The Advocate

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

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Criminal Justice Legislation of the 2006 General Assembly

- A Closer Look at Wrongful Conviction in Kentucky
- The 2006 Supplement to Meth Manufacturing
- Pretrial Service Risk Assessment

Highlights from the 34th Annual Public Defender Awards Dinner

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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

New laws enacted by the General Assembly go into effect this month, in this edition Margaret Case and Ernie Lewis provide a review of all the criminal justice legislation of the 2006 General Assembly.

This edition brings the first in a series of articles to explore what went wrong in recent wrongful convictions in Kentucky. Kentucky Innocence Project attorney Melanie Lowe's article starts the series with an overview of Kentucky exonerations.

Leading Meth Defense attorney B. Scott West updates his Meth Manufacturing: The Defense Attorney's Notebook following the overruling of *Kotila* in *Matheny v. Commonwealth*.

The Administrative Office of the Courts Pretrial Services is rolling out a new proven system for risk assessment. This new tool to assist courts in making pretrial release decisions is described along with an overview of the validation study of the instrument.

In June, the Department of Public Advocacy held its annual seminar for over 450 public defenders and staff in Northern Kentucky. Special guests at the awards dinner included Governor Ernie Fletcher, Chief Justice Joseph Lambert, Justice Will Scott, Court of Appeals Chief Judge Sara Combs, and new Justice Cabinet Secretary Norman Arflack. The DPA honored a number of outstanding public defenders as highlighted in this edition.

Note: A number of important Supreme Court decisions have come down after the deadline for this edition. These decisions will be discussed in upcoming editions.

Special Juvenile Justice Edition: September marks the 100th Anniversary of Juvenile Court in Kentucky. In honor of this occasion the September Advocate will be devoted to juvenile justice issues. ■

CRIMINAL JUSTICE LEGISLATION OF THE 2006 GENERAL ASSEMBLY

By Ernie Lewis, Public Advocate, and Margaret Case, General Counsel

The following is a review of all of the criminal justice legislation of the 2006 General Assembly. We hope that it is helpful to you. However, we encourage you to consult the statutory language under appropriate circumstances. The effective date of this new legislation is July 12, 2006.

House Bill 3: Sex, Juveniles, PFO, Violent Offender

Proponents of this bill presented it as having resulted from a series of public meetings held by the Kentucky Coalition Against Sexual Assaults. It is well over 100 pages long and covers many different matters, some of which are unrelated to sex offenses. The most important changes in the law are dealt with here.

State legislation to pre-empt the field of sex offender and violent offender laws

- A new section of KRS Chapter 65, ("General Provisions Applicable to Counties, Cities, and Other Local Units"), states the General Assembly's intent to occupy the entire field of laws relating to persons who have committed violent offenses defined in KRS 439.3401 and the following sex offenses:
  - A felony defined KRS Chapter 510, the sex offense chapter
  - KRS 530.020: incest
  - KRS 530.064(1)(a): First-degree unlawful transaction with a minor involving sexual activity
  - KRS 531.310: Use of a minor in a sexual performance
  - KRS 531.320: Promoting a sexual performance by a minor
  - A felony attempt to commit any of the above-listed offenses
  - Felonies, similar to the above-listed offenses, from the federal jurisdiction, U.S. military jurisdiction, or another state or territory.
- No political subdivision of the state may legislate in these areas. Any pre-existing ordinance, resolution, or rule in the area will be null, void, and unenforceable on July 12, 2006.

Changes to Penal Code offenses

- Third-degree rape, (KRS 510.060), third-degree sodomy, (KRS 510.090), and second-degree sexual abuse, (KRS 510.110), are expanded to include sexual intercourse, deviate sexual intercourse, and sexual contact with a person under 16, if the defendant came into contact with the person by being in a position of authority or special trust, as defined in KRS 532.045.
- First-degree sexual abuse, (KRS 510.110), becomes a Class C felony when the victim is under the age of 12.
- KRS 510.155 is amended. Cellular telephones are added to the list of electronic means by which one may not procure or promote the use of a minor in certain illegal sexual activity. And, the list of prohibited conduct in the statute is expanded to include third-degree rape, third-degree sodomy, first-degree promoting prostitution, and any Chapter 531 pornography offense.
- A new section of KRS Chapter 519, "Obstruction of Public Administration," creates a new Class D felony: tampering with a prisoner monitoring device.
- Under an amended KRS 530.020, the crime of incest:
  - Stays a Class C felony if the act is committed by consenting adults,
  - Becomes a Class B felony if it is committed by forcible compulsion or involves a victim either under the age of 18 or incapable of consent because of physical helplessness or mental incapacitation, and
  - Becomes a Class A felony if it involves a victim who either is under the age of 12 or receives serious physical injury.

This new difference in classification makes the incest penalties an almost mirror image of the first-degree rape penalties.

- First-degree unlawful transaction with a minor is divided into two distinctly separate types:
  - KRS 530.064(1)(a) – Knowingly inducing, assisting, or causing a minor to engage in illegal sexual activity, and
  - KRS 530.064(1)(b) — Knowingly inducing, assisting, or causing a minor to engage in illegal controlled substances activity (other than activity involving marijuana).

The distinction is designed to prevent the unintended consequence of sex offender laws being applied to people whose crimes involved only controlled substances activity.

This change in the law necessitated amendments to many, many provisions throughout the Kentucky Revised Statutes, including various professional licensing statutes and KRS 421.350, which deals with a child's testimony being televised via closed circuit equipment. After the effective date of House Bill 3, anyone facing a situation

that involves the alleged unlawful transaction with a minor should check on whether other relevant statutes have been changed.

- When a person employed by or working on behalf of a state or local agency is charged with an offense in KRS Chapter 510, the complaining witness is deemed incapable of consent if he or she was under the care or custody of that agency pursuant to court order. This provision does not apply if (a) the people are lawfully married to each other and (b) there was no court order against contact between them.
- Under the current version of KRS 531.335, possession of matter portraying a sexual performance by a minor is a Class A misdemeanor for the first offense, with subsequent offenses being raised to Class D felonies. Under House Bill 3, all offenses, including the first, will be Class D felonies.
- Distribution of matter portraying a sexual performance by a minor, (KRS 531.340), and advertising such material, (KRS 531.360), are raised to Class C felonies for subsequent offenses.

New offenses outside the Penal Code

- A new section of KRS 17.500-17.580 creates new offenses related to sex offender registration. Each of the following is a Class A misdemeanor for the first offense and a Class D felony for each subsequent offense:
  - Making a false and misleading statement regarding a noncompliant registrant to a law enforcement official, (which is very broadly defined).
  - Harboring a noncompliant registrant for the purpose of avoiding registration.
- Subsequent violations of the sex offender registration requirements of KRS 17.510 will now be Class C felonies under KRS 17.510(11).
- Under KRS 17.510(12), subsequent convictions for giving false, misleading, or incomplete sex offender registry information will now be Class C felonies.

Pre-trial release of alleged sex offenders

- KRS 431.520 is amended to mandate that, when an alleged sex offender is released on personal recognizance or unsecured bail bond, the court must consider requiring electronic monitoring and must consider requiring home incarceration.

Sex offender treatment programs

- The adult privilege statute, KRS 197.440, is amended, to specify those sex offender treatment program communications that are protected by the privilege are not subject to disclosure under KRS 620.030, which pertains to the duty of reporting dependency, neglect, or abuse.
- The juvenile privilege statute, KRS 635.527, is also amended. Its new language tracks the language of the adult statute, KRS 197.440, including the provision reported above concerning KRS 620.030.

Sex offender registration

- The list of offenders who are subject to mandatory registration, (KRS 17.500 et seq.), is expanded to also include:
  - Any person whose sexual offense has been diverted pursuant to KRS 533.020, until the diversionary period is successfully completed,
  - Any person convicted of first-degree unlawful transaction with a minor for having knowingly induced, assisted, or caused a minor to engage in illegal sexual activity, or an attempt to commit that offense, and
  - Any offense in KRS Chapter 531, ("Pornography"), or an attempt to commit such an offense, involving a minor or depictions of a minor.
- Notification to a sex offender about the registration requirement must be made
  - By the court, if no period of incarceration is imposed or if the offender is probated or conditionally discharged, or
  - By "the official in charge of the place of confinement," upon release from a period of incarceration.
- The person giving this notification must order the person to register with the appropriate local probation and parole office.
- The person giving this notification must obtain the person's fingerprint and photograph.
- The registrant must return to the appropriate local probation and parole office once every two years for a new photograph.
- A new section of KRS Chapter 439, ("Probation and Parole"), will require that officers be trained on the sex offender registration laws and be able to (a) register or re-register an offender and (b) answer questions about the registration law and its requirements. Also, the Justice Cabinet must provide each probation and parole office with copies, (for distribution), of the sex offender registration statutes, any administrative regulations concerning registration, a brochure explaining the registration requirements in lay person's terms, registration forms, fingerprint cards, etc.
- A sex offender from another jurisdiction, who (a) was notified about a registration requirement in the other jurisdiction, or (b) was committed as a sexually violent predator in the other jurisdiction, or (c) has a "similar conviction" from another country, must comply with Kentucky's registration law within five (5) working days of relocation to Kentucky.
- Within five (5) working days after obtaining a new residence, the offender must register with the probation and parole office in the county of the new residence.
- An offender's "residence" is any place where the offender sleeps. A single offender can have more than one residence and must register each one. It appears that the registration requirement is written broadly enough to necessitate registration during such periods as visits with relatives in their homes, vacations, and hospitalizations.

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- KRS 17.510(7), which requires registration upon entering Kentucky for employment or study, now requires that the registration occur within five (5) working days.
- Anyone required to register under federal law or the laws of another state or territory shall be presumed to know of the duty to register in Kentucky.
- Duration of the registration requirement is also changed.
  - Lifetime registration due to prior convictions is now limited to just those prior crimes that are felonies; KRS 17.520(2)(a)(3) and (4) are amended.
  - Non-lifetime registration under KRS 17.520(3) is increased from ten to twenty (20) years.
- KRS 431.005 is amended, to specify that a peace officer may make a warrantless arrest when the officer has probable cause, based upon information from the Law Information Network of Kentucky, to believe that a person is out of compliance with sex offender registration requirements.
- Currently, a violation of sex offender registration requirements is a Class D felony. Under the new version of KRS 17.510(11), subsequent offenses will be Class C felonies.
- Currently, the giving of false, misleading, or incomplete registration information is a Class D felony. Under the new version of KRS 17.510(12), subsequent offenses will be Class C felonies.
- Registrant information on the Kentucky State Police website will be expanded under an amendment to KRS 17.580(1). New information on the website will concern the registrant's crime of conviction, the elements of the offense, whether the registrant is on probation or parole, and whether the registrant is in compliance with relevant laws.

