his own right and that the other [cohabitants] have assumed the risk that one of their number might permit the common area to be searched.'" The Court also looked at *United States v. Jenkins*, 92 F. 3d 430 (6th Cir. 1996), in which the Court had stated that it is "generally considered reasonable for police officers to presume that persons answering knocks at the door of a residence have authority to consent to a search of that residence."

The Court held that the search of Bogel's apartment was reasonable under the totality of the circumstances test. "Based on the facts available to Officer Robinson and his fellow officers at the time of the search, it was objectively reasonable for the officers to believe that Heather Warden had common authority over the apartment (despite the revelation, based on facts discovered after the search, that such authority was likely apparent and not actual). Accordingly, the trial court did not err when it denied Appellant's motion to suppress evidence obtained as a result of the warrantless search of Julie Bogel's apartment."

United States v. Davis & Presley

2005 U.S. App. LEXIS 25124,*;2005 FED App. 0449P, 2005 WL 3108503, C.A.6 (Mich.), 2005

The DEA was investigating a drug trafficking ring in Detroit and Chicago. They suspected one Sidney Zanders and a cocaine supplier in Chicago named Keith Presley. Cook County police began to watch Presley and his associates. On three occasions they stopped someone after they observed him talking with Presley and found 30 kilograms, 65 kilograms, and 38 kilgrams of cocaine on them. In 1999, they began to follow Presley and Davis in two cars. They lost Presley but pulled over Davis for speeding at 6:45 p.m.. They asked him for consent to search, but he declined. At 7:15, an officer arrived with Rocky the dog, who did not alert to Davis' car. At 8:20, Sabor the dog arrived and alerted on Davis' car. Based upon this, a search warrant was obtained and $705,880 was found in the search of the car. Based upon this search, another search warrant was obtained and executed at Davis' house and a storage locker, resulting in the seizure of $2 million in cash. Davis and Presley were both indicted and charged with conspiracy to distribute more than five kilograms of cocaine along with other charges. Davis filed a motion to suppress. The district court held that the police had reasonable suspicion that Davis was in possession of narcotics which justified the continued detention for narcotic sniffing dogs to come to the scene. After the motion was overruled, a jury trial was held in which Davis was convicted and sentenced to 360 months in prison. Davis appealed to the Sixth Circuit.

In an opinion written by Judge Moore and joined by Judge Carman, the Sixth Circuit reversed. The Court agreed with the lower court that the police had been justified in stopping Davis for speeding. The Court rejected the government's assertion, however, that there was probable cause to believe that Davis had drugs in his car at the time of the stopping. The Court reminded the government that "'a person's mere propinquity to others independently suspected of criminal activity'" does not constitute probable cause. "While the presence of the detergent boxes may have correctly been a source of suspicion, this alone cannot justify stopping someone who merely engaged in a conversation with a suspected criminal. To hold otherwise would be to ignore the basic rule that 'a search or seizure of a person must be supported by probable cause particularized with respect to that person.'"

The Court held that despite the legality of the initial stopping for speeding, law enforcement violated Davis' Fourth Amendment rights when they continued to detain Davis after issuing the warning. "Once the purpose of the initial traffic stop is completed, an officer cannot further detain the vehicle or its occupants unless something happened *during the stop* to cause the officer to have a 'reasonable and articulable suspicion that criminal activity [is] afoot.'" The Court agreed that reasonable suspicion existed at the time of the initial stopping justifying some extended detention. However, once the first drug-sniffing dog failed to alert on the car, that reasonable suspicion ended and so should the detention. "Given that the police had no reason to continue to suspect that Davis possessed narcotics, delaying Davis's vehicle an additional hour in order to permit a second examination of the vehicle by another drug-sniffing dog was unreasonable. The use of the second dog and the continued detention of Davis's vehicle served no investigatory purpose…The police already had confirmation from Rocky that no narcotics were in the vehicle. Thus, to delay Davis another hour in order to permit a second search of the vehicle simply delayed the release of Davis and his vehicle without any investigatory purpose. Such a delay is specifically prohibited by the Fourth Amendment."

The Court further determined that despite the officers' obtaining a warrant to search the car, "the search of Davis's vehicle was tainted by the illegal seizure, and thus the search warrant was insufficient to overcome this constitutional defect." The Court examined the warrant to search the car, removed the illegally obtained information, and considered the fact that the failure of Rocky to alert had been omitted from the affidavit in support of the warrant. "All that a neutral and detached magistrate could glean from this evidence is that the police initially had reason to believe that Davis had narcotics but that this theory was proved false by the first drug-sniffing dog's examination of the car. The search warrant was therefore insufficient to cure the illegal seizure of Davis and his vehicle."

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Judge Sutton dissented in part. Judge Sutton believed that there was probable cause that Davis was involved in drug trafficking at the time of the initial detention. "When the police stopped Davis on April 29, they thus knew that: (1) Davis had just rendezvoused with a suspected drug dealer, Presley, whom the police had already linked to over 100 kilgrams of cocaine; (2) when the police had seen Davis and Presley together earlier that day, Tide boxes were 'on the hood or tailgate' of Davis's car; (3) Tide boxes used as drug packaging material had been found in the December 1998 search of Presley's drug house; and (4) the officers stopped four individuals after those individuals met with Presley under suspicious circumstances, and each time the officers found substantial quantities (30,38 and 65 kilgrams) of cocaine. On this record, the officers could fairly conclude that probable cause existed, namely there was a 'fair probability that contraband or evidence of a crime [would] be found' in Davis's car."

United States v. Waller
426 F.3d 838 (6th Cir., 2005)

Waller was a convicted felon living with Storey, a man he had met in prison. They lived in Storey's grandmother's house. When the grandmother's daughter moved in, she saw illegal activity, and asked Waller to move out. Eventually, an arrest warrant was signed on Waller. Waller asked a friend if he could store personal belongings in Howard's apartment, including luggage. Waller did not sleep at Howard's apartment. On June 21, 2002, Metro Nashville Police went to Howard's apartment to serve the warrant on Waller. They arrested Waller as he left the apartment. The police asked which apartment he had come from, and then went to that apartment and talked with Howard. Howard gave his consent to search the apartment. The police found a brown luggage bag in the closet, and searched it, finding two guns. Waller was charged with being a felon in possession of firearms. He moved to suppress, with the court finding that he did not have standing to challenge the search of Howard's apartment. He was found guilty at trial, and appealed to the Sixth Circuit.

