The Advocate

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Kentucky Department of Public Advocacy

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KENTUCKY INNOCENCE PROJECT
TWO MORE WRONGFUL CONVICTIONS SET ASIDE

- **POVERTY AND ITS IMPACT ON THE CLIENT-ATTORNEY RELATIONSHIP**
- **A TEN-STEP GUIDE TO CLOSING ARGUMENT**
- **ATTORNEYS AND SOCIAL WORKERS WORKING TOGETHER IN DPA**

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Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists...it is fundamental that justice should be the same, in substance and availability, without regard to economic status.

— Lewis Powell, Jr., U.S. Supreme Court Justice

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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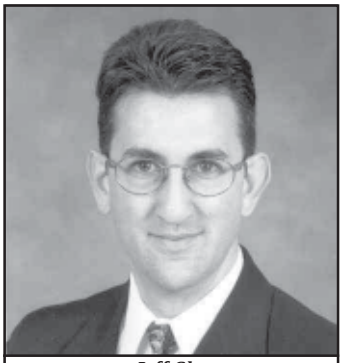
FROM THE EDITOR...



Jeff Sherr

Mark Robert Rank, in the just released *One Nation, Underprivileged: Why American Poverty Affects Us All*, writes "A majority of the American population will encounter poverty and the welfare system at some point in their lifetimes," predicting that by age 75, three-fourths of the population will experience poverty or near-poverty. In this edition, Cessie and Ivette Alfonso explore the issue of **Poverty and its Impact on the Client-Attorney Relationship.** They share insight to aid attorneys in recognizing the role poverty plays in their communication with our indigent clients and techniques to enhance the attorney-client relationship.

Cathy R. Kelly, the Director of Training for the Missouri State Public Defender System, offers another article in her series of excellent litigation skills guides. In **A Ten Step Guide to a Closing Argument**, she provides a clear step-by-step approach to developing an excellent closing.

The new budget funds DPA to conduct a pilot project to study the impact on incarceration and recidivism of adding a social worker to a public defender field office. This project follows the work the DPA has done through a Juvenile Accountability Block Grant to integrate social work interns into our juvenile defense practice. In **Attorneys and Social Workers Working Together in DPA**, Jennifer G. Withrow and Rebecca Ballard DiLoreto discuss the role of social workers in public defender offices and its positive impact on the criminal justice system.

The Kentucky Innocence Project continues to have great success in identifying and obtaining the release of the wrongfully convicted. This *Advocate* offers a preview of a more in depth article coming soon regarding the factors which have led to innocent citizens spending years of their lives in prison. ■

POVERTY AND ITS IMPACT ON THE CLIENT-ATTORNEY RELATIONSHIP

By Cessie Alfonso, LCSW and Ivette Alfonso, MA

Author's Note: In 1997, I wrote an article with Mr. Frank Badillo on poverty and its impact on client attorney relationship. Back then and now I continue to define poverty as a lack of resources. Discussions of a lack of resources generally focus on the financial, educational, and the familial. As criminal justice professionals, we must also include, within the definition of poverty, limitations of cognitive, problem-solving resources. Having financial, educational, and familial resources give individuals the opportunity and capacity to develop, identify, and utilize life options. With such resources cognitive and problem solving skills are nurtured and enhanced. In contrast, poverty does not offer some individuals the opportunity to develop a repertoire of options to life situations. At the same time, the condition of poverty can generate a range of emotions, such as depression, anxiety, fear, anger, helplessness, despair, and emotional isolation. These emotions can be managed in adaptive behaviors, maladaptive or criminal behaviors.

An understanding of poverty is crucial not only to the public defender, but also to all criminal justice professionals. Only in more fully understanding poverty and its effects can the public defense attorney provide the highest level of legal assistance to the client. For it is the public defender, more than any other practitioner, who provides legal aid to the majority of America's poor.

We will first address the question of "what is poverty." We then discuss the many dimensions and effects of poverty regarding clients. Finally we move on to consider the impact of poverty on the attorney-client relationship. To help attorneys recognize their clients' issues, as well as their own responses to these issues, we highlight these dynamics in three examples. We conclude by presenting techniques for attorneys that enhance their relationships with clients.

Poverty: Lack of Resources

While the clients who seek the services of public defenders vary with regard to race, ethnicity, and gender, they all have in common their poverty. Poverty is the primary criterion for legal services in the nation's public defenders system. In Kentucky to qualify for public assistance, when this article was originally written in 1997, a single individual's income could not exceed $6,624. In the year 2000, in Kentucky, as in other parts of the country, the Census Bureau defined an individual as poor if he earned $9,393 and for a family of three $14,680. The difference of $2,686 in income reflects an increase in the cost of living from 1997 – 2000. By the year 2000, there were 7.6 million American families or 10% of all families, living in poverty. By 2003, poverty in America had increased for the 3rd year in a row from 10% to 12.5%. The poverty increase was due to the significant number of children living in single female-headed households. The U.S. Bureau of the Census estimates that 13 million children, or 1 out of *5* children, in America is poor.

Living in the State of Poverty

Poverty, for some, inhibits the ability to develop a repertoire of socially acceptable life management skills. The lack of these skills may lead individuals to develop behaviors that are self destructive and ultimately destructive to society as a whole. For example, such individuals may use school delinquency, mind-altering substances, manipulation, nomadic lifestyle, sexual deviance, or violence to manage the conditions of emotional and physical effects resulting from poverty. This is in contrast to persons who receive emotional and material nurturance. The latter are able to expand the repertoire of life management skills to attain their goals and achieve a greater degree of emotional equilibrium.

Poverty is defined as lacking the resources, financial and otherwise, needed to live in the United States in a manner that enables the individual to develop their cognitive, physical and emotional capacities. Today, a married couple working full time, making $5.50 an hour, together would gross $21,120 a year. This is notable because the intent of the article is to review and update the implications of poverty and its impact on the attorney/client relationship. This review, hopefully, will enable the public defender to actively listen to their client, address some of the clients concerns and develop appropriate assumptions and expectations about their client.

In 1996, America began a policy of Welfare Reform. The federal government reduced the money given to families and only allowed families or individuals to be on welfare for 5 years. The implications of this change in social policy are enormous for both the attorney and their client. An example of this change is the question of public housing.

In 1997, if you were poor, it was assumed that you would be eligible to live in public housing. Today, 24% of the entire United States population is experiencing housing problems. In many states, including Kentucky, subsidized housing is effectively unavailable. According to the National Law Center

on Homelessness and Poverty, by 1999, there were 2 million people homeless every year. It is currently estimated that 35 to 40% of homeless persons are in need of drug treatment, and that many engage in criminal activities to support their habits.

The implications are: that a significant number of those individuals that a public defender will come in contact with may not have a place to call home. Although they may give the attorney an address, stating that is where they reside, this address may not be their home; it may be a place where they have been allowed to sleep. Also significant is that if you allow a person charged with a criminal offense to reside in your home you may be evicted from public housing.

Not having the resources of a home can lead the client to withhold information about where they reside from the attorney. The withholding of information may make the client appear distracted and uninvolved with their defense. This perception may distort the communication between the attorney and their client, have a significant impact on the facts of their case and hamper the attorney's ability to provide effective legal advocacy. A client-centered attorney, having an awareness of the impact of poverty on his/her clients, will be in a better position to address the concerns of their clients. By doing so, the attorney provides more effective legal advocacy.

[A] significant number of those individuals that a public defender will come in contact with may not have a place to call home.

Like many poor people, the public defender's clients must often contend with a severe shortage or absence of even the most basic resources. Many live daily in apartments with no heat, hot water, cooking facilities, or sanitary bathing facilities. Increasingly, recent studies reveal the extreme shortage of adequate health care in poor communities, and attribute the rise of AIDS and higher incidence of HIV positive persons to the absence not only of medical facilities, but also to the absence of educational structures. Such structures are needed to encourage and support poor people – who are at highest risk of AIDS and other diseases - in using the medical care available.

Significant portions of the poor population are victims of childhood abuse, are caught in a generational cycle of violence, alcoholism and drug abuse, and a disorganized home environment. Reports of child abuse and neglect have risen over 200% from 1980. Alcoholism is implicated in over 70% of all murders and violent crimes.

Nationwide, the high school dropout rate is increasing, along with adolescent delinquency, substance abuse, and violent behavior. Studies show that high school dropouts demonstrate higher rates of antisocial behavior and are more apt to be unemployed. It is estimated that one million teenagers will drop out of school this year.

Even those who do stay in school are not guaranteed an education that will make them literate. The lack of quality education for the poor results in many of the public defender's clients not being able to read or write beyond a 3rd grade level. Consider the difficulties that create for the client when attempting to review legal documents.

The shame associated with illiteracy makes it difficult for the client to participate actively in his defense. The client may resort to all sorts of subterfuges to hide this limitation. For example, the client may have other inmates read their documents so they may memorize phrases. However, this exposes them to possible misuse of their information.

In my 25 years of interviewing individuals charged with criminal offenses, they have repeatedly shared with me that they find that their attorney's do not listen. The attorney's tend to dismiss or not pay attention to the verbal and non-verbal communication presented by their clients. Today there are over 2.5 million individuals incarcerated in America, with such a significant number of our population incarcerated and that number increasing, it is critical that the public defender bridge the communication gap between themselves and the client.

Actively listening to individuals who live with the consequences of poverty is essential since some clients lack the wherewithal to overcome the feelings and physical consequences of poverty. The shame and self blame resulting from not having adequate education, housing, transportation, health care and money, may result in the client not informing the attorney of the lack of these resources. The lack of these resources may lead the client to not inform the attorney of their illiteracy, physical aliments, lack of transportation and ultimately, their lack of money. Denying the attorney this critical information may confuse and perplex the attorney as to their client's credibility and willingness to participate in their defense. Therefore, it is the attorney's responsibility to pay attention to the verbal and non-verbal cues that inform the attorney as to whom their client is.

An additional component for some individuals living in the state of poverty is isolation. Poverty physically and psychologically segregates the individual. It precludes the opportunity to experience people in positions of authority or power as peers or equals. The poor client has little opportunity to develop relationships with professional, educated members of society, and, therefore, may be uncomfortable relating to the attorney.

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The Client-Attorney Relationship

Despite the harsh realities some poor people face daily, many professionals, including attorneys, generally expect poor clients who seek legal assistance to perform and behave in ways similar to their own experience. Often these professionals' knowledge of poor people is limited to what they read in magazines or newspapers, or the images they view nightly on television broadcasts. It is imperative that public defenders understand their clients' experiences so as to engage the clients in the defense process. Anyone, including attorneys, who interact with individuals who are feeling despair, helplessness, frustration, and anger, will be affected by such feelings. Our experience has shown that these behaviors may generate in the professional, in this case the attorney, feelings of fear, anger, anxiety, frustration, and withdrawal.

Poverty physically and psychologically segregates the individual. It precludes the opportunity to experience people in positions of authority or power as peers or equals. The poor client has little opportunity to develop relationships with professional, educated members of society, and, therefore, may be uncomfortable relating to the attorney.

The following examples highlight how clients' feelings and behaviors can generate in attorneys responses that impede the defense process:

Example 1.

The client is a young Hispanic woman who is inarticulate and illiterate. The never wed mother of four children has received public assistance since the age of *15*, when she gave birth to her first child. She feels hopeless and helpless. In this emotional state, she abdicates her responsibility to participate in the defense process.

The attorney responds to the client's behavior by feeling angry and frustrated, and by labeling the client as "difficult" or "truculent." The attorney tells this client: "I can only see you two more times. Then I'll have to present you to the judge." Or, the attorney tells the client: "Please fill out these applications. Leave them in the folder outside."

Example 2.

The client is black, in his early thirties, muscular, wears an earring, and always dresses in a clean, long, white flowing garment and turban.

The attorney feels frustrated and threatened by the client, and labels the behavior as "bizarre," "acting out," and "hostile." Consequently, the attorney fails to build on the client's areas of competence and avoids the client. The attorney tells this client: "Well, I already have 300 cases," or "I've been in court and the judge said, 'Let's get this case over with!'

Example 3.

The client is white and in his early twenties, homeless prior to arrest, he is dirty and lice carrying, moves and speaks aggressively, and is apparently high from an illegal chemical substance.

The attorney fails to take into account what this client has to say on his or her own behalf. The attorney tells his colleague: "These clients always lie," or "They're just being manipulative." The client's behavior generates in the attorney anger, contempt, and fear. The attorney attempts to distance herself from the clients' anger, frustration, and impatience by not giving serious consideration to the client's concerns.

In each case, the attorney responds to the poor client by being insensitive, judgmental, punitive, and by stigmatizing, labeling, and denying the client a voice.

The following behaviors are likely to have a deleterious effect on the attorney - client relationship and the defense process as a whole:

- The attorney's limited interaction conveys the message that the client is unworthy, "you're not worthy of my time."
- The attorney's silence communicates disinterest and disengagement.
- The attorney's body language such as avoiding eye contact, failing to shake hands, moving away, and so on can convey discomfort, fear, contempt, or emotional distance.

It is important that the attorney provide a relationship that is different from the client's experience and expectations, at the same time recognizing that the clients may likely re-create the negative interactions that may have characterized their lives.

Enhancing the Client-Attorney Relationship

The public defender can enhance his relationship with clients by recognizing and identifying those behaviors that impede the defense process. Through empathy and objectivity, the attorney can view clients' behavior within the context of

their poverty. This perspective helps the attorney better understand what the client is experiencing, and the limited repertoire with which the client attempts to cope with their poverty and legal situation.

To enhance the attorney-client relationship it is crucial that attorney understand how the clients' feelings of anger, anxiety, frustration, and so on affect them. The attorney may be unable to change their clients' feelings, nevertheless, as professionals, they can identify and manage their own feelings.
The attorney may use the following techniques to improve management of their feelings and to achieve a more effective relationship with clients:

- The attorney needs to identify and label their feelings generated by their client
- Acknowledge the feelings of the client, regarding fears and resistance to legal assistance, but avoid becoming consumed by such feelings.
- Set limits and structure where appropriate, while being sensitive to the client's feelings.
- Give some degree of support directly to the client, so as to help him or her cope with the reality of difficulties and conflicts concerning the charges.
- Maintain an active role in the client's defense, to further the relationship.
- Remain objective while communicating understanding.
- Share emotional reactions when appropriate; avoid hiding behind intellectualization or position.
- Be aware of his or her attitudes and mannerisms.
- Re-frame situations so as to give the client a sense of control.
- Remain aware of body language and eye contact and remember that feelings of contempt and disgust are usually expressed non-verbally.
- Do not assume that your client is literate.
- Explore if your client has any health problems.
- Enable the client to understand the reality of the situation: what is the client's role, what is the attorney's role in the defense.
- Avoid making assumptions. Whether this is the client's first, second, or third experience with the criminal justice system, the attorney must discuss step-by-step the legal process.

Through empathy and objectivity, the attorney can view clients' behavior within the context of their poverty. This perspective helps the attorney better understand what the client is experiencing, and the limited repertoire with which the client attempts to cope with their poverty and legal situation.

Example

The attorney is feeling angry and frustrated by his client. The attorney, in conversation with his client, asks if he is feeling angry and frustrated. The client tells the attorney that he is feeling angry and frustrated with court, his case and his attorney. The attorney listens to the client and responds appropriately.

While discussing the client's feelings and concerns, the attorney obtains critical information to the case. In doing so, enhances the attorney /client relationship and is in a better position to provide legal assistance to the client. For many clients the facts of the case may make it impossible for the client not to be incarcerated. The client's sense of satisfaction with the legal services provided by their attorney is not determined by case outcome, but by feeling heard and understood by their attorney.

Rather than suggesting that attorneys should not be affected by the clients' behavior, we offer these techniques to increase their awareness of various issues and their ability to manage them. The management process involves three steps.

First, the attorney *identifies* these feelings, bringing to the conscious level anger, frustration, and indifference, and resisting ambivalence about seeing the client. It is helpful for the attorney to pay attention to the client's feedback. Is the client saying, I don't trust you, I don't want to work with you, you're impertinent and impatient; or I'd rather have another lawyer.
Second, the attorney *labels* the feelings. For instance, he or she may note, I'm feeling angry, contemptuous, or frustrated. In labeling the feeling, the attorney is able to pinpoint the area of difficulty and to focus on this area, apart from other emotions or concerns.

Third, the attorney *manages* the feelings. He or she acknowledges the feelings and how they affect the relationship with the client. The attorney can now make a conscious decision to control the feelings through the management techniques outlined earlier. In addition, attorneys can discuss these feelings with colleagues, which can further aid in overcoming resistance that blocks their ability to mount the best defense possible. The process of airing concerns enables attorneys to reduce burnout, a major problem for public defenders.

Conclusion

In undertaking this process through identification, labeling, and management, public defenders become *client -centered.* That is, as professionals, they hold to a belief in the *fundamental worth of their clients as human beings.* Only in establishing mutual respect, recognizing their clients' feelings, and managing their own responses can attorneys

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build the most effective defense. Public defenders, in their commitment to poor clients, provide a service vital to society as a whole. We have suggested these approaches in the hope that they will provide attorneys with additional resources for working at the highest level of legal assistance.

Only in establishing mutual respect, recognizing their clients' feelings, and managing their own responses can attorneys build the most effective defense. Public defenders, in their commitment to poor clients, provide a service vital to society as a whole.

Cessie Alfonso, MSW; ACSW; LCSW

Cessie Alfonso is a forensic social work consultant and president of Alfonso Consultants, a clinical and human resources management firm, with headquarters in Troy, New York. She received an MSW from Rutgers University in 1977. She lectures nationwide and writes often on issues such as Battered Women's Syndrome and Cultural Diversity, and is an expert on socio-political issues related to defendants. She is a mitigation specialist who has provided expert testimony in state and federal death penalty cases. She is bilingual (Spanish) and bicultural Latina, bringing a unique perspective that enhances her consultancy.

Ivette Alfonso, MA

Ivette Alfonso has been an early childhood educator and school administrator for over 30 years. She has mainly worked with the urban poor and has sadly seen firsthand the devastation poverty has wrought both in the United States and Puerto Rico. She has championed family literacy as a mechanism to encouraging families to see the importance of and to invest in education for all. Presently she is the site director for the Unity Sunshine Child Development Program of Unity House of Troy in New York.

Endnotes:

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Overcoming poverty is not a gesture of charity. It is an act of justice.

- Nelson Mandela, July 1, 2005

A Ten-Step Guide to Closing Argument

by Cathy R. Kelly, Director of Training, Missouri State Public Defender System

Step One: List the Blocks of Your Argument

You cannot argue effectively that which you cannot yourself believe. List first for *yourself* all the facts that support the verdict you want the jury to return, whether that verdict is not guilty or a verdict of guilty on some lesser-included offense. Once you have them listed, group them together into related blocks and give each a working title. These will become the "chapters" of your closing argument.

Ex:
1. *Problems with the identification.*
2. *Alibi*
3. *Physical evidence*
4. *Police screw-ups*

TIPS: Try to come up with a minimum of three chapters, but make sure you have no more than seven. Listeners have a tough time retaining the cohesion of your argument if you throw more than seven categories at them. Four or five is probably ideal. List each block title at the top of its own page, then go on to Step Two.

Step Two: List Beneath Each Chapter Title *Every* Piece of Evidence Which Supports That Point.

Scour the discovery in your case — every police report, lab report, motion hearing transcript, witness interview, photograph, piece of physical evidence, record or fact of any other kind you can get your hands on. Pull out each piece of evidence which can be used to support your theory of the issues and list it beneath the appropriate chapter heading(s).

Ex: Problems with the Identification
- *> Only saw man 1 to 2 seconds across parking lot*
- *> Orig told police could give no description*
- *> 2d time, gave descrip of beige pants*
- *> 3rd time, descrip changed to bib overalls*

TIP: You will often encounter one piece of evidence that supports more than one chapter of your argument. Go ahead and list it under as many chapters as it fits.

> *Caveat:* The first time a piece of evidence or a particular witness is mentioned in your argument, the temptation is to launch into a discussion of all the other inferences that can be drawn from that same piece of evidence or particular witness. *"As-long-as-we're-talking-about-so-and-so . . . "*
>
> DON'T DO IT!

> Think of it as a play. The *issue* you are arguing is the scene. The pieces of evidence and the individual witnesses are the actors, brought out to say their few lines in support of the issue currently on center stage *and then sent back to the wings* to wait for their next scene. If they have more lines to share on other blocks of your argument, call them back out when *that* block moves onto center stage and refer to them again. But do not allow them to destroy the progress of the show by launching all of their lines for the entire production the first time they make an appearance!

Step Three:
Develop a *Complete* Argument Within Each Chapter

Every chapter must have a beginning, a middle, and an end:

1. In the **beginning**, tell your listeners what your point is. In other words, *tell them what you're going to tell them.*

2. In the **middle**, discuss each piece of evidence that supports your point, using to your advantage the good facts and neutralizing as best you can the negative ones. In other words, *tell them.*

3. At the **end**, *repeat* the overall point you are trying to make, highlighting its connection to the verdict you seek. In other words, *tell them not only <u>what</u> you told them but <u>why</u> you told them.* Don't just set out the facts and fail to articulate the significance of those facts to your theory of the case. The close of each block of your argument is often an ideal place to repeat your *case theme* if you can make it fit smoothly.

PREPARATION TIP:

Talk first, write second. None of us talks the same way we write. If you write out your argument first, and *then* practice speaking it, your end product is much more likely to sound stilted and to be unpersuasive. Instead, try developing each of your arguments by *talking* aloud to yourself. Make each point of your argument, playing with the phrasing, word choices, points of emphasis, etc. When you're satisfied with a particular point, *then* stop and write down whatever notes you need to help you remember what you've just developed beyond the next 30 minutes and move on to the next point of your argument.

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CONTENT TIPS:

I. Avoid Legal Arguments!

Only lawyers are persuaded by legal arguments (and sometimes not even them!) The rest of the world is persuaded by *higher* principles than legal loopholes — things like justice, fairness, right & wrong. If your case is built on a legal argument, find a way to argue your point *without* invoking the dry, legal technicality itself. Remember those technicalities jurors detest were in fact created to protect or implement those very principles that so appeal to their hearts. Find ways to tie your argument to the *principle* rather than to the *technicality*!

> *Ex: To most jurors, the requirement of proof beyond a reasonable doubt is a legal technicality. The fear of convicting an innocent man is not.*

II. Consider Your Audience!

David Ball[1], a trial consultant extraordinaire, teaches that you have three audiences during your closing argument and a different mission to fulfill with each. Your audiences are:

a) Jurors who are already in your favor. *Your mission is to give them the ammunition with which to fight your battle for you in the jury room.*

b) Jurors who are undecided. *Your mission is to persuade them to your point of view and likewise give them the ammunition to support it.*

c) Jurors who are already against you. *Your mission is to avoid entrenching them further and allow them room to both save face and change their minds. (In other words, you* don't *want to say things like "only an idiot would believe . . .!")*

Step Four: Decide Upon the Order and Weed Out the Chaff

1. Select the chapter that you believe is your very strongest argument. Place it at the very end of your closing.

2. Select the chapter that you believe is your *second* strongest argument. Place it at the beginning of your closing.

3. Evaluate each chapter of your argument for weak or inconsistent arguments. You will often find that some don't really carry their weight. They're throw-away arguments, so throw them away. Less is more.