Residence restrictions on sex offenders

- The class of sex offenders subject to residence restrictions is expanded. Currently, the restrictions apply to sex offenders who are on probation, parole, or other form of release. Under the new law, the restrictions will apply to all persons required to be registered, including those who have served out their sentences or been discharged from parole.
- The list of places, from which a sex offender's residence must be at least 1000' away, is expanded. Currently, a sex offender may not reside within 1000' of a high school, middle school, elementary school, preschool, or licensed day care facility. Under the new law, that list will include a "publicly owned playground." (KRS 17.495 is amended.)
- The way to measure the 1000' has also been changed. Currently, the measurement is between the walls of the relevant buildings. Under the new law, that measurement will be "from the nearest property line of the school to the nearest property line of the registrant's place of residence."
- A registrant's "residence" is any place where the registrant sleeps. A registrant may have more than one address and is required to register each of them.
- As of the new law's effective date, (July 12, 2006), any registrant living within 1000' of a facility on the prohibited list must move within 90 days.
- If a new facility opens within 1000' of a registrant's residence, the registrant is presumed to know about it and must move within 90 days to a place more than 1000' away from any facility of the type on the prohibited list.
- Violation of the residence restrictions is a Class A misdemeanor for the first offense and is a Class D felony for each subsequent offense.

Juveniles

- KRS 17.170 is amended. The Department of Juvenile Justice shall take a DNA sample from any youthful offender who is in the Department's custody by virtue of a felony sex offense conviction under KRS Chapter 510 or incest under KRS 530.020. The sample will be for law enforcement identification purposes and inclusion in law enforcement identification databases.
- Under an amended KRS 640.030, the list of crimes for which youthful offenders must be provided sex offender treatment by DJJ is changed to:
  - A felony defined KRS Chapter 510
  - KRS 530.020: Incest
  - KRS 530.064(1)(a): First-degree unlawful transaction with a minor involving sexual activity
  - KRS 531.310: Use of a minor in a sexual performance
  - KRS 531.320: Promoting a sexual performance by a minor
  - A felony attempt to commit any of the above-listed offenses
  - Felonies, similar to the above-listed offenses, from the federal jurisdiction, U.S. military jurisdiction, or another state or territory.
- Currently, a participant in the DJJ sex offender treatment that is mandated by KRS 635.515 may not be kept in the program for more than three (3) years. House Bill 3 provides that the treatment may be extended for one (1) additional year if the sentencing court orders such extension upon DJJ's motion. Also, the amendment removes the current provision about a person in DJJ custody, who reaches the age of 19 before completing treatment or at least finishing three (3) years of it, being returned to the sentencing court, which may order completion of treatment.
- The current KRS 17.495, (on residency restrictions for sex offenders), is repealed. It will be replaced by a new section of KRS 17.500-17.580. A description of the new residency restrictions appears above, in a separate section. But, one change applies specifically to juveniles.

Current law exempts probated and paroled youthful offenders from the residency restrictions, during their minority or while enrolled in secondary education programs. This exemption has now been expanded to include persons enrolled in elementary education programs.

- KRS 196.280, concerning the Department of Corrections' system for providing the public with notice of offender releases and escapes, is amended to include releases and escapes from a "facility for youthful offenders." The prior language was "juvenile detention facility."
- KRS 605.090 is amended
  - to permit foster parents, custodians, private facilities, and governmental entities to share otherwise confidential information about a child for the protection of any child, and
  - to require that a child committed under KRS Chapter 620 for commission of a sex crime must be kept segregated from other children in the same home, facility, or other shelter, who have not been committed because of commission of a sex crime.
  - KRS 620.090 and KRS 620.230 are similarly amended.
- Access to juvenile court records:
  - KRS 610.320(3) is amended, to require that court clerks keep a separate record covering court documents that are accessible to the public in juvenile delinquency proceedings concerning children at least fourteen (14) years or older at the time of the offense.
  - KRS 610.340(7) is amended, to require that juvenile records, obtained by officials engaged in the investigation and prosecution of cases, may be used for official use only, shall not be disclosed publicly, and are exempt from disclosure under the Open Records Act (KRS 61.870 to 61.884).
  - Under an amended KRS 610.345, the juvenile court is required under certain circumstances to direct or authorize, (depending upon the circumstances), the prosecution to give the child's school district or school a statement of facts in the case. The change to current law is in removing the court's discretion whether or not to authorize the prosecution to disclose the facts.
  - There has been much discussion and confusion over the extent to which House Bill 3 changes the law on public access to juvenile court records. In sum, the bill does not open to the public any records that were previously kept confidential. Rather, the bill simply (a) provides a more efficient way for the public to find those particular records that are open to the public, (b) specifies how juvenile records that are disclosed to law enforcement officials must be kept confidential by those officials, and (c) mandates that relevant school officials be told about the facts in certain cases.

Persistent felony offenders

- KRS 532.080(3), as amended by House Bill 3, will extend first-degree PFO status to a person who stands convicted of a felony after having been convicted of one (1) or more prior felony sex crimes against a minor. The current offense does not have to be either a sex crime or an offense against a minor. The bill is unclear as to what constitutes a prior "felony sex crime against a minor."
- A first-degree persistent felony offender, being sentenced for a current sex crime committed against a minor, may be sentenced up to life imprisonment without parole for twenty-five (25) years, if:
  - The current offense is a Class A or B felony, **or**
  - The person was previously convicted of at least one sex crime committed against a minor.

  The amendment is somewhat unclear as to what constitutes a "sex crime committed against a minor." But, it is clear that the amendment intends to extend greatly the number of people in Kentucky against whom LWOP-25 sentencing is possible.

- KRS 532.080(7) is amended so that the eligibility for certain first-degree persistent felony offenders to be probated, shock probated, or conditionally discharged is denied to a person who stands convicted of a sex crime. The amdned statute is somewhat ambiguous as to whether only a current "sex crime" disqualifies the person from these forms of release. At least one commentator has opined that any "sex crime" conviction, past or current, triggers the disqualification.

Violent offenses" under KRS 439.3401

- The list of "violent" offenses is greatly changed, with one deletion from the list and several additions.
- The new, longer list reads as follows:
  - A capital offense
  - A Class A felony
  - A Class B felony involving the death of the victim or serious physical injury to a victim;
  - The commission or attempted commission of a felony sexual offense in KRS Chapter 510;
  - Use of a minor in a sexual performance as described in KRS 531.310;
  - Promoting a sexual performance by a minor as described in KRS 531.320;
  - Unlawful transaction with a minor in the first degree involving sexual activity
  - Promoting prostitution in the first degree as described in KRS 529.030(1)(b);
  - Criminal abuse in the first degree as described in KRS 508.100;
  - Burglary in the first degree accompanied by the

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commission or attempted commission of an assault described in KRS 508.010, 508.020. 508.032, or 508.060;

- Burglary in the first degree accompanied by commission or attempted commission of kidnapping as prohibited by KRS 509.040; or
- Robbery in the first degree

- House Bill 3 deletes one current "violent offense" from the new list: first-degree burglary accompanied by the commission or attempted commission of a felony KRS Chapter 510 sexual offense.
- Although many new offenses will now be called "violent" under KRS 439.3401, the statute's 85% parole eligibility rule still applies only to Class A and B felonies. For Class C and D felonies, the only effect of being denominated "violent" appears to be the KRS 439.3401(4) restrictions on the availability of credits against sentence.
- There is no language in House Bill 3 to limit application of the amended statute to crimes committed after the effective date of the amendment.

Criminal records checks

- KRS 17.165 currently prohibits child care centers from employing, (in a position involving direct contact with a minor), any person who is a violent offender or has been convicted of certain enumerated sex crimes. House Bill 3 amends the statute, to add the following new sex crimes to the list:
  - All felony offenses in KRS Chapter 510, (rather than just the selected Chapter 510 offenses currently on the list)
  - KRS 530.064(1)(a) – First-degree unlawful transaction with a minor involving sexual activity (NOTE: The legislature deleted second-degree unlawful transaction from the list.)
  - A felony attempt to commit a felony offense in the two categories described above
  - Felonies, similar to the above-listed offenses, from the federal jurisdiction, U.S. military jurisdiction, or another state or territory.
- For changes to the list of "violent offenses." See immediately above for the section on KRS 439.3401.
- KRS 160.151 and 160.380 are amended. Schools, school boards, and school superintendents may require volunteers, visitors, contractors, and contractor employees to submit to national and state criminal history checks.
- A new section of KRS Chapter 164, (pertaining to public colleges and universities), requires criminal history background checks on all new hires. Such checks on visitors, volunteers, contractors, and contractor employees are discretionary. The new section authorizes various actions when the background check reveals a prior sex crime or violent offense, including denial of employment, modification of employment conditions, denial of entry, and the requirement of special supervision. If a previously-hired employee is convicted of a sex crime or violent offense, that person's employment may be terminated.

Additional provisions regarding sentencing

- KRS 532.110 is amended to require that sentences for two or more felony sex crimes involving two or more victims must run consecutively.
- KRS 439.265(5) is amended, to specify that the only unlawful transactions with a minor that preclude the defendant from consideration for probation or conditional discharge are those unlawful transactions that involve sexual activity.
- KRS 533.030 is amended to provide that the restitution mandated in cases of probation or conditional discharge may include relocation expenses incurred by a victim who moved for the purpose of his/her own safety or the safety of someone in the victim's household. This provision applies in cases of both sex and non-sex crimes.

Miscellaneous provisions

- The mandatory three-year period of post-release conditional discharge for sexual offenders is increased to five years. (KRS 532.043 and 532.060 are amended.)
- KRS 533.250 is amended, to preclude pretrial diversion for anyone convicted of:
  - A felony defined KRS Chapter 510
  - KRS 530.020: Incest
  - KRS 530.064(1)(a): First-degree unlawful transaction with a minor involving sexual activity,
  - KRS 531.310: Use of a minor in a sexual performance
  - KRS 531.320: Promoting a sexual performance by a minor
  - A felony attempt to commit any of the above-listed offenses
  - Felonies, similar to the above-listed offenses, from the federal jurisdiction, U.S. military jurisdiction, or another state or territory.

  People on diversion when the law goes into effect may remain on diversion as long as they continue to meet diversion and sex offender registration requirements.

- KRS 197.045(4) is amended to clarify that restrictions on good time credits apply to "eligible sex offenders."
- KRS 532.100 is amended to specify that when an indeterminate sentence of at least two (2) years is imposed for a felony sex crime or any similar offense in another jurisdiction, the sentence shall be served in a state institution.
- KRS 441.046 is amended to mandate that a person who is

arrested or detained in an adult or juvenile detention facility shall be fingerprinted before release and a copy of the fingerprints must be transmitted to the Kentucky State Police. Sanctions are imposed on jailers who do not comply.