In an opinion by Judge Keith and joined by Judges Clay and Farris, the Sixth Circuit reversed. The Court held that Waller "had a legitimate expectation of privacy in his luggage bag" and thus could challenge its search. The Court found that the expectation of privacy in the bag was reasonable. The Court found that Howard's consent did not extend to the search of the bag. "[I]t is obvious that Howard, who assented to the search of his apartment in general, did not have common authority specifically with regard to Waller's luggage." Nor did Howard have "apparent authority" to consent to the search. "[W]e conclude that the circumstances made it unclear whether Waller's luggage bag was 'subject to "mutual use" by' Howard and therefore the officers' warrantless entry into that luggage without further inquiry was unlawful." "The facts in this case are clear: the police never expressed an interest in Howard's belongings in Howard's apartment. The very purpose of the police presence was to search for (presumably) illegal possessions of Waller's. Why would the police open the suitcase if they reasonably believed it belonged to Howard? The answer is that they would not have opened the bag. They opened the bag precisely because they believed it likely belonged to Waller."

United States v. Thomas
2005 U.S. App. LEXIS 26142,*;2005 FED App. 0460P,
2005 WL 3209248 (6th Cir., 2005)

The police were contacted when Thomas was seen near an anhydrous ammonia tank. The police went to the home where Thomas was staying and found the door to his truck open with a .357 handgun on the front seat. They saw a silver canister in the back. The officers went to the house, with four patrol cars being present. Thomas came to the door, and the officers told him to come outside, at which point he was arrested. The police searched him and found methamphetamine and a recipe for manufacturing meth. Thomas moved to suppress, and his motion was granted. The district court held that a "constructive entry into Hopper's home had taken place, that the police neither possessed a warrant nor established exigent circumstances for the entry and that the arrest accordingly was unlawful." The government appealed.

The Sixth reversed in an opinion by Judge Sutton, joined by Judges Siler and Sharp. The Court considered the difference between a consensual encounter, even at the threshold of a home, and a "constructive entry" "when the police, while not entering the house, deploy overbearing tactics that essentially force the individual out of the home." "The officers' conduct in this case did not rise to the level of a constructive entry. Two officers 'knocked on the rear door…When Defendant came to the door, Officer Cunningham told Defendant that the Alabama investigators wanted to talk to him and asked him to come out of the residence, which he did.'" In so finding, the Court rejected Thomas' argument that the state of mind of the officers did not determine whether a constructive entry had occurred or not, nor did the number of officers who had come to the threshold of the home.

United States v. McClain, Brandt, and Davis
2005 U.S. App. LEXIS 26267,*;2005 FED App. 0463P,
2005 WL 3242028 (6th Cir., 2005)

A neighbor called the police in Hendersonville, Tennessee, reporting that a light was on at 125 Imperial Point, a house that had been vacant. The police went to the house and eventually went inside a door they found ajar. Upon looking around, they found what they believed to be a marijuana growing operation. They obtained a warrant for 123 Imperial Point based upon this information, the execution of which resulted in the seizure of 348 marijuana plants. The defendants were charged with conspiring to manufacture and distribute marijuana. They moved to suppress the evidence, and their motion was granted. The United States appealed.

In an opinion by Judge Batchelder and joined by Judge Gibbons, the Sixth Circuit reversed. The Court first rejected the government's assertion that there was probable cause to believe that a burglary was in progress when the police first went to 123 Imperial Point, and thus there were no exigent circumstances justifying the warrantless entry. Accordingly, the Court found that the entry and search violated the Fourth Amendment.

However, the Court went on to find other grounds to approve of this search. "The wrinkle in the case before us today is that the warrants on which the officers relied—reasonably, we think—to search 123 Imperial Point a second time and to search the five other properties were themselves the fruit of the poisonous tree. The question therefore becomes whether the good faith exception to the exclusionary rule can apply in a situation in which the affidavit supporting the search warrant is tainted by evidence obtained in violation of the Fourth Amendment." The Court noted that there was a split in the circuits on this question. "We conclude that this is one of those unique cases in which the *Leon* good faith exception should apply despite an earlier Fourth Amendment violation…Because the officers who sought and executed the search warrants acted in good faith, and because the facts surrounding the initial warrantless search were close enough to the line of validity to make the executing officers' belief in the validity of the search warrants objectively reasonable, we conclude that despite the initial Fourth Amendment violation, the *Leon* exception bars application of the exclusionary rule in this case."

Judge Boggs concurred in the judgment. However, he wrote separately to say that the initial entry and search did not violate the Fourth Amendment.