TIP: When selecting the order of your remaining chapters, you want your arguments to build upon each other both logically *and emotionally*. The emotion of your argument should *build* throughout to a strong ending, not wax and wane. 'Tis not a tide we're creating here. If you have a very emotional plea in one chapter and another which is not so emotional, you will generally want to put the emotional argument toward the end of your closing and your less emotional chapters toward the front.

Step Five: Polish the Persuasiveness

There are ways to say things and there are *ways to* ***say*** *things*. All is *not* equal when it comes to the power of the spoken word. Listed below are a number of devices to consider when you begin putting together your argument:

1. **Trilogies** — For reasons known only to those folks who study such things, the human mind seems to hang on to things that come in threes *longer* than it does to things that come solo or in any other combination. There is something poetic and memorable about trilogies, so look for opportunities to build trilogies into your argument. Those who doubt the power of the trilogy need only look at those built into their own history:

> *Ex: "drugs,sex, and rock & roll"*
> *"blood, sweat, & tears"*
> *"red, white, & blue"*

2. **Metaphors** – Sentiments, which may be difficult to understand when expressed in the abstract, can often be made much more real and memorable through the use of metaphorical word pictures. Not only do such word pictures capture our imagination and, therefore, our memories more than any abstract concept can, they also appeal to our other senses in ways the word alone does not.

> *Ex: "All of his life, he'd been pricked with sharp needles of humiliation."*
> *—Robert Pepin*[2]

3. **Alliteration** – A series of words that begin with or include the same sound tend to be more memorable and more powerful than words with no auditory connection to one another.

> *Ex: "A small-time snitch searching for someone to sacrifice."*
> *"Close enough for Callahan"* (the sloppy investigating officer)
> *" Like most teenagers, she was curious and confused, seduced by and scared of sex."*

4. **Quotations** — Not only are quotations a much more succinct and powerful way of making the point we want to make, they also invoke the imprimatur of the wisdom of the ages upon the actions of your client.

> *Ex:* Where your client remained at the scene until police arrived, you may want to invoke the wisdom of the Proverbs*: "The wicked flee when no man pursueth, but the righteous* ***stand****, bold as a lion.."*

Or if you want to highlight how a witness has been caught in his own lies, there is always Sir Walter Scott's wonderful quote, *"Oh, what tangled webs we weave when first we practice to deceive."*[3]

TIPS: When using a quotation in your argument, play with placing the emphasis upon different words within the quote to vary the meaning and power. In the Proverbs quote above, I had always placed the emphasis on the word "righteous" and was surprised at how much more powerful the quote became for my case simply by shifting the emphasis to the action of my client!

5. **Analogies** — As with metaphors, it is sometimes easier for us to understand a situation if we can analogize it to an experience or story that is familiar to us. This is true for jurors as well. Fairy tales, children's stories, or everyday experiences can all be valuable tools for analogy in a closing argument.

Caveats:

(a) Make it *succinct.* Analogies are notorious for running rampant and swallowing up large chunks of argument time while your jury fidgets and wishes you would get to the point!

(b) Only use an analogy if it is *unquestionably* and *directly* on point to a *significant* issue of your case. Analogies are too time-consuming to waste on an insignificant point; nor do you want to get bogged down in a side battle over whether your analogy fits the point you're trying to make. (Such battles can be loud and painful if the prosecutor chooses to ram it down your throat during rebuttal, or silent and secret within a juror's own mind. Either is deadly to your case.)

6. **Silence** — This is an incredibly powerful tool often overlooked by lawyers who are uncomfortable with it.

- *Use silence at the beginning* of your closing argument to build tension in the courtroom and to gather the attention of your audience. Have you ever been in a noisy classroom where the teacher suddenly stops talking? You can literally watch the silence move, row by row, all the way to the back of the room until every eye is turned to the teacher and you could literally hear a pin drop in that room. THAT is a level of attention you want to use your benefit in a courtroom. You get it, easily and instantly, by using silence.
- *Use silence during your argument* as a nonverbal parenthesis to set apart and emphasize a powerful point or to let an argument float in the air for a bit before moving on to the next one. Give the jurors time not only to taste but to savor your point, before moving to the next one.
- *Use silence at the end* of your argument after you have said your last words. Simply stand for a moment, meeting the eyes of each of your jurors, letting your last words soak in before you simply, softly say *thank-you* and return to your seat. All that will happen when you sit down is the prosecutor starts talking again. That alone is worth postponing. But the silence also again gives the jurors time to savor and absorb your argument and to note your obvious belief in what you're saying as you solidly stand your ground and meet their eyes

Do NOT clutter it up by moving about! Movement destroys the power of the silence. Learn to simply stand and let the silence speak for you on occasion.

BUYERS BEWARE: Each of the techniques discussed above is a valuable tool that you need to know how to use. Each can be very powerful *if* used effectively. As with most good things, however, they must be used in moderation! Too much of even a good thing can quickly descend into gimmickry and undercut the sincerity of your plea.

Step Six: Create Chapter Headings & Transitions

Ever try to read a book of several hundred pages with no chapters? Probably not. There is a *reason* for that. Without some framework for processing it all, the reader gets information overload and just gives up. The same is true for closing arguments. *You* have lived and breathed this case for days, weeks, and months by the time of closing. *You* can jump back and forth between issues & topics & players without once losing the action. Jurors don't have that luxury. This is their one and only time through. It is much easier for them to get lost than you realize! And if you lose them? You lose.

1. Chapter Headings:

Always give your jurors a "heads-up" that you are moving to a new topic. This can be as simple as a *"Now let's talk about the sloppy police work brought to you in this case."* Or you may want to use a flip chart to list *"the five things you heard in this case that show us the police have the wrong man,"* then simply flip the page to the next chapter of your argument when you're ready to move on. Another excellent method of chapter headings is to simply ask the questions you know the jury wants answered. *Ex.* In a rape case where the defense is consent but all parties agree the victim was found in tears, *If this is what she wanted, if this were her choice, then why was she crying?* Then answer the question! There are any number of ways to communicate your chapter headings to your jurors and by all means draw upon your own creativity in the process. Just make sure you DO it.

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2. Transitions Between Chapters

Even *with* a chapter heading, shifts of topic can be jarring if they are too abrupt or seem wholly unrelated or unconnected in any way to what has gone before. It's as if you're speeding down a street and suddenly slam on your brakes to make a sharp, right turn. Your passengers may be dragged along with you, but if they didn't know it was coming they may take a few minutes to catch their breath again. You cannot afford for your jurors to spend a few minutes "catching up" to you during your closing argument. After all, you only *have* a few minutes! How to avoid it?

Make sure you slow down *before* you reach the turn:

a) Give each chapter of your argument a clear and definite closure;
b) *Pause*;
c) Announce your next chapter heading; (ask your question, flip your chart, etc.)
d) *Pause* briefly again to give your jurors time to make that move with you, then begin.

TIP: One excellent transition technique is to tie each of your chapters back to your theme. Not only does this give you added opportunity to repeat your theme, it also helps jurors understand that the various chapters of your closing are simply different branches of the same tree.

Ex: [Closing of Chapter One] *The victim's description does not match Joe Defendant because the police have the wrong man.*

<pause>

[Heading of Chapter Two] *What's the second piece of evidence you heard from that stand that shows the police have the wrong man?*

And then launch into your second chapter.

Step Seven: Decide Your Opening Hook

The first few moments of your closing is the most attentive your jury will be throughout your argument. *Do not waste it with thank-you's or apologies for how long the trial has taken.* Start with something strong and attention-grabbing that will make your jurors want to stay with you beyond your opening lines!

Step Eight: Decide on your Closing Lines:

All too often you will see an otherwise great closing argument trickle off into a mumbled thanks at the end, draining the power of the defense away with it. Don't leave your closing lines to chance! You want to take that opportunity to ask the jury for the verdict you want, but there are thousands of ways to do just that. The goal is to find a way that is powerful, persuasive, and that comes from your heart.

Step Nine: Practice It

You must prepare not only the content of the closing, but the delivery, and that can only be done through practice. Practice it aloud — to yourself, to your mirror, to your spouse, colleague or pets — but ***practice it.***

Do not *memorize* it. Few of us are sufficiently gifted thespians to deliver a memorized monologue and make it ring sincere. Simply talk it through several times. Each time you do, your argument will come out slightly different and that is the way it should be. That's what keeps it fresh and sincere and real. What you want to *remember* are those key phrases you've chosen, the metaphors, analogy, or trilogies; the silences you've built in; the transitions you've decided upon— as well as, of course what evidence you want to discuss under each chapter!

Step Ten: Reduce it to Outline Form

You cannot read a closing argument and persuade anyone of anything. Your persuasiveness comes from your own passion about that of which you speak. If you don't know it well enough to remember it without reading it, you've just spoken volumes to the jury about just how passionately you feel about it!

"But there is SO much to remember!!" Yes, there is. That's why you must PRACTICE, PRACTICE, PRACTICE until you know your arguments so well that you *can* speak from the heart about each and every one of them.

Then reduce your argument to a **one-page outline form** which you can lay on the lectern or table corner as your safety net in case you go blank. The outline will list your chapter headings and *no more* than a word or two prompt for each of the pieces of evidence you plan to discuss under that heading.

Ex: ***I. ID Probs***
> 1-2 secs
> distance
> descriptions

If your notes are any more detailed than this, you will not be able to even find your *place* in a glance, much less your *prompt;* and a glance is all you can spare for notes during closing!!

TIPS: Place your cup of water beside your outline during your closing. Then if you DO go blank and have to refer to them, you can simply pause, walk to your cup, take a sip (while you're frantically

scanning your outline) and as far as the jury knows, you simply had a dry throat.

Or you can list your chapters and supporting evidence on a flip chart for use as demonstrative evidence during your closing argument. Not only does this allow the jury to follow your argument more easily as you go through each topic, you don't have to worry about using your notes!

Endnotes:

1 *Dr. David Ball* is an adjunct Professor of Law at Campbell University and a former chair of the theater department at Duke University. He is the author of *Theater Tips and Strategies for Jury Trials* (NITA, 1994), a trial consultant, and frequent lecturer for NITA.

2 *Robert Pepin* is a federal public defender in Denver, Colorado and a fellow faculty member of the National College for Criminal Defense, where I first heard him use this particular example to extremely powerful effect.

3 *Sir Walter Scott, Marmion xvii* ■

A Word About Storytelling:

The new touchstone in trial practice is *storytelling* and I am one of its avid disciples. However, I am convinced that the best storyteller will fail to persuade the jury if s/he uses closing argument *only* as an opportunity to tell a story. A story told well may hold the jurors' interest and even entertain them, but if the lawyer fails to explain why it matters to their verdict, in the end, the lawyer will still lose. For that reason, I encourage you to think of a good closing argument not as a single story, but as a well-organized photo album; each page of vivid, vibrant photographs carefully attached in its appropriate place beside a succinct, running commentary. The commentary points out the significance of and subtleties within each photograph that might easily be missed or overlooked by the casual observer.

The photographs in your closing argument are the vignettes and scenes carefully culled from the evidence and vividly painted for your jurors through the skills of storytelling to prove a point. The moment your innocent client learns he's falsely accused and yet does not run away is a photograph that supports his innocence. The harsh reality of an interrogation room is a photograph which explains why the confession does not match the physical evidence and is therefore not believable. Each of these scenes must be brought to life again for the jurors during your argument through the skill of storytelling. *Yet they do not and cannot stand alone*. Without benefit of an accompanying commentary, a carefully-crafted explanation of how each of these events fit together to paint a picture of innocence, you run the very real risk that your jurors may never understand the significance of or subtleties within your photographs. Absent that understanding, the likelihood they will reach the conclusion you want them to reach is a risk no gambler would want to take.

Of course, the opposite extreme is equally ineffective. The perusers of our proverbial photo album will quickly lose interest in the most thorough of commentaries if there are no photographs to accompany it! A dry exposition on how the evidence supports a finding of not guilty does not move us, capture our attention or imagination, or make us care. BOTH vivid photographs (storytelling) and carefully crafted commentary (argument) are critical to an effective closing. Equal attention must be paid to both. ■

Preparation is still the greatest technique for winning.

-- Larry Pozner

ATTORNEYS AND SOCIAL WORKERS WORKING TOGETHER IN DPA

By Jennifer G. Withrow, Internal Policy Analyst, and
Rebecca Ballard DiLoreto, Director, Post Trial Division

Case assignment overload, overcrowding in prisons, lack of resources and lack of time to assist clients with accessing resources are all realities that attorneys in DPA face everyday. Some in Kentucky are working to address these issues. Senator Dan Kelly of Springfield sponsored Senate Bill 245 which would have utilized social workers through the Department of Corrections and provided additional beds in treatment facilities. Though unfortunately that legislation did not pass, DPA does have a chance to increase its use of social workers to serve clients. The Department of Public Advocacy will initiate a Social Work Pilot Project in three public defender offices across the Commonwealth. With expertise in assessment and interviewing and knowledge of community resources, placement options, and treatment options, social workers are able to assist trial counsel in their advocacy for effective treatment and other alternative sentences as an option to incarceration. In addition, decreasing recidivism rates as a result of receiving treatment will decrease the attorney caseloads and decrease overcrowding in prisons, thus providing overall relief to our attorneys.

Through the years, DPA has had a few social workers on staff as mitigation specialists and recently hired a social worker as an internal policy analyst. Two social workers have provided assistance in KRS 202A commitment hearings and monitored clients who were placed in state mental hospitals. While these social workers are a great asset to DPA, the long term goal of DPA is to staff each public defender office with a social worker who can effectively assist the defense team so we might focus our representation on the whole client, reduce recidivism for our own clients and address the socio-economic problems that impede our representation. We will begin that long term effort with the 2006 DPA Social Work Pilot Project.

What is a Social Worker?

The National Association of Social Workers defines a Social Worker as a highly trained professional, who has earned a social work degree at the bachelor's, master's or doctoral level. Many individuals working in the field of social services may not have a social work degree, therefore are not social workers and should not be called social workers. It is important to reiterate that an individual should only be called a social worker if that individual has obtained a degree in social work. Kentucky's Personnel Cabinet has taken steps to acknowledge this with state job classifications and has reclassified the title of case workers as "social service workers" to accommodate for workers performing case work without social work degrees.

Professional social workers are trained to work in schools, hospitals, mental health clinics, senior centers, elected office, private practices, prisons, military, corporations, international settings, and in numerous public and private agencies that serve individuals and families in need. Social workers must have knowledge of human development and behavior, as well as knowledge of social, economic and cultural institutions, and display an understanding of the interaction of these areas.

The National Association of Social Workers Preamble states that "the primary mission of the social work profession is to enhance human well-being and help meet the basic human needs of all people, with particular attention to the needs and empowerment of people who are vulnerable, oppressed, and living in poverty…Social workers promote social justice and social change with and on behalf of clients."

History of Social Work

Social work emerged as a profession in 1898. Since that time, social workers have led the way in addressing social injustice, and developing private and non-profit organizations to serve individuals in need, and bringing the nations' social problems to the public's attention. Many benefits taken for granted today are a result of the work of social workers, including laws protecting the civil rights of all people regardless or gender, race, faith or sexual orientation. The efforts of social workers are also behind the creation of unemployment insurance, disability pay, worker's compensation, Social Security, humane treatment for individuals with mental illness and developmental disabilities, Medicaid, Medicare, and child welfare.

Famous social workers include: **Jane Addams**, who in 1931 became one of the first women to receive a Noble Peace Prize; **Frances Perkins**, who was the first woman to be appointed to the cabinet by a President and also drafted much of the New Deal legislation; **Whitney M. Young, Jr.**, an expert in race relations, former executive director of the National Urban League, and key inspiration for President Johnson's War on Poverty; **Harry Hopkins**, with the Works Progress Administration; **Dorothy Height**, with the National Council of Negro Women, and **Jeanette Rankin**, the first woman elected to the U.S. Congress.

The History of Social Workers and Public Defenders in the Justice System

While there is a long history of social workers involved with the criminal justice system, their presence has not always been accepted. The journal, *Social Work*, published an article back in 1976 on the topic, "How Social Workers Help Lawyers," by James Scherrer. Scherrer reported strain and conflict in the working relationship between social workers and lawyers. At that time, lawyers saw clients' problems as legal, rather than social or emotional, and blamed the social workers for the blatant disregard of their clients' rights by the courts. Scherrer noted that social workers possessed such skills as interviewing, evaluation, crisis intervention, short-term case management, negotiation and referral. These skills allow social workers to help the lawyer serve the client more efficiently and successfully. In cases where social workers were used, they de-escalated the client and obtained information that the lawyer was unable to obtain. By using interviewing skills, social workers were able to ascertain important information in order to view the entire situation. This allowed the social worker to refer the client to appropriate treatment prior to the case being heard by the judge to establish that treatment would work to rehabilitate the client.

The more social workers were able to define their roles in the criminal justice system, the more they were viewed as part of the team rather than adversaries. As far back as 1975, *Social Work* published an article by Joseph Senna entitled, "Social Workers in Public Defender Programs." Senna identified that social workers in public defender offices are positioned to assist the accused offender at a time when the accused is more open to the help. Social workers in this area are also in a position to influence treatment options and initiate the rehabilitation of the public defenders' clients. Senna cited a 1972 study from Santa Clara California, which found that involvement from a social worker had a beneficial effect on case results. The social workers' reports were used effectively in the sentencing process and the judges found the rehabilitation plans helpful. Social workers were seen by their lawyer co-workers as an asset to the team because they understood current socio-economic issues and could offer effective alternative sentencing options. Lawyers interviewed in the article also noted the importance of social workers conducting follow-up with clients once the lawyers' work was completed. A more up to date article written by Robin Steinberg and David Feige was published by the Harvard Executive Session on Public Defense in August 2002. In "Cultural Revolution: Transforming the Public Defender's Office," Steinberg and Feige discuss how social workers and public defenders can work together for the best interest of the client. Social workers are trained to focus on the whole client, not just on an isolated incident. They have the best perspective of the client and can work with the lawyer to present this to the criminal justice system. Successful integration of social workers into public defender offices is consistent with a more holistic model of representation. The holistic model is client focused, interdisciplinary and community-based. Working from this holistic view, lawyers and social workers can work together to represent the person rather than offense. For example, a client faces robbery charges. The social worker investigates and finds the client is in an abusive relationship and has a drug problem. While these issues may or may not be related to the robbery charge, the lawyer and social worker are able to recognize that these issues may either affect the case or the client in how he/she sees the case. Additionally, in working with defense counsel, the social worker can offer the attorney information that may tend to mitigate the offense in the eyes of the judge, prosecutor or jury.

What are Other States Doing?

A recent survey done of those public defender programs with integrated full time social work staff reveals some variety in the job descriptions and scope of services provided. See chart below:

Public Defender Office	Attorney's on Staff	Number of Social Workers	Primary Job Duties of SW
Leon County, Tallahassee, FL	48	2	Assist in evaluating clients, attend interviews, and provide letters for juveniles with disabilities in order to look for competency and insanity.
Wyoming	?	1	Act as a consultant for youth, aids with interviews, assisting in hearings and helps evaluate parent and child relationships, assists in early screening.
Kansas Legal Services in Wichita	6	2	Meet with families to develop plans and address concerns which are preventing release, providing parenting advice, and job workshops for youth.
D.C. Public Defender Service	200	3	Assist twelve trial lawyers and three Special Ed. Lawyers, who work with children, the SW work with clients on the day of arrest.
Colorado State Public Defenders Office	236	1 in Jeff. Co, 2 in Denver regional office	Assist with sentencing, placements, and generalized social services type recommendations in juvenile division.

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Public Defender Office	Attorney's on Staff	Number of Social Workers	Primary Job Duties of SW
Minneapolis, Hennepin Co. Public Defenders Office	118	10 total- 4 in adult division 5 in juvenile division and 1 in drug division	Disposition advisors' work in defense practices; state or federal social workers work with children and adults.
Office of the Chief Public Defender, Hartford, CT	?	1 in each PD office	Locate services and make referrals to assist in release arguments, assist with disposition planning and link with local schools, fill in attorneys' placement, conferences, and evaluations for juveniles.
Southwest Juvenile Defender Center in Houston, TX	9	1	Assist attorneys in delinquency cases and dependency cases for youth.
The Juvenile Rights Division of NYC's Legal Aid Society	150	50	Provide representation to young people in delinquency proceedings and child protective and foster care matters.
Dekalb County Circuit Public Defenders Office – Decatur, GA	41	2	Visits jails to see mentally ill clients, interview with clients, evaluations and assessments, and review jail records.
The Knox County Public Defenders Community Law Office – Tennessee	?	5	Provide assistance with getting drivers license, job placement, housing and mental health assessment.
California Calaveras County	3	Use SW only when needed	Work with clients who may have a mental illness, and has committed a crime, assist in proper placement and evaluations.
Public Defenders Office in Franklin Co. Ohio	80	9 in juvenile div., 2 in common pleas unit and 1 in municipal unit	The mitigation specialists generally assists attorneys in all cases within the common please unit with death penalty specifications and within the juvenile unit with felony issues, including developing information relative to clients' problems, environment, behavior patterns, and family and friends. In the juvenile division, the SW collaborates with the attorneys on delinquencies, abuse, neglect, and dependency cases and serving as lay guardian, represents juveniles in various capacities. Provides supervision to other social workers.
Clark Co. Nevada	96	5 in juvenile and 2 in adult	Certifications, find background history on clients, attend evaluations, and talk with family members, assist in interviewing, detention hearings, placement, and alternative sentencing.
Missouri State Public Defender	350	19	Assist in fining alternatives to death penalty, work with family of client, in order to learn the history of the client, assist in alternative sentencing, placement, and makes referrals after evaluating mental health.
Public Defender Law Office Cook County – Chicago, IL	542	4	Work in delinquency division, assists with dependency and delinquency cases. Three work in abuse and neglect cases. One works with parents to obtain information about the client.
Delaware Co. Public Defenders Office – Media, PA	46	1. They retain others only if needed	Assists adult and juveniles. Assists with placement, early release, rehabilitation, interaction with client and family, and assists in public assistance for job placement, etc.
Whatcom Public Defenders Office - Bellingham, WA	17	1	Assists with placement, alternative sentencing, interviewing, and assist client in brief counseling sessions. Most of the work is done with adults, but delinquents are also assisted by the SW in dependency cases.