Senate Bill 38: Self Defense

- This is the bill that states specifically that there is no duty to retreat, amending KRS Chapter 503.
- The heart of the bill is the following: "A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force."
- The definition of "dwelling" under KRS 503.101(2) is amended to read that it is a "building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night." Note that this is a different definition from that contained in the burglary statute, KRS 511.010(2), which defines dwelling as "a building which is usually occupied by a person lodging therein."
- "Residence" is defined as a "dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest."
- "Vehicle" means a "conveyance of any kind, whether or not motorized, which is designed to transport people or property."
- A presumption is established that a person who uses "defensive force" against another did so while holding a "reasonable fear of imminent peril of death or great bodily harm to himself or herself or another" when two conditions exist: first, that the person against whom force was used (the victim) was unlawfully and forcibly entering a dwelling, residence, or occupied vehicle, or was removing a person against that person's will from the place, and; second, that the person using the force knew about the unlawful entry.
- The presumption cannot be used if the victim had a right to be in the place, if the alleged kidnapped person was a child or grandchild of the victim, if the person using the force is committing a crime or using the place to commit a crime, or if the victim is a peace officer acting during the performance of her duties and the officer identified herself or the person using the force knew or reasonably should have known that the person is a peace officer.
- A second presumption is created that a person who unlawfully and forcibly enters a person's dwelling, residence, or occupied vehicle is "doing so with the intent to commit an unlawful act involving force or violence."
- KRS 503.050(2) is amended to expand the right to use deadly physical force to include that the defendant may use deadly physical force when he is trying to protect himself from a "felony involving the use of force," or under the other circumstances detailed above. Likewise, KRS 503.070 is amended to accomplish the same thing for the use of deadly physical force in protection of another. Both new provisions specifically direct that a person has no "duty to retreat."
- KRS 503.080 is expanded to allow for the use of physical force and deadly physical force to protect property to prevent a robbery "or other felony involving the use of force" or other circumstances detailed above.
- A person using force as described above is "justified" and "immune from criminal prosecution and civil action" for using the force unless she is a peace officer.
- Law enforcement may not "arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful."
- In a civil action brought against a person using force, the court shall award attorney's fees, court costs, compensation for loss of income, and expenses if the court finds that the person using the force is "immune from prosecution."

House Bill 380: Executive Branch Budget

- A biennial budget was passed for the Executive Branch. In many ways, this expresses the policies, including criminal justice policies, for the Commonwealth. Referral to the complete copy of this bill would be necessary to understand all of its provisions. The following are among its many provisions.
- **Drug Courts.** $1.3 million in FY07 and $1.8 million in FY 08 is transferred to ODCP for drug courts from the Local Government Economic Development Fund.
- **Operation Unite**. $1.25 million in FY07 & in FY08 are allotted to ODCOP for Operation Unite "in relation to the Federal Task Force on Drug Abuse" from the Local Government Economic Development Fund.
- **Attorney General.** $25.8 million in FY07 and $25.7 million in FY08 are allotted to the Office of the Attorney General. $275,000 is allotted for purposes of expert witnesses as a necessary governmental expense.
- **Unified Prosecutorial System.** Commonwealth's Attorneys receive $32.1 million in FY07 and $32.9 million in FY08. County Attorneys receive $27.3 million in FY07 and $28.2 million in FY08. Together, PAC receives $59.5 million in FY07 and $61.2 million in FY08.
- **Crime Victims' Compensation.** This Board is funded as part of the Board of Claims at $3.5 million in FY07 and $3.3 million in FY08. Language requires examinations for

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reported victims of sexual assault to be paid by the Crime Victims' Compensation Board.

- **Children's Advocacy Centers.** As part of the Human Support Services Budget, each regional Children's Advocacy Center has its base budget increased by $32,000 per year. In addition, funding is included by $34,600 "provided that the Center has on staff, or can document the intent to employ or contract for, a qualified forensic interviewer at least half-time."
- **Regional Rape Crisis Centers.** These centers have their base budget increased by $66,600 for each region "to cover increased levels of client service needs and increased cost of center operations."
- **Domestic Violence Statewide Programs.** These programs have their base budgets increased by $45,000 for each region to also cover increased levels of client service needs.
- **Justice Cabinet Administration.** $28.6 million in FY07 and $28.8 million in FY08 is allotted to the Justice Cabinet for administration. This is down from $31.8 million in FY06. This includes $1.3 million in FY07 and $1.8 million in FY08 for ODCP in restricted funds, and an additional $1.8 million in FY07 and $1.9 million in FY08 for ODCP from tobacco settlement funds. This also includes $1.5 million each year of the biennium as a pass through for civil legal services. $1.25 million is allotted to Operation Unite. Finally, $1 million is allotted to ODCP to maintain existing multijurisdictional drug task forces and to expand "under served and unserved areas to assist local and state law enforcement agencies in a proactive effort to combat drugs and crime."
- **Department of Criminal Justice Training.** DOCJT receives $48.2 million in FY07 and $48.6 in FY08, mostly from restricted funds. This includes $3100 in "incentive" payments to individual KSP troopers for training. This is up from $45.4 million in FY06.
- **Department of Juvenile Justice.** DJJ receives $110,925,900 for FY07 and $112,344,900 for FY08. This is up from $106.9 in FY06. There is an exception in the budget to allow Madison County to house their juveniles in the detention facility.
- **Kentucky State Police.** KSP is funded at $149.8 million in FY07 and $157.2 million in FY08. This is up from $141.2 million in FY06. This includes an authorized strength level of 1070 troopers.
- **Department of Corrections.** DOC is funded at $397,466,100 for FY07 and $417,615,800 for FY08. This is up from $371,510,700 in FY06. This includes $22.9 million for both years of the biennium for Corrections Management.
  - The budget includes the following language: "The Kentucky Commission on Services and Supports for Individuals with Mental Illness, Alcohol and other Drug Abuse Disorders, and Dual Diagnoses shall, in its annual review of the Commission plan, include in its duties recommendations for improvements in identifying, treating, housing, and transporting prisoners in jails and juveniles in detention centers with mental illness…"
  - $239.3 million is allotted for FY07 and $246.3 million in FY08 for adult correctional institutions.
  - KCTCS is mandated to provide adult basic education classes aimed at getting GED degrees.
  - $118.9 in FY07 and $132 million in FY08 is allotted for community services and local facilities.
  - Payments to local jails to meet their per diem amounts are deemed to be necessary governmental expenses (and thus do not have to remain within the allocation).
  - $4 million in FY07 and $1.5 million in FY08 is to be allocated for local correctional facility and operational support.
  - $1 million is added for an increase in the per diem rate to counties for housing state inmates.
  - Funds allocated for local jail per diem payments and halfway house payments "may also be used for the establishment and operation of an intensive secured substance abuse recovery program for substance abusers who have been charged with a felony offense."
  - $16.2 million is allocated for each year of the biennium for local jail support.
  - $931,100 in both years of the biennium is allocated for medical care contracts to counties for partial reimbursement. "in no event shall this apply to expenses of an elective, opposed to emergency, basis…"
  - $960,000 is allocated for each year of the biennium to each county with a life safety jail or closed jail.
- **Department of Vehicle Enforcement.** DVE is funded at $20.8 million in FY07 and $20 million in FY08. This is similar to the $20.5 million in FY06.
- **Department of Public Advocacy.** DPA is funded at $38.2 million in FY07 and $38 million in FY08. This is up from the adjusted FY06 budget of $34 million. $6.8 million in revenue is authorized to be spent in FY07, and $4.4 million in FY08. General Fund dollars increase from $29.7 in FY07 to $31.8 million in FY08. DPA is authorized to continue to suspend Block 50 payments and convert those payments into sick leave for attorneys.
- **Justice and Public Safety Cabinet.** The total Justice Cabinet budget is $794,065,000 for FY07 and $822,831,100 for FY08.
- **Salaries for State Employees.** The statutory 5% salary increment is again suspended. In its place is a sliding scale depending upon base salary. For those earning $0 to $30,000, a $1350 increment will be added each year of the biennium. For those earning $30,000.01 to $50,000,

$1200 will be added. For those earning $50,000.01 to $60,000, $1000 will be added. For those earning $60,000.01 to $80,000, $600 will be added. Finally, for those earning $80,000.01 and above, $400 will be added.

- **Home Incarceration.** The budget bill includes a permanent change to KRS 532.260. The statute is amended to extend the present statute applicable to persons in a state-operated prison to allow for someone serving time for a Class C or D felon in a contract facility or a county jail to serve his or her sentence on home incarceration. It also changes the persons who are eligible from those with 60 days to serve to 90 days to serve.

House Bill 382: The Judicial Branch Budget

- This is the judicial branch budget. In FY 07 the Court of Justice is funded at $268,139,100. For FY08, the Court of Justice is funded at $302,893,100.
- Employees in the Court of Justice will be receiving similar sliding scale salary increases to state employees.
- Eight Circuit Court Judgeships authorized by the 2005 General Assembly received funding. In addition, 7 new judgeships are added in the 4th, 9th, 14th, 39th, 49th, 54th, and 57th Judicial Circuits.
- Three new District Court Judgeships are added in the 6th, 8th and 25th Judicial Districts
- General Fund money is allotted to replace federal funds for existing drug court sites. In addition, money is appropriated for FY08 to expand eight existing drug courts and to begin 20 new drug courts.

House Bill 117: Helmets for Kids on ATVs; Primary Enforcement of Seat Belt Law

- This bill is primarily a series of public health measures. Among its many provisions it mandates that persons 16 or older operating an all-terrain vehicle on public property must wear "approved protective headgear." Exceptions to this requirement are for farming, mining, agriculture, logging, other business, industrial, or commercial activity, or use of an ATV on private property.
- It also mandates that persons under the age of 16 shall wear "approved protective headgear" when riding on or operating an all terrain vehicle. There are no exceptions to this requirement.
- The bill also prohibits operating a vehicle manufactured after 1981 that doesn't have a seat belt. Failure to have a seatbelt while operating a vehicle becomes a primary offense. A conviction for violating this provision is not sent to the Transportation Cabinet, and it is not part of the person's driving record. A prepayable fine of up to $25 without court costs is the penalty. Law enforcement is prohibited from erecting roadblocks to enforce this provision.

House Bill 272: Vehicles in Accidents

- This bill amends several provisions of KRS 189.
- Operators of a vehicle that is involved in a minor accident on an interstate or parkway must move it out of the highway close to the accident. The operator may authorize others to move the vehicle as well, and the police may take it upon themselves to similarly move the vehicle.
- Where a death or injury accident occurs, an officer may move the vehicle without consent of the operator only after all medical assistance and cleanup have occurred.
- Where a death or injury accident occurs, the operator has a responsibility to notify law enforcement of that fact if he has a cell phone. Failing that, the responsibility rests with the owner of the vehicle or an occupant of the vehicle.
- Where an accident involving death or injury occurs on a highway and is not investigated by law enforcement, the operator must file a written report with KSP with 10 days of the accident.

Senate Bill 44: Actions required after certain highway accidents

- KRS 189.580 is amended to specify the actions that various individuals are required to take after a highway accident. Only two new requirements carry penalties for a violation.
- Under the new KRS 189.580(6)(a), if there is a fatality, or a known or visible personal injury, or damage rendering a vehicle inoperable, the operator must notify a public safety entity if the person has a communications device - Penalty: $20-100 fine.
- Under the new KRS 189.580(7), if the accident results in death, personal injury, or property damage over $500, and if law enforcement does not investigate, the owner of a vehicle involved must file a state police report within 10 days - Penalty: $20-100 fine.