SHORT VIEW

1. *Jones v. Wilhelm*, 425 F.3d 455 (7th Cir. 2005). In this civil rights case, the Seventh Circuit held that where an affidavit in support of a search warrant is ambiguous, the officer cannot use his own personal knowledge obtained from surveillance to resolve the ambiguity. Here, the officer had watched a building and knew that there were two apartments upstairs. The search warrant authorized him to enter an apartment on the 2nd floor without indicating which apartment. The officer knew from his surveillance that one of the apartments had more foot traffic, and executed the warrant there. When he realized he was in the wrong apartment, he left. The renter then sued. The Seventh Circuit held that the officer should have known the search warrant was ambiguous and that by using his own previous observations, he was violating the Fourth Amendment. The "Fourth Amendment prohibits [the officer] from applying his earlier surveillance and subsequent deductions to resolve the warrant's ambiguity rather than presenting those observations to a magistrate for determination….This determination of which apartment was more likely to contain contraband, thereby meriting a constitutionally acceptable search, constitutes an evaluation of probable cause that the Fourth Amendment requires be left to the magistrate absent exigent circumstances."
2. *State v. Brunetti*, 883 A.2d 1167 (Conn., 2005). When a person consents to the search of a home, but another person is also home and objects to the search, the police may not rely upon the consent of the first and ignore the objections of the second person. "[T]he rule requiring the consent of both present joint occupants strikes the appropriate balance between individual liberties and police expediency. Specifically, requiring the consent of both present joint occupants for a valid consent search is consistent with our manifest preference for warrants and our well established regard for the sanctity of the home." This is an issue upon which the U.S. Supreme Court has granted *cert*. *State v. Randolph*, 604 S. E. 2d 835 (Ga. 2004), *cert. granted*, 125 S.Ct. 1840 (2005).
3. *People v. Gomez*, 5 N.Y.3d 416, 2005 N.Y. LEXIS 2696, 2005 WL 2759218, (N.Y., 2005). When a motorist consents to a search of his car that does not mean that the police can damage the car, according to the New York Court of Appeals. In this case, the police pulled up carpeting, and took a crowbar and pried open part of the gas tank. In doing so, they found a significant amount of cocaine. The Court relied upon *Florida v. Jimeno*, 500 U.S. 248 (1991), looking at what a reasonable person would understand the scope of the consent to be. The Court stated that in "the absence of other circumstances indicating that defendant authorized the actions taken by police, a general consent to search alone cannot justify a search that impairs the structural integrity of a vehicle or that results in the vehicle being returned in a materially different manner than it was found…Here, the officer clearly crossed the line when he took this action without first obtaining defendant's specific consent."
4. *United States v. Kennedy*, 427 F.3d 1136 (8th Cir. 2005). The police were contacted by a woman who said that she had an intimate relationship with a man and that he had stolen money from her and was driving away in a particular car. She also stated that he "deals a lot of methamphetamine" and keeps drugs in a box behind a speaker in the trunk of his car. The police stopped and searched the car and found methamphetamine and cash. The Eighth Circuit upheld the magistrate's decision to suppress the evidence from the search. The Court found that the statement by the woman did not give a time frame during which the defendant dealt in meth, and thus there was not probable cause to believe that the meth was in the car. "[I]nformation of an unknown and undetermined vintage relaying the location of mobile, easily concealed, readily consumable, and highly incriminating narcotics could quickly go stale in the absence of information indicating an ongoing and continuing narcotics operation." ■

KENTUCKY CASE REVIEW

by Sam Potter, Appeals Branch

Robert A. Dickerson v. Commonwealth
Rendered 10/20/05, To Be Published
2005 WL 2674943
Reversing and Remanding
Opinion by J. Cooper

Dickerson moved in with Crystal Crumble during the summer of 2000. Crumble had a 10 year old daughter, A.H. Dickerson and Crumble married in December of 2000. Dickerson worked the night shift at a local factory, and Crumble worked the day shift. One day while Crumble was at work, Dickerson sexually abused A.H. both orally and anally. He then showed her a gun and told her not tell anyone. He did not come home from work the next night. He was found in a hotel three days later having overdosed with medication in a claimed suicide attempt.

The jury convicted Dickerson of one count of first degree sodomy, for being a second degree persistent felony offender, one count of possession of a handgun by a convicted felon, and for failing to inform his probation officer of his change of address. The trial court ordered all of the sentences to run concurrently for a total of 30 years.

The 2000 amendments to the sex offender registration act cannot be applied retroactively to a person who became a registrant before the 2000 amendments took effect. Dickerson had pled guilty to sex offenses on two previous occasions, once in 1988 and in 1995, but served out his 1995 sentence on August 1, 1997. The 2000 amendments increased the penalty for a violation of the act to a class D felony. The effective date of the amendment was April 11, 2000. The unambiguous language of the amendment prevents it from being applied retroactively to a person who became a registrant in 1997 when the 1994 version of the act was in effect.

The trial court should not have consolidated the sex offender registration charge with the handgun charge for purposes of trial. Consolidation of separate indictments for trial is permitted only if the offense charged in those indictments could have been joined in a single indictment. No similarity existed between the handgun offense and the sex registration offense. Also, it was completely irrelevant and highly prejudicial to prove at his trial for possession of a handgun that that he was not only a convicted sexual offender, but also had violated the sex offender registration act.

Potential jurors may be excluded for implied bias. 19 of the 37 jury panel members for the gun charge trial had also been members of the panel that participated in the *voir dire* of his sodomy charge trial. In that sodomy trial, the jury convicted Dickerson for forcibly sodomizing a child under 12 with the handgun for which he was being tried for possessing. Seven of the 12 jurors selected to try the handgun case had participated in the *voir dire* of the sodomy case, including a juror whom Dickerson's previous lawyer had removed by peremptory strike. This juror became the foreperson in the gun charge trial. The jurors who participated in the *voir dire* of Dickerson's sodomy trial and thereby learned the facts of how that case related to his gun charge trial were impliedly biased and should have been excused from serving on the subsequent handgun trial.


Sam Potter

When the Commonwealth introduces final judgments to prove prior convictions, the jury should only learn of the crimes for which the person was convicted. To prove that Dickerson was a convicted felon, the Commonwealth introduced the 1995 judgment that showed that Dickerson pled guilty to three counts of first degree sexual abuse. That judgment also stated that the charges were amended down from three counts of sodomy first, two counts of rape first, and that the PFO charge was dismissed. This was erroneous and prejudicial.

A continuing objection does not cover all possible grounds for objecting. Dickerson's trial lawyer, in the retrial of the sodomy charge, moved *in limine* to suppress the evidence of his prior convictions. The trial judge overruled this motion. The judge granted a continuing objection to any evidence of prior bad acts. During trial, a former police officer read from an unidentified document in his file that detailed the facts surrounding Dickerson's 1995 conviction. The Supreme Court concluded this issue was not preserved because the continuing objection was premised on KRE 404(b) and not KRE 802.

It is not the commonality of the crimes but the commonality of the facts constituting the crimes that demonstrates a *modus operandi*. The method of committing other crimes must be so similar and so unique as to indicate a reasonable probability that the crimes were committed by the same person. This does not require identical facts in all respects, but they must be so similar as to constitute a signature crime. The only similarity offered at Dickerson's trial was that these prior bad acts involved the allegation of the crime of sodomy. This conclusory testimony established insufficient commonality of facts indicative of a signature crime that would

demonstrate a *modus operandi* to prove that Dickerson committed these offenses.

The right to present a defense includes informing the jury of a witness' testimony that supported the defendant's complete denial of the crimes charged who had testified at the first trial but was unavailable for the second trial. At Dickerson's first sodomy trial, Jawan Ghoulson testified that Crumble told him that Dickerson did not do it. Ghoulson was subpoenaed for the retrial, but the sheriff could not find him. The trial judge declared him to be "unavailable as a witness" according to KRE 804(a)(5). The defense counsel asked to read Ghoulson's testimony from the first trial. The Commonwealth objected according to CR 30.06(1), which requires that the officer taking a deposition "shall certify on the deposition that the witness was duly sworn by him and that the deposition is the true record of the testimony given by the witness." Defense Council introduced the transcript by avowal, but did not request to play the official videotape from the first trial.