Social Workers working with Public Defenders in Kentucky

Pete Schuler is the Chief Juvenile Defender in the Louisville-Jefferson County Public Defender's office. The office has had social workers on staff since its inception in 1972 in response to the American Bar Association's recommendation in 1971 that social services be provided in public defender offices to offer assistance appropriate to social work as well as legal services. There are currently two social workers in the office, both with the Juvenile Division. One of the social workers leads the office's Team Child Program, which is a preventative program, geared towards working with the entire family rather than with just the client.

These social workers investigate alternative solutions to incarceration and make recommendations towards least restrictive placements. Their social workers have a great rapport with the judges, the attorneys and the clients. They are respected members of the team and the courts view them as having excellent credibility. The social workers assist in waiver cases, gather information, complete social histories, testify at waiver hearings and obtain mental health and school records on the client. The social workers are excellent at de-escalating clients and their family members in times of high stress.

[S]ocial workers in public defender offices are positioned to assist the accused offender at a time when the accused is more open to the help.

DPA Social Work Pilot Project

For the next year and a half, DPA will work to create a solid social work model useful to our state-wide indigent defense program in Kentucky. Professors from the state's many schools of social workers and DPA supervising attorneys will be involved in fashioning workable job descriptions, acceptable standards of practice and applicable evaluation tools to effectively assess the program's value. The Department is aided in this effort by the models already in place with a grant from the Bureau of Justice, the Juvenile Accountability Block Grant (JABG). DPA has used this grant for a number of purposes in the past including seeking the release of unrepresented juveniles, providing mentoring, motions and appellate resources to our trial lawyers, and bringing together local juvenile justice stakeholders to both create and better utilize community-based resources to avoid commitment to DJJ or placement in detention. Currently, the JABG grant is devoted to integrating social work interns into our juvenile court practice at the trial level to reduce detention and commitment and enhance representation. Professors from each of the state's leading schools of social work have assisted us with this grant by providing field supervision and oversight to the program. The colleges and universities involved include the University of Kentucky, Morehead State University, Northern Kentucky University, Brescia College, the University of Louisville, and Western Kentucky University. DPA offices that have taken on the work of partnering juvenile defense specialists with social work interns include Boone County, Covington, Owensboro, Morehead, Fayette County Legal Aide, the Frankfort Trial Office, and Bowling Green. We hope to expand the program in the fall of 2006 to include our Henderson County office.

The JABG program has given us the groundwork to successfully begin the 2006 DPA Social Work Pilot Project. DPA will hire three social workers for our Covington, Owensboro and Morehead trial offices. The scope of their services will include pretrial diversion, treatment recommendations to secure alternative sentences and assistance for our juvenile defense specialists. There will be a special focus on drug offenses with a goal of reducing both imprisonment or incarceration and recidivism.

Attorneys and social workers collaborating together to decrease the rate of repeat offenders through providing access to community resources may give DPA the chance to help reduce the ever-growing prison population and allow our lawyers to better represent the whole client. ■

This is our special duty, that if anyone specially needs our help, we should give him such help to the utmost of our power.

— Cicero

KENTUCKY INNOCENCE PROJECT
TWO MORE WRONGFUL CONVICTIONS SET ASIDE

by Melanie Lowe, DPA Kentucky Innocence Project, and Marguerite Thomas, Post Conviction Branch Manager

The Kentucky Innocence Project (KIP) is pleased to announce two more wrongful convictions have been set aside. Both clients were released on Friday May 5, 2006, the culmination of months of investigation and litigation.

In the first case, Kenton County Judge Patricia Summe vacated Timothy Smith's 2001 conviction and twenty-year sentence for sodomy in the first degree. After serving five years for a crime he steadfastly has maintained he did not commit, Mr. Smith walked out of the Eastern Kentucky Correctional Complex.

DPA's KIP worked with law students at Chase College of Law, located at Northern Kentucky University, and a private attorney, Patrick Lamb, of Chicago, to investigate Mr. Smith's claim of factual innocence. Katie Smith, the daughter of Tim Smith, accused him of sexual abuse. The turning point for the defense occurred when the daughter's profound mental disturbance was uncovered as she was killed while trying to steal a woman's unborn baby. Reporter Dave Wagner of WLWT Channel 5 helped to unravel the falsehoods that resulted in Tim Smith's wrongful conviction. Judge Summe's Order cited numerous errors made by trial counsel including his failure to challenge the credentials and testimony offered by an expert on "repressed memory."

"The lack of evidence in this case was glaring," states Elizabeth Keller, former KIP student and now an Ohio public defender. "Mr. Smith should never have been found guilty by a jury." Tim Smith agreed, "This was a very bad mistake by the court system. I have always claimed that I am completely innocent," stated Mr. Smith. "Finally I can return to my family and have my life back."

In the second case, on April 26, 2006, Butler Circuit Court Judge Ronnie Dortch entered an order dismissing a sex abuse and sodomy conviction and fifty-five year sentence because the defendant, Ben Kiper, has proven he is an innocent man. Mr. Kiper's young stepdaughter was originally manipulated into testifying against her stepfather. There was absolutely no physical evidence or corroborating proof of guilt. Since trial, Mr. Kiper's stepdaughter, now sixteen, admitted to various professionals that she had not been truthful when she testified. None of these conversations were brought to the attention of the court prior to the involvement of the *Kentucky Innocence Project*. On October 25, 2005, Mr. Kiper's stepdaughter testified in front of the Butler Circuit Court recanting her pervious story. "Fortunately, our justice system provides procedural rules and mechanisms that allow wrongs to be made right. No one can give Ben Kiper back the six years he lost as a result of his wrongful conviction and the harm to his reputation, but the system has given Ben the opportunity to enjoy the rest of this life as a free man. "The young lady who originally testified against Ben has had a huge burden lifted and hopefully this will help her move her on in a positive way in her life," according to Gordon Rahn, Project Coordinator for the Kentucky Innocence Project.

"I am relieved the court considered my case and released me from prison," Ben Kiper stated when he was released May 5, after six years of incarceration. "I know it took a lot of courage for my daughter to come forward and make things right. I've never held any anger or bitterness toward her, only pride. I am very grateful for the *Kentucky Innocence Project* in helping me bring the truth out."

These rulings mark the third and fourth sex convictions overturned by innocence project efforts with evidence of innocence in Kentucky since 2000. The first case handled by the national Innocence Project prompted the formation of the *Kentucky Innocence Project*. These victories are the second and third such cases handled by the Department of Public Advocacy's KIP unit. Litigation is expected to continue in both the Smith and Kiper cases on appeal. Nationwide over 170 people have been exonerated by innocence projects. ■

Ben Kiper (c) celebrates his homecoming with DPA's Marguerite Thomas (l) and Gordon Rahn (r).

CAPITAL CASE REVIEW

By David M. Barron, Capital Post Conviction

Supreme Court of the United States

***Oregon v. Guzek*, 126 S.Ct. 1226 (2006)**
(Breyer, J., joined by, Roberts, C.J., Stevens, J., Kennedy, J., Souter, J., and Ginsburg, J.; Scalia, J., concurring, joined by, Thomas, J.) (use of residual doubt evidence at the sentencing phase of a capital case)

On direct appeal, the Oregon Supreme Court affirmed Guzek's conviction but reversed his death sentence. The Oregon Supreme Court also ruled that Guzek must be allowed to introduce alibi evidence at his resentencing. The Supreme Court of the United States granted certiorari to determine if the Eighth Amendment provides a capital defendant with the right to introduce residual doubt evidence at the sentencing phase. The Court, however, did not reach this issue; instead deciding the case on narrower grounds. The Court held that the Eighth Amendment does not provide Guzek with the right to present alibi evidence at the sentencing phase, because: 1) sentencing traditionally concerns how, not whether, a defendant committed the crime; 2) the parties previously litigated the relevant evidence - - whether Guzek committed the underlying crime; and, 3) the negative impact of a rule restricting Guzek's ability to introduce new alibi evidence is minimized by the fact that Oregon law gives the defendant the right to present to the sentencing jury all the evidence of innocence from the original trial.

Note: Guzek suggests that under the Eighth Amendment, a capital defendant should be able to introduce residual doubt at sentencing if 1) the evidence concerns how a crime was committed, not whether the defendant committed the crime; 2) the evidence was not admitted at the guilt – or – innocence phase due to an evidentiary ruling (i.e., scientific evidence that does not satisfy Daubert); 3) the evidence was unavailable at the time of the guilt – or – innocence phase; or, 4) state law does not allow the capital defendant to present to the sentencing jury all the evidence of innocence from the original trial (express ruling that some or all guilt – or – innocence phase evidence cannot be re-introduced at the sentencing phase, or an instruction that leads the jury to believe that it cannot consider this evidence).

Scalia, J., concurring, joined by, Thomas, J.:
Scalia and Thomas would hold that the Eighth Amendment does not allow a defendant to present evidence and argument at the sentencing phase concerning residual doubt under any circumstance.

***Brown v. Sanders*, 126 S.Ct. 884 (2006)**
(Scalia, J., for the Court, joined by, Roberts, C.J., O'Connor, Kennedy, and Thomas, JJ.; Stevens, J., dissenting, joined by, Souter, J.; Breyer, J., dissenting, joined by, Ginsburg, J.)


David M. Barron

The issue before the Court was what happens to a death sentence when at least one of the valid death eligibility factors has later been held to be invalid. In deciding this issue, the Court abandoned the distinction between "weighing" and "non-weighing" or "threshold" statutes when addressing the remedy for consideration of an invalid aggravating circumstance.

The historical distinction between "weighing" and "threshold" death penalty statutes: The difference between weighing and non-weighing (threshold) statutes is that in non-weighing statutes, the sentencer can consider aggravating circumstances not enumerated by statute.

Weighing statutes are those in which the only aggravating factors permitted to be considered by the sentencer are the factors making the defendant eligible for a death sentence. In a weighing state, the sentencer's consideration of an invalid eligibility factor automatically skews the sentencer's balancing of aggravating and mitigating circumstances, because, for example, four aggravators is more weighty than three. Thus, reversal is required unless the appellate court finds the error harmless or reweighs the aggravating and mitigating circumstances.

In a threshold (non-weighing) statute, the sentencer is permitted to consider aggravating circumstances different from, or in addition to, the eligibility factors. Because the aggravating factors could be different from the eligibility factors, consideration of an invalid eligibility factor may not affect the decision to impose death. Thus, reversal is required only if 1) the reason for the invalidity of the eligibility factor is that it authorizes a jury to draw adverse inferences from conduct that is constitutionally protected, or that it attaches the aggravating label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, or to conduct that actually should militate in favor of a lesser sentence; or, 2) consideration of the invalid eligibility factor

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allowed the sentencer to hear evidence that would not otherwise have been before it.

Whether the death penalty statute is a weighing statute or a threshold statute shall no longer be a factor in determining whether reversal is required because the sentencer considered an invalid sentencing factor: The Court abolished both the distinction between an invalid death eligibility factor and an invalid death selection factor and the distinction between a weighing and threshold death penalty statute when it comes to determining whether reversal is required because the jury considered an invalid factor in determining to impose death. Instead, "[a]n invalidating sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances."

***Evans v. Chavis*, 126 S.Ct. 846 (2006)**
(Breyer, J., for the court, joined by all, except Steven, J., who concurred in the judgment)

In this non-capital case, the Court held that an opinion or order denying an appeal on the merits does not automatically indicate that the appeal was timely filed. Rather, in the absence of a "clear indication that a particular request for appellate review was timely or untimely, the Circuit must itself examine the delay in each case and determine what the state courts would have held in respect to timeliness. In other words, unless the state court ruling says the appeal was timely, the federal court must decide whether the state court would consider the state appeal to have been timely filed.

Supreme Court Grants of *Certiorari*

***Lawrence v. Florida*,**
No. 05-8820, cert. granted, March 27, 2006

1. There is a split in the circuits about whether the one-year period of limitations is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment of claim is pending . . . ." Antiterrorism and Effective Death Penalty Act (AEDPA) 28 U.S.C. Section 2244(d)(2). Where a defendant facing death has pending a United States Supreme Court certiorari petition to review the validity of the state's denial of his claims for state post-conviction relief, does the defendant have an application pending which tolls the 2244(d)(2) statute of limitations?

2. Alternatively, does the confusion around the statute of limitations - - as evidenced by the split in the circuits - - constitute an "extraordinary circumstance," entitling the diligent defendant to equitable tolling during the time when his claim is being considered by the United States Supreme Court on certiorari?

3. And in the second alternative, do the special circumstance where counsel advising the defendant as to the statute of limitations was registry counsel - - a species of state actor - - under the monitoring supervision of Florida Courts, with a statutory duty to file appropriate motions in a timely manner, constitute an "extraordinary circumstance" beyond the defendant's control such that the doctrine of equitable tolling should operate to save his petition?

***Kansas v. Marsh*, No. 04-11170,**
restored to active docket on March 24, 2006, to be reargued on April 25, 2006

Does it violate the Constitution for a state capital sentencing statute to provide for the imposition of the death penalty when the sentencing jury determines that the mitigating and aggravating evidence is in equipoise?

***Hill v. McDonough*, No. 05-8794,**
cert. granted,
Jan. 25, 2006, to be argued on April 26, 2006

1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as habeas petition under 28 U.S.C. § 2254.

2. Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983.

Note: The original Respondent was Crosby. He resigned his position with the Department of Corrections and was replaced by McDonough. Thus, McDonough was substituted in as the named Respondent.

Note: Hill's execution was stopped by the Supreme Court of the United States after the I.V.s were inserted into Hill's veins.

Stays of Executions

***Rutherford v. Crosby*:** Rutherford filed a 42 U.S.C. § 1983 suit challenging the chemicals and procedures used in lethal injections. The district court denied a stay of execution, holding that the 42 U.S.C. § 1983 challenge is properly construed as a habeas petition and that Rutherford unduly delayed in filing his lethal injection challenge, even though he filed his lethal injection suit immediately after the claim

was denied in state court. The Eleventh Circuit affirmed, but the Supreme Court of the United States stayed Rutherford's execution.

***Taylor v. Crawford**:* On order from the United States Court of Appeals for the Eighth Circuit, a federal district court in Missouri held an expedited limited hearing on the merits of Taylor's challenge to Missouri's lethal injection chemicals and procedures. The district court denied relief on the merits, which was affirmed by the Eighth Circuit. Sitting en banc, the Eighth Circuit granted Taylor a stay of execution to review the district court's decision. By a vote of 6-3, the Supreme Court of the United States upheld the stay of execution. Oral argument in the Eighth Circuit is scheduled for April 2006.

Morales v. Hickman: A federal district court in California denied Morales a stay of execution to allow a challenge to California's lethal injection chemicals and procedures to go forward, but conditioned the denial of a stay on the California Department of Corrections either having a trained medical professional monitoring for consciousness between the injection of the first and second chemical and the second and third chemical, or administering only a barbiturate. The DOC appealed and lost in both the Ninth Circuit and the Supreme Court. The DOC chose to have a medical professional monitor for consciousness. Shortly before the scheduled execution, the anesthesiologists who had agreed to monitor for consciousness refused to do so. The DOC rescheduled Morales' execution for the next day, planning to administer only pentobarbital, a long acting barbiturate. Morales' filed emergency motions in the district court, which ruled that trained medical personnel (such as an anesthesiologist) had to administer the pentobarbital directly into Morales' vein, rather than through a tube that would flow to Morales' vein. The DOC appealed and again lost. Hours before the scheduled execution, the DOC called Morales' execution off because they were unable to find someone to administer the pentobarbital. Since then, the DOC has been continuously tinkering with its execution protocol. A hearing on California's chemicals and procedures for lethal injections is scheduled for May 2006. This hearing will address whether the three drug cocktail (sodium thiopental, pancuronium bromide, and potassium chloride) and procedures for administering these chemicals and inserting an I.V. pose an unnecessary risk of pain and suffering, in violation of the Eighth Amendment to the United States Constitution.

Note: The California branch of the American Civil Liberties Union has filed a lawsuit arguing that administering pancuronium bromide during an execution violates the media's (and public's) First Amendment right to observe the effects of the lethal injection chemicals and determine if the inmate is suffering pain. Pancuronium bromide paralyzes all voluntary muscles and prevents both the inmate from expressing any signs of pain and lay witness from observing any indication of pain.

Note: Since the grant of certiorari in Hill, the Supreme Court of the United States has denied or vacated a stay of execution in numerous cases. In each of those cases, the delay in filing the challenge to the lethal injection chemicals and procedures was at issue. Post-Hill, no execution has been allowed to proceed where a challenge to the lethal injection chemicals and procedures was raised in a timely manner.

United States Court of Appeals for the Sixth Circuit

Broom v. Mitchell,
2006 WL 664438 (6th Cir. March 17, 2006)
(Moore, J., for the court, joined by, Batchelder and Gibbons, JJ.)

Broom's *Brady* claim is exhausted: Exhaustion is a judicially created doctrine involving comity that has nothing to do with whether a prisoner has defaulted a constitutional claim. Rather, exhaustion only requires federal courts to abstain from addressing a claim that has not been presented in state court. But a federal court can address an unexhausted claim when "there is an absence of available State corrective process." Because Broom is unable to satisfy the Ohio's requirements for bringing a second postconviction petition, there is no longer an available state remedy. Thus, Brooms *Brady* claim is exhausted.

Broom's *Brady* claim is procedurally defaulted: A claim is procedurally defaulted and thus cannot be considered by a federal court on habeas review when the petitioner fails to obtain consideration of a claim by a state court, either due to the petitioner's failure to raise that claim before the state courts while state-court remedies are still available or due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner's claim. Because Broom could have brought his *Brady* claim in state court proceedings and did not do so, his *Brady* claim is procedurally defaulted.

The law on excusing a procedural default: Procedural default can be overcome "only by a showing that there was cause for the default and prejudice resulting from the default, or that a miscarriage of justice will result from enforcing the procedural default in the petitioner's case." Cause is established by showing "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." A showing that the "factual or legal basis for a claim was not reasonably available to counsel," or that some interference by officials, made compliance impracticable, would constitute cause under this standard." Ineffective assistance of counsel also may constitute cause, but "a claim of ineffective assistance must generally be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default."

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Broom cannot establish cause to excuse his procedural default: Broom argued that state law prohibiting a defendant in a criminal case who has exhausted direct appeal may not avail herself of the state open records laws to obtain documents to support post conviction relief establishes cause for Broom's failure to present a claim in state court that involved documents obtained through the state's open record laws. Broom, however, had already obtained the documents. Because Ohio law does not directly address whether a defendant can use documents already in the defendant's possession as a result of a previously filed open records request, the court held that "there was a reasonably available 'legal basis' for Broom either to file another petition for postconviction relief or to amend the petition that he had already filed." Thus, Broom cannot establish cause to excuse his default.

Counsel's mitigation investigation was not deficient: Broom's counsel attempted to obtain psychological testimony, attempted to obtain the services of a mitigation expert, contacted Broom's family members, his school, and the prison. Unlike other cases where defense counsel had been found ineffective, Broom's counsel did not refuse expert assistance or ignore signs of mental illness. Thus, although Broom's counsel could have gathered additional information in order to present a more complete picture of Broom's difficult background, counsel's investigation was not objectively unreasonable.

Show-up was not so suggestive as to create a likelihood of misidentification: In determining whether a "show-up" identification was impermissibly suggestive, thereby creating a likelihood of misidentification, a court must consider the following factors: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of his prior description of the criminal; 4) the level of certainty demonstrated at the confrontation; and, 5) the time between the crime and the confrontation. Applying these factors, both the Ohio Supreme Court and the Sixth Circuit on habeas review ruled that the "show-up" was unnecessary and suggestive, but that reversal was not required because: 1) the witnesses had ample time to view appellant; 2) the witness' attention was completely focused on appellant; 3) the description given to police prior to the confrontation matched the appellant; and, 4) the identification was emphatically positive, and it occurred very shortly after the crime.

The prosecutor's improper statements to the jury do not require reversal: During closing argument, the prosecutor commented on Broom's unsworn statement, told the jury that he was not withholding evidence, misstated the facts of the rape, and characterized Broom as a serial killer. Broom argued that these comments constituted prosecutorial misconduct and thus deprived him of due process and the Eighth Amendment right to individualized sentencing.

In analyzing a due process claim of prosecutorial misconduct based on improper comments to the jury, the "relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." To satisfy this standard, the conduct must be both improper and flagrant. Comments are improper when the comments are not based on evidence in the record, are designed to undercut the defendant's sole mitigation theory, or are calculated to incite the passions and prejudices of the jurors. Once it is determined that the comments were improper, four factors are considered in determining flagrancy: 1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; 2) whether the remarks were isolated or extensive; 3) whether the remarks were deliberately or accidentally made; and, 4) the total strength of the evidence against the defendant. When the prosecutor's comments are so egregious that that they effectively foreclose the jury's consideration of mitigating evidence, the Eighth Amendment requirement of individualized sentencing is violated.

Applying this standard to the facts, the court held that the prosecutor's comments were clearly improper, but that the comments were not sufficiently flagrant to justify reversing the conviction or death sentence.

Lundgren v. Mitchell,
2006 WL 589356 (6th Cir. March 13, 2006)
(Clay, J., for the court, joined by, Daughtrey, J.; Merritt, J., dissenting)

Lundgren, who ran a cult, was sentenced to death for the murders of five of his cult members. The Avery family (husband, wife, and three children) were members of the cult. At Lundgren's direction, another member of the cult led the Avery's to a barn, where each was bound and gagged by Lundgren and another cult member. They then placed the Avery's into a pit. Lundgren shot each of the Avery's two or three time and then filled the pit with dirt and stones. After the murders, Lundgren went back to the farmhouse and held a prayer meeting.

In an unsworn statement before the jury at the sentencing phase, Lundgren asserted that he abhorred the sin he saw in the Avery family and explained that God commanded him to kill the Avery's. He stated, "I cannot say that God was wrong. I cannot say that I am sorry I did what God commanded me to do in the physical act . . . . I am a prophet of God. I am even more than a prophet. I am not a false prophet; therefore, I am not worthy of the death penalty."

By reviewing a claim for plain error, a court rules that the claim is defaulted: Plain error analysis is a court's right to overlook procedural defects to prevent manifest injustice, but it is not equivalent to a review of the merits. If a claim is properly preserved, the claim will be reviewed on the merits

rather than as plain error. Thus, by applying plain error review to a claim, a court is implicitly ruling that the claim is defaulted and reaching the merits anyway. Doing so does not waive the procedural default ruling.

Note: Even if the Kentucky Supreme Court or the Kentucky Court of Appeals addresses a claim under the plain error doctrine, the claim remains procedurally defaulted for purposes of federal habeas review. To avoid the procedural default, thereby allowing a federal court to review the claim, counsel must also raise the claim under the rubric of ineffective assistance of counsel. This should be done in an RCr 11.42 motion.