House Bill 90: Drivers' license for juveniles

- This bill pertains to drivers' licenses for juveniles and amends KRS 186.
- The bill expands the graduated licensing for juveniles. It requires a person between 16 and 18 to obtain an instruction permit for 180 days before obtaining what is known as an intermediate license. The intermediate license also lasts for 180 days, after which a person can obtain an operator's license.
- A person with an instruction permit under the age of 18 can only drive with 1 other person under the age of 20. A violation of this provision is <u>not</u> a primary offense. If a person with an instruction permit drives without the permit being in his possession, or if he or she operates

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the vehicle between 12:00 midnight and 6:00 a.m., or he or she drives with too many people under 20, or he or she commits a moving violation for which points can be assessed, or he or she violates KRS 189A.010(1), another 180 days will be added on to the instruction permit.

- A person may obtain an intermediate license at 16 ½ years of age, so long as she has had an instruction permit for 180 days without a violation of the provisions in the above paragraph. In addition, she must have a statement presented to the state police attesting to having driven 60 hours under supervision, with 10 of those hours being at night. An intermediate license cannot be used to drive between 12:00 midnight and 6:00 a.m. Nor shall he operate a vehicle with more than 1 person under the age of 20. This is not a primary violation either. A similar 180 add-on operates under the intermediate license provisions.
- An operator's license may be obtained at 18 after holding an intermediate license for 180 days with no violations and after having completed a driver's training program.

House Bill 67: Drug related deaths and vehicular accidents

- This is a bill that effects both the Medical Examiner's Office under KRS Chapter 72 and an accident involving a fatality under KRS 189A.105.
- The Medical Examiner's Office is required to prepare an annual report to the Justice Cabinet Secretary reporting on the number of drug-related deaths, where they occurred, and the specific drugs involved.
- KRS 189A.105(2)(b) is amended to mandate the officer investigating a fatal traffic accident to seek a search warrant "for blood, breath, or urine testing." Where the testing demonstrates the presence of alcohol or drugs and the defendant is convicted of an offense arising out of the accident the cost of the testing must be borne by the defendant.

House Bill 129: Fraudulent use of driver's license

- KRS 186.560 is amended to clarify that a person under the age of 21, who is convicted of purchasing or attempting to purchase alcoholic beverages by either (a) fraudulent use of a driver's license or (b) use of a fraudulent driver's license, shall have his or her license revoked for six months, or shall be denied a license for that period of time, with increasing periods of revocation for subsequent convictions of any offense listed in the statute.

Senate Bill 93 *AND* House Bill 333: Maintaining the peace at funerals and burials

- These bills affect KRS Chapter 525, "Riot, Disorderly Conduct, and Related Offenses."
- The bills are virtually identical. The one difference is highlighted in the text below.
- A new section of Chapter 525 creates the new Class B misdemeanor of "interference with a funeral"; a person commits the new crime in one of three ways:
  - By obstructing or interfering with access into or from any building or parking lot of a building, or parking lot of a cemetery, in which a funeral, wake, memorial service, or burial is taking place; or
  - By congregating, picketing, patrolling, demonstrating, or entering an area within 300 feet of a funeral, wake, memorial service, or burial; or
  - By doing either of the following without authorization:
    - Making sounds or images observable to, or within earshot of, participants in a funeral, wake, memorial service, or burial, or
    - Distributing literature or any other item.
- There will be two degrees of "disrupting meetings and processions", rather than a single offense.
  - The current "disrupting meetings and processions" under KRS 525.150 becomes "disrupting meetings and procession in the second degree." It remains a Class B misdemeanor.
  - A new section of KRS Chapter 525 creates the new Class A misdemeanor offense of "disrupting meetings and processions in the first degree"; a person commits the new offense by, (with the intent to prevent or disrupt a funeral, burial, funeral home viewing, funeral procession, or memorial service), doing any act tending to obstruct or interfere physically, or making any utterance, gesture, or display designed to outrage the sensibilities of those attending.
- There will be two degrees of "disorderly conduct," rather than a single offense. The current "disorderly conduct" under KRS 525.060 becomes "disorderly conduct in the second degree." It remains a Class B misdemeanor
  - A new section of KRS Chapter 525 creates the new Class A misdemeanor offense of "disorderly conduct in the first degree"; there are three elements to the new offense:
    - Being in a public place and, with intent to cause, or wantonly creating a risk of, public inconvenience, annoyance, or alarm:
      - Engaging in fighting or in violent, tumultuous, or threatening behavior,
      - Making unreasonable noise, or
      - Creating a hazardous or physically offensive condition by any act that serves no legitimate purpose; and
    - Acting in any of the above-listed ways within 300 feet of a cemetery during a funeral or burial, a funeral home during the viewing of a deceased person, a funeral procession, or ***a funeral or memorial***

service, (House Bill 333 says "building in which a funeral or memorial service is being conducted"); and

- Knowledge that an occasion listed above is occurring within 300 feet.

House Bill 290: Carrying Concealed Deadly Weapons

- This bill amends the Carrying Concealed Deadly Weapon law of KRS Chapter 237. It authorizes the Kentucky State Police to renew licenses to carry concealed firearms or other deadly weapons.
- The bill explicitly states that a license to carry a concealed deadly weapon permits the holder to carry firearms, ammunition, and other deadly weapons, "at any location in the Commonwealth." Thus, unless another section of the law precludes the carrying of the weapon, there remains a right to carry it. In addition, the bill ensures that the right includes the right to carry the firearm or deadly weapon "on or about his or her person."
- Licenses last for 5 years.
- Prior to issuing a license, KSP is required to conduct a background check both at the state and federal levels.
- Licenses must be issued if: the person is not statutorily precluded from having a license, is a citizen of the US and a resident of the Commonwealth for 6 months, is a citizen and a member of the Armed Forces of the US and on active duty and has been in Kentucky for 6 or more months, is 21 years of age or older, has not been a substance abuse offender within the past 3 years, is not a chronic and habitual alcohol abuser, does not owe 1 year's worth of child support, has not been convicted of assault 4th or terroristic threatening in the 3rd degree during the past 3 years (KSP may waive this provision), and demonstrates competence with a firearm by completing a firearm safety course.
- Current and retired federal peace officers are deemed to have met the training requirements for obtaining a license.
- Previous provisions precluding one committed under KRS 202A or 202B was eliminated.
- KSP is precluded from releasing the entire list of persons with a license in toto or in a particular geographic area.
- The commissioner of KSP is authorized to revoke the license of a person who becomes permanently ineligible to hold a license. A person whose license is revoked may have a hearing on the issue before a hearing officer. Failure to surrender a suspended or revoked license is a Class A misdemeanor.
- The license must be carried at the same time the person is carrying the weapon or ammunition.
- Concealed deadly weapon class applicant, instructor, and instructor trainer information and records are to be confidential unless authorized by the trainer.
- The bill eliminates random inspects of certified firearms instructor classes and trainers.
- The bill claims the exclusive right to revoke or suspend licenses. No one else, and no government, may do so.
- During a disaster or emergency "no person, unit of government, or governmental organization" shall revoke or suspend "or otherwise impair the validity of the right of any person to purchase, transfer, loan, own, possess, carry, or use a firearm…" whether they have a license or not. Nor may anyone during a disaster or emergency seize or confiscate a weapon or firearm from any person, whether they own a license or not. This right applies to any relocation to temporary housing during or after the disaster or emergency. This limits the right of the Governor to exercise emergency power during a disaster or emergency pursuant to KRS Chapter 39A.
- No one, including employers, may prohibit a person from possessing a firearm or ammunition in a vehicle, unless they are prohibited by law from that possession.
- A person may remove a firearm from a vehicle "in the case of self-defense, defense of another, defense of property."
- Employers who violate the law regarding employees' rights are liable in civil court for damages.

House Bill 193: Inmate lawsuits

- KRS 454.415 is amended to require exhaustion of administrative remedies within the Department of Corrections before an inmate may bring an action challenging prison conditions.
- Also, the statutory exhaustion requirement is extended to include actions brought "on behalf of an inmate," (rather than just those brought by the inmate himself or herself), relating to prison disciplinary proceedings, challenges to sentence calculations, challenges to custody credit, and challenges to prison conditions.
- Eliminated is the prerogative of a court to continue an action while administrative remedies are exhausted.

House Bill 530: Jail canteen accounts

- KRS 441.135 currently requires that canteen profits be used for prisoner "benefit or recreation." The new law will say that profits shall be used for "the benefit and to enhance the well being of the prisoners," and it specifies that authorized expenditures "shall include but not be limited to recreational, vocational, and medical purposes."
- Beginning July 1, 2007, fiscal courts must keep a certain, specified level of funds in the canteen accounts, based upon the average daily number of inmates in the population.

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House Bill 616: Private adult prison facilities

- KRS 197.510 currently specifies that each resident must be provided with a minimum of sixty (60) square feet of floor space in "the sleeping area of the adult correctional facility." This bill modifies it to require sixty (60) square feet of floor space in "the living area of the adult correctional facility."
- In private adult prisons, the minimum age for security employees is reduced from 21 to 18 years of age.

House Bill 258: Jail evacuation plans

- A new section is added to KRS Chapter 441 on "Jails and County Prisoners."
- The Department of Corrections must develop evacuation and relocation protocols for local and regional jails, to be used in emergencies that render a facility temporarily or permanently uninhabitable. DOC has 180 days to promulgate regulations.
- Each jailer must develop an evacuation and relocation plan based on DOC's protocols and must submit it to the county legislative body for compatibility with relevant plans for local emergency operations. Plans must be completed and transmitted to DOC by January 31, 2008.
- If DOC finds a jailer's plan to be deficient, DOC must notify the judge executive and jailer of every county that houses prisoners at the jail in question. DOC may itself impose sanctions.
- DOC is authorized to consult and collaborate with the Jail Standards Commission. DOC may delegate to the Commission the responsibility of developing the evacuation and relocation protocol.

House Bill 289: Computer assisted remote hunting

- This bill creates a new section of KRS 150. It outlaws "computer-assisted remote hunting", defined as "the use of a computer or any other device, equipment, or software to remotely control the aiming and discharge of a rifle, shotgun, handgun, bow and arrow, cross-bow, or any other implement to hunt or harvest wildlife in the Commonwealth."
- The bill excepts those persons who are disabled and use technological means to hunt.
- The penalty for a violation of this act is a fine from $100-500 or up to six months in jail or both.

Senate Bill 49: Gift cards issued by merchants

- A new section is added to KRS Chapter 244, ("Alcoholic Beverages; Prohibitions, Restrictions, and Regulations") — No person under the age of twenty-one (21) may redeem a gift card or any portion of a gift card for the purchase of alcoholic beverages.
- Violation is punishable under KRS 244.990(1) as a Class B misdemeanor for the first offense, and as a Class A misdemeanor for subsequent offenses. It appears that these sanctions are available against both the purchaser and the seller of the alcoholic beverages.