KRE 901(a) states that authentication or identification is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. The Commonwealth's argument lacked merit because they made no contention that the proffered testimony was not the testimony actually given by Ghoulson at the first trial. A defendant has a right to present a defense, and this evidence supported his defense theory that he did not commit the offense. At retrial, Dickerson can read the transcript or play the videotape.

Evidence of the victim's emotional state following a sexual assault is relevant to prove the assault. The victim visited a rape crisis center for treatment after the alleged assault. This evidence of the victim's emotional injury was directly relevant to prove that she was sexually assaulted. This was an issue of first impression.

Johnnie Hayes v. Commonwealth & John Paul Harrison v. Commonwealth
Rendered 10/20/05, To Be Published
2005 WL 2674967
Reversing and Remanding & Vacating in Part and Reversing and Remanding in Part
Opinion by J. Cooper, J. Roach dissents

Both Hayes and Harrison were convicted of manufacturing methamphetamine and possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine. Both had their manufacturing convictions firearm enhanced to a class A felony. Hayes received a life sentence, and Harrison received a total sentence of 50 years.

The police received a tip of illegal drug activity occurring at Hayes' farm, which contained a dozen mobile homes used for various purposes. The police found Hayes and Harrison performing repairs on a garbage truck that Hayes used in his garbage disposal business. They asked to search and Hayes said, "Look anywhere you want. I own it all." The police found two firearms and an empty Sudafed box in a storage trailer. They searched the trailer in which Hayes lived and confiscated several knives, shotgun shells, and prescription pill bottles. The police found a trailer containing a modified a propane tank containing anhydrous ammonia, a duffel bag containing all the ingredients necessary to manufacture methamphetamine, and an active methamphetamine lab.

The police left and returned the next day. They asked Hayes' wife for the keys to the methamphetamine trailer, which she gave them. A search behind that trailer revealed burn piles containing residue of items used in manufacturing methamphetamine. They also found a buried barrel covered by carpet that contained more manufacturing materials and a sawed off shotgun. Inside the Harrison trailer, the police found among other things a syringe, a tourniquet, needles, distilled water, alcohol, cotton swabs, Band-Aids, and scissors.

Issues relating to both Hayes and Harrison

A defendant has the right to question perspective jurors as to whether they would hold prejudice against the defendant for exercising his Fifth Amendment right not to testify. Trial counsel for a Hayes attempted to ask the jury panel during *voir dire* if anyone would hold it against Hayes if he exercised his Fifth Amendment right not to testify. The judge, *sua sponte*, refused to allow him to do so. Hayes and Harrison objected to the judge's refusal. Hayes stated on the record the questions he wished to ask, which included you understand that he does not have to testify because he's presumed innocent, would anyone hold this against him, and any necessary follow-up questions. Neither Hayes nor Harrison testified at trial, and the judge included a "no adverse inference" instruction.

The Fifth Amendment grants a criminal defendant the right not to testify at his trial, and the Sixth Amendment entitles him to an impartial jury that will not be adversely influenced by his exercising that right. When an anticipated response to the precluded question would afford the basis for a peremptory challenge or a challenge for clause, then the judge abused his discretion. *Voir dire* exposes a potential juror's state of mind, enables the judge to determine actual bias, and allows counsel to assess suspected bias.

Reversible error occurs when a trial judge refuses to excuse for cause a juror who would be prejudiced against the defendant because he did not testify in his own behalf. In this case, however, the judge's limitation of *voir dire* prevented the discovery of this information. This precluded the exercise of possible challenges for cause and interfered with the intelligent exercise of peremptory strikes. The Court wrote "admonitions and instructions are no substitute for interrogation." This particular error is not subject to harmless error analysis.

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A defendant can *voir dire* perspective jurors about the standard of proof in criminal cases. The judge, *sua sponte,* prevented Hayes during *voir dire* from telling the jury the Commonwealth's burden of proof is beyond a reasonable doubt and asking them whether they would hold the Commonwealth to that burden. The Court noted that these questions were proper, though no attempt can be made to define that concept. However, the Court did not reverse on this issue because the judge interrupted Hayes before he could state his question to the jury, and he did not state on the record exactly what he intended to ask.

Errors asserted by Hayes

Profile evidence of methamphetamine users and manufacturers is inadmissible character evidence. During cross-examination by Hayes, an officer testified that in his experience only 10 to 15% of methamphetamine manufacturers do not use methamphetamine, and users tend to be skinny. The judge interrupted, *sua sponte*, and gave Hayes the choice of accepting a jury admonition to disregard the evidence or admitting Hayes' recent conviction of first degree trafficking in methamphetamine as rebuttal character evidence.

Evidence that people who use methamphetamine are skinny and that most manufacturers use their product is a type of character evidence commonly called "profile evidence." Such evidence is inadmissible to prove guilt or innocence in criminal cases. His prior conviction was not admissible as rebuttal character evidence because it is a particular act of misconduct. However, his conviction was admissible to prove his motive, intent, and plan to manufacture methamphetamine. Thus, admitting this evidence was correct, even if done for the wrong reason. No reversible error occurred here.

Errors asserted by Harrison

The circumstantial evidence relied upon to prove Harrison's complicity to manufacture methamphetamine and possession of anhydrous ammonia in an unapproved container was so tenuous and speculative that it was clearly unreasonable for the jury to have found guilt. Harrison did not own the trailer with the methamphetamine lab. That trailer was padlocked, and Harrison did not have the key. He was not near that trailer when the police arrived. No evidence suggested that he had ever been inside that trailer. No anhydrous ammonia or other chemicals or equipment necessary to manufacture methamphetamine were found in his personal or constructive possession. The trailer where the Commonwealth claimed he lived was at least 300 feet away from the trailer with the methamphetamine lab, which was not visible from his alleged trailer.