Note: The court's interpretation of plain error should be used in Kentucky cases to explain the difference between plain error and ineffective assistance of counsel, and that a claim should be cognizable as an ineffective assistance of counsel claim even if it could have been or was raised as plain error on direct appeal. According to the Sixth Circuit, plain error review recognizes that a claim is procedurally defaulted. All procedural defaults can be excused by ineffective assistance of counsel. Thus, an opportunity to establish counsel's ineffectiveness as cause to excuse the default must be available. This cannot be done on direct appeal. As a result, plain error review and ineffective assistance of counsel review are distinct issues that must be available.

Numerous claims are defaulted by the failure to raise ineffective assistance of appellate counsel: Counsel's deficient performance constitutes cause to excuse a procedural default. Here, the default occurred by Lundgren's failure to raise the claims on direct appeal, not the failure of trial counsel to proffer contemporaneous objections. But, Lundgren did not raise appellate counsel's ineffectiveness. Thus, numerous claims are defaulted.

Ineffective assistance of counsel standard: To establish a claim of ineffective assistance of counsel, a petitioner must establish that counsel's performance "fell below an objective standard of reasonableness" as judged by "prevailing professional norms," and that counsel's deficient performance prejudiced the defendant. "Indicia of objective unreasonableness include the violation of certain basic duties inherent in the representation of a criminal defendant, among them a duty of loyalty to the client, from which derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." In a capital case, counsel has an "affirmative duty to pursue mitigation evidence and to conduct an appropriate investigation into potential mitigating factors." Prejudice is established if "there is a reasonable probability that at least one juror would have struck a different balance." In determining whether prejudice exists, a court must consider the combined effects of all acts of counsel found to be deficient and the totality of the evidence before the jury - - "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."

Counsel was not ineffective for failing to pursue a not guilty by reason of insanity defense: The court acknowledged that an attorney's failure to explore the possibility of a not guilty by reason of insanity defense through a reasonable investigation, including the use of a qualified mental health expert, can rise to the level of constitutionally defective counsel. But, under the facts of this case, the court held that counsel provided effective assistance, despite not pursuing an insanity defense. In so holding, the court said that that counsel obtaining the assistance of two mental health experts rather than the "constitutionally mandated single mental health expert" shows that counsel engaged in a reasonable investigation into Lundgren's mental state at the time of the crimes. Given that one of these experts testified at the sentencing phase of Lundgren's trial and stated that she could not reach a conclusion on Lundgren's sanity at the time of the crimes, counsel's decision to not pursue an insanity defense must be considered a reasonable strategic decision.

Note: The court's mention of a "constitutionally mandated single mental health expert" suggests that seeking the assistance of a mental health expert in a capital case is now required.

The prosecutor's repeated reference to the unsworn nature of Lundgren's statement was improper but does not require reversal: In addressing whether reversal is required because of improper comments by the prosecutor, the "relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the conviction a denial of due process." Reversal is required only if the misconduct is "so pronounced and persistent that it permeates the entire atmosphere of the trial or so gross as probably to prejudice the defendant." If the court finds constitutional error in the sentencing phase, the court must then ask whether the constitutional error influenced the jury's decision between life and death.

Here, the prosecutor's seven references to the unsworn nature of Lundgren's testimony and the prosecutor's invitation to the jury to draw negative conclusions from Lundgren's failure to testify under oath during either the guilty or penalty phase were improper as the Ohio Court of Appeals and Supreme Court found. But the Ohio courts conclusion that the error was harmless after reweighing of the aggravating and mitigating circumstances was harmless cured any error, particularly in light of the facts of the crime.

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Note: This is the first case where the Sixth Circuit addressed the constitutionality of reweighing aggravators and mitigators to cure a trial level violation tending to prejudice the jury's view of the evidence, as opposed to the jury's inclusion of an impermissible factor of failure to consider a relevant mitigating factor.

Note: Under Supreme Court of the United States' precedent holding that a jury must find all facts that enhance a sentence or make a person eligible for death, the constitutionality of an appellate court reweighing aggravating and mitigating circumstances is being challenged in numerous states.

Merritt, J., dissenting: In a lengthy dissent that discusses the history of the insanity defense going as far back as 1800, Merritt believes counsel was ineffective for failing to present a not guilty by reason of insanity defense.

Note: Merritt's dissent should be read by anyone considering raising an insanity defense at trial, on appeal, or in post conviction proceedings.

Awkwal v. Mitchell,
2006 WL 559370 (6th Cir. 2006) (unpublished)
(Moore, J., and Cole, J.,; Gilman , J., concurring in part and dissenting in part)
(standard for determining competency to waive appeals and when determination to be made)

Awkal filed a pro se motion in the Sixth Circuit to withdraw his habeas petition and to forgo further challenges to his conviction and death sentence. The Sixth Circuit remanded to the district court to hold an evidentiary hearing on Awkal's competency. The Sixth Circuit instructed the district court to apply the standard articulated in *Rees v. Peyton*, 384 U.S. 312 (1966). The *Rees* standard requires a court to determine "whether [the petitioner] has [the] capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id*. at 314. Applying *Rees*, the district court ruled that Awkal was incompetent to waive his appeals because his desire to waive appeals was based on Awkal hearing his dead wife's voice calling him to join her, and his feeling of guilt for civilian deaths in the Middle East. Because approximately one year passed since the district court's ruling that Awkal was incompetent to waive his appeals, the Sixth Circuit remanded to the district court for a second determination of Awkal's competency to waive his appeals.

Gilman, concurring in part and dissenting in part: Gilman concurred in the remand for a further determination of Awkal's competency to waive appeals, but believes that the district court should address Awkal's competency under both the *Rees* standard and the standard articulated in 18 U.S.C. § 4241 whether Awkal "is able to understand the nature and consequences of the proceedings and able to assist his defense." Because the 4241 standard is the "near-universal standard for competency in the federal system, Gilman believes 4241's standard could be adopted by an en banc panel of the Sixth Circuit or the Supreme Court of the United States at the exclusion of *Rees* as the standard for determining competency in the habeas context. Thus, judicial efficiency suggests that the district court should address Awkal's competency under both the *Rees* and 4241 standard, particularly because Awkal could be incompetent under the *Rees* standard but not under the 4241 standard.

Note: *The court issued a show-cause order as to why the appeal should not proceed while Awkal was incompetent. Instead of addressing this issue, the court remanded for a second competency determination. Thus, whether an appeal can proceed when the inmate is incompetent to waive appeals (and similarly whether an appeal can proceed when an inmate is incompetent) remains an open issue. In his concurring in part and dissenting in part opinion, Gilman suggests that an appeal cannot proceed when an inmate is incompetent: "[i]f the prior ten years of experience are any indication as to the next ten and the ten after that, Awkal will never achieve a level of competency that would allow him to forgo his appeal under the Rees standard. The case would then likely end up in a state of perpetual stay."*

Hodges v. Bell,
2006 WL 508043 (6th Cir. 2006) (unpublished)
(Batchelder J., joined by Cook J.,; Daughtrey, J., dissenting)
(district court's ability to grant provisional orders under the All Writs Act to help determine competency to waive appeals)

Hodges filed a pro se motion to dismiss his habeas petition and to have his execution carried out. A typed statement from Hodges stated "I don't want to die. I just can't take the way they treat me anymore. . . . If the judge could do something about the way they treat me out here, then my motion to dismiss might not be necessary." Based on this statement, Hodges' attorneys argued that Hodges suffered from mental illness, was subjected to unconstitutional living conditions on death row, and suffered psychological turmoil because he was transported by guards armed with tasers and baton who pulled on his wrist shackles. The district court ruled that Hodges' living conditions went to the competency and the voluntariness of his motion to dismiss his habeas petition, and ordered further briefing on the allegations of unconstitutional living conditions. Hodges' counsel requested that Hodges be transferred to a special needs unit of the prison for treatment and that his movement to the special needs unit be videotaped because it was relieve Hodges' anxiety. The district court ordered that any movement of Hodges by prison staff shall be videotaped.

The order, however, did not specify the purpose for videotaping Hodges' movements within the prison. The Warden sought interlocutory relief from the Sixth Circuit, arguing that the district court did not have jurisdiction to order the prison to videotape all movement of Hodges by prison staff.

The district court ruling is an interlocutory order subject to review under 28 U.S.C. § 1292. Section 1292 grants the court of appeals jurisdiction to review orders of the federal district courts granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. An order is injunctive when it temporarily awards or denies a part or all of the injunctive relief sought. Because the district court's order stems from a motion for injunctive relief requesting that the district court order that Hodges' movements be videotaped, the order is injunctive in nature and thus subject to review under section 1292.

Habeas proceedings do not provide jurisdiction to order videotaping a petitioner's movements: Because the videotaping that the district court ordered does not implicate the validity of Hodges' conviction or sentence, the district court has no jurisdiction in a habeas proceeding to order videotaping Hodges' movements in prison. Hodges' allegations should be presented in a 42 U.S.C. § 1983 action, challenging the conditions of his confinement.

Note: *Seemingly, the district court has the authority to order videotaping a person's movements within a prison when those movements are relevant to a prison conditions lawsuit. Information obtained from videotaping an inmate under this circumstance could be used in support of a habeas petition, or, as would be the case with the factual circumstance of this case, to determine if an inmate is competent to waive further appeals.*

The All Writs Act, 28 U.S.C. § 1651, does not provide jurisdiction to videotape a petitioner's movements for purposes of use in a habeas proceeding: Section 1651 grants the federal courts the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." In other words, a federal court can issue all commands that may be necessary or appropriate to effectuate and prevent the frustration or orders it has issued in its exercise of jurisdiction otherwise obtained. But, a federal statute can confine a federal courts ability to issue an order under the All Writs Act. Thus, the inquiry into whether the All Writs Act covers an order issued by a federal court requires an appellate court to determine: 1) whether the federal court's action is in aid of its jurisdiction; and, 2) whether such action is specifically covered by another statute.

Here, the videotaping is not necessary or appropriate in aid of the district court's habeas jurisdiction to determine the legality of Hodges' conviction or sentence. The videotape was sought to reduce Hodge's anxiety so as to improve his living conditions. The injunctive order was not sought or designed to examine the legality of his conviction or sentence. Thus, the videotaping could not be in aid of the district court's adjudication of the habeas petition.

Daughtrey, J., dissenting: Daughtrey believes the district court has the authority to order videotaping Hodges' movements if there might be a connection between the conditions of Hodges' confinement and his competency to withdraw his habeas petition. Thus, Daughtrey would remand to the district court to make factual findings that continued videotaping is necessary to a determination of competency.

Note: The majority opinion seems to leave the door open for the district court to issue an order in conformance with Daughtrey's dissenting opinion.

Franklin v. Anderson,
434 F.3d 412 (6th Cir. 2006)
(Boggs, C.J., for the Court, joined by, Clay, J.; Batchelder, J., dissenting) (in pre AEDPA case, reversing death sentence because of improper prosecutorial argument)

The law of procedural default: A federal court is barred from reviewing a claim that is allegedly defaulted in state court if the following four requirements are satisfied: 1) the petitioner failed to comply with a state procedural rule that is applicable to the claim; 2) the state court refused to address the claim on the merits because of the state procedural rule; 3) the state procedural rule is an independent and adequate state ground to foreclose review of the federal constitutional claim; and, 4) the petitioner is unable to establish cause for the default and resulting prejudice, or that a miscarriage of justice will occur if the claim is not addressed on the merits.

What is cause and prejudice to excuse procedural default? Demonstrating cause requires showing that an "objective factor external to the defense impeded counsel's efforts to comply" with the state procedural rule. Demonstrating prejudice requires showing that the trial was infected with constitutional error. Ineffective assistance of counsel can serve as both cause and prejudice to excuse procedural default of a substantive claim, but where the ineffective assistance of counsel claim is itself defaulted, cause and prejudice to excuse the default of the ineffective assistance of counsel claim must also be established.

Franklin's claims are not defaulted: Under *Ford v. Georgia*, 498 U.S. 411 (1991), a petitioner relying on prior rulings cannot be held to new procedural requirements that go into effect after petitioner raised his claim. After a lengthy discussion of unique Ohio laws and procedures, the court held that

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Franklin's claims were not defaulted because 1) the alleged default resulted from procedural requirements that went into effect after Franklin raised his claim; and, 2) Ohio's procedural rule that resulted in the alleged default was not a "firmly established and regularly followed" procedural rule governing the timeliness of filing a motion for delayed reconsideration.

Reversal is required because a juror who could not comprehend the legal standard she was supposed to apply served on the jury: On voir dire, Juror Arthur stated: 1) that she believed the defendant should get on the stand and prove he is innocent; 2) that she understood that the prosecution has the burden of proof and that she has no problem with that; 3) she sees no reason why she cannot be a fair and impartial juror; 4) "I believe that he should bring himself out, if he didn't do it, just testify, tell what happened, you know"; 5) she guesses she would not hold against the defendant if he did not present evidence; and, that 6) if the defendant did not testify, she would not hold that against him. Although trial counsel did not challenge this juror for cause, on habeas review, the district court found that she was biased and granted the writ of habeas corpus, ruling that appellate counsel was ineffective for failing to raise this issue. The Sixth Circuit affirmed, ruling that she was biased because she could not understand the law, and that because impaneling a biased juror cannot be harmless, automatic reversal is required without a showing of prejudice. In so ruling, the Sixth Circuit noted that Juror Arthur made five statements indicating that she did not understand that the defendant was not required to prove his innocence.

Note: The court stated that there can be no reasonable strategic basis for keeping a biased juror, because doing so would amount to waiving the right to an impartial jury. Thus, the court essentially automatically finds deficient performance and prejudice anytime trial counsel fails to object to impaneling a biased juror. The court also seems to state implicitly that the right to an impartial jury cannot be waived. Thus, the claim should be cognizable at any time without being subject to procedural default.

Note: Although the reason the juror was unqualified to serve was that she believed the defendant had to prove his innocence, the court relied on cases involving excusing jurors because of substantial impairment in their ability to consider both a life and a death sentence. The court noted this but held that the life and death-qualification cases were applicable because those cases also stand for the proposition that "a jury should be composed of jurors who will consider and decide the facts impartially and conscientiously apply the law as charged by the court."

Factors to consider in determining whether appellate counsel's failure to raise a claim was deficient:

1. Were the omitted issues "significant and obvious?"
2. Was there arguably contrary authority on the omitted issues?
3. Were the omitted issues clearly stronger than those presented?
4. Were the omitted issues objected to at trial?
5. Were the trial courts rulings subject to deference on appeal?
6. Did appellate counsel testify in a collateral proceeding as to his appeal strategy, and, if so, were the justifications reasonable?
7. What was the appellate counsel's level of experience and expertise?
8. Did the petitioner and appellate counsel meet and go over the possible issues?
9. Is there evidence that counsel reviewed all the facts?
10. Were the omitted issues dealt with in other assignments of error?
11. Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

In addition to the listed factors, a court may consider prevailing norms of practice as reflected in American Bar Association standards and the like.

Appellate counsel was ineffective: The following actions rendered appellate counsel's performance deficient: 1) appellate counsel failed to raise the juror bias issue or any of the other issues for which the district court issued a certificate of appealability; 2) lead appellate counsel never met with the appellant and only corresponded with him through letters; 3) second chair appellate counsel has no contact with appellant; 4) appellate counsel failed to answer any questions during argument that pertained to the portions of the brief written by co-counsel, even though co-counsel was unable to attend the oral argument; and, 5) counsel's behavior at the other oral argument on the case was unprofessional because counsel: a) laughed during the argument; b) admitted that she might be wrong about one of her contentions; c) gave equivocal responses to questions from justices; d) stated that she wished she had more to say on the appellant's behalf; and, e) displayed a lack of familiarity with the facts.

The court ruled that appellate counsel's failure to meet the ABA standards in dealings with appellant concerning his appeals and appellate counsel's failure to raise the biased juror issue prejudiced Appellant, since no claims of strategy can excuse the seating of a juror unable to follow the law.

***White v. Mitchell*,**
431 F.3d 517 (6th Cir. 2006)
(Gibbons, J., for the court, joined by, Daughtrey, J.; Merritt, J., concurring) (in post-AEDPA case, reversing death sentence because juror who should have been excused for cause served on the jury)

Standard of review: Under the Anti-terrorism and Effective Death Penalty Act, relief cannot be granted unless the state court's decision "was contrary to, or involved an unreasonable application of clearly established" Supreme Court precedent or "was based on an unreasonable determination of facts in light of the evidence presented" during the state court proceedings. A state court decision is contrary to federal law when it "arrives at a conclusion opposite to that reached by the Supreme Court on a question of law" or "decides a case differently than the Supreme Court has on a set of materially indistinguishable facts." A state court decision is an unreasonable application of Supreme Court precedent when it "identifies the correct governing legal principles from Supreme Court decisions but unreasonably applies that principle to the facts" of the case. When a claim has not been reviewed on the merits in state court, these limitations on relief do not apply. Rather, the claim is reviewed de novo by the federal court.

A district court's legal conclusions are reviewed de novo and its factual findings are reviewed for clear error. But where the district court makes no independent findings of fact, the factual findings are reviewed de novo. Mixed questions of law and fact are reviewed under the "unreasonable application" prong of the Anti-terrorism and Effective Death Penalty Act.

The law of procedural default: Procedural default is not a jurisdictional matter. Thus, procedural default is waived if not raised by the opposing party. But a court is permitted to consider procedural default when raised for the first time on appeal.

A federal court is barred from reviewing a claim that is allegedly defaulted in state court if the following four requirements are satisfied: 1) the petitioner failed to comply with a state procedural rule that is applicable to the claim; 2) the state court refused to address the claim on the merits because of the state procedural rule; 3) the state procedural rule is an independent and adequate state ground to foreclose review of the federal constitutional claim; and, 4) the petitioner is unable to establish cause for the default and resulting prejudice, or that a miscarriage of justice will occur if the claim is not addressed on the merits.

In determining whether the state court enforced a procedural bar, the federal court must look to the last reasoned opinion of the state courts and presume that later courts enforced the bar rather than rejecting the claim on the merits.

Plain error review is not on the merits for purposes of procedural default: Plain error review by a state court does not constitute a waiver of procedural default rules. Thus, all claims found not to rise to the level of plain error were defaulted by trial counsel's failure to raise the claim. Because counsel made no attempt to establish cause and prejudice to excuse the default, the federal court could not review claims reviewed by the state court for plain error.

Note: Ineffective assistance of trial counsel can constitute cause and prejudice. Thus, claims addressed by the state court as plain error are reviewable in federal court if trial counsel's ineffectiveness for failing to raise the issue at trial was also raised in state court proceedings.

For purposes of procedural default, a substantive claim and an ineffective assistance of counsel claim for failing to raise the substantive claim are independent claims: In his habeas petition, the petitioner raised a claim that the prosecution improperly excluded women from the jury, and an ineffective assistance of appellate counsel claim for not raising the jury claim. Because the jury claim was not raised in state court, the federal court found the claim defaulted. The ineffective assistance of appellate counsel claim was not sufficient to exhaust the substantive claim, because "where difference between two similar claims is difference in legal theory, exhaustion of one claim is not sufficient to find exhaustion of other claim."

Note: In order to ensure that a federal court can review both a substantive claim and an ineffective assistance of counsel claim for failing to raise the substantive claim, counsel must raise the claim both as a substantive claim alleging ineffective assistance of counsel as cause to excuse the default, and as an independent ineffective assistance of counsel claim for failing to raise the substantive claim.

A claim cannot be considered defaulted because it was raised or could have been raised on direct appeal, when the petitioner asserts evidence outside the original trial record.

The Fifth Amendment privilege against self-incrimination was not violated when statements to an examining psychiatrist were used against the petitioner: Under *Estelle v. Smith*, 451 U.S. 454 (1981), "a criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." By requesting an evaluation for competency to stand trial and by introducing expert testimony at the sentencing phase that relied in part on the examination for competency, the petitioner waived the Fifth Amendment protection under *Estelle*.

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Note: A different result might be reached if the defendant was never informed of the right to refuse to speak to the expert or that statements made to the psychiatrist were not confidential.

Juror Sheppard was qualified to decide petitioner's guilt or innocence: Juror Sheppard originally stated that she had a strong believe that the defendant was guilty based on what she read in the newspapers. She continued, "I mean I will be willing to listen to everything, but I still feel too strong [sic] about this." She also stated that anything the defense presented would not change her mind. Upon inquiry by the prosecution, Juror Sheppard said she could decide the case based only on the evidence presented at trial. She continued by stating that the defense would have to work hard to change her mind, but that she would be willing to listen to the evidence and then make a final decision. She then told defense counsel that the defendant would not want her on the jury. Defense counsel asked her to look him in the eye and tell him that she could put her opinion aside and decide the case based on the evidence, to which she said she could. At this point, defense counsel withdrew his challenge for cause to Sheppard.

Because Sheppard said she could be fair and impartial and unequivocally stated she could set aside any previously formed opinions and decide the petitioner's guilt based on the evidence presented at trial, the state court's determination that she was qualified to serve on the jury was not an unreasonable application of clearly established law.

Reversal is required because Juror Sheppard's ability to impose less than death was substantially impaired: On voir dire concerning the ability to impose less than death and the ability to consider mitigating evidence, Juror Sheppard said she "thinks" she cannot be fair and that she has a strong belief on what the penalty should be if the defendant is found guilty. She then said "I think I could go in and listen to all the facts, but I still have a little bit of doubt. And I think for a person's life, there should not be any doubt whatsoever." Then, she emphatically stated that she believes she should not serve on the jury because of her viewpoints. When questioned by the prosecution, she stated that she would like be a part of punishing the defendant, but that she would obey the law. On re-questioning by defense counsel, Sheppard stated that she would not let her personal feelings and opinions interfere with her fairness and impartiality as a juror. She continued by agreeing that she would be willing to consider mitigating factors with an open mind before deciding on the punishment.

In reviewing these statements, the Sixth Circuit commented that Sheppard made series of highly troubling and contradictory statements with regard to her ability to be a fair and impartial juror for the penalty phase, including that she had doubts as to whether she could follow the law and that she did not think it would be fair to the defendant for her to serve on the jury. The court was struck by the vacillating nature of her responses, contradicting herself from question to question. But, the most problematic statements she made was that she felt a duty to serve on the jury and relished taking part in the imposition of the death penalty in this case. "These statements not only indicate that Sheppard had a strong inclination toward imposing the death penalty, they also indicate that she was looking forward to participating in the imposition of this particular defendant's sentence. Although Sheppard stated subsequent to these comments that she could follow the law and not let her personal feelings interfere, her statements to this effect were far more cursory and, given the frequency with which her statements shifted back and forth on her ability to be fair, such subsequent statements are insufficient to alleviate the grave concerns raised by her previous comments." In light of this, the court found that Juror Sheppard was unable to lay aside her viewpoints and render a verdict based on the evidence. Thus, the court held that the state court ruling that no abuse of discretion occurred for failing to excuse her for cause was contrary to or an unreasonable application of Supreme Court precedent.