House Bill 395: Credit Cards

- This bill authorizes the clerk to accept credit and debit cards for payment of fines, forfeitures, taxes, or fees.
- Where a check is used to pay for a fine, forfeiture, tax, or fee, and is returned for insufficient funds, the clerk may charge an amount set by a Supreme Court rule not to exceed $25. This money goes into the General Fund.

Senate Bill 204: County detectives

- This bill amends KRS 69.360 to allow county detectives to execute civil process statewide so long as they are "certified in accordance with KRS 15.380 to 15.404." If they are not so certified, they may serve civil process only in the county "in which the county attorney is elected."

Senate Bill 56: Opened wine containers taken off restaurant premises Wine

- This bill allows for a person to take a resealed bottle of wine from a licensed restaurant. It allows for one opened container of wine to be taken off the premises if the customer has purchased and partially consumed the wine with a meal on the premises. The container must be resealed by the proprietor in such a way as to make it visibly apparent if it is subsequently opened or tampered with.
- The wine must be placed in a locked glove compartment, trunk, or other area not classified as a passenger area.

Senate Bill 230: Cervids

- This bill bans the importing of "cervids," which is undefined but apparently refers to deer, reindeer, moose, elk, and similar animals. It also regulates the holding of "captive cervids."
- Importing "members of the animal family "Cervidae" is a Class D felony.

Senate Bill 59: Homeland Security

- This bill attaches the Office of Homeland Security to the Governor's Office.
- The office is to coordinate the efforts of the Office of Homeland Security with the efforts of the Federal Department of Homeland Security.
- The Office is established to develop a strategy to "detect, deter, mitigate, and respond to a terrorist incident," as

well as a strategy for obtaining and allocating federal homeland security funding.

Senate Bill 174: KRS 202B Amendments

- This bill amends the provisions of KRS 202B regarding the involuntary commitment of persons with mental retardation.
- This bill allows for a physician to admit any person with mental retardation who voluntarily applies for admission to an ICF/MR facility and is found to be capable of consent. The bill omitted the language "mildly or moderately mentally retarded adult person" as one who could voluntarily be admitted.
- The bill adds a requirement for the petition that is used to begin involuntary commitment proceedings. There must be a document filed that details a psychological examination or assessment that demonstrates that a person has "moderate to severe range of mental retardation" based upon a full scale IQ. The exam must have been conducted within a reasonable time prior to the filing of the petition.
- Old law states that the examination accompanying the petition must have been conducted by "two qualified mental retardation professionals." This is changed to one "qualified mental retardation professional" and one "licensed psychiatrist, psychologist, or physician with special training and experience in serving individuals with mental retardation." One of them must be from the community and one must be "an employee of a state operated ICF/MR facility."
- Once the petition is filed, the court may require the person to be examined by the same professionals as above.
- Old law stated that between the preliminary hearing and the final hearing, the court could order the person to reside in an ICF/MR facility. This bill allows the court to order the person to reside at his or her current residence, an emergency placement "designed by the regional mental health and mental retardation program, or an ICF/MR facility.
- When an involuntary commitment is ordered, the person must be transported to an ICF/MR facility along with a document stating that there are no serious medical issues based upon a current medical examination, and that the psychological examination reveals a full scale IQ in the moderate to severe range of mental retardation.
- The bill creates a resource center established by the Kentucky Department for Mental Health and Mental Retardation to give information to "aging caregivers." The purpose of the resource center is to "establish a centralized resource and referral center designed as a one-stop, seamless system to provide aging caregivers with information and assistance with choices and planning for long-term supports for individuals with mental retardation or developmental disability."

Senate Bill 9: Release of homicide victim's body to family

- This bill creates a new section of KRS Chapter 213, on "Vital Statistics."
- If a person charged with homicide refuses to permit the burial, cremation, or other lawful disposition of the body of the deceased person, the family of the deceased person may seek a circuit court order for release of the body.
- The court must provide the homicide defendant an opportunity to be appear at a hearing personally and/or by counsel.
- The court may order release of the body to the family "if good cause is shown."

Senate Bill 62: Practice of architecture

- KRS 323.990 is amended, to provide that the following are Class A misdemeanors:
  - Practicing architecture without a license,
  - Styling oneself as an architect, or using any words, letters, titles, or descriptions tending to convey the impression that one is an architect, without a license, and
  - Falsifying an application for certification or renewal of an architect's license.

Senate Bill 127: Kentucky Board of Medical Licensure

- Agents of the Board will be required to obtain consent, a search warrant, or a subpoena before obtaining evidence; they will be authorized only to "interview" persons, rather than "interrogate" them. (KRS 311.605(2) is amended.)
- First-offense practicing medicine without a license will be a Class D felony. (KRS 311.990(4) is amended.)

House Bill 301: Elections and voting

- A new Class B misdemeanor is created in KRS Chapter 119 on "Election Offenses and Prosecutions."
- It is applicable when a person provides compensation, payment, or consideration for registering voters, if the expenditure is based upon either (a) the total number of voters a person registers or (b) the total number of voters a person registers in a particular party, political group, political organization, or independent status.

House Bill 333: Maintaining the peace around funerals and burials

See above re: Senate Bill 93. ■

WHAT WENT WRONG? A CLOSER LOOK AT WRONGFUL CONVICTION IN KENTUCKY PART I

By Melanie Lowe, DPA Kentucky Innocence Project

The recent releases of wrongfully convicted defendants highlight the problems continuing to plague the criminal justice system. At this time, newly-freed men within our Commonwealth are experiencing the milestones which come only to those known as "the exonerated,": They hug their families outside of prison walls. They appear on television talking about what they missed the most – sleeping in a quiet room, tasting their favorite meal, or getting a real paycheck. While these men pick up the pieces and re-adjust to life beyond prison, they provide interviews saying there is no bitterness and they are only happy to be out. At this time, we in the criminal justice community should think about these men and their cases. At this time, we should take a look back and ask what went wrong?

William Gregory

Both of the victims in William Gregory's case lived in the same apartment complex in Louisville. The attacks occurred approximately one month apart. Gregory was accused and convicted of rape and burglary of the first victim and of the attempted rape of the second victim. He was sentenced to consecutive sentences of seventy years.

At trial, the Commonwealth presented evidence that Gregory resided in the same apartment complex as the two victims. Both women identified him, the second victim through a show-up procedure. The forensic evidence consisted of hairs found in the stocking cap worn and left behind by the assailant. Testing indicated that the hairs were of Negroid origin. Nonetheless, the victim claimed to not have had any African American visitors in her apartment.

After his appeals failed, Mr. Gregory contacted Barry Scheck and Peter Neufeld of the Innocence Project and asserted his innocence. The Project proceeded to locate, preserve, and secure the release of the hair evidence. The hairs were tested using a relatively new form of technology, mitochondrial DNA testing. Initially, only one hair was tested. The results excluded Gregory as the source. But, before agreeing to release Gregory, the prosecution insisted that the rest of the hairs be tested. The Commonwealth tested the hairs at their expense. These results also excluded Gregory.

When he was released in 2000, William Gregory became the first person to be exonerated by mitochondrial testing alone and the first inmate to be exonerated based on DNA testing in Kentucky. He served seven years of his sentence.[1]

Melanie Lowe

Mr. Gregory filed suit against the Louisville Police Department and others he believed were responsible for his wrongful conviction. Originally dismissed by a federal district court judge in 2004, a three-judge federal appeals court panel reinstated the case in April of 2006.

Herman May

In the early morning hours of May 22, 1988, Herman May's life changed forever. At approximately 3:00 a.m. in the backyard of a house in Frankfort, an unknown assailant raped and sodomized a female University of Kentucky student. Just over a month later, while on vacation in California, the young victim picked the picture of Herman May from a photo lineup and identified him as her attacker. In October of 1989, May was convicted of rape and sodomy and sentenced to concurrent 20 year sentences.

May's case involves some of the most common errors found in the wrongful conviction of innocent people. First, there was the identification issue. The initial description of the attacker was that he was thin, in his 20s, had long, stringy, greasy dark brown hair, and was wearing a blue cap. Two police officers testified about the description given within minutes of the attack. The investigating officer testified that the victim gave the same physical description at the hospital except that she also noted that the attacker's hair was "chocolate brown." Herman May was 17 years old in May 1988 and had bright red hair.

Once May was identified as a suspect, the investigating detective flew to California and showed the victim a photo lineup that included May's picture. The victim first picked

out three pictures and began a process of elimination that led to her identifying May as her attacker.

At trial there was also testimony about similarities between hair found on the victim and Herman May's hair. The forensic specialist testified that "…it was as good of a match as I have ever had."

Based upon the victim's testimony at trial that she had not had consensual sex for several weeks prior to the rape, KIP requested the release of slides from the rape kit for DNA testing. The court granted the motion and DNA tests excluded Herman May as the donor of the semen. Amazingly, what should have led to the release of Herman May from prison led to a new revelation from the victim—she had consensual sex within a "couple of days" of the rape. As a result, the court ordered an additional battery of tests on other physical evidence and all of those test results were inconclusive. Still nothing matched Herman May.

On July 31, the court ordered additional testing. The hairs entered into evidence at trial were sent to a laboratory for mitochondrial DNA testing, and on September 18, 2002, Herman May's life changed again. Franklin Circuit Court Judge Roger L. Crittenden received the lab report on the 18th and after discussing the results with the lab technicians, entered an order that found that "…the results of the tests are of such decisive value or force…that it would probably change the result if a new trial should be granted."

Judge Crittenden's order required the immediate release of Herman May from prison. The order was entered and on September 18, Herman May walked out of the Kentucky State Penitentiary. Herman May today is adjusting to his new life and catching up on 13 years he missed with his family.

Tim Smith

Tim Smith's case was tried based upon allegations of abuse made by his troubled daughter. From the time of the initial report until the trial, the girl's story continued to evolve. Meanwhile, her history of outlandish lies remained under-investigated by Smith's trial attorney. At trial, the Commonwealth utilized an "expert" on the topic of "Repressed Memory Syndrome." The defense counsel failed to challenge the expert's credentials or the science behind the theory of "Repressed Memory." The result was a conviction and 20-year sentence for Smith who continued to maintain his innocence.

The turning point for Smith occurred when his 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. DPA's KIP worked with law students at Chase College of Law and a private attorney, Patrick Lamb of Chicago, to investigate and litigate Mr. Smith's claim of factual innocence. The effort uncovered that the "expert" presented by the Commonwealth, who identified herself as a doctor, only possessed the degree via an unaccredited, on-line university.

Kenton County Judge Patricia Summe vacated Timothy Smith's 2001 conviction and 20-year sentence for sodomy in the first degree. Judge Summe's Order cited numerous errors made by trial counsel including his failure to challenge the credentials and testimony offered by the expert on "Repressed Memory." After serving five years for a crime he steadfastly maintained he did not commit, Mr. Smith walked out of the Eastern Kentucky Correctional Complex on May 5, 2006.