His mere presence at the scene, knowledge that a crime was occurring, association with people committing a crime, and/or ownership of property on which contraband was found was insufficient to support his conviction. The Commonwealth's theory was that Harrison was an accomplice to Hayes. This evidence must constitute more than a mere suspicion of involvement. The Commonwealth failed to introduce evidence to prove this. The evidence seized in his alleged trailer was more consistent with possession for personal consumption than possession for purpose of sale. While the possession of cash can be relevant to prove drug trafficking, the $340 found on Harrison was insufficient to indicate criminality, especially when an officer testified that Harrison worked for Hayes.

Nelson Lopez v. Commonwealth
Rendered 10/20/05, To Be Published
2005 WL 2674953
Reversing
Opinion by J. Cooper

A district court jury convicted Nelson Lopez of operating a motor vehicle with an alcohol concentration at or above 0.08. Lopez was sentenced to 21 days in jail. He appealed to circuit court, which held that the district court committed reversible error by allowing the Commonwealth to introduce an irrelevant videotape of a field sobriety test because the only element for the offense which Lopez was tried was having a blood alcohol concentration of 0.08 or more. The circuit court, *sua sponte*, ruled that the instruction was erroneous and directed the district court upon retrial to instruct the jury in accordance with the 2000 amendment of the statute. The Court of Appeals denied discretionary review. The Supreme Court granted discretionary review on the sole issue of how to properly instruct the jury upon retrial.

The Commonwealth challenged the instruction upon which Lopez was convicted, claiming it was improper. Lopez claimed the instruction was proper. Specifically, the issue is whether the statute prohibits having a blood alcohol content of 0.08 or more while operating a motor vehicle or by having a blood alcohol content of 0.08 or more while taking the blood-alcohol test.

The 0.08 blood alcohol content relates to when the accused had control of the vehicle and not to when the test was administered. The circuit court misconstrued the 2000 amendment of the statute. The Supreme Court wrote that, "the General Assembly intended to criminalize the existence of a blood alcohol concentration of 0.08 or more only if the accused was then operating or in physical control of a motor vehicle." The two hour time limit prescribes the time when a blood test must be administered to sustain a conviction based solely on the results of that test.

Lewis Earl Davenport v. Commonwealth
Rendered 10/20/05, To Be Published
2005 WL 2674945
Affirming
Opinion by J. Johnstone, J. Roach dissents

Patrick Perkins was found dead in his home about 9 p.m. on January 5, 2001. Blood was on the wall, and his furniture was overturned. Four bullet casings and a cane were found by the body. Perkins' pants pockets were turned out and empty, a

gun was missing, but $247 in cash remained in his house. Perkins had been shot four times and had defensive wounds on his arms and wrists. Davenport admitted to being at Perkins' home that night, after having visited a bar. Davenport's nephew had driven him to Perkins' house to buy whiskey. The nephew heard somebody besides his uncle yell, "please don't kill me." The nephew panicked and drove away. Davenport told his nephew the next day to deny having dropped him off at Perkins' house. A jury convicted Davenport of murder and robbery, sentencing him to 50 years in prison.

The trial court did not err in prohibiting cross examination of the nephew's probation in a neighboring county and his pending misdemeanor charges in the trial county. The Sixth Amendment Confrontation Clause contains the right to cross examine witnesses. The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross examination. However, the cross examination must be relevant. The trial judge may set appropriate boundaries for cross examination as long as the jury receives a reasonably complete picture of the witness' veracity, bias, and motivation.

No error occurred here because the jury received a reasonably complete picture of the nephew's veracity, bias, and motivation. He admitted on direct examination that he had a felony conviction and that he had some problems in his life. While no one had moved to revoke his probation in the neighboring county, no offer of leniency had been made in exchange for his testimony. The nephew received no offer of leniency regarding his pending misdemeanor charges, which were not pending when he made his original statement to the police. Also, the nephew's testimony was corroborated in nearly every material respect. For these reasons, this claim was purely speculative.

Two lessons should be drawn from this issue. One, if the judge excludes some of your evidence, include it in the record for appellate review by way of avowal testimony. Trial counsel in this case included by avowal evidence the fact that the nephew was on probation and had pending misdemeanor charges. This preserved the issue for appellate review. Two, when the trial judge limits the introduction of impeachment evidence on cross examination, make every effort to connect that impeachment evidence to the witness' veracity, bias, or motivation to testify. Also, argue that the question is one of weight that should be decided by the jury, rather than its admissibility (see J. Roach's dissent).

No error occurred when the trial court denied expert funds to defense counsel. Trial counsel asked for expert funds in this case because the investigation into Perkins' death was insufficient and not conducted pursuant to commonly accepted standards. These failures included: Perkins' core temperature was not taken to determine the specific time of death, the police made no effort to determine who owned the other weapons found in Perkins' home, and that neither fingerprints nor blood samples were taken from Perkins' home. A trial judge should not provide funds from KRS 31.110(1)(b) for trial counsel to conduct a "fishing expedition." When asking for expert funds, trial counsel must provide specific information that Council expects the expert to provide at trial. General requests should be denied. No error occurred here because attacking the sufficiency of the investigation procedures could better be accomplished through cross examination, and the request was not specific enough.

James Fairrow, J.R. v. Commonwealth
Rendered 10/20/05, To Be Published
2005 WL 2674977
Affirming
Opinion by J. Cooper

Ms. Gay Royal offered to buy drugs for the Madisonville Police Department so that she could earn money to leave town and "get straight." The police searched her. Then Royal called "J-Man," whom she knew to be Fairrow. A short time later, a car drove up to Royal's house, she approached it, she reached inside, and then returned to the house. The police audiotaped and videotaped this encounter. A couple of hours later, a second controlled buy was made. The jury found Fairrow guilty of two counts of first degree trafficking in a controlled substance and for being a first degree PFO. He received a 35 year sentence.

The detective's testimony that the Royal was a reliable informant whose work always resulted in convictions was inadmissible character evidence under KRE 404(a). Had the Commonwealth asked the police to testify about Royal's truthfulness, the evidence in question would have been admissible under KRE 608. However, the Court made a key distinction between "truthfulness" and "reliability." The reliability evidence told the jury that Royal's work always resulted in successful buys that led to convictions and that her work here should result in two more convictions. The Court wrote, "obviously, admission of this testimony constituted error."

Character evidence cannot be proven by specific instances of conduct. Only opinion or general reputation testimony is allowed to prove character, except in limited circumstances not present here. This renders the detective's testimony that Royal's work with the police always resulted in convictions inadmissible.