Merritt, J., concurring: Because the court was granting the writ on a sentencing phase issue, he would not have reached the merits of the other sentencing phase claims.

Spirko v. Bradshaw,
2005 WL 3528924 (6th Cir. 2005) (unpublished)
(Batchelder, J., joined by, Daughtrey, J., and Gilman, J.)

The court held that the federal district court did not abuse its discretion in ruling that even if the state prosecutor concealed information or misrepresented information, the prosecutor's actions are not fraud on the court and did not bear on the outcome of the federal habeas proceedings.

Issues left unresolved: The court refused to address whether the Anti-Terrorism and Effective Death Penalty Act applies to a Federal Rules of Civil Procedure, Rule 60(b) motion when the original habeas petition was filed prior to the effective date of the Anti-Terrorism and Effective Death Penalty Act. The court also refused to address whether a state prosecuting attorney is an officer of the court for purposes of a fraud-on-the-court claim.

Hicks v. Taft,
431 F.3d 916 (6th Cir. 2005)
(Siler, J., joined by Daughtrey, J., and Clay, J.,)
(denying stay of execution because lethal injection claim was filed shortly before execution date)

On October 5, 2005, Hicks' execution was scheduled for November 29, 2005. On the eve of Hicks' execution, the

federal district court granted Hicks' motion to intervene in a pending lawsuit challenging Ohio's chemicals and procedures for lethal injections. But the district court, denied Hicks' motion for an injunction barring his execution, holding that a balance of the equities weighed against granting an injunction because Hicks unduly delayed in filing his lethal injection litigation. The Sixth Circuit held that this was not an abuse of discretion.

United District Courts for Kentucky

***Moore v. Simpson*,**
2006 WL 83438 (W.D. Ky. 2006)
(Russell, J., construing Federal Rules of Civil Procedure, Rule 60(b) motion as a habeas petition)

While the appeal of the denial of Moore's habeas petition was pending in the United States Court of Appeals for the Sixth Circuit on a motion for rehearing en banc, Moore filed a 60(b) motion in the district court, arguing that the Supreme Court of the United States' decision in *Rompilla v. Beard*, 125 S.Ct. 2456 (2005), establishes that the district court should not have applied 28 U.S.C. § 2254(d)'s limitation on relief standard (contrary to or an unreasonable application of clearly established law) to claims and subparts of claims not adjudicated on the merits in state court. Moore requested that the district court reopen his habeas petition to apply de novo review to any claims or subparts of claims that were not addressed on the merits in state court.

Jurisdiction to entertain a 60(b) motion while an appeal is pending: Ordinarily, a court loses jurisdiction over an action once a party files a notice of appeal as that action transfers jurisdiction to the appellate court. Yet, a federal district court has jurisdiction to provisionally grant a 60(b) motion, which entitles a petitioner to request a limited remand from the appellate court for the purpose of granting the 60(b) motion.

The difference between a 60(b) motion and a habeas petition: A purported 60(b) motion is properly construed as a 60(b) motion when the motion attacks some defect in the integrity of the federal habeas proceedings. On the other hand, a purported 60(b) motion that seeks to advance one or more substantive claims after denial of a habeas petition must be reclassified as a successive habeas petition. A claim is an asserted federal basis for relief from a state court's judgment or conviction. For example, a motion that contends a substantive change in the law should justify relief under Rule 60(b) must be reclassified as a successive habeas petition. The same is true for a motion that attacks the federal court's previous resolution of a claim on the merits.

What is cognizable in a 60(b) motion?: A motion that attacks the integrity of the federal habeas proceedings in contradistinction to an attack on the court's resolution of a particular claim on the merits is permissible. This type of motion is limited to fraud on the federal habeas corpus court, which does not include an attack based on the movant's own conduct or the omissions of his counsel for such is in effect asking for a second chance to have the merits determined favorably.

Moore's claim is not cognizable in a 60(b) motion: To the extent Moore claims that the court used an improper standard of review, he should have raised that issue on appeal to the Sixth Circuit, particularly because in the opinion denying habeas relief, the district court mentioned that Sixth Circuit law conflicts with all other circuits to have considered the issue and also appears to be inconsistent with recent United States Supreme Court law. "In preparing Moore's appeal, appellate counsel missed this waiving red flag. That oversight constitutes an omission of counsel not a defect in the integrity of the court's proceeding." Thus, Moore's claim is not cognizable as a 60(b) motion.

Note: The district court, in this opinion, and the Sixth Circuit have taken a restrictive view of the scope of 60(b) motions addressing federal habeas adjudications. 60(b) law is governed by Gonzales v. Crosby, 125 S.Ct. 2641 (2005). The leading Sixth Circuit case is Post v. Bradshaw, 422 F.3d 419 (6th Cir. 2005). Whether the Sixth Circuit's interpretation of 60(b) motions is consistent with Gonzales is an open issue, as is whether a certificate of appealability is required to appeal the denial of a 60(b) motion.

Kentucky Supreme Court

***Iseral v. Winchester*,**
2005 WL 3500792 (Ky. 2005) (unpublished)

After finding Iseral guilty of murder, the jury recommended a fifty year sentence, which the trial judge imposed. On direct appeal, the Kentucky Supreme Court affirmed Iseral's convictions but remanded for a new sentencing phase. The Commonwealth announced its intent to seek the death penalty. Iseral moved to preclude the death penalty, arguing that seeking death was prohibited by the double jeopardy clause because the jury did not recommend death at his first trial. After the trial court denied the motion, Iseral sought a writ of prohibition in the Kentucky Supreme Court.

Iseral argued that *Apprendi v. New Jersey*, *Ring v Arizona*, and *Sattazahn v. Pennsylvania*, requires the Kentucky Supreme Court to overrule Kentucky law on when the imposition of a lesser sentence prohibits seeking death on retrial. The court declined this invitation and reiterated its holding in *Salinas v. Payne*, 169 SW.3d 536 (Ky. 2005), that "an implied acquittal of the death penalty occurs only where the jury or reviewing court affirmatively finds that the Commonwealth has failed to prove the existence of an aggravating circumstance."

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In Iseral's case, the verdict forms only required an affirmative finding of an aggravating circumstance before imposing death, life without the possibility of parole, or life without the possibility of parole for 25 years. Iseral's jury had the choice of imposing one of these sentences, or imposing a lesser sentence that did not require finding the existence of an aggravating circumstance. The jury imposed a sentence that did not require finding an aggravating circumstance, but because this did not require them to make an independent finding of whether an aggravating circumstance existed, it cannot be determined that the Commonwealth failed to prove the existence of an aggravating circumstance. Thus, double jeopardy does not bar the Commonwealth from seeking death on retrial.

Note: *Iseral, and the case it relied upon, Salinas, are examples of why, in cases where the death penalty is sought, the jury should be required to make a specific finding of whether each aggravating circumstance has been proven beyond a reasonable doubt. Without such a finding, it appears impossible to satisfy the Kentucky Supreme Court's standard for when double jeopardy bars seeking death at a retrial.*

Note: Whether the Kentucky Supreme Court's double jeopardy jurisprudence in the death penalty context is constitutional remains an open issue. At the resentencing, death was not imposed in Salinas, Iseral, or the earlier case, Eldred. Thus, neither the federal courts nor the Supreme Court of the United States has had the opportunity to address the Kentucky Supreme Court's interpretation of the double jeopardy clause as applied to the death penalty in a case where death was actually imposed.

***Wood v. Commonwealth*,**
178 S.W.3d 500 (Ky. 2005)
(Johnstone, J., for a unanimous court)

Although death was not imposed, the jury found as an aggravating circumstance that "the offense of murder or kidnapping was committed by a person with a prior record of conviction for a capital offense, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions." K.R.S. 532.025(2)(a)(1). On appeal, Wood argued that this aggravating circumstances void for vagueness because the statute fails to 1) define "substantial history"; 2) fails to define "serious assaultive convictions"; and, 3) fails to put people on notice of what type of assaultive conduct may later be used against them as an aggravating circumstance.

Standard for determining when a statute is void for vagueness: A statute is impermissibly vague if it fails to define a statute with sufficient clarity as to inform ordinary persons as to what conduct is prohibited while also not leading to arbitrary or subjective enforcement. When people of common intelligence must guess at the meaning of a statute, it is impermissibly vague.

Death penalty statutes must also channel and direct the sentencer's discretion so as to minimize the risk of capricious or arbitrary application. Clear and objective standards must be in place to provide specific and detailed guidance to the sentencer, and to make the process rationally reviewable by an appellate court. In addition, a capital sentencing scheme must enable the sentencer to draw distinctions between those defendants who deserve capital punishment versus those that do not, and limit the class of death eligible defendants to the point where the sentencer could not believe that the aggravating circumstance applies to every defendant eligible for the death penalty.

K.R.S. 532.025(2)(a)(1) is not vague: By using the plural of "conviction," the legislature has limited the aggravating factor to defendants who have at least two prior assaultive convictions, which is further limited by the word substantial. According to the Kentucky Supreme Court, the average person or juror comprehends the meaning of the word "substantial." Thus, the wording of the statute limits the quantity of prior convictions to be considered. The statute also limits the jury's deliberations to only assaultive behavior that resulted in convictions.

K.R.S. 532.025(2)(a)(1) sufficiently narrows the class of death eligible defendants: Because not every defendant convicted of capital murder will have at least two prior assaultive criminal convictions, the aggravating circumstance sufficiently narrows the class of death eligible offenders.

Jury determines what is "substantial history": The question of what constitutes a "substantial history of serious assaultive criminal convictions" is a question for the jury.

Sufficient evidence of "serious assaultive convictions" was presented at trial: Wood was previously convicted of the following crimes that, according to the Kentucky Supreme Court, could reasonably have been construed as serious assaultive convictions: seventeen counts of first-degree wanton endangerment; one count of third-degree assault; one count of assault in the first degree under extreme emotional disturbance; one count of assault in the fourth degree with a knife; another count of assault in the fourth degree; and, one count of menacing.

Emergency protective order can be used as an aggravating circumstance: Because an emergency protective order is a valid court order that must be obeyed until the court can hear the adverse party, an emergency protective order can be used an aggravating circumstance even though it is granted *ex parte*.

Note: *It is not clear from the court's opinion if the emergency protective order claim was raised as a violation of the Confrontation Clause.*

White v. Commonwealth,
178 S.W.3d 470 (Ky. 2005)
(Roach, J., for a unanimous court)

Law enforcement and public official aggravating circumstance: Kentucky's aggravating circumstance for the killing of a police officer is not applicable solely because the victim was a law enforcement officer. Rather, the officer must be engaged in the lawful performance of his duties at the time he is killed. "Lawful performance of his duties" means while performing a law enforcement function. This condition is not limited to the performance of specific tasks and duties. It also includes being imminently available to carry out those tasks. A police officer being "on duty" satisfies this condition.

The court also held that the killing of a public official aggravating circumstance only applies if the public official was killed while engaged in the lawful performance of his duties.

Evaluating possibly non-unanimous verdicts: If the evidence would support conviction under both theories, the requirement of unanimity is satisfied. However, if the evidence would support a conviction under only one of two alternative theories, the requirement of unanimity is violated.

Woodall v. Commonwealth,
2005 WL 3131603 (Ky. 2005) (unpublished)
(*denying RCr 11.42 relief in a capital case)*

Woodall pled guilty to murder and was sentenced to death by a jury. In a memorandum opinion, the court denied relief without discussing any claims in detail.

Failure to hold competency hearing and mental retardation claim: The court held that the competency and mental retardation claims were speculative and should have been raised on direct appeal. In addition, the failure to request a competency hearing and to raise mental retardation was held not to be ineffective assistance of counsel because the KCPC expert found no evidence of competency or mental retardation.

Claims that could have been or were raised on direct appeal cannot be raised as ineffective assistance of counsel claims in post conviction: The court declined to overrule precedent prohibiting claims that were raised or could have been raisedas palpable error on direct appeal from being raised as an ineffective assistance of counsel claim in post conviction.

Woodall v. Commonwealth,
2005 WL 2674989 (Ky. 2005) (unpublished)

Woodall filed a CR 60.02 motion alleging juror misconduct based on an affidavit from one of his jurors saying that the juror looked up bible verses relating to capital punishment on the internet, printed them out, and brought the verses to the jury room during deliberations.

Availability of CR 60.02: 60.02 is an available when an appellant has already sought relief under RCr 11.42. A CR 60.02 claim, however, cannot rehash arguments that were or should have been raised on direct appeal or pursuant to RCr 11.42.

The juror misconduct claim was untimely: Because the Governor is authorized to set a date of execution at any time after a death sentence has been affirmed, the court denied Woodall's argument that the signing of a death warrant immediately after direct appeal proceedings concluded did not prevent Woodall from fully developing and investigating all of his claims prior to the filing of his 11.42 motion. The court also noted that Woodall unduly delayed by waiting until three before his scheduled execution to interview jurors when he had over fourteen months from the issuance of the court's opinion affirming his conviction to prepare an 11.42 motion. Thus, Woodall's juror misconduct 60.02 motion is procedurally barred because it could have been raised in his 11.42 motion.

Application of RCr 10.04: 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." But the court has previously reversed where a juror consulted a priest and informed another juror of what the priest said. The court distinguished Woodall's case on the ground that no evidence was presented showing that the juror who consulted the bible told other jurors about the bible contents.

The juror misconduct is meritless: Because there is no evidence other than an uncorroborated affidavit from one of the jurors establishing that the bible passages were brought into the jury room or that any other jurors were affected by the present of this material, Woodall's evidence of juror misconduct is insufficient to require reversal.

Note: *The court seems to ignore the impact of the bible passages on the decisionmaking of the juror who consulted the Bible.* ■

Where justice is denied, where poverty is enforced, . . . neither persons nor property will be safe.

— Frederick Douglass

6TH CIRCUIT CASE REVIEW

By David Harshaw, Post-Conviction Branch

***Nash v. Eberlin*,**
437 F.3d 519 (2006)

The Sixth Circuit remands a case for consideration of the entire transcript, which had not been before the district court.

Darrell Nash, Sr., and his spouse, Connie Nash, got into an argument in their kitchen. Connie had just returned home from work. The argument escalated into a fight that then escalated into Nash going upstairs and grabbing his .9 millimeter pistol. When Nash returned to the kitchen, he was grabbed by his son, Darrell, Jr., and the gun discharged into the kitchen floor. Connie fled to their daughter's bedroom. Nash followed. Darrell, Jr., also followed and grabbed Nash again. The gun then discharged into the bedroom wall. Nash fled the scene.

Later, Nash told the police that he only got the gun to scare his wife. At trial, however, he stated that he got the gun in order to remove it from the house. A police officer at the scene overheard Nash on the phone with his son saying, "[S]he did it this time. You can tell her she doesn't have a job any longer because I'm going to F'ing kill her." Nash denied making this statement.

An Ohio trial court convicted Nash of discharging a firearm at or into a habitation as well as felonious assault. The Ohio Fifth District Court of Appeals overturned the former conviction because the applicable statute read "at or into a habitation" rather than "in the habitation." The Court did uphold the felonious assault, holding that returning to an argument with a gun leads to the probable result that the gun will go off.

> *Note: Ohio follows the common law definition of assault, which is: "Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability so to do, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes assault." Black's Law Dictionary, Abridged Sixth Edition (1991). In Kentucky, what we call assault is the common law crime of battery.*

Nash filed a *pro se habeas corpus* petition, saying inartfully (but effectively) that his conviction was had in violation of *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson*, the "relevant question is 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." *Id.* at 319. Nash argued to the district court that the evidence at his trial was that the second shot had not been fired in the direction of Connie Nash. Despite the magistrate judge recommending against granting the writ, the district court granted relief saying: "Even viewing the facts in the light most favorable to the prosecution, a rational trier of fact could not conclude beyond a reasonable doubt that the petitioner knowingly caused or attempted to cause physical harm to his wife or anyone else." The district court relied on the factual findings of the Ohio appellate court to make this determination because the transcript of the trial was not before it.

On appeal, Ohio argued that reversal and remand were required because the transcript showed that there was evidence at the trial that Nash fired the second shot in the direction of his wife. The Sixth Circuit thought that this factual point could be dispositive and so remanded back to the district court. The Sixth Circuit did this despite the fact that Ohio acknowledged that it had not presented the district court with the full transcript and despite Rule 5(c) of the Rules Governing Section 2254 Cases which states that "[t]he respondent must attach to the answer parts of the transcript that the respondent considers relevant."

Supporting the remand, the Sixth Circuit cited 28 U.S.C. § 2254(f) which requires production of a transcript for sufficiency of the evidence claims. The Sixth Circuit also cited its own case of *Adams v. Holland*, 330 F.3d 398 (6th Cir. 2003), in which a defendant/petitioner received a remand for full consideration of a transcript. In *Adams*, the Sixth Circuit stated that the district court should have reviewed the transcript because in *habeas* cases it was required to do so under the caselaw. *Id.* at 406.

***Brown v. Palmer*,**
___ F.3d ____, 2006 WL 618791

The Sixth Circuit upholds a grant of *habeas corpus* on sufficiency of the evidence in a facilitation case.

Like the previous case, this case involves the application of *Jackson v. Virginia*, 443 U.S. 307 (1979).

Josh Brown was parked in his Monte Carlo near a gas station. Witnesses saw another man exit the gas station building and get into Brown's car. Brown then drove his car up to

one of the gas pumps. The second man then alit from the car and approached Jerome Campbell who was also at the gas station standing outside of his Buick. The second man pointed a gun at Campbell. As Campbell fled, the second man fired shots at him. The second man then stole Campbell's Buick.

Brown then tried to drive away but his car skidded on snow. Campbell ran over to Brown's Monte Carlo and punched him through the driver's window. Brown explained to Campbell that he had just met the other man and that Brown was simply giving him a ride. Campbell and a friend then took the Monte Carlo from Brown and drove to a police station to report the carjacking of Campbell's Buick. Brown never contacted the police to get his car back.

Brown was arrested, after being identified through his car. The carjacker was never identified. Brown's defense was that he was just giving the carjacker, who was a stranger to him, a ride. Brown was convicted in the Michigan state courts of being an aider and abettor to robbery, carjacking, and attempted murder. Brown then filed a *habeas corpus* petition, wherein he argued sufficiency of the evidence. The district court granted the writ and the Sixth Circuit affirmed.

The Sixth Circuit laid out the elements of aiding and abetting under Michigan law: the prosecution must prove beyond a reasonable doubt that "(1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted in the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended it when the defendant gave aid or encouragement." Michigan argued that intent could be inferred from the facts of the case. Michigan also argued to the Sixth Circuit that the district court had not given proper deference to the underlying state court decisions.

In ruling for Brown, the Sixth Circuit cited two of its own cases, *Fuller v. Anderson*, 662 F.2d 420 (6th Cir. 1981), and *Hopson v. Folsz*, No. 86-1155, 1987 WL 37432 (6th Cir. May 20, 1987) (unpublished). In *Fuller*, the defendant's conviction of acting as a lookout for an arsonist was overturned. The prosecution put on evidence that Fuller stood guard prior the crime and then ran away with the person who torched the building. The Sixth Circuit ruled that this evidence created a reasonable speculation but not a reasonable doubt that Fuller aided and abetted the arson. In *Hopson*, the defendant's conviction as an accomplice to murder was also overturned. The prosecution put on evidence that Hopson had an argument with the victim shortly before the murder, that Hopson was present when the victim was killed, and that Hopson may have known that the perpetrator intended to kill the victim. The Sixth Circuit concluded that mere animus towards the victim and knowledge of what the killer was going to do did not establish beyond a reasonable doubt that Hopson consciously aided in the murder.

The Sixth Circuit stated that Michigan "offered no evidence that Brown had ever met the gunman prior to arriving at the gas station, that Brown possessed a weapon or handed one to the gunman, or that Brown knew that the gunman was going to commit a robbery and carjacking." The Court found the facts of Brown's case less incriminating than the facts of *Fuller* or *Hopson*.

Remember this case and the cases it cites for your directed verdict motions on facilitation or accomplice cases. ■

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PLAIN VIEW . . .

Ernie Lewis, Public Advocate

Georgia v. Randolph,
126 S.Ct. 1515 (2006)

This is a very interesting case with a very simple holding. Simply stated, the question addressed in this case is whether the seizure of evidence is lawful "with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent." The five person majority opinion written by Justice Souter answers simply: "[w]e hold that, in the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him."

The facts are important. Scott Randolph, apparently a lawyer, and his wife Janet separated in 2001. Janet later returned to the house. On July 6, Janet called the police and said that her husband had taken her son. The police went to the Randolph house, where Janet told the police that Scott was a cocaine user. While this conversation was taking place, Scott Randolph returned home without their son, who had been left at a neighbor's house. Janet and one of the officers went to reclaim the son. When they returned, Janet said again that Scott was a drug user and that he had evidence of that drug use in the house. When the police asked Scott for permission to search for that evidence, Scott refused; when that occurred, the police asked Janet for permission to search for the evidence, and permission was granted. Janet took the officer to a bedroom where a straw with powdery residue on it was found. The officer called the district attorney's office, who advised him to get a warrant. Thereafter, Janet withdrew her consent. A later search warrant resulted in the seizure of additional evidence of drug use. Scott Randolph was indicted for possession of cocaine. The trial court denied Scott's motion to suppress, but the Court of Appeals of Georgia reversed the trial court. The Georgia Supreme Court sustained the Court of Appeals, saying that "the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search." The Supreme Court granted *certiorari.* "to resolve a split of authority on whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search."

One reason the case is interesting is that the case looks at very commonsense realities of people living together. Justice Souter looked first at *United States v. Matlock*, 415 U.S. 164 (1974). There, Matlock was in a squad car when Mrs. Graff, with whom he lived, consented to a search of the house. The Court held that "'the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.'" Important to the Court's use of *Matlock* was that "the reasonableness of such a search is in significant part a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests." The Court next looked at *Minnesota v. Olson*, 495 U.S. 91 (1990), where the Court held that an overnight guest had a reasonable expectation of privacy in his temporary place of residence. Again the Court noted that the expectations of the guest regarding privacy were of importance. "If that customary expectation of courtesy or deference is a foundation of Fourth Amendment rights of a houseguest, it presumably should follow that an inhabitant of shared premises may claim at least as much, and it turns out that the co-inhabitant naturally has an even stronger claim." "In sum, there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders."

The majority opinion addresses what it calls two "loose ends." First, the Court clarifies the respective "rights" of the two co-tenants in giving consent. "The answer appears in the very footnote from which the quoted statement is taken: the 'right' to admit the police to which *Matlock* refers is not an enduring and enforceable ownership right as understood by the private law of property, but is instead the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances."

The second loose end is the "significance of *Matlock* and *Rodriguez* after today's decision." The majority acknowledges the slight effect of their ruling. After all, in *Matlock* the defendant was in a squad car near the house, with no opportunity to object to the consent given by his co-tenant. In *Rodriguez,* the defendant was asleep in the house, again without the opportunity to raise the objection to the consent given by his co-tenant. "If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-

tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out. This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it."