Commonwealth's Attorney Bill Crocket has appealed Judge Summe's decision to overturn Smith's conviction.

Ben Kiper

In Ben Kiper's case, his seven-year-old step-daughter was manipulated into testifying against him as part of a heated custody battle between the girl's mother, Kiper's wife at the time, and the girl's father. Suspiciously, the allegations surfaced when a final decision about custody was imminent.

The ensuing investigation uncovered absolutely no physical evidence or corroborating proof of guilt. While at trial, the child's mother gave testimony stating the little girl had confided that the story of abuse was not true and she was being forced to testify by her father and step-mother. Nonetheless, Ben was convicted after only 2 hours of trial testimony. Then, the jury sentenced Ben to 55 years.

Since trial, Mr. Kiper's step-daughter, now sixteen, admitted to various professionals, including a district court judge, that she had not been truthful when she testified. None of these conversations were brought to the attention of the circuit court prior to the involvement of the Kentucky Innocence Project. On October 25, 2005, Mr. Kiper's step-daughter testified before the Butler Circuit Court recanting her previous story and describing the abuse she suffered at the hands of those who fabricated her perjured testimony.

On April 26, 2006, Butler Circuit Court Judge Ronnie Dortch entered an order overturning Ben Kiper's sex abuse and sodomy conviction and 55 year sentence. On May 5, 2006, Mr. Kiper left prison after serving nearly 7 years of continuous incarceration.

Lessons

The work of Innocence Projects throughout the country has freed approximately 180 wrongly convicted persons, mostly via DNA.[2] But, while many respond saying that the releases

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are proof of the system's ability to correct itself, others believe the loss of life and livelihood reveal a larger picture of failings. "DNA testing is to justice what the telescope is for the stars." Clearly, biological evidence is secured and maintained in the vast minority of cases. It is only reasonable to assume the problems causing false convictions in this small percentage of cases continue to produce similar disparities of justice in the system as a whole.[3] Barry Scheck and Peter Neufeld, founders of the Innocence Project have noted:

> In the United States there are strict and immediate investigative measures taken when an airplane falls from the sky, a plane's fuel tank explodes on a runway, or a train derails. Serious inquiries are swiftly made by the National Transportation Safety Board (NTSB), an agency with subpoena power, great expertise, and real independence to answer the important and obvious questions: What went wrong? Was it system error or an individual's mistake? Was there any official misconduct? And, most important of all, what can be done to correct the problem and prevent it from happening again? The American criminal justice system, in sharp contrast, has no institutional mechanism to evaluate its equivalent of a catastrophic plane crash, the conviction of an innocent person.[4]

In response, many jurisdictions have created innocence commissions to study the systemic problems resulting in wrongful convictions. These commissions, working in conjunction with social scientists, have identified a number of characteristic issues which lead to wrongful conviction including: flawed eyewitness identification; false confessions; poor and biased investigations; prosecutorial misconduct; junk science, and inadequate defense.

In jurisdictions like Kentucky, without commissions charged with examining wrongful convictions, the criminal defense bar must consider these issues within their individual area of practice. In Kentucky, all of the convictions overturned by innocence project efforts have involved sex offenses. As any defense practitioner can tell you, this statistic is no anomaly. Interestingly, the Kentucky releases underscore the problems inherent, not just in the system at large, but particularly in the investigation, prosecution and defense of sex offenses. In addition to the hallmarks of wrongful convictions noted by innocence commissions, sexual offenses also possess their own unique issues serving to enhance the problems already present in the system.

In the series that follows this introduction we will analyze some of the more common elements of wrongful conviction with an eye toward helping defense practitioners prevent our clients from becoming statistics of the system's failings. The series will serve to aid trial attorneys in utilizing experts in these areas as a means of helping correct the inequity imposed by *Stopher v. Conliffe*.[5] What matters now is not how these men were able to walk out of prison but how they ended up incarcerated in the first place.

Endnotes:

1. http://www.innocenceproject.org/case/display_profile.php?id=74
2. http://www.innocenceproject.org/causes/
3. *Actual Innocence*, Dwyer, Jim; Neufeld, Peter; Scheck, Barry, Doubleday (2000) xv
4. "Toward the Formation of 'Innocence Commissions' in America" Barry C. Sheck & Peter J. Neufeld (2002)
5. *Stopher v. Conliffe*, 170 S.W.3d 307, Ky (2005), Kentucky Supreme Court case denying expert funding in post-conviction matters. ■

Every time you convict an innocent person, a guilty person is out there committing more crimes and has to be stopped.

— Barry Scheck

METH MANUFACTURING: THE DEFENSE ATTORNEY'S NOTEBOOK (2006 SUPPLEMENT)

By Brian Scott West, Directing Attorney, Murray

B. Scott West

"Poems are made by fools like me,
But only God can make a tree."

From "Trees" by Joyce Kilmer

I quote Joyce Kilmer because I am tired of killing trees. It seems to me that with each new session of the Kentucky General Assembly, or with every new opinion issued by the Kentucky Supreme Court, there is a sea-change in the law of manufacturing methamphetamine. This is quite frustrating to anyone who writes or teaches defense of meth manufacturing charges. Each passing year leaves last year's article hopelessly outdated. Each May, I prepare a *new* article, attempting to put into one piece of work *everything* I know or could possibly say about defending meth cases. And each May, the piece grows in length and taxes the printing and paper budget. (Last year's article, for example, was 28 typewritten single spaced pages, and equaled 14 printed pages when published in *The Advocate.*)

This year, following the example of West Publishing Co. (no relation to the author) and other fine publishers of legal texts, I have decided to issue a "pocket part" to last year's article, rather than try to reissue an entire updated article. Last year's article is still available, after all, online by visiting the archives of *The Advocate* (Vol. 27, No. 3, July 2005) on the Department of Public Advocacy's website: http://dpa.ky.gov/library/advocate.php. Welcome, then, to the 2006 Supplement to "Meth Manufacturing: The Defense Attorney's Notebook."

I. *Kotila* is Overruled!

A. The Old Statute Becomes the New Statute

The new methamphetamine manufacturing makes unlawful the actual manufacture of methamphetamine, or possession of two (2) or more chemicals or two (2) or more pieces of equipment with the intent to manufacture methamphetamine. Now, after *Matheney v. Commonwealth,* ___ S.W.3d ___ (Ky. 2006), so does the old statute! Although neither party had requested the court to overrule *Kotila v. Commonwealth,* 114 S.W.3d 226 (Ky. 2003), by a five to two decision, the Kentucky Supreme Court decided to do so anyway. Concluding that the *Kotila* decision was based on "grammatical construction and subsequent statutory enactments by the General Assembly," in the face of admittedly ambiguous intent by the legislature, the Supreme Court departed from the requirement that a person must possess "all" the chemicals or "all" the equipment necessary to manufacture methamphetamine and in its place substituted the requirement that "one must possess two or more chemicals or items of equipment with the intent to manufacture methamphetamine to fall within the statute." The court declared this to be a "common sense approach that gives proper import to the use of the plural 'chemicals."

And because the *Kotila* holding avoided the argument that the then-current meth manufacturing statute was void for vagueness, the *Matheney* court confronted the vagueness issue head on:

> Essentially, Appellant argues that if KRS 218A.1432(1)(b) is interpreted to encompass possession of less than all the chemicals or equipment necessary for the manufacture of methamphetamine, then a citizen is required to guess what combinations would result in a violation of the statute. Appellant overlooks that the statute allos conviction only when an individual possesses the requisite chemicals or equipment *with the intent to manufacture methamphetamine.* This makes certain what conduct is proscribed. [Emphasis supplied by Supreme Court.]

With that, the old statute has become identical in interpretation to the new statute. The only apparent difference between the two is that the old statute did not have a definition of "intent to manufacture methamphetamine," and the new statute does. However, as will be shown in *Parks v. Commonwealth, infra*, the new intent definition is being applied even to cases being tried under the old statute. Thus, there is no real difference now in interpretation between the old statute and the new statute.

The only possible distinction hinges upon whether the *Matheney* court still requires possession of two or more chemicals or two or more pieces of equipment, rather than one of each. The inartful wording of the holding raises the question:

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> We construe the language in KRS 218A.1432(1)(b) that states "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.

What does "two or more chemicals or items of equipment" mean? It could mean two chemicals or two items of equipment. Or it could mean one of each. The *Kotila* court was specific in this regard, and removed any doubt. But in the *Matheney* holding, the Court has left an ambiguity. (This holding will only fuel the fire for a constitutional challenges based on vagueness and/or ambiguity, discussed in the 2005 article which this article supplements, and discussed even more fully by Justice Cooper in his dissent.)

B. The Cooper Dissent

Justice Cooper wrote a scathing dissent, calling the majority opinion a "startling display of judicial activism," made without the benefit of briefing or oral argument. At 41 pages, it is 35 pages longer than the portion of the majority opinion that dealt with the *Kotila* case. It is an excellent primer on the history of importance of the doctrine of *stare decisis;* but its importance for purposes of this article is that it to some extent presents a blueprint for how a defense attorney may challenge not only the old statute, but the new statute as well. Admittedly, many of the points made by Cooper may fall on deaf ears, given that a majority of the current court has already rejected them. However, as Cooper states early in his dissent, *Kotila* was overruled largely because one justice has "changed his mind," and that "two new Members of the Court would not have joined the *Kotila* majority had they been Members when it was decided." The composition of the Supreme Court, of course, is subject to change with each new election. (And, of course, if one can get her case "federalized," there might one day be a United States Supreme Court interpretation. One can hope.)

1. The Void for Vagueness Argument

Cooper begins his section on the "void for vagueness" doctrine by reciting the standard that a criminal statute must attain: It must "define an offense with sufficient clarity that persons of ordinary intelligence 'can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). [Other citations omitted.] It is the latter prong that Cooper finds to be unsatisfied given the majority's conclusion that possession of two or more chemicals suffices for a conviction:

> The majority opinion concludes that the statute's intent requirement alone satisfies the vagueness doctrine…[cite omitted]. While the intent requirement does satisfy the "notice" inquiry by curing any uncertainty in the mind of the defendant as to the nature of the conduct proscribed, *Kotila*, 114 S.W.3d at 249, the majority's conclusion that the intent requirement overcomes the vagueness challenge because it "makes certain what conduct is proscribed" [cite omitted], completely ignores the more important inquiry into whether the statute encourages arbitrary and discriminatory enforcement.
>
> > Where…there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." [*Papachristou v. City of Jacksonville*, 405 U.S.156, 170, 92 S.Ct. 839, 847, 31 L.Ed.2d 110 (1972)(emphasis supplied by Justice Cooper)]…
>
> We have held that an inquiry into intent is "a subjective matter," [citation omitted] and that "neither the inference nor the presumption of intent [is] mandatory." [Citation omitted.] This standard requires no additional factual showing beyond the conduct from which the inference arises, a very low threshold indeed. Under the majority's construction, the statutory requirement of intent to manufacture methamphetamine may be inferred from mere possession of two or more of the chemicals or items of equipment necessary to do so.