The grounds for an objection the party states at trial prevents that party from asserting a different basis for the objection on appeal. The objection lodged against whether Royal was reliable was not that it was improper character evidence, but on the ground that it "calls for a conclusion as to the facts as to whether she is reliable or not." No objection was entered when the detective testified about the conclusion that the cases Royal worked always resulted in convictions. Thus, this error was not preserved. ■

JUVENILE COLUMN

BUILDING AN EFFECTIVE DEFENSE TEAM CAPABLE OF DELIVERING QUALITY REPRESENTATION TO THE CLIENT WHO GREW UP IN A HOME SHAPED BY DOMESTIC VIOLENCE

by Rebecca Ballard DiLoreto, Director, Post-Trial Division

The representation of children who either witness domestic violence within their families or are themselves direct victims of a battering parent is a daunting task. It is our duty as advocates to litigate for our client's asserted interests. As attorneys and as compassionate persons we also have an obligation to respond to our clients when we are in a position of influence and we perceive that a child's home environment is a dangerous place for that child's safety and well being. It can be very difficult to penetrate the shield that families put in place to conceal abuse. The problem of intimate partner violence is a complex one that may cause us to shy away from even beginning to help our clients unravel a solution. Taking on the representation of clients who are in such pain challenges our own sense of boundaries. Yet, to fail to respond appropriately may be to unwittingly permit the multiplication of abuse that will likely impact later generations. Securing the needed resources of skilled social workers on staff in our DPA offices can help attorneys provide more knowledgeable and skilled representation to their clients.

CDC statistics expose extent of problem of domestic violence and its impact upon children. The Centers for Disease Control and Prevention through its National Center for Injury Prevention and Control conducts research on intimate partner violence (IPV). Its web site contains salient and startling facts about the extent of domestic violence in the United States. The following facts are of particular note in a discussion of the impact of intimate partner violence on children:

- Approximately 1.5 million women and 834,700 men are raped or physically assaulted by an intimate partner each year;
- As many as 324,000 women each year experience IPV during their pregnancy;
- Witnessing violence is a risk factor for long-term physical and mental health problems, including alcohol and substance abuse, being a victim of abuse and perpetrating IPV;
- Witnessing IPV as a child or adolescent, or experiencing violence from caregivers as a child, increases one's risk of both perpetrating IPV and becoming a victim of IPV.[1]

Rebecca Ballard DiLoreto

The Problem of Violence is So Pervasive that Policy Makers Struggle With the Question - Should The Witnessing of Child Abuse Be Deemed Child Maltreatment Under the Law? There is debate in the literature, among legal scholars and social scientists as to whether the witnessing alone of intimate partner violence should be deemed child maltreatment under the law.[2] Fear exists that making such action the equivalent of child abuse only further victimizes both the abused parent and the child. There is also concern that to not do so ignores the prejudicial impact of such witnessing. The abuse witnessed by the children of profoundly victimized women is stunning. *Sisters in Pain*, the stories of women whose sentences were commuted or who were released on parole by Kentucky Governor Brereton Jones, recounts horror story after horror story of children pleading for their mothers' lives as they witnessed fathers commit indescribable acts of violence.[3] The merging of distinctions that could be drawn between the witnessing of abuse and the direct experience of physical abuse is understandable as most children who experience their primary caretaker being abused, perceive themselves as radically attached to the parent/victim.

Responding to the impact on children of witnessing domestic violence, at least sixteen states have revised their criminal and civil codes to address the needs of children exposed to adult domestic violence.[4] In Utah, California and Oregon, the presence of children at the scene of an assault upon an adult enhances the penalty of the offense.[5] In Minnesota, the definition of "child maltreatment" has specifically been expanded to include the witnessing of domestic violence.[6]

Yet, The Right to Maintain Family Ties is Often Important to Children, As Well as Abused Spouses or Partners. The countervailing force against the trend to remove children from homes darkened with accusations of domestic violence is "the right of the family to remain together without the coercive influence of the awesome power of the state."[7] This right is a reciprocal one owned by both the parent and the child.[8] *Id.* at 825. In examining the liability of the city of New York in its decision to remove children from their abused mothers' custody, the United States District Court for the Eastern District of New York found that a mother's due process rights were infringed when her children were summarily removed on grounds that the father was abusive to the mother in the absence of findings that the mother was herself abusive or neglectful. This landmark case, *Nicholson v. Williams*, is itself a treatise on the social, historical and legal context for domestic violence in this country. [9]

The *Nicholson* court recognized that a child and a mother's Fourteenth Amendment right to substantive due process could be bolstered by Thirteenth and Nineteenth Amendment analysis. In *Nicholson* and later commentary, jurists and scholars have recognized that forcible removal of children can be equated with slavery-like conditions under the Thirteenth Amendment and that a state's practice of automatically branding a mother with her partner's physically injurious behavior implicates a woman's Nineteenth Amendment right to autonomy under the law.[10]

Many juvenile codes define neglect and abuse to include caretaker creating or allowing to be created a risk of emotional as well as physical injury. However, removal from the home is generally not to be sought by the state if other less restrictive alternatives can bring about a change in circumstances.[11] When advocating for children who do not want to be separated from the abused parent, it must be the role of the lawyer for the child to locate reasonable less restrictive alternatives and present those options as reasonable solutions to the court. Social workers on the defense team can play a key role in finding reasonable and safe ***less restrictive alternatives*** to incarceration or confinement outside one's community.

Defending Our Client's Interests Mandates that Defenders Locate Accessible, Helpful Resources. It is often said that lawyers shy away from any role that smacks of social work. Yet, the attitude "I am not a social worker," can blind us to our obligation to help our clients solve the real problems that they face. With violence in the home, access to intervening resources is key to survival. Kentucky court mediator and social worker, Linda Harvey has found in her experience "that a majority of women interviewed at the Kentucky Correctional Institution for Women in Pewee Valley who were co-defendants in homicide or had committed a homicide crime were in a domestic violence relationship with their co-defendant or were sexually abused as a child. I was appalled by the stories of women who killed their abuser in self-defense. These women gave examples of where the criminal justice system and other community resources were not available to them or did not respond appropriately. Some were given sentences as long as 20 years." From the perspective of advocates for youth, the loss of life of one parent and the long-term incarceration of the other is not a reasonable solution for a child.