The majority consisted of Justice Souter, the author, and Justices Stevens, Kennedy, Ginsburg, and Breyer. Justice Alito did not take part in the decision.

A second reason the case is interesting is that this is the first search and seizure case in which the Chief Justice has written, and he has done so as the author of the chief dissenting opinion, joined by Justice Scalia. He framed the issue differently from the majority. "The Fourth Amendment protects privacy. If an individual shares information, papers, *or places* with another, he assumes the risk that the other person will in turn share access to that information or those papers *or places* with the government…so too someone who shares a place with another cannot interpose an objection when that person decides to grant access to the police, simply because the objecting individual happens to be present."

The Chief Justice objected to the majority's reliance upon social custom in deciding whether a tenant should be able to consent to a search over the objection of a present co-tenant. "A wide variety of often subtle social conventions may shape expectations about how we act when another shares with us what is otherwise private, and those conventions go by a variety of labels—courtesy, good manners, custom, protocol, even honor among thieves. The Constitution, however, protects not these but privacy, and once privacy has been shared, the shared information, documents, or places remain private only at the discretion of the confidant."

The Chief Justice also questioned whether the right to privacy is in any way enhanced by the majority opinion. "That the rule is so random in its application confirms that it bears no real relation to the privacy protected by the Fourth Amendment. What the majority's rule protects is not so much privacy as the good luck of a co-owner who just happens to be present at the door when the police arrive." "Considering the majority's rule is solely concerned with protecting a person who happens to be present at the door when a police officer asks his co-occupant for consent to search, but not one who is asleep in the next room or in the backyard gardening, the majority has taken a great deal of pain in altering Fourth Amendment doctrine, for precious little (if any) gain in privacy."

A third reason this case is of interest is that it features two senior justices arguing over the use of history and original intent. The Framer's intent is not really at issue in the case. However, Justice Stevens could not resist picking at old wounds. Justice Stevens wrote a concurring opinion in which he made the following point: "[I]f 'original understanding' were to govern the outcome of this case, the search was clearly invalid because the husband did not consent. History, however, is not dispositive because it is now clear, as a matter of constitutional law, that the male and the female are equal partners." This is so, according to Justice Stevens, because in the 18th Century, women could not own property, and only the consent of the husband would matter. Rising to take the bait, Justice Scalia disagreed. "Now that women have authority to consent, as JUSTICE STEVENS claims men alone once did, it does not follow that the spouse who *refuses* consent should be the winner of the contest…The most common practical effect of today's decision, insofar as the contest between the sexes is concerned, is to give men the power to stop women from allowing police into their homes—which is, curiously enough, *precisely* the power that JUSTICE STEVENS disapprovingly presumes men had in 1791."

Finally, the opinion is interesting due to the prevalence of concerns over domestic violence. The majority opinion rejected the notion that the holding of the Court was insensitive to issues surrounding domestic violence. "No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence." The domestic violence concerns are viewed as a "red herring" by the majority. The Chief Justice was particularly concerned about the effect of the majority opinion on victims of domestic violence. "Perhaps the most serious consequence of the majority's rule is its operation in domestic abuse situations, a context in which the present question often arises. Justice Breyer wrote a concurring opinion in which he takes the specter of domestic violence very seriously while rejecting its import in this case. "If a possible abuse victim invites a responding officer to enter a home or consents to the officer's entry request, that invitation (or consent) itself could reflect the victim's fear about being left alone with an abuser…In that context, an invitation (or consent) would provide a special reason for immediate, rather than later, police entry…today's decision will not adversely affect ordinary law enforcement practices.

Justice Thomas writes a dissent in which no other justice agrees. He would have decided the case by relying upon *Coolidge v. New Hamphsire*, 403 U.S. 443 (1971). In *Coolidge*, the Court approved of Coolidge's wife letting officers into their home and taking them to retrieve evidence of murder. The Court held in *Coolidge* that "no Fourth Amendment search occurs where, as here, the spouse of an accused voluntarily leads the police to potential evidence of

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wrongdoing by the accused. *Id*., at 486-490. Because *Coolidge* squarely controls this case, the Court need not address whether police could permissibly have conducted a general search of the Randolph home, based on Mrs. Randolph's consent."

United States v. Grubbs,
126 S.Ct. 1494 (2006)

Jeffrey Grubbs purchased a videotape portraying child pornography from a website operated by the Postal Service. The tape was to be sent to his residence, and a search warrant was obtained in advance to seize the tape after its delivery. The warrant could be executed when "the parcel has been received by a person(s) and has been physically taken into the residence…" A Magistrate Judge issued a warrant, the package was delivered, Grubbs' wife signed for the package, Grubbs was detained as he left the house, and ultimately the tape was seized. Thirty minutes into the search Grubbs was given a copy of the warrant but not the affidavit that contained the language indicating the triggering device for the anticipatory search warrant. Grubbs was arrested and charged with receiving a visual depiction of a minor engaged in sexually explicit conduct in violation of U.S.C § 2252(a)(2). His motion to suppress was overruled by the trial court. However, the 9th Circuit reversed, holding that the warrant violated the particularity requirement of the Fourth Amendment by not including the condition precedent to the anticipatory warrant. "Because the postal inspectors 'failed to present the affidavit—the only document in which the triggering conditions were listed'—to Grubbs or his wife, the 'warrant was…inoperative, and the search was illegal.'"

The United States Supreme Court reversed the 9th Circuit in a unanimous decision written by Justice Scalia (Justice Alito did not participate). The Court held for the first time that anticipatory search warrants are constitutional. "Because the probable-cause requirement looks to whether evidence will be found *when the search is conducted*, all warrants are, in a sense, 'anticipatory.'" "Anticipatory warrants are, therefore, no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed… [T]he probability determination for a conditional anticipatory warrant looks also to the likelihood that the condition will occur, and thus that a proper object of seizure will be on the described premises. In other words, for a conditional anticipatory warrant to comply with the Fourth Amendment's requirement of probable cause, two prerequisites of probability must be satisfied. It must be true not only that *if* the triggering condition occurs 'there is a fair probability that contraband or evidence of a crime will be found in a particular place,' *Gates*, *supra*, at 238, but also that there is probable cause to believe the triggering condition *will occur*. The supporting affidavit must provide the magistrate with sufficient information to evaluate both aspects of the probable-cause determination."

The Court also held that the warrant itself did not have to contain the triggering condition nor did the warrant have to be presented to Grubbs. "The Fourth Amendment, however, does not set forth some general 'particularity requirement.' It specifies only two matters that must be 'particularly describe[ed] in the warrant: 'the place to be searched' and 'the persons or things to be seized.'" "The Fourth Amendment does not require that the warrant set forth the magistrate's basis for finding probable cause, even though probable cause is the quintessential 'precondition to the valid exercise of executive power.' Much less does it require description of a triggering condition."

Justice Souter wrote a concurring opinion joined by Justices Stevens and Ginsburg. They were concerned about not including the triggering condition in the warrant, and equally concerned about the failure to give the warrant to the homeowner. "To begin with, a warrant that fails to tell the truth about what a magistrate authorized cannot inform the police officer's responsibility to respect the limits of authorization… And if a later case holds that the homeowner has a right to inspect the warrant on request, a statement of the condition of authorization would give the owner a right to correct any misapprehension on the police's part that the condition had been met when in fact it not been. If the police were then to enter anyway without a reasonable (albeit incorrect) justification, the search would certainly be open to serious challenge as unreasonable within the meaning of the Fourth Amendment."

Commonwealth v. Kelly,
180 S.W.3d 474 (Ky. 2005)

The Fayette County police received a call from two Waffle House employees saying that a person at the Waffle House was intoxicated and about to drive away. They described the car as a red, older model Camaro with Tennessee tags, and the driver as a white male. The officer went to the Waffle House where he was greeted by two persons he assumed to be the two who had called him. They pointed to a car at a night club across the street. The officer followed the car to a nearby hotel, pulled it over, smelled alcohol, performed field sobriety tests (which the driver failed) and searched Kelly and his car, finding drugs, cash, and a gun. Kelly was arrested and indicted on three counts of trafficking and one count of DUI. He moved to suppress and won his motion. The Court of Appeals sustained the trial court.

The Supreme Court granted discretionary review and reversed in a published decision by Justice Graves. The court held that the phone call from the two Waffle House employees should not be characterized as an anonymous

tip. "While the tipsters did not give their names, they (1) identified themselves as employees of the Waffle House restaurant; and (2) provided the location of the particular restaurant where they worked." The officer thereafter was able to corroborate the tip given by the employees. "When all these facts are considered in their totality (including and especially the pre-detention investigation which verified most of the information given by the tipsters), it is clear to us that this tip was generated from identifiable informants as opposed to anonymous informants.

As a result, the Court gave additional deference to the information when determining whether reasonable suspicion existed to pull over Kelly. "[S]uch tips are entitled to greater 'presumption of reliability' as opposed to the tips of unknown 'anonymous' informants (who theoretically have 'nothing to lose')." Based upon all of the circumstances, the Court held that there was reasonable suspicion to justify the stopping of Kelly.

***Commonwealth v. Priddy*,**
184 S.W.3d 501 (Ky. 2005)

Officer Michael Koenig was driving in Louisville when he was flagged down by a citizen who "told him a six foot tall, 170 pound white male with shoulder-length, black, curly hair, driving a late 1970s model black Ford truck with primer on the hood—was in the K-mart parking lot on 191 Outer Loop and was about to conduct a drug transaction." Koenig went to the K-mart parking lot and saw a car and person who matched the description given by the citizen. Koenig followed the car and stopped it. He saw a "large bulge in Appellee's front pants pocket," which Priddy said was a crack pipe. Priddy was arrested and a search incident thereto revealed methamphetamine. Priddy was indicted on first degree possession of a controlled substance, and possession of drug paraphernalia. After losing a motion to suppress, Priddy entered a conditional plea of guilty. He appealed to the Court of Appeals, which reversed the trial court, finding that the trial court had not entered findings of fact but had instead relied upon the uniform citation which had not been offered into evidence. The Court further held that without the uniform citation, there was insufficient evidence to support a reasonable suspicion.

In a published decision written by Justice Scott, the Supreme Court reversed the Court of Appeals. The Court first stated that there was nothing wrong with the trial court relying upon the uniform citation which had not been filed in the record. The Court noted that "the citation **was used** by the parties during the hearing, as well as, having then been reviewed by the court from its record…We can assume that the Commonwealth had a copy of the officer's citation at the suppression hearing, but it is known from the video record that the officer, **counsel for the Appellee, and the court had a copy and used it.**" "Evidence is what a court is told, knows, sees, or perceives, formally in open court. Exhibits are what are filed in a trial and by such, become part of the record on appeal. And where there is no objection, as here, in a video proceeding, KRE 104(a) is dispositive." "This means that the judge can bring to bear on those questions evidence that might not be admissible at trial—hearsay without worry about hearsay rules, opinion without concern about opinion rules, documents without concern about the best evidence., etc."

The Court went on to hold that there was reasonable articulable suspicion to support the stopping of Priddy. The Court again relied upon the fact that the informant was not "anonymous" but was rather a citizen. "[T]he Court of Appeals failed to consider the different levels of reliability between tips from a 'confidential informant or anonymous tipster' versus that of a citizen, who personally approaches an officer to give information about ongoing criminal activity." Justice Scott's opinion was joined by Justice Graves, Johnstone, Roach, and Wintersheimer.

Justice Cooper wrote a dissenting opinion joined by Justice Lambert. Justice Cooper asserted that the trial court had made an error in evaluating the evidence before him. Justice Cooper wrote that the case was factually similar to *Florida v. J.L.*, 529 U.S. 266 (2000). "The tip accurately described Appellee and his vehicle—information available to anyone in a position to observe. The tipster's only predictive information was that Appellee was selling narcotics to another person. This information, however, unlike the tip in *White*, was not corroborated. Koenig did not witness a drug transaction or even see another person in the K-Mart parking lot." The only "corroboration" came from information in the uniform citation that Priddy had met with another person in the parking lot. "Obviously, the trial court based her crucial finding of fact that Koenig observed Appellee 'meeting up with another subject' in the parking lot on the statement contained in that report and upon her mistaken belief that she had heard Koenig make the same statement during his testimony…Unfortunately, the trial court was not only misled by the statement in the report that she found in the clerk's record, she also mistakenly believed Koenig had repeated the statement during the evidentiary hearing."

The dissenters also believed that there was not a reasonable articulable suspicion in this case. Justice Cooper noted that more is required than a tip be made. "However, all of the post-*J.L.* cases cited in the majority opinion required some factor in addition to a face-to-face encounter to render the tip sufficiently credible to justify the subsequent *Terry* stop…[t]he tipster did not give Koenig his/her name, address, or any information that would have indicated that he/she had reason to know that criminal activity was afoot in the K-Mart parking lot. Koenig did not testify that he observed anything about the tipster's demeanor that caused him to give credibility to the tip. Nor did he testify that the K-Mart

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parking lot was a high-crime area where drug transactions often occurred. In other words, he had no information lending credibility to the anonymous tip except the tip, itself. Under *J.L*, that is not enough."

Nichols v. Commonwealth
2005 WL 2694678, 2005 Ky. App. LEXIS 223
(Ky. Ct. App. 2005)

Williams Wells, a Radcliff police officer worked at a Kroger's in Radcliff during his off-duty hours. On November 2, 2003, he saw David Nichols buy ten boxes of pseudoephedrine pills. He believed that to be too much and called the Elizabethtown Police Department. Officer Boling came to the Kroger's, talked with Wells, and stopped Nichols when he was driving away. Boling asked Nichols for permission to search his car, and Nichols said yes. Marijuana and three Kroger bags containing ten boxes of pseudoephedrine pills was found. Nichols was charged with the unlawful distribution of a methamphetamine precursor, unlawful possession of a methamphetamine precursor, and possession of marijuana. Nichols' motion to suppress was overruled, after which he entered a conditional plea of guilty. Nichols appealed.

In an opinion written by Judge Henry and joined by Judges Combs and Tackett, the Court of Appeals affirmed the decision of the trial court. The Court held that "a tip by a store security guard alleging that a customer has just purchased a large quantity of pseudoephedrine, when considered together with the rational inferences from that act, create a 'reasonable and articulable suspicion' of possible criminal activity sufficient to justify an investigatory stop." The Court considered this a "close question because, like the facts in *Terry*, the suspicious act viewed alone appears as consistent with legal as with illegal activity. We believe that the purchase of a large amount of pseudoephedrine, together with the rational inferences that a trained police officer would make as a result of the purchase, justified a brief investigatory stop."

Smith v. Commonwealth
181 S.W.3d 53 (Ky. Ct. App. 2005)

In this published opinion by Judge Schroder and joined by Judges Combs and Henry, the Court of Appeals looks at the issue of consent to allow the police to take blood and urine from a person involved in a fatal accident. Here, the driver had been taken to the Pineville Hospital following a fatal accident. There she "verbally agreed" to the taking of her blood and urine upon request of the police. The police read her a consent form which she signed while prone. The Court of Appeals agreed that the taking of the blood sample constituted a search under *Schmerber v. California*, 384 U.S. 757 (1966). The Court rejected Smith's assertion that the nature of her injuries had made it impossible to give a voluntary consent. "[W]e believe the testimony of Lifert and Trooper Cashen, along with the consent form, was substantial evidence that Smith had the capacity to and did indeed give her consent to the blood tests."

United States v. Davis
430 F. 3d 345 (6th Cir. 2005)

The DEA was investigating a group of drug traffickers in the Chicago and Detroit areas. As part of this investigation, they began to follow a red Corvette of one of the primary people they were investigating, Presley, and a Range Rover driven by Davis, who they had not been aware of previously. They followed the two cars to Presley's home, and saw Presley talking with Davis in the driveway. The two men drove away from the house and got on the interstate, and Presley lost the DEA. Davis drove into Indiana and was stopped for speeding. Davis was asked if he would consent to a search of his car and he refused. Rocky the drug dog came to the car and failed to alert to it. However, Davis was not allowed to leave. A second drug dog, Sabor, was brought over an hour later, and Sabor alerted to the hatchback of the Range Rover. A search warrant was obtained, and $705,880 in cash and two Tide detergent boxes were seized. A search warrant for Davis' house was obtained; the execution of the warrant revealed a key to a storage locker, which resulted in another warrant and a seizure of $2 million in cash. Davis and Presley were both indicted on charges of conspiracy to distribute and possession with the intent to distribute more than five kilograms of cocaine, among other charges. Their suppression motions were denied. At trial, both were convicted and given 360 months in prison.

The Sixth Circuit reversed Davis' conviction in an opinion written by Judge Moore joined by Judge Carman. The Court held that the initial stop of Davis' car was legal in that Davis was speeding at the time. The Court also held that the police had a reasonable suspicion of further criminal activity sufficient to detain Davis for purposes of the arrival of the drug dog. The Court rejected the government's contention that there was probable cause to hold Davis in order to search his car for contraband. The fact that others had met with Presley and thereafter found to be in possession of cocaine did not constitute probable cause. "[T]his improperly bases a finding of probable cause on 'a person's mere propinquity to others independently suspected of criminal activity.' *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). "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."

The Court next held that while there was probable cause to stop and a reasonable suspicion to detain, that it was violative of the Fourth Amendment to continue to hold Davis

following the failure to alert by the first drug dog. "Once the drug-sniffing dog was brought to the scene and failed to alert positively to the presence of narcotics in the vehicle, the officers' suspicions that Davis was in possession of narcotics were dispelled." "The Fourth Amendment allows police to detain a suspect on reasonable suspicion only for as long as it takes for the police to test the validity of their suspicions. Reasonable suspicion, a limited exception to the probable-cause requirement, does not permit unlimited bites at the apple. Officers must act to confirm or dispel their suspicions quickly. While they may be disappointed when their chosen investigatory technique dispels their suspicions, the Fourth Amendment does not permit them to keep trying until they obtain the desired result. To hold otherwise would permit the *Terry*-stop exception to engulf the general Fourth Amendment prohibition against search and seizure absent probable cause. We thus hold that the officers' detention of Davis's vehicle for the purpose of obtaining a second drug-sniffing dog violated the Fourth Amendment."

The Court rejected the government's assertion that the obtaining of the warrant obviated the illegality. "We hold that the search of Davis's vehicle was tainted by the illegal seizure, and thus the search warrant was insufficient to overcome this constitutional defect…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."

United States v. Henry
429 F. 3d 603 (6th Cir. 2005)

In 2003, Antonio Henry was released on shock probation and reported to his probation officer. A condition of Henry's probation was that he keep the office informed of his residence. At one meeting, the probation officer sent two officers with Henry to his residence. There, one officer stayed downstairs with Henry while the other officer went upstairs to Henry's bedroom to look around. She looked in a gym bad and found a firearm and ammunition. That resulted in an indictment for possession of ammunition by a convicted felon in violation of 18 U.S.C. § 922(g)(1) and 924(3). The district court overruled Henry's motion to suppress and Henry was found guilty and sentenced to 280 months' in prison. Henry appealed to the Sixth Circuit.

In an opinion written by Judge Moore and joined by Judges Daughtrey and Aldrich, the Sixth Circuit reversed. The Court analyzed the propriety of the search using *Griffin v. Wisconsin*, 483 U.S. 868 (1987) rather than *United States v. Knights*, 534 U.S. 112 (2001) because the former was a probationary search while the latter was an investigatory search. "When analyzing the validity of a probation search under the Fourth Amendment, we follow the Court's example by applying its 'two-pronged inquiry.' *United States v. Loney*, 331 F.3d 516 (6th Cir. 2003). 'First, [we] examine whether the relevant regulation or statute pursuant to which the search was conducted satisfies the Fourth Amendment's reasonableness requirement. If so, [we] then analyze whether the facts of the search itself satisfy the regulation or statute at issue.'"

The Court noted that in *United States v. Payne*, 181 F. 3d 781 (6th Cir. 1999), the Court had approved of a previous Kentucky Department of Corrections regulation. Further, in *Loney*, the Court had approved of a regulation similar to Kentucky's out of Ohio. "Because Kentucky's probationary search policy incorporates both the quantum of evidence (*i.e*., reasonable suspicion) approved in *Payne* and the breadth (*i.e*., not just contraband but any probation violation) approved in *Loney*, we hold that the policy is reasonable under the Fourth Amendment."

While the Court held the regulation to be reasonable, the Court held that the specific search conducted here did not constitute reasonable suspicion that Henry was violating a condition of his probation, *i.e,*. that he was staying at a particular place. "Because the government has pointed not to 'articulable reasons' and 'a particularized and objective basis' that Henry violated the residency condition of his probation but instead to a chain of tenuous inferences, we hold that the officers did not have the requisite reasonable suspicion to conduct the search. Having failed the second step of the *Griffin* probationary-search analysis, the search was unreasonable under the Fourth Amendment."

The Court also rejected the government's contention that this was a consensual search due to Henry's having agreed to the conditions of probation which included a search provision. The Court noted that the Supreme Court left this question open in the *Knights* case. However, the Court found that because the search here was not conducted pursuant to the search provision, that consent was not at issue. "Because the search was not conducted for the limited reason set out in the search condition, and no other condition provided for searches pursuant to the government's asserted reason for the search (*i.e.*, a suspected residency violation), Henry did not consent to the search by agreeing to the conditions of his probation—even if such consent were possible."

Finally, the Court rejected the assertion that by agreeing to a home visit, Henry had consented to a search of the bag. "In sum, taking the government's factual allegations as true, Henry consented not to a contraband search but to a home visit to verify his address. In light of the probation conditions and regulations reviewed above, it is clear that consent to a home visit does not encompass consent to a full search."

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United States v. Morgan
435 F.3d 660 (6th Cir. 2006)

This case was written prior to *Georgia v. Randolph* above. It would be interesting to see whether after *Randolph* this case would have been decided differently. In this case, Cassie Morgan contacted the Boone County Sheriff and told him that she suspected her husband was viewing child pornography on their home computer. She also told him that she had installed spyware on the computer. The next day, she called to report domestic violence that had occurred as a result of her confronting her husband about his viewing of child pornography. The police came to the Morgan household and Cassie Morgan signed a consent to search form allowing for a search of a computer located in a common area. The computer was not password protected. She did not tell the police that she had her own personal computer. The police examined the computer's hard drive and found a significant number of images of child pornography. Morgan was indicted on receiving child pornography that had been shipped in interstate commerce in violation of 18 U.S.C. § 2252A(a)(2). When his motion to suppress was denied, he entered a conditional plea of guilty and filed an appeal.