Cooper's point is clear: You must possess two or more items of equipment or two or more chemicals with the intent to manufacture – however, you can infer the intent from the possession of the chemicals. It is circular reasoning. The so-called "intent requirement" places no additional burden of proof upon the Commonwealth, since possession of two or more chemicals will equal the intent.

This cannot be the law, and we should never concede it to be. The Constitutionality of this law must be challenged every time, and not waived, until a majority of the Supreme Court once again recognizes the potential for arbitrary and discriminatory enforcement this interpretation fosters.

Cooper's dissent then goes on to list several instances in which purely innocent conduct can come within the threshold of the majority's interpretation. The person who drives "a carbureted vehicle (often requiring starter fluid) while carrying a cell phone (likely powered by a lithium

battery)." The camper who takes salt and camping fuel. The mechanic who may have starter fluid, antifreeze, and/or driveway salt. True, it is unlikely that a prosecutor would ever take anyone to trial, or even seek an indictment, based upon these facts. But the truth is that a policeman is on solid ground in each of these situations to insist that he has probable cause that a crime is being committed in his presence, sufficient to justify an arrest and subsequent search incident to that arrest. That the prosecutor won't touch the case, assuming the officer comes up with nothing else in the course of the search, will be cold comfort to anyone who has to spend a few hours or a few days in jail waiting to be released for lack of evidence.

2. The Double Jeopardy Argument

Justice Cooper was also concerned that the majority's opinion affects the double-jeopardy problem anticipated in *Kotila*. In that case, the Commonwealth had requested an interpretation identical to the one adopted by the majority in *Matheney.* In rejecting the interpretation at that time,

> We pointed out…under that construction if one of the chemicals possessed by the defendant was anhydrous ammonia, evidence of the defendant's possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine would prove both that offense, as defined in KRS 250.489(1) and KRS 250.991(2), and manufacturing methamphetamine under KRS 218A.1432(1)(b). *Kotila,* at 239. But if KRS 218A.1432(1)(b) required possession of anhydrous ammonia *and* all of the other chemicals necessary to manufacture methamphetamine, the latter requirement distinguished the two offenses, thus avoiding double jeopardy. *Id.* At 239-40. In retrospect, when viewed in light of the ramifications of today's majority opinion, that dictum is probably incorrect.

This author, for one, never completely bought into the "no double jeopardy" dictum in *Kotila* in the first place. The *Kotila* court reasoned that the crimes of (1) possession of anhydrous ammonia in an unapproved container and (b) manufacturing methamphetamine each contained an element that the other lacked. The anhydrous statute had an element of possessing an unapproved container, and manufacturing methamphetamine did not. Manufacturing methamphetamine had the element of having to possess other chemicals in addition to the anhydrous, and the anhydrous statute did not.

But this argument is specious. Anhydrous Ammonia can hardly be possessed by the non-farmer anyway *other* than in an approved container. And since the container is a necessary apparatus for applying anhydrous ammonia (since it does not exist in atmosphere unless it is colder than 28 degrees below zero Fahrenheit), the tank or container itself would qualify as "equipment." In fact, the Supreme Court in *Fulcher v. Commonwealth,* 149 S.W.3d 363 (Ky. 2004) identified "a storage container for anhydrous ammonia (usually a modified propane tank)" as one of the ten pieces of equipment necessary to produce methamphetamine. Thus, the idea of each statute having an element the other one does not require elevates form over substance, as there are no cases where the meth maker will not have the anhydrous in a container other than an unapproved container.

Moreover, if in fact the Supreme Court has departed from the notion of "two or more chemicals or two or more pieces of equipment," and now requires only one of each, then the mere possession of a storage container with anhydrous ammonia in it will now satisfy both statutes!

Regardless, Justice Cooper's dissent breathes new life into the double jeopardy argument, and his dissent should be reviewed *very closely* by the defense attorney who is defending a client charged with both possession of anhydrous ammonia and manufacturing methamphetamine.

3. The "Intent" Definition Argument

Finally, Justice Cooper pointed out that the majority opinion in *Matheney* failed to take into account the fact that the 2005 General Assembly enacted a definition of "intent to manufacture" which does not exist in the older version of the statute. This definition provides as follows:

> (14) "Intent to manufacture" means <u>any evidence which demonstrates a person's conscious objective</u> to manufacture a controlled substance or methamphetamine. Such evidence includes but is not limited to statement, a chemical substance's usage, quantity, manner of storage, or proximity to other chemical substances or equipment used to manufacture a controlled substance or methamphetamine.
>
> 2005 Ky. Acts, ch. 150, Sect. 7(14) (emphasis added by Justice Cooper).

This definition, Justice Cooper argues, added a "heightened evidentiary requirement for proof of intent to manufacture" and thus, was a "saving provision" for the constitutionality of the new statute.

With all due respect to Justice Cooper, this is the one part of his dissent with which I do not agree, for two reasons.

First of all, there is no reason why the new definition could not be applied retroactively to meth manufacturing cases tried under the previous version of the statute. In fact, this is *exactly* what happened in *Parks v. Commonwealth,* ____ S.W.3d ___ (Ky., May, 2006), in an opinion authored by none other than Justice Cooper himself. In *Parks,* Justice

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Cooper acknowledged that the first version had no definition of "intent to manufacture," but then stated "[w]here an ambiguous statutory meaning is clarified by subsequent legislation, that subsequent legislation is strong evidence of the legislative intent of the first statute," and then applied the definition to the facts of the case, which was tried under the old statute. Hence, the "saving provision" applies both to the new statute and the old statute.

Second, however, and more importantly, this writer takes issue with the notion that the definition "heightens" the evidentiary requirement for conviction, and that it is a "saving" provision. In fact, the definition WEAKENS the intent requirement in several ways. To see why, one need only examine the definition of intent the jury would have submitted to them prior to the 2005 meth bill and compare it to the new definition.

Prior to the enactment of the new statute, a jury would be left with the old definition of "intent," found in the penal code at KRS 501.020(1). That definition – used by Cooper in his book *Instructions for Juries* – provides that "a person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his **conscious objective** is to cause that result or to engage in that conduct." [Emphasis added.] No further words are used. The jury is left to determine from all the facts and evidence before it, what was the person's "conscious objective."

The new definition, by contrast, gives lip service to demonstrating a person's conscious objective, but does NOT require the jury to look at all of the facts and circumstances as a whole in arriving at a decision about the person's conscious objective. There are three reasons why:

(1) Rather than asking the jury to decide whether his "conscious objective" is to commit the act, the jury is allowed to find intent to manufacture when they sea "any evidence" which demonstrates a person's conscious objective. There is an ocean of difference between "any evidence" which demonstrates conscious objective and determining the "conscious objective" after reviewing the evidence as a whole.

(2) Corollary to (1) above, the statute cites a laundry list of factors that can be considered by the jury, and ends the list with the disjunctive "or." A fair construction of the definition is that the jury is free to find that one's "conscious objective" is to manufacture methamphetamine if the jury finds proof of ANY ONE FACTOR. The discussion in the jury room then becomes a search to find one of the factors, without any overall discussion of what the person's conscious objective may have been. Thus, if the jury finds that there is evidence of a "statement" (whose statement? A snitch's? The defendant's? A co-defendant's? A police officer's?) then they can end the search for the defendant's "conscious objective." They found it. Same thing if they find, as Justice Cooper as suggested, starter fluid, anti-freeze, and driveway salt on the shelf in the garage. And the "or" means they only have to find one factor to find intent.

(3) There is no end to the laundry list of factors! "Such evidence includes but is not limited to…" Suppose someone finds a recipe to make meth (such as the ones in Uncle Fester's *Secrets of Methamphetamine Manufacture*," which – being a teacher of how to defend meth cases – I carry with me all the time)? Is that evidence of conscious objective? What about KRE 404(b) evidence, which allows the prosecution to put on evidence of prior bad acts, including prior convictions, for the purpose of showing intent? Has the definition of "intent to manufacture" opened that door for good? Is everyone who has ever been convicted of any drug offense now subject to having that conviction brought into the Commonwealth's case in chief in order to satisfy the intent requirement? How do you exclude it?

No, it appears that the new definition waters down the concept of "conscious objective" and replaces it with a mechanism where a finding of intent will be virtually automatic.

C. So What is left of *Kotila?*

From a criminal defense attorney's point of view, not much. However, there is a crumb left, and it is found in the phrasing of the holding of *Kotila: "* [W]e construe 'the chemicals or equipment' to mean all of the chemicals or all of the equipment necessary to manufacture methamphetamine." *Matheney* has construed "the chemicals or equipment for the manufacture of methamphetamine" to mean that one must possess two or more chemicals or items of equipment" to fall within the statute. But in so doing, the court left intact the word "necessary." The two or more pieces of equipment or two or more chemicals still must be chemicals *necessary* to the production of methamphetamine. That raises yet another question: What is methamphetamine for purposes of the meth manufacturing statute?

To answer that, we must look to yet another new case, *Robinson v. Commonwealth,* ____ S.W.3d ____ (Ky. 2006), discussed in part II, below.

II. "Meth – the Controlled Substance" v. "Meth – the Usable Product"

In *Robinson v. Commonwealth,* a conviction was upheld under the old statute where the defendant possessed methamphetamine residue. The residue satisfied prong (a) of 218A.1432. Jennifer Winnegar, with respect to prong (b), testified that only three chemicals are **necessary** for the manufacture of anhydrous under the ephedrine reduction

method (anhydrous ammonia, ephedrine, lithium metal), and only one item of equipment is necessary (mason jar). Leaving aside for the moment the fact that she is wrong about the equipment, anyway [how do you store the anhydrous ammonia without the container mentioned in *Fulcher?*], *Robinson* basically stands for the proposition that you can be convicted, even under the *Kotila* standard, by having the three **necessary** to make "meth, the controlled substance."

> In a close reading of KRS 218A.1432 and 218A.1432, there is no requirement that the methamphetamine be in a "usable" form in order to be establish [sic] a crime…Considering the evidence and testimony on this issue, the trial court, again, correctly determined that the Commonwealth had met its burden of proof…

The testimony in *Matheney, supra*, was that there were six chemicals necessary to manufacture methamphetamine. But that testimony was taken before the Supreme Court determined in *Robinson* that "meth, the controlled substance" and not "meth, the usable product," is all that is necessary to prove manufacturing by prong (b). Construing *Matheney* and *Robinson* together, the law must now be that you must have two or more chemicals necessary to make meth, the controlled substance, which means that you must have two of the three: anhydrous ammonia, (pseudo)ephedrine, and/or some reactive metal such as lithium or sodium.