The enlightenment of our day has led to awareness that domestic violence is a public health issue. Renowned Harvard psychiatrist and author, James Gilligan, recognized in 1996 that "the public health model is the appropriate model to show violence is a contagious disease, not an hereditary one. The pathogen is psychological, not biological, and it is spread primarily by means of social, economic, and cultural vectors, not biological ones."[12]

With this awareness has come an avalanche of resources, but most of those resources are more easily accessible to the state and those identified clearly as only "victims." State government and prosecutor's offices have staff dedicated to addressing domestic violence. The Violence Against Women's Act has provided funding for several years to local initiatives. There are regional domestic violence and rape crisis centers that have programs targeted at assisting children. We automatically assume that these centers are available to guardian *ad litems*, attorneys for the mother or a prosecutor for the state. However, defenders of youth can also turn to such centers for help in unraveling the impact of abuse on their clients. The addition of social workers as key investigators and professionals committed to the defense team can help defenders access government and non-profit resource centers that have an obligation to help all who have been victimized by violence and who suffer the effects of poverty.

The Challenge of the Attorney/Client Relationship: People Conceal Their Victimization Both as Witnesses of Intimate Partner Violence and as Those who are Battered. As an attorney for a child, sometimes the most difficult impediment to good representation can be the reticence of the child to reveal the degree of abuse witnessed or directly physically suffered. Children are ashamed of their parents' brutality toward them and try to conceal or minimize it. The parents' intergenerational psychopathology leads to concealment, as adult abusers have a vested interest in concealing their own abuse.[13]

Studies have confirmed that those convicted of violent crimes for acts committed as juveniles systematically conceal factors in their lives that could mitigate the punishment received.[14]

The publicized case of Kentuckian Kevin Stanford, sent to death row as a teenager and eventually commuted to a life

Continued on page 36

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sentence in prison by Governor Patton is illustrative. Facts did not surface about Kevin Stanford's life until well into the appellate process in part because of his hesitancy to reveal what he endured as a child and because of the parents' reticence to confess their role in the harming of another human being. Post trial investigation revealed that Stanford both witnessed domestic violence and was himself subject to direct physical abuse by caretakers with whom he was left.[15]

The United States Supreme Court, in *Wiggins v. Smith*, reversed a death sentence in 2003 because trial counsel did not investigate domestic violence in the client's childhood beyond examining the presentence investigation report and the department of social services report. Neither of those reports contained the full story. The emotion packed mitigation came forward only after the distance of time and perspective and the involvement of a trained social worker who interviewed the defendant and family members and connected the dots between state social service records, school records and medical records.[16]

It takes patience, time and a culture of safety for the client and those close to him to share their stories of abuse with legal counsel. And as *Wiggins v. Smith* demonstrated, it takes the skills of a trained social worker, helping the defense team.

Understanding Healthy Boundaries is Critical. Representing children who are victims of domestic violence in one sense or another tests the limits of professionalism. An appreciation of the role that you play as counsel for your client is critical. Training in this area is key. Again, social workers who are educated on maintaining professional boundaries from their first semester in a college social work program can help defenders. In a workbook created by Kentucky legal services lawyers, plaintiff experts Susan Mooney and Rebecca Rolfe note that "[I] t is important for you and for your clients that you recognize, articulate, and maintain appropriate boundaries. Sexual and domestic violence results in a loss of power and control and is a fundamental transgression of boundaries. Empowerment for survivors is a process of regaining control of their lives. The empowerment process will be greatly facilitated by your ability to maintain appropriate limits and boundaries and provide your clients with the information they need to make their own choices. Your failure to maintain appropriate boundaries can hurt your clients, and ultimately, their cases…find a shelter, not your guest room."[17] Social workers take mandatory classes on establishing and maintaining appropriate boundaries. They are trained to always have someone available to offer an outside perspective in a difficult situation. As defenders we can benefit from that expertise and awareness.

Hulk: Our Corporate Responsibility To Be Healers

The challenge of taking on the issue of domestic violence in the lives of our child clients has enormous value despite threatening obstacles, value both to the client and to society. The movie *Hulk* has a lesson on point for us. Actor Eric Bana played scientist Bruce Banner, alias HULK. His father David Banner (Nick Nolte) injects himself with the DNA of altered animals in an effort to create the superhuman. The injection seems to have no effect on David but when Bruce is born he carries within him this altered DNA. As a toddler, Bruce witnesses his father, David Banner (Nick Nolte) kill his mother, The knife was intended for Bruce, but the toddler did not understand who his father was trying to kill nor why. Sam Elliot, as General Ross, ships the toddler off for adoption as he prosecutes and imprisons Bruce's father. Bruce grows into a boy and then a man and blocks out the memory of his past. The altered DNA in Bruce is activated when he absorbs radiation in a laboratory experiment gone awry.

In talking with his daughter and musing on his own role in the creation of this monster man, Hulk, General Ross notes that once baby Bruce was adopted, Ross gave no more thought to the child. Ross never imagined how Bruce might have been impacted by what he witnessed nor how what the child endured might create a monster who put others at risk. Hulk caused enormous destruction once his submerged rage was unleashed. In some great cinematography, Hulk destroys San Francisco, Utah, and Arizona, leaping across the deserts, plains and cities of northwest America.

On one level, the movie is about our corporate responsibility for abuse suffered by the young who are in some sense in the care of all of us. The story line and underlying themes explicitly recognize our societal obligation to wake up to the collateral damage caused to children by the actions of adult caretakers. The movie reverberates with the echo of un-addressed long-term damage caused by intentional and inadvertent violence. The story also speaks of hope, the hope achieved when one person is willing to risk their own well-being to save the humanity of another, the hope achieved when one parent (General Ross) faces his own failures and seeks to repair the damage he caused in the life of his daughter and of Hulk. This effort at personal and corporate reparation merits consideration for attorneys and lawmakers.

Lawyers as Healers – a Possibility. The challenge of taking on the issue of domestic violence in the lives of our child clients has enormous value despite threatening obstacles. The value enures both to the client and to society. Doctors have long enjoyed the status of being a part of the healing profession. Many doctors are successful at their practice in large measure because they also rely upon trained nursing staff to assist them. We, as lawyers for children, have that same opportunity, to work to heal the ravages of violence in our society by forging committed (and somewhat risky) professional relationships with our clients and with those stakeholders key to a successful outcome for litigation. Just as doctors rely upon trained nurses, lawyers need to recognize that their skills and service to clients will be enhanced by the support of trained, skilled social workers. For as attorneys, we need to remember that the litigation is itself not the end all and be all for our clients, rather, in the hands of a skillful lawyer and a committed defense team, litigation can be designed to maximize our client's chance to build a healthy life.