The Sixth Circuit affirmed the decision of the trial court in an opinion written by Judge Moore joined by Judges Rogers and McKeague. The Court held that the case was to be resolved by the case of *United States v. Hunyady*, 409 F. 3d 297 (6th Cir. 2005), in which the Court had held that "there is no Fourth amendment violation if the police conducted the search in good faith reliance on the third-party's *apparent authority* to authorize the search through her consent." The Court found that the police had relied in good faith on Cassie Morgan's consent to search a computer that she had access to and that was not password protected.

United States v. Coffee
434 F.3d 887 (6th Cir. 2006)

The police in Inkster, Michigan, used a confidential informant to buy cocaine base from a male known as J out of a house at 26868 Penn St. When the informant returned to the police, he handed over .3 grams of cocaine base. The police used that information to obtain a search warrant for 26868 Penn St., where 28 bags of marijuana, guns, and 7.6 grams of cocaine base were found. Coffee was indicted for possession with intent to distribute marijuana and cocaine base and being a felon in possession of a firearm. After his motion to suppress was denied, Coffee was tried and convicted on the charged offenses. He appealed to the Sixth Circuit, which affirmed the lower court in an opinion written by Judge Griffin and joined by Judges Siler and Katz.

The Court held that the warrant was properly based upon probable cause. The opinion is highly fact based. While "Adams' affidavit contains no averments that the informant was reliable based on prior contacts, the affidavit does state that the CI had made several purchases in the past from 'Jay' at the specified address. The affidavit also contains substantial independent police corroboration because it details the circumstances of the controlled purchase of the cocaine base. Thus, as the district court properly determined, a magistrate could conclude, based on the totality of the circumstances described in Officer Adams' affidavit, that there was a fair probability that contraband or evidence of a crime would be found at 26868 Penn."

United States v. McClain
430 F.3d 299 (6th Cir. 2005)

On October 12, 2001, the Hendersonville, Tennessee Police Department received a call from a neighbor reporting that a vacant house had a light on in it. An officer went to the house, watched it for awhile, and eventually entered it with gun drawn. He saw what appeared to be the beginning of a marijuana growing operation, although he did not see any marijuana. He left and told his supervisors what he had found. It was determined that Kevin and Tina McClain owned the house, and the police began to watch the house for any continuation of the operation. After a few weeks, a warrant was obtained to search the house. The affidavit used information gained in the initial warrantless entry of the house. The execution of the search warrant, along with other properties, revealed 348 marijuana plants and equipment. McClain and two others were charged with conspiring to manufacture and possess with intent to distribute more than 1000 marijuana plants, among other charges. The district court granted McClain's motion to suppress based upon the illegal warrantless entry, and ruled that evidence obtained pursuant to the warrant was not admissible under the good faith exception.

In an opinion by Judge Batchelder joined by Judges Boggs and Gibbons, the Sixth Circuit affirmed the district court's determination that the initial search was illegal, but overruled the lower court's determination that the good faith exception should not apply. The Court held that the initial entry into the house was done without probable cause, and that it could not be justified by the exigent circumstances exception. "In general, exigent circumstances exist when 'real immediate and serious consequences' would occur if a police officer were to 'postpone [] action to get a warrant.'…[T]he undisputed facts in this case demonstrate that the police did not have probable cause to believe that a burglary was in progress; hence there was no exigency as a consequence of the possible burglary such that *Johnson* would support the warrantless entry."

The Court went on to rule, however, that the evidence obtained pursuant to warrant was admissible under the good faith exception to *United States v. Leon*, 468 U.S. 897 (1984).

The Court framed the issue as one of first impression in the Sixth Circuit: "we must reconcile the 'good faith' exception established in *Leon*…with the 'fruit of the poisonous tree' doctrine first coined in *Nardone v. United States*, 308 U.S. 338 (1939)." "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 held, with the Second and Eighth Circuits that the good faith exception can apply under these circumstances. "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 with 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 wrote a concurring opinion. He wrote, however, because he did not believe the initial entry into the house was illegal. "[M]y judgment would be that there was probable cause to believe that criminal activity was afoot in the house, based on the information on which the officers could reasonably rely that there was not a legitimate reason for activity in the house. Therefore, I would uphold the initial warrantless search as falling under the exigent circumstances exception."

United States v. Buckingham
433 F.3d 508 (6th Cir. 2006)

Officer John Foren of the Milan, Tennessee, Police Department pulled over James Buckingham for having one headlight on the night of October 31, 2003. After deciding not to cite him for that offense and for driving with an expired license, he asked Buckingham if he could search the car. Three or four additional officers in several cars had arrived by the time the consent was requested. Buckingham did not agree to consent, and the officers called for a contraband-sniffing dog. After waiting for 4-5 minutes, Buckingham consented to the search prior to the dog's arrival. A loaded semi-automatic weapon was found. Buckingham was indicted for being a convicted felon in possession of a firearm. The district judge denied Buckingham's motion to suppress, and he entered a conditional plea of guilty.

In a decision by Judge Oberdorfer and joined by Judged Keith and Batchelder, the Sixth Circuit reversed. The Court held that the district court had erred in finding the Buckingham had consented without considering whether he had withdrawn his consent, and thus they vacated and remanded the case back to the lower court. "The record provides support for Buckingham's argument that he withdrew his consent. First, Officer Foren's testimony suggests that Buckingham, when confronted with the officer's request for written consent for the search, withdrew his oral consent…Second, Officer Foren's actions following his exchange with Buckingham indicate that he understood Buckingham had withdrawn the initial, oral consent to the vehicle search: Officer Foren did not proceed with his planned consent search of Buckingham's car; instead, he called for a contraband-sniffing dog in an apparent effort to obtain probable cause and thereby obviate the need for consent."

United States v. Hang Le-Thy Tran
433 F. 3d 472 (6th Cir. 2006)

Hang Le-Thy Tran was indicted for arson. She moved to suppress evidence obtained in a search of her mobile home and of her business. The district court denied the motions; Tran was convicted and sentenced to 72 months imprisonment. She appealed her conviction and the Sixth Circuit reversed on grounds unrelated to her Fourth Amendment claim.

The Court affirmed the lower court's Fourth Amendment decision in an opinion written by Judge Merritt and joined by Judges Moore and Sutton. The Court held that the search warrant for the Kimberly Beauty College had been improperly altered by the police officer to correct an inaccurate address, but that "there was no bad faith, deception, or prejudice as a result. The officer simply tried to correct a minor error and did not know that the document had now become a judicial matter." The Court also held that the warrant for the mobile home had inadequate nexus between the home and the arson, but that the nexus had been provided in testimony before the magistrate issued the warrant. "In this circuit, the failure to establish an adequate nexus between the residence and any criminal activity within the four corners of the affidavit is not necessarily fatal, provided that the information is actually presented to the magistrate through sworn oral testimony…The Fourth Amendment does not require that the basis for probable cause be established in a written affidavit; it merely requires that the information be given by 'Oath or affirmation' before a judicial officer."

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THE SHORT VIEW . . .

1. *Nicholas v. Goord*, 430 F.3d 652 (2nd Cir. 2005). The Second Circuit has joined other circuits in holding that it does not violate the Fourth Amendment to seize body samples in order to construct a database for DNA evaluation. The Second Circuit utilized the special needs doctrine, joining the 7th and 10th Circuits. The 3rd, 4th, 5th, 9th, and 11th Circuits all use a more traditional balancing test. "Although the DNA samples may eventually help law enforcement identify the perpetrator of a crime, at the time of collection, the samples 'in fact provide no evidence in and of themselves of criminal wrongdoing,' and are not sought 'for the investigation of a specific crime,'…Because the state's purpose in conducting DNA indexing is distinct from the ordinary 'crime detection' activities associated with normal law-enforcement concerns, it meets the special-needs threshold."
2. *Duckett v. United States*, 886 A.2d 548 (D.C. 2005). The fact that a license plate number does not show up on a national or local database does not establish reasonable suspicion to pull the car over, according to the DC Court of Appeals. As a result, drugs found after the stop were inadmissible. And, as it turned out, the reason the license plate number did not show up was that there was a lag time between registration and an update of the database.
3. *Miranda v. Cornelius*, 429 F.3d 858 (9th Cir. 2005). A man was teaching his wife to drive. The police saw her drive awkwardly, and followed. When the woman pulled into her driveway and parked her car, she was cited for driving without a license. The car was then impounded. You will recall that a car may be impounded under *Colorado v. Bertine*, 379 U.S. 367 (1987) "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." Here, because the car was on private property, in the plaintiff's driveway (this was a § 1983 civil rights lawsuit), and because there was no further evidence that public safety was threatened, the impoundment was illegal. "[T]he police have no duty to protect a vehicle parked on the owners' property and there was no reason to believe that impoundment would prevent any threat to public safety from its unlawful operation beyond the brief period during which the car was impounded."
4. *State v. Morse*, 123 P.3d 832 (Wash. 2005). The Washington State Supreme Court has ruled under the state constitution that a guest in a house cannot consent to a search of the premises when a person with at least as great an interest in the house is present. The Court rejected the "apparent authority" doctrine of *United States v. Matlock*, 415 U.S. 146 (1974), preferring under the state constitution to look at the "expectations of the people being searched and the scope of the consenting party's authority." The Court did not abandon altogether the notion that a third party can consent, however. "The touchstone of the inquiry is that the person with common authority must have free access to the shared area and authority to invite others into the shared area. That access must be significant enough that it can be concluded that the nonconsenting co-occupant assumed the risk that the consenting co-occupant would invite others into the shared area."
5. *People v. Moss*, 78 Cr. L. 335, 842 N.E.2d 699 (Ill. 2005). The Illinois Supreme Court has decided that it makes a difference whether someone is on parole or probation when evaluating whether a warrantless search is legal under *United States v. Knights*, 534 U.S. 112 (2001). Here, the Court allowed police officers to conduct a warrantless and suspicionless frisk of someone pulled over for a traffic violation who they knew was on probation with a condition mandating consent to searches of person, property, and residence. Essentially, in utilizing *Knight's* balancing test, the Illinois court has decided that the search of a probationer requires reasonable suspicion, while the search of this parolee required no such level of suspicion. "The vulnerable position of the officers, the trooper's concerns about the histories of the men who were pulled over, the defendant's MSR status, and his significantly reduced expectation of privacy make the pat-down search reasonable in light of the totality of the circumstances." The Court also held that the police could question the defendant on matters unrelated to the traffic stop due to the status of the defendant as a parolee. Note that the United States Supreme Court has granted *certiorari* in *Samson v. California* on the question of whether a suspicionless search of a parolee or probationer is constitutional or not.
6. *State v. Williams*, 887 A.2d 190 (N.J. Super. Ct. App. Div. 2005). If the police stop a person in the absence of a reasonable suspicion, and he flees, they may not then arrest him based upon his flight. This includes an arrest for "obstruction," defined in part as preventing a public servant from performing an official function by fleeing. "A citizen's reaction to an unlawful search and seizure may not be criminalized when exercised in a peaceful manner…Not even in good faith could the police officers generate the circumstances upon which they might later base a charge of obstruction…by conducting an unlawful investigatory stop that caused an individual to flee."
7. *Parker v. State*, 182 S.W.3d 923 (Tex. Crim. App. 2006). A boyfriend has a reasonable expectation of privacy in a car rented by his girlfriend. Thus, the boyfriend had standing to challenge a search of the car when he was driving it. This is a question dividing courts around the country. The Texas Court of Criminal Appeals decided on the expectation of privacy issue by considering the

"circumstances surrounding the use of the vehicle, as well as the nature of the relationship between the driver and the lessee…."

8. *State v. Eckel*, 888 A.2d 1266 (N.J. 1/10/06). As a matter of state constitutional law, the New Jersey Supreme Court has rejected the search incident to a law arrest exception in the context of the arrest of an occupant of a car. The US Supreme Court case that the Court rejects is *New York v. Belton*, 453 U.S. 454 (1981). In *Belton* the Court had held that a police officer may search the passenger compartment of a car, including the glove compartment, following the arrest of an occupant. "To us, a warrantless search of an automobile based not on probable cause but solely on the arrest of a person unable to endanger the police or destroy evidence cannot be justified under any exception to the warrant requirement and is unreasonable." The Court stated the New Jersey rule as follows: "Once the occupant of a vehicle has been arrested, removed and secured elsewhere, the considerations informing the search incident to arrest exception are absent and the exception is inapplicable…Obviously, where a defendant has been arrested but has not been removed and secured, the court will be required to determine, on a case-by-case basis whether he or she was in a position to compromise police safety or to carry out the destruction of evidence, thus justifying resort to the search incident to arrest exception."
9. *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006). FBI agents obtained a warrant that authorized the search of a defendant's safe inside of his house and his car. When they went to the defendant's home they searched in other places and seized evidence from there. The 10th Circuit reversed the district court's decision not to suppress the evidence, saying that when there is particularity in the warrant there is no room to interpret it to allow for searches beyond the warrant. While *United States v. Ortega-Jiminez*, 232 F. 3d 1325 (10th Cir. 2000), allowed for courts to use a "standard of practical accuracy rather than technical precision," the Court stated that when there is no room for dispute the job of the reviewing court is not to expand the reach of the particular terms of the warrant. The Court also rejected the good faith exception, saying that the problem in this case "lies in the execution, and not the constitutionality, of the search warrant."
10. *United States v. Coles*, 437 F.3d 361 (3rd Cir. 2006). The police cannot create an exigency illegally and then rely upon that exigency to search a hotel room without a warrant, according to the Third Circuit, which acknowledges that the circuits are split on this issue. In this case, a hotel manager saw drugs in one of his rooms, and invited the police to search the room, which they did illegally. The police then set up surveillance of the room, developing probable cause. Thereafter the police knocked on the door three times, and upon hearing sounds like the flushing of a toilet, they entered the room by force. The Court stated that courts should not endorse "'contrivances by law enforcement officials in their efforts to circumvent the Fourth Amendment's warrant requirement…' It was that decision to conduct a warrantless entry and search of the room, without any urgent need to do so, that impermissibly created the very exigency relied upon by the government in this case."■

KENTUCKY CASE REVIEW

Sam Potter, Frankfort Appeals Branch

Jeffrey Matheney v. Commonwealth
Rendered 3/23/06, To Be Published
2006 WL 733985
Affirming
Opinion by J. Roach,
Concurrence by J. Graves, Dissent by J. Cooper

On March 4, 2001, Matheney bought eight boxes of pseudoephedrine from four different pharmacies, three cans of starting fluid from an auto parts store, and a gallon of liquid fire from a hardware store. The store manager from the last pharmacy from which Matheney bought the pills recognized him from his purchase of Sudafed a couple of weeks before and called the police. An officer confronted Matheney in the parking lot and obtained consent to search his car. The search revealed 396 pills containing pseudoephedrine, the starting fluid, and the liquid fire. A jury found him guilty of manufacturing methamphetamine and for being a second-degree persistent felony offender.

The Court overruled *Kotila's* construction of the manufacturing methamphetamine statute. The court in *Kotila v. Commonwealth*, 114 S.W.3d 226 (Ky., 2003) interpreted the manufacturing methamphetamine statute to require the possession of ***all*** the chemicals or equipment necessary to manufacture methamphetamine. The *Matheny* Court reversed this ruling. *Matheny* interpreted the language of KRS 218A.1432(1)(b), which reads "the chemicals or equipment for the manufacture of methamphetamine," to mean that "one must possess two or more chemicals or items of equipment with the intent to manufacture methamphetamine to fall within the statute." (Slip opinion, 6)

This new interpretation, according to the Court, is not unconstitutionally void for vagueness. This construction does not require a person to guess what combinations will result in a violation of the statute. *Matheny's* interpretation requires that a person possess the requisite chemicals or equipment with the intent to manufacture methamphetamine. This qualification renders it "difficult, if not impossible, for a person to inadvertently purposely or knowingly take action in furtherance of the criminal production or manufacture of dangerous drugs." (Slip opinion, 7) However, a void for vagueness challenge was not directly before the Court. Such a challenge can and should be raised. J. Cooper provides a detailed roadmap for a vagueness challenge in his 41 page dissent. (*See*, dissenting slip opinion, 28-40)

The trial court properly admitted evidence from a pharmacy manager that Matheney had bought pseudoephedrine from her store a couple of weeks before. The manager's direct testimony that he bought pseudoephedrine from her store a short time before explained why she called the police. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky., 1988) does not apply to this testimony because it dealt with the verbal act doctrine and investigative hearsay. Nor does the store manager's testimony violate KRE 404(b) because it showed Matheney's intent to manufacture methamphetamine.


Sam Potter

The prosecutor's misstatement of the law did not constitute reversible error. The Commonwealth Attorney stated in his closing argument that he did not have to prove that Matheney was going to manufacture methamphetamine, but only that Matheney intended the chemicals and equipment he possessed be used to manufacture methamphetamine. The Court said this statement of the law would only be appropriate if the Commonwealth had prosecuted Matheney for complicity. However, no objection was made at trial so the issue is not preserved. Additionally, substantial evidence supported Matheney's conviction.

Proof that a person does not possess pseudoephedrine pills for a claimed lawful purpose is circumstantial evidence that he possesses those pills for an unlawful purpose. Matheny told the police officer that he would send the pills to school with his children because they have allergies. The school nurse and guidance counselor testified that this would violate school policy, that they had been given no notice of any medical problems of the children, and that their teachers would have reported allergy pill use. Matheny also told the police that he took 12 to 16 pills per day. Medical testimony that such consumption would lead to significant medical problems refuted Matheny's statement. This medical testimony and school employee testimony rebutted his claimed lawful use of pseudoephedrine pills and thus tended to prove his intent to manufacture methamphetamine.

Shane Layton Ragland v. Commonwealth
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2006 WL 733983
Reversing and Remanding
Opinion by J. Cooper for Parts I-V,
Per Curium for Part VI

In 1994, Trent DiGiuro died of a single gunshot wound to the head after being shot while sitting on his front porch in Lexington. Bullet fragments, which most likely came from a .243 caliber rifle, were recovered during the autopsy. Six years later, Ragland's ex-girlfriend, Aimee Lloyd, told Lexington police that he confessed to her that he killed DiGiuro. An undercover FBI agent had Lloyd meet Ragland at a bar and secretly record their conversation, in which Ragland allegedly expressed regret for having killed DiGiuro. A jury convicted Ragland of murder and sentenced him to 30 years in prison.

Lloyd told the police that Ragland had showed her the rifle he used to shoot DiGiuro and that he had it at his mother's house in Frankfort. However, Lloyd believed the rifle belonged to Ragland's father and that he may have returned it to his father's residence elsewhere in Frankfort. A search of Ragland's mother's house revealed a .243 caliber rifle with three unspent bullets in the chamber. A search of his father's house revealed an ammunition box that contained 17 unspent .243 caliber bullets. The box indicated that the bullets were manufactured three months before DiGiuro was shot.

Comparative bullet lead analysis (CBLA) is scientifically unreliable and irrelevant, which makes CBLA evidence inadmissible. Kathleen Lundy, an FBI forensic scientist metallurgist, tested the bullets seized by the police and the fragments taken from DiGiuro in a CBLA. Lundy testified at trial in March 2002 that one of the bullets recovered from the rifle and nine of the bullets found in the ammunition box were "analytically indistinguishable" in metallurgical composition from the bullet that killed DiGiuro. She described this as consistent with the bullets having originated from the same source of molten lead.

Significant criticism of CBLA developed contemporaneously with and subsequent to Ragland's trial. This criticism caused the FBI to evaluate its CBLA test results according to the requirements of *Daubert* and *Kumho Tire Co.* A 113 page report rendered in February 2004 seriously challenged the relevancy and reliability of CBLA testing. The FBI announced on September 1, 2005, that it would no longer conduct these tests. Thus, the Court reversed Ragland's conviction, holding that "the finding by the trial court that the evidence is both scientifically reliable and relevant would be clearly erroneous, . . . and a finding that the evidence would be helpful to the jury would be an abuse of discretion." (Slip opinion, 14)

That Lundy gave knowingly false testimony at the *Daubert* hearing did not justify granting a new trial but supported the unreliability of her testimony. During the *Daubert* testimony regarding the CBLA evidence, Lundy made a statement that substantially reduced the number of possible bullets traceable to the lead used to make the bullet that killed DiGiuro. Ragland subsequently learned that this statement was false and cross examined Lundy at trial regarding it. Lundy admitted her testimony was false. An FBI report produced after trial concluded that she knowingly gave this false testimony at the *Daubert* hearing. Lundy was later indicted in Fayette County for false swearing, and she pled guilty to that offense.

When Ragland learned that Lundy had knowingly perjured herself, he moved for a new trial, which the trial judge denied. The Supreme Court wrote that it would not reverse this case solely on the basis of this newly discovered evidence. Ragland's conviction was not obtained by the perjured evidence. Nor does this new evidence prove a motive for Lundy to fabricate the substantive evidence she presented at trial. However, that Lundy gave knowingly false testimony at the *Daubert* hearing reinforced the Court's decision that CBLA evidence does not satisfy the *Daubert/Kumho* requirements.

Comparing the markings from bullets fired by the seized rifle and similar rifles was relevant. A fire arms expert testified that markings on the bullets test-fired from the seized rifle matched the markings on the murder bullet. Markings from bullets test-fired from three other .243 caliber rifles manufactured by the same company during the same time did not match those found on the murder bullet. The fragmentation of the murder bullet prevented the firearms examiner from conclusively stating that the seized rifle fired the murder bullet. Evidence demonstrating that other rifles of the same caliber manufactured by the same company caused different markings on the test-fired bullets enhanced the relevancy of the evidence that markings on the bullets test-fired from the seized rifle were similar to the markings found on the murder bullet. This provided circumstantial evidence that the seized rifle fired the fatal shot.

***Miranda* does not require a talismanic incantation as long as the warnings adequately advised the suspect of his *Miranda* rights.** The transcript of Ragland's videotaped interrogation omitted some of the *Miranda* warnings, including "anything you say can be used against you in court." Suppression hearing testimony indicated that the videotape operator inadvertently turned off the volumes which caused the missing words not to be recorded. A visual review of the tape showed the officer continued to speak and use hand gestures during the silent portion. The officer testified that he fully informed Ragland of his *Miranda* rights. The Court found this explanation to be adequate and did not suppress Ragland's statement.

A suspect may waive his *Miranda* rights either expressly or implicitly. Ragland claimed he did not acknowledge that he understood his *Miranda* rights and that he did not specifically waive them. While the transcript of his statement is inaudible at this point, the tape clearly shows that Ragland nodded his head affirmatively. Shortly thereafter, he made statements that he knew he had the right to counsel. He then voluntarily answered the officer's questions. This provided substantial evidence that Ragland voluntarily waived his *Miranda* rights.

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Ambiguous or equivocal references to an attorney during interrogation do not require the cessation of the interrogation. During his questioning, Ragland asked "do I need to get an attorney for this because I'm really concerned? . . . I don't think I need one but you know . . . (cut off by officer)." A suspect must clearly assert his right to counsel to halt the interrogation. Even the phrase, "maybe I should talk to a lawyer" is insufficient to stop the interrogation. His statements here were insufficient to require cessation of further interrogation.

A statement made by the victim that provided a motive for the accused to kill him is admissible as non-hearsay. Ragland, DiGiuro, and Matt Blandford pledged the same fraternity as freshmen at the University of Kentucky. One afternoon, Ragland boasted that he had slept with a particular female student, who happen to be the girlfriend of a senior member of the fraternity. This person "blackballed" Ragland from the fraternity. Later in the semester, Blandford and DiGiuro encountered Ragland while walking across campus. According to Blandford, Ragland accused him of telling the senior fraternity member, but DiGiuro intervened and said he was responsible. DiGiuro's statement was not hearsay because it was not offered to prove the truth of the statement. Rather, it was offered only to prove that Ragland had a motive to kill DiGiuro.

The prosecutor did not inappropriately comment on Ragland's failure to testify. During the Commonwealth's closing argument, the prosecutor stated "the only person who knows where that shot was fired from exactly is the person sitting in that chair over there [indicating Appellant] and he hasn't seen fit to tell us." Ragland objected, his motion for mistrial was denied, and his requested admonition was not given.

Not every comment that refers to a non-testifying defendant is an impermissible comment on the defendant's failure to testify. Every comment upon silence is not reversible error. A comment violates the defendant's constitutional privilege against self-incrimination only when the comment was manifestly intended to be, or the jury would necessarily infer it to be, a comment upon the defendant's failure to testify. The comment here constituted a concession about and an explanation for an uncertainty as to one aspect of the Commonwealth's theory of the case.

Keith Jackson v. Commonwealth, Daron Haydon v. Commonwealth
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2006 WL 733991
Affirming in Part, and Reversing and Remanding in Part
Opinion by J. Graves, Dissent by C.J. Lambert

Jackson and Haydon, each armed with a gun, approached a truck that was sitting at a car wash in Louisville on March 16, 2002. Jackson, while wearing a mask, approached the passenger side of the vehicle. Haydon, who was unmasked, approached the driver's side. They ordered the four occupants of the truck to get out, empty their pockets, and get on the ground. J. Louis Nance pulled a gun as he got out of the truck and struggled with Haydon. Both Nance and Haydon were shot. During the investigation, both Jackson and Haydon made incriminating statements to the police. Haydon entered conditional guilty pleas to four counts of attempted murder and first-degree robbery and one count of first-degree assault. Jackson entered conditional guilty pleas to those charges as well as to possession of a firearm by a convicted felon and tampering with physical evidence.

***Crawford v. Washington* excludes a co-defendants hearsay statement made during police interrogation.** Both appellants argued that *Bruton v. U.S.* required separate trials. *Bruton* held that it was a violation of the Confrontation Clause to admit unredacted hearsay statements made by a non-testifying defendant at trial if those statements implicate a codefendant unless that codefendant has a fair chance for cross examination. The Commonwealth argued that the statements in these cases constituted an exception to the *Bruton* rule because the statements contained particularized guarantees of trustworthiness. The trial court ruled the statements admissible.

After the trial court's ruling, the United States Supreme Court overruled the particularized guarantees of trustworthiness exception in *Crawford v. Washington*, 541 U.S. 36, 60-61 (2004). Since the statements in this case were made during police interrogations, *Crawford* clearly excluded them. Reversible error occurred in admitting them. Harmless error analysis did not apply in this case because no trial was held.

The facts and circumstances of an interrogation are relevant to determine whether the suspect made a clear and unequivocal request for an attorney. Haydon argued that his statements should be suppressed because he made a clear and unequivocal request for an attorney. The Court disagreed because of the confusion surrounding his questioning prevented his assertions from being clear and unequivocal. He had a pending charge against him in a domestic matter. The investigators had not yet decided if they were going to charge him with a crime in this case. He had already been informed of his rights prior to going on tape and had presumably agreed to waive them.

***Miranda* warnings need only be given when a suspect is subjected to custodial interrogation, which means that he has been placed under arrest or has been deprived of his freedom of action in any significant way.** The lead investigating officer heard Jackson's name from several sources during his investigation. He met Jackson three days after the incident in traffic court with two other detectives. They asked Jackson to accompany them from the courthouse back to the police station to talk about their investigation, and Jackson agreed. The officer questioned him for 30

minutes before reading him his *Miranda* rights. When Jackson made incriminating statements, the officer arrested him and read him his *Miranda* rights. Jackson waved his *Miranda* rights and made more incriminating statements.

Jackson relied on two facts to argue that he was in custody while interrogated. First, the detectives never told him that he was not under arrest or was free to leave. Second, that the officers arrested him mid-interrogation and did not allow him to go home. He argued these facts demonstrated the heightened coercive posture of the situation. The Court ruled that Jackson had not been subjected to a custodial interrogation, relying on the following facts: he had a high school diploma, he was familiar with the criminal justice system, he was asked instead of being ordered to come with the detectives, he freely agreed to do so, and he said he was not threatened or physically coerced when he made his statements to the police.

Jamin Roberson v. Commonwealth,
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2006 WL 435460
Affirming
Unanimous Opinion by J. Scott

On February 24, 2003, Jamin Roberson was arrested at his home in Bowling Green for a murder that occurred three days earlier. The arresting officers advised Roberson of his *Miranda* rights, and Roberson responded by unequivocally stating that he desired to have a lawyer. However, he confessed later that night at the police station. He subsequently entered a conditional guilty plea to murder and first-degree burglary and received a life sentence.

Custodial interrogation must cease when a suspect makes a clear and unequivocal request for counsel, unless the suspect himself initiates further communication, exchanges, or conversations with the interrogators. Roberson's mother expressed an interest in going to the police station with her son because he was only 19 years old. The officers told her she could meet them there if she desired. At the police station one of the arresting officers told Roberson's mother that they had blood evidence against him, that this was a death penalty case, and that she could do nothing for her son. Roberson's mother said that she knew "from TV" that if her son spoke to the police he might receive more favorable treatment. Also, the Commonwealth Attorney told her that there was nothing she could do and that she should go home. When she persisted she was allowed to speak to her son. Upon her advice, he confessed.

Roberson initiated the further communication that led to his confession. At the suggestion of his mother, Roberson reinitiated conversation with the police. Because both the police and Commonwealth Attorney encouraged his mother to go home, she was clearly not acting as an agent on their behalf. No error occurred when the trial judge did not suppress his statement.

Ricky L. Posey v. Commonwealth
Rendered 2/23/06, To Be Published
2006 WL 435407
Affirming
Opinion by J. Graves, dissent by J. Scott

On January 6, 2002, two Louisville police officers attempted to serve an arrest warrant on a person named James Powell at his last known address. Ricky L. Posey answered the door and started speaking with the officers. The officers observed in the home shotgun shells, individually wrapped packets of marijuana, and smelled marijuana. The officers entered the home and arrested Posey for possession of a controlled substance. Posey was indicted for trafficking in marijuana (subsequent offense), possession of a firearm by a convicted felon, and other misdemeanor drug related charges. Posey filed a motion to dismiss the firearm possession charge, arguing that it is unconstitutional. The trial court rejected his motion, and Posey entered a conditional guilty plea reserving this issue for appeal.

KRS 527.040 is not arbitrary or irrational and does not unduly infringe upon the right to bear arms which was reserved to the people through § 1(7) of the Kentucky Constitution. KRS 27.040 makes it a felony for convicted felons to possess, manufacture, or transport a firearm in Kentucky. Posey argued that this violated § 1(7) of the Kentucky Constitution which states that all men have "the right to bear arms in defense of themselves and of the state." The Court found no conflict between the statute and the Constitution, therefore upholding the statute as constitutional.

The most recent version of the Kentucky Constitution uses the term "men," while the previous version used "citizens." Posey argued that the use of the word men included all persons rather than with those who were endowed with the rights and privileges of citizenship. However, the view prevailing when Kentucky's most recent Constitution was formulated was that felons were not endowed with the natural right to possess firearms.

Posey argued that comparing § 145 to § 1(7) of the Kentucky Constitution demonstrates the framers' intent to allow convicted felons to possess firearms. § 145 describes in detail those who are eligible to vote. This section specifically excludes persons who are convicted felons. Posey argued that because § 1(7) does not specifically exclude convicted felons from gun possession, they are entitled to possess guns. However, the Court could not infer a clear intent to allow convicted felons to possess firearms by reference to language utilized in a different section of the Kentucky Constitution for a different purpose. ■

RECENT CASES IN JUVENILE LAW (2000-PRESENT)

Compiled by Tim Arnold, Juvenile Post Dispositional Branch Manager
Updated by Gail Robinson, Juvenile Post Dispositional Branch

Public/Status Offender Cases

Final and Published

N.T.G. v. Commonwealth,
___S.W.3d ___ (Ky. App. Rendered February 17, 2006)
Juvenile Court may not impose probated detention sentence on thirteen (13) year old child when KRS 635.060 (4) prohibits detention for children under fourteen (14).

A.W. v. Commonwealth, 163 S.W.3d 4 (Ky. 2005)
Child can be found in contempt of court for violating a condition of probation. Court may impose sentence longer than sentence that was probated. Contempt sanction may be longer than the maximum detention time permitted for a public offender, as statute was not intended to limit court's contempt powers.

T.D. v. Commonwealth, 165 S.W.3d 480 (Ky. App. 2005)
KRS 159.140 and 630.060 requiring that CDW may not receive an habitual truancy complaint unless adequate assessment of reasons for truancy has been performed by Director of Pupil Personnel must be followed since the statutes are jurisdictional. Child's attorney must be permitted to make closing statement at juvenile court adjudication.

Q.C. v. Commonwealth, 164 S.W.3d 515 (Ky. App. 2005)
Juvenile court has inherent authority to revoke probation, and juvenile probation is sufficiently similar to adult probation that KRS 533.050 applies. Due process requires the Commonwealth to file written notice of alleged violations of probation. However, appeal was dismissed as moot since Q.C. was over 18.

M.M. v. Williams, 113 S.W.3d 82 (Ky. 2003)
A juvenile who wishes to have their judgment stayed pending appeal must file for mandamus in the Court of Appeals. Habeas corpus not appropriate to review issue of whether the judgment is stayed by operation of law.

D.R.T. v. Commonwealth,
111 S.W.3d 392 (Ky. App. 2003), discretionary review denied August 13, 2003
A person who is over 18 at the time of disposition may not be ordered into detention as a disposition.

X.B. v. Commonwealth, 105 S.W.3d 459 (Ky. App. 2003)
Before a child can be committed and removed from the home, the juvenile court must make formal findings which demonstrate that commitment and removal from the home is the least restrictive alternative.

Commonwealth v. M.G., 75 S.W.3d 714 (Ky. App. 2002)
A child has a right to personally confront the victim in a sex offense case, and a juvenile court may not violate that right by conducting an *ex parte* interview of the victim. Social workers are required to *Mirandize* a child before interviewing them, if the worker is acting as an agent of law enforcement. Juveniles have a right against self incrimination in the disposition of a juvenile case, so a child may not be punished for not admitting to his offense as part of a sex offense evaluation.

D.R. v. Commonwealth, 64 S.W.3d 292 (Ky. App. 2001)
Generally a child cannot waive counsel unless they have first had occasion to speak with counsel. (Note: modified by amendment to KRS 610.060). *Boykin* applies in juvenile proceedings.

J.D.K. v. Commonwealth, 54 S.W.3d 174 (Ky. App. 2001)
Juvenile sex offender not required to give blood sample to the Department of Corrections for inclusion in sex offender DNA database.

M.J. v. Commonwealth, 115 S.W.3d 830 (Ky. App. 2003), discretionary review denied
October 15, 2003.
Trial court did not err by continuing trial for two weeks after Commonwealth announced closed, in order to allow the Commonwealth to meet the burden of proof. Continuations are in the sound discretion of the court, and the unavailability of the witness at the time trial commenced justified the trial court letting the Commonwealth re-open their case after announcing closed.

Commonwealth v. J.T. ex. rel. Deweese, 141 S.W.3d 372 (Ky. App. 2003), discretionary review denied October 24, 2003
Juvenile not entitled to discovery before automatic transfer hearing. KRS 610.342 not a rule of discovery, as legislature is not permitted to create a rule of practice and procedure. Discovery rules do not apply to preliminary hearings, such as transfer hearings.

Not to Be Published

W.L. ex. rel. Deweese v. Commonwealth,
2004 WL 406537 (Ky. App. 2004)
Finding that a child used a deadly weapon for the purpose of the Robbery statute does not necessarily equal "use of a firearm" for the purpose of automatic transfer statute, KRS 635.020(4).

C.I. v. Commonwealth, 2003 WL 22361730 (Ky. App. 2003)
Juvenile court not required to conduct a hearing on CR 60.02 motion arguing that the juvenile could not be a sexual offender because he is mentally retarded. While some evidence tended to support allegation of mental retardation, that evidence was insufficient to overcome presumption that original judgment was correct.

I.K. v. Foellger, 2003 WL 22271357 (Ky. App. 2003)
District court may impose a no contact order as condition of release, even where that condition burdens the public school. However, district court may not continue that no contact order after commitment to the Department of Juvenile Justice. DJJ's authority with respect to treatment and placement may not be overruled by the district court.

Youthful Offender Cases

Note: only those with significant application to juvenile practice are included. Only juvenile issues included in summary, so rulings on general criminal law or evidence law issues are not included unless they have special application to juvenile court.

Final and Published

Humphrey v. Commonwealth,
153 S.W.3d 854 (Ky. App. 2004), (discretionary review denied Feb. 9, 2005)
Juvenile's waiver of juvenile transfer hearing must be knowing voluntary and intelligent. Where only evidence of voluntariness of waiver was waiver form, and record was ambiguous about whether juvenile was properly advised by counsel, hearing was appropriate to determine whether the waiver was knowing, voluntary and intelligent.

Caldwell v. Commonwealth, 133 S.W.3d 445 (Ky. 2004)
Apprendi v. New Jersey, 530 U.S. 466 (2000) does not apply to juvenile transfer proceedings. Factors relevant to transfer do not have to be submitted to a jury or proved beyond a reasonable doubt.

Phelps v. Commonwealth, 124 S.W.3d 237 (Ky. 2004)
A juvenile court adjudication is not a "conviction" for the purposes of any offense under the penal code, so a youthful offender cannot be charged with being a "second or subsequent offender" or a "felon in possession of a firearm" on the basis of the offender's prior juvenile court record. Also, substantial defects in the degree of the offenses for which the child was indicted warrants dismissal of the indictment, and remand to juvenile court for a new transfer hearing.

Welch v. Commonwealth, 149 S.W.3d 407 (Ky. 2004)
Defendant was entitled to be informed of his *Miranda* rights before being asked to make incriminating admissions at a program for adjudicated juvenile sexual offenders. Admissions made to counselors without benefit of *Miranda* warnings are inadmissible. Admissions subsequently made to sheriff's deputies, while defendant was still a resident of the treatment program, were fruit of the poisonous tree.

Commonwealth v. Jeffries, 95 S.W.3d 60 (Ky. 2002)
Juvenile entitled to a meaningful opportunity to be heard at his 18 year old hearing. This right was denied when the trial court denied Jeffries the right to present evidence in mitigation, and to controvert the contents of a report submitted by the Commonwealth.

Commonwealth v. Townsend, 87 S.W.3d 12 (Ky. 2002)
Juvenile who agreed at his 18 year old hearing to be remanded to a DJJ institution for six months and then returned to court for a decision about whether to be probated or remanded to corrections, waived his right under the statute to be "finally discharged" upon the completion of the juvenile treatment program. (Note: KRS 640.030(2) amended subsequent to this to remove the "finally discharged" language).

Commonwealth v. Davis, 80 S.W.3d 757 (Ky. 2002)
Juvenile who did not challenge whether he met the minimum criterion for transfer to circuit court and trial as an adult in either the circuit or district court waived his right to make that challenge on appeal.

Manns v. Commonwealth, 80 S.W.3d 430 (Ky. 2002)
Juvenile court adjudication is not a "conviction" for the purpose of the rule of evidence permitting impeachment by prior "convictions." Statute permitting juvenile records to be used at sentencing or for impeachment is unconstitutional to the extent that it applied to the use of those records as impeachment. Juvenile court adjudications can be used at sentencing, provided they meet the minimum qualifications provided by statute.

Barth v. Commonwealth, 80 S.W.3d 390 (Ky. 2001)
Co-defendant's statement, which was inadmissible at trial, was admissible at juvenile transfer hearing for the purpose of establishing probable cause. Rules of evidence do not apply in a transfer hearing.

Osborne v. Commonwealth, 43 S.W.3d 234 (Ky. 2001)
Fact that burglary charge was omitted from transfer order transferring child to circuit court for trial as an adult on

Continued on page 50

Continued from page 49

robbery and murder charges did not deprive circuit court of jurisdiction over burglary count. KRS 640.010 provides process for transferring the child, not the charge, and indictment can vary from transfer order so long as the child would still be eligible for transfer on indicted offenses.

Gourley v. Commonwealth, 37 S.W.3d 792 (Ky. App. 2001) Youthful Offender entitled to have PSI done by Department of Juvenile Justice, rather than Probation and Parole. Court order directing Probation and Parole to do PSI in YO case was prejudicial and reversible.

Stout v. Commonwealth, 44 S.W.3d 781 (Ky. App. 2001) Decision about whether to transfer juvenile under KRS 640.010 (the "eight factors test") must be supported by substantial evidence.

Darden v. Commonwealth, 52 S.W.3d 574 (Ky. 2001) Juvenile may not be tried as an adult for mere possession of a firearm. "Use of a firearm" is required under KRS 635.020(4), and possession does not equal use.

Cases in the MDR Pipeline
(MDR Pending or Recently Granted or Denied in Appellate Court)

Supreme Court

B.B. v. Commonwealth – Were statements by a complaining witness to a nurse and social worker admissible at B.B.'s sodomy trial? Was the 4 year old child a competent witness? **Pending.**

N.S. v. Commonwealth – can a 13 year old who has sex with an 11 year old be adjudicated guilty of first degree rape? **Denied.**

B.P. v. Commonwealth – Can a juvenile court enter a status offender which subjects a child to the possibility of detention for contempt for the offense of possession of tobacco by a minor? **Denied.**

J.B. v. Commonwealth – What is an "adequate assessment" under KRS 159.140 and KRS 630.060(2) which the Director of Pupil Personnel is required to make before the CDW can accept an habitual truancy complaint? **Denied.**

N.S. v. Commonwealth – Can a judge reject a disposition in the community to which the prosecutor, DJJ and the defense agree and commit a child to DJJ solely based on the child's record? **Denied.**

C.N. v. Commonwealth – Can a school circumvent IDEA requirements when the "school resource officer" files the petition against the child resulting in the child's removal from school? **Denied.**

Court of Appeals

S.L.K. v. Commonwealth, B.J. v. Commonwealth, M.F. v. Commonwealth – Can a court require a person over 18 to pay restitution for an offense committed when the person was a juvenile? Note: courts below were split on this issue. **Granted.**

W.D.B. v. Commonwealth – Should the trial court have found the prosecution barred by the infancy defense? Should the trial court have conducted a *Daubert* hearing concerning the sex offender evaluation? **Granted.** ■

PRACTICE CORNER

Litigation Tips & Comments

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

A Directed Verdict Motion May Not Be Enough: How to Preserve Sufficiency Claims

To preserve a claim that the evidence is insufficient to support a conviction, defense counsel must do more than utter the words, "I move for a directed verdict." The motion must be specific, renewed, and will likely need to be followed by an objection to the instructions. To ensure that the client's appellate rights are protected, the following steps are highly recommended:

1. The Motion must be Specific – A general motion for directed verdict will be viewed on appeal is little better than no motion at all. Failure to state specific grounds for a directed verdict motion forecloses appellate review of the denial of the motion. *Pate v. Commonwealth*, 134 S.W.3d 593, 597-98 (Ky., 2004); *see also* CR 50.01 ("A motion for a directed verdict shall state the specific grounds therefore."). The best way to be specific is simply to go down the elements of the offense arguing any that are absolutely clear. The breakdown of offenses in the back of the Criminal Law of Kentucky green books is very helpful for this practice.

2. A Motion may be made at the end of the Commonwealth's case, but must be made at the close of all the evidence. *Baker v. Commonwealth*, 973 S.W.2d 54, 55 (Ky., 1998). If a specific motion is made at the end of the Commonwealth's case, then a later renewal of the motion "on the same grounds" will preserve the issue without need to repeat the specifics. *Hill v. Commonwealth*, 125 S.W.3d 221, 230 (Ky., 2004). If no defense evidence is presented, then it is not required that the motion be renewed because no additional evidence has been presented. *Scruggs v. Commonwealth*, 566 S.W.2d 405 (Ky., 1978). If defense evidence is presented and the Commonwealth introduces rebuttal evidence, then the Motion for directed verdict must be made or renewed after all the evidence is closed. *Baker*, *supra*.

3. IMPORTANT! - If the evidence supports any lesser included offense, then the issue may only be preserved by a timely objection to the jury instructions. *Baker*, *supra*. If the evidence is insufficient to support the primary charge, then counsel must object to the giving of that instruction and tender instructions for the lesser included offenses that are supported by the evidence. This method of preservation is required because a directed verdict is only appropriate "when the defendant is entitled to a complete acquittal *i.e.*, when, looking at the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, under any possible theory, of any of the crimes charged in the indictment or of any lesser included offenses." *Campbell v. Commonwealth*, 564 S.W.2d 528, 530 (Ky., 1978).

SO WHAT? You may think that preserving sufficiency is not that important because surely, if an appellate court reviews anything, it will review whether the Commonwealth proved the defendant guilty beyond a reasonable doubt. In *Potts v. Commonwealth*, 172 S.W.3d 345 (Ky., 2005), the Kentucky Supreme Court emphasized the importance of preserving sufficiency claims. Under RCr 10.26, unpreserved claims are reviewed only for a palpable error that affected the defendant's substantial rights and resulted in manifest injustice. In *Potts*, the Court rejected DPA's argument that a conviction based on insufficient evidence *always* meets the 10.26 standard. Instead, the court reiterated the "well-established requirement that a party properly preserve a claim of insufficiency of evidence by informing the trial court of the relief requested and the reasons therefore."

I Know Certified and YOU are Not Certified

FROM Roger Gibbs:
At some recent arson training's for law enforcement, participants have been told that once they take the training and pass the written test they become "certified arson investigators." A Local Public safety director even said in paper recently that Laurel county now has five "certified" arson investigators where before it had none. For everyone's information, just taking the training and passing the test will not make anyone certified. There is a certification process to go through with the National Certification Board of the National Association of Fire Investigators in Sarasota Florida. Taking the training and passing the test is part of the process (NAFI web site: http://www.nafi.org/cfei.htm)

So if all of sudden there are newly certified arson investigators offering opinions in your cases, the National organization can be reached at 1-877-506-NAFI. You can check the credentials with them.

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. ■

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