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PRACTICE CORNER
LITIGATION TIPS & COMMENTS
Compiled by Damon Preston, Appeals Branch Manager

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

"That's a Load of *#!@ and You Know It!"

Have you had a case where the police interviewer said this or something similar to your client in an audiotaped interview? Probably so. In *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005), the Kentucky Supreme Court addressed the question of whether such an interview can be admitted at trial unredacted. After all, if the police officer could not testify at trial that he believed the defendant was lying, why should that same opinion come in as part of a pretrial interview?

In *Lanham*, the Court held that such an interview could be introduced verbatim because such accusatory or dismissive statements by an officer are an accepted interrogation technique and provide context for the defendant's statements. However, the Court warned that such statements within an interview are not to be introduced for the truth of the opinions asserted and that the trial court should give a limiting admonition before playing the recording. The Court warned that reversible error may be committed if such an admonition is requested and denied.

I have seen very few police interviews of a defendant where, at some point or other, the officer does not turn on the defendant and accuse him/her of lying or hiding the truth. It is very important that trial attorneys know about *Lanham* and request an admonition in every case before the tape is played.

Challenge SOTP Requirement for Clients Who Cannot Complete It

KRS §§ 197.045 & 439.340 state that prisoners who are "eligible sexual offenders," but have not completed the Sexual Offender Treatment Program shall not be paroled or given any "good time" credits toward their sentence. But what about a prisoner who cannot, through no fault of their own, complete the SOTP?

KRS § 197.410(2) says that the initial determination of whether a person convicted of a sex crime is an "eligible sexual offender" is to be made by the sentencing court. The statute requires a finding that the offender:

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

The plain language of the statute requires that the defendant not suffer from active psychosis or mental retardation **and** the likely to benefit from the program. If you have a mentally retarded client, you must get the trial court to enter an order finding that the defendant is not an eligible sexual offender, asking for a hearing if necessary on the issue.

What you may not have considered is the second requirement: that the client **is likely** to benefit from the program. If your client is illiterate or suffers from serious mental or emotional illness, then he or she is not likely to benefit and can also be excluded.

197.410 allows for this determination to be made by either the sentencing court or the Department of Corrections. We are not seeing the Department of Corrections find very many prisoners to be ineligible. The best chance for getting your client relief from the SOTP requirement is to make a motion at sentencing that your client be found not to be an eligible sexual offender. If the court is unwilling to make this finding, then ask for an evidentiary hearing so that the matter may be appealed.

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. ■

Public Advocacy Seeks Nominations

We seek nominations for the Department of Public Advocacy Awards which will be presented at this year's 32nd Annual Conference in June. An Awards Search Committee recommends two recipients to the Public Advocate for each of the following awards. The Public Advocate then makes the selection. Contact Lisa Blevins at 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; Tel: (502) 564-8006 ext. 236; Fax: (502) 564-7890; or Email: Lisa.Blevins@ky.gov for a nomination form. **All nominations are to be submitted on this form by March 31, 2006.**

Gideon Award: Trumpeting Counsel for Kentucky's Poor

In celebration of the 30th Anniversary of the U.S. Supreme Court's landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the *Gideon* Award was established in 1993. It is presented at the Annual Conference to a person who has demonstrated extraordinary commitment to equal justice and who has courageously advanced the *right to counsel* for the poor in Kentucky. Clarence Earl Gideon was denied counsel and was convicted. After his hand-written petition to the U.S. Supreme Court was successful, counsel was assigned for his retrial and that counsel obtained an acquittal for Mr. Gideon.

ROSA PARKS AWARD: FOR ADVOCACY FOR THE POOR

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

NELSON MANDELA LIFETIME ACHIEVEMENT AWARD

Established in 1997, this award honors an attorney for a lifetime of dedicated service and outstanding achievements in providing, supporting, and leading in a systematic way the increase in the right to counsel for Kentucky indigent criminal defendants. Nelson Mandela was the recipient of the 1993 Nobel Peace Prize, President of the African National Congress and head of the Anti-Apartheid movement. His life is an epic of struggle, setback, renewal hope and triumph with a quarter century of it behind bars. His autobiography ended, "I have walked the long road to freedom. I have tried not to falter; I have made missteps along the way. But I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb... I can rest only for a moment, for with freedom come responsibilities, and I dare not linger, for my long walk is not yet ended."

IN RE GAULT AWARD: FOR JUVENILE ADVOCACY

This award honors a person who has advanced the quality of representation for juvenile defenders in Kentucky. It was established in 2000 by Public Advocate Ernie Lewis and carries the name of the 1967 U.S. Supreme Court case that held a juvenile has the right to notice of charges, counsel, confrontation and cross-examination of witnesses and to a privilege against self-incrimination.

PROFESSIONALISM & EXCELLENCE AWARD

The Professionalism & Excellence Award began in 1999. The President-Elect of the KBA selects the recipient from nominations. The recipient is a person who best exemplifies Professionalism & Excellence as defined by the 1998 Public Advocate's Workgroup on Professionalism & Excellence: prepared and knowledgeable, respectful and trustworthy, supportive and collaborative. The person celebrates individual talents and skills, and works to ensure high quality representation of clients or service to customers, taking responsibility for his or her sphere of influence and exhibiting the essential characteristics of professional excellence.

ANTHONY LEWIS MEDIA AWARD

Established in 1999, this Award is named for the *New York Times* Pulitzer Prize columnist and author of *Gideon's Trumpet* (1964). **Anthony Lewis** himself selected the two recipients of the award in 1999. The award recognizes excellence in media coverage of the crucial role played by public defenders play in ensuring a fair court process which yields reliable results, in which the public can have confidence. ■

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In 2005, Public Advocacy Commission members attended meetings throughout the state and heard testimony from Supreme Court Justices, Court of Appeals judges, public defenders, concerned members of the private bar, judges, prosecutors, and others. The consistent theme was that of an overwhelmed and jeopardized criminal justice system.

A 28-minute audio highlights summary of these public forums is available online at http://dpa.ky.gov.