Just as the strategy under the new meth statute will be to argue that two or more chemicals requires the "necessary" chemicals, this will become the strategy for remnant old statute cases. Criminal defense attorneys should seek to get certified copies of Winnegar's testimony, so they can argue that the defendant must possess two of three necessary to make "meth, the controlled substance." It might be too much to call her to the stand or have her available as a "hostile expert," but it would definitely be worthwhile to give to your own consulting expert, so that he can opine accordingly.

III. The "Intent" Element of Mfg. Meth and Possession of Anhydrous Ammonia

In *Parks v. Commonwealth of Kentucky*, __ S.W.3d __ (Ky. May 18, 2006), the Kentucky Supreme Court applied the definition of "intent to manufacture" definition contained in the 2005 "New Meth Law" to a case tried under the "old" meth manufacturing statute, and in so doing reversed convictions for (1) manufacturing methamphetamine and (2) possession of anhydrous ammonia with the intent to manufacture methamphetamine. According to the facts of the case, the defendant possessed anhydrous ammonia along with other chemicals. However, the Commonwealth's proof clearly showed that the defendant's intention was not to engage in the manufacture of methamphetamine himself, but that his intention was to *trade* it to another person in exchange for some already-manufactured methamphetamine, without "a scintilla of evidence to the contrary."

Although both statutes predicate a finding of guilt where the defendant possesses the chemicals and the anhydrous ammonia "with the intent to manufacture methamphetamine," the instructions in this case permitted a finding of guilt "if Appellant possessed 'equipment and/or raw material for manufacturing methamphetamine…*for the purpose of* manufacturing methamphetamine,' and possessed anhydrous ammonia '*for the purpose of* manufacturing methamphetamine'" (emphasis supplied by Supreme Court). This was an improper jury instruction:

> Obviously, possession "for the purpose of" does not require the same personalized intent as does possession "with the intent to" manufacture methamphetamine. And, obviously, "raw materials" is a broader concept than "chemicals…" [I]nstructions in criminal cases should conform to the language of the statute.

The Supreme Court went even further to draw a bright-line distinction between actually "intending to manufacture," and knowing that the possessed materials might wind up being used in someone else's manufacturing process:

> At the time these offenses were committed, KRS 218A did not contain a definition of "intent to manufacture." However, the General Assembly subsequently enacted KRS 218A.010(14), which defines the phrase, *inter alia*, as "any evidence which demonstrates a person's conscious objective *to manufacture* a controlled substance or methamphetamine…" The phrase "to manufacture" in KRS 218A.010(14) clearly requires that Appellant's intent in possessing the anhydrous ammonia, the starting fluid, and the lithium batteries must have been that he, himself, either as principal or accomplice, would use those items to manufacture methamphetamine. The definition does not say, *e.g.*, "with the intent that methamphetamine will be manufactured."

IV. Developments in Accomplice Liability

If it appears to you that the prosecution is getting too "loosey-goosey" in its indictments by alleging complicity theories of guilt in the absence of the completion of an actual crime, you are not alone. In two opinions – one published by the Kentucky Supreme Court and one not published by the Kentucky Court of Appeals – the judicial branch has taken two hard looks at complicity cases and has tightened up the practice of using the complicity statute to get a conviction. Read both of these cases carefully before trying a case where guilt is premised on accomplice liability, and make sure you tender jury instructions which are in conformity therewith.

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A. "Complicity" is not an inchoate crime; the underlying crime being aided and abetted must have actually been committed.

In *Parks, supra,* the Kentucky Supreme Court clarified the burden required of the Commonwealth when it comes to seeking a conviction on a theory of accomplice liability. In *Parks* the Commonwealth's complicity theory was that the defendant possessed anhydrous ammonia, starting fluid, and lithium batteries, and intended to deliver them to a co-defendant, who in turn would then possess them with the intent to manufacture methamphetamine. In its brief on appeal, the Commonwealth stated that "this case is a complicity liability case, which, by definition, does not require the proof of each element of the underlying offense." This position was rejected by the Supreme Court:

> Complicity liability under KRS 502.020 is not an inchoate offense, such as the offenses described in KRS Chapter 506, *e.g.*, criminal facilitation, KRS 506.080, the offense to which [two other co-defendants] pled guilty. Inchoate offenses carry reduced penalties because the underlying offense was never actually committed. However, unlike an inchoate offense, "KRS 502.020 does not create a new offense known as complicity." *Commonwealth v. Caswell*, 614 S.W.2d 253,254 (Ky. App. 1981). "[O]ne who is found guilty of complicity to a crime occupies the same status as one being guilty of the principal offense." *Wilson v. Commonwealth*, 601 S.W.2d 280, 286 (Ky. 1980).
>
> **Thus, to convict a defendant of guilt by complicity, the jury must find beyond a reasonable doubt that the offense was, in fact, committed by the person being aided or abetted by the defendant…** Therefore, guilt in this case could not be premised on a complicity theory that Appellant aided and abetted Joey Barnes's possession of the anhydrous ammonia, starting, fluid, and/or lithium batteries with the intent to manufacture methamphetamine. Detective Edwards destroyed the anhydrous ammonia at the scene of the arrest, and the starting fluid and batteries were confiscated by the arresting officers. [The co-defendant] never possessed any of those items, regardless of the intent; thus, Appellant could not have been complicit in such possession. [Bold lettering added.]

B. The Accomplice Must Intend to Commit the Underlying Offense; It is not Enough that the Person Being Aided Intend to Commit the Crime

In an unpublished opinion, *Cahill v. Commonwealth*, No. 2004-CA-001192-MR, the Kentucky Court of Appeals reversed a conviction for complicity to tampering with anhydrous ammonia with intent to manufacture methamphetamine because the jury instructions, as submitted by the court, lacked the requisite intent element sufficient to convict under a theory of complicity. In that case, Cahill and Gourley were both charged as accomplices to each other in the tampering with a tank that contained anhydrous ammonia. Cahill, who had been caught at the site, had confessed to the tampering. The trial was held on the issue of whether or not he and Gourley had intended to manufacture methamphetamine with the anhydrous, had they been successful in obtaining it.

However, the jury instruction asked the jury to find Cahill guilty if they believed that (1) Gourley tampered with anhydrous ammonia equipment, (2) Gourley did so with the intent to manufacture methamphetamine, and (3) Cahill aided and assisted Gourley to tamper with the anhydrous ammonia equipment. In reversing the conviction, the Court of Appeals stressed that it was *Cahill's* intent to manufacture methamphetamine – not *Gourley's* – that should have been in question when deciding whether Cahill was guilty of complicity. A proper jury instruction would have predicated a finding of guilt upon a finding that Cahill had intended to manufacture meth. The court cited *Harper v. Commonwealth*, 43 S.W.3d 261 (Ky. 2001), as the case requiring reversal, and hence, issuing a published opinion was not required.

Although not published, the *Cahill* case is of instructional value because of how the error in the case was preserved. The trial attorney in the case (which happened to me this writer) did not object to the Commonwealth's instruction due to the improper omission of the intent element as it pertained to Cahill. Error was preserved, however, by the tendering of a correct instruction, which the court stated "arguably at least, satisfied RCr 9.54, which provides that '[n]o party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction.'" Thus, an objection to a jury instruction, by itself, does not satisfy RCr 9.54 – there must also be a tender of a correct instruction. And apparently, the tender of a correct instruction will bail out an attorney who otherwise has failed to object to an improper jury instruction. (Thanks to appellate attorney Emily Holt for making a silk purse out of a sow's ear.)

Thus, to summarize *Parks* and *Cahill*, if one is defending a person on a theory of complicity liability, she must require the Commonwealth to prove two cases beyond a reasonable doubt. First, that the person being aided or abetted by the client has in fact completed every element of the underlying crime, and second, that the client aided or abetted that person while having the intent of to complete that crime.

V. Conclusion

I don't think I saved any trees at all. ■

PRETRIAL SERVICE RISK ASSESSMENT

AOC Pretrial Services
Ed Crockett, Tara Boh Klute, and Charlotte McPherson

Introduction

We recognized that judges could make better-informed bond decisions if given information that was statistically shown to predict the likelihood a Kentucky defendant will return to court and will not commit an offense while out on bond. To meet this need, AOC Pretrial Services collected and examined Kentucky data and that of two other states. We used this data to assign a numeric weight to factors in a defendant's history that are statistically shown to reliably predict bond decision success or failure. Applying those factors, we developed a risk assessment model that provides judges a more reliable and scientifically sound basis to decide whether and how to release a defendant. The model also provides judges a means to reduce the risk posed by defendants they release.

Risk Assessment Factors and Instrument

The new risk assessment instrument uses a weighted scale based on current research for both failure to appear in court and the likelihood of re-offending while out on bail. Validation studies show that certain factors, which demonstrate one's ties to the community and prior criminal history, can reliably predict both flight risk and the potential for re-offending. Flight risk prediction factors include having a local address for twelve or more months, prior failure to appear and having active pending cases. Factors proven to measure risk of re-offending and danger to the community include a history of drug or alcohol abuse, prior criminal history, prior violent crime convictions, the severity of the current charge, the status of active pending cases, prior failure to appears, sufficient means of support and expecting someone at arraignment.

The factors statistically shown to be the more accurate predictors of failure were assigned higher risk weighted values. Specifically, prior failure to appears, active pending cases, prior misdemeanor or felony convictions, prior convictions for violent crimes and a history of drug or alcohol abuse. Pretrial Services then used those risk values to develop a model that will be used to make recommendations to judges for release decisions.

After interviewing and gathering data concerning a defendant, pretrial officers will input this data into the computer model and determine whether the defendant should be considered low, moderate, or high-risk. Based on the nature of risk identified, pretrial officers will make a release recommendation. For low risk defendants, pretrial officers will recommend release on OR, unsecured or non-financial surety bond. For moderate risk defendants, the pretrial officer will recommend release on OR, unsecured or non-financial surety bond with conditions that are related to the nature of the risk posed by the defendant. Through identifying factors and supervising the defendant pretrial will attempt to lower the risk posed.

For example, a defendant may not have a local address for twelve months and have a prior failure to appear in court, but he/she has no previous violent criminal history or any pending cases. This person would be considered a moderate risk for flight risk and a low risk for anticipated criminal behavior, meaning they are an overall moderate risk. Using this information the Pretrial Officer would recommend conditions that attempt to lower the flight risk such as reporting and court notification.

Another example would be a situation where the defendant has lived locally for the past twelve months and has no prior failure to appears or pending cases, but has a significant criminal record and history of drug or alcohol abuse. This defendant would have a low flight risk score and a moderate re-offending score and thus rated overall as a moderate risk. Since the highest risk involves re-offending and danger to the community, the Pretrial Officer would recommend conditions that address these issues such as random drug testing and treatment or electronic monitoring.

Those defendants who are high risk in both areas would not be recommended without further assessment for release on recognizance with or without conditions due to the prediction that the defendant is both a flight risk and more likely to re-offend. However, if released by the court on non-financial conditions Pretrial Services would monitor compliance.

Methodology for Validation Study

Pretrial Services used diverse and detailed information to determine the statistical validity of the pretrial risk assessment tool. The validation study for the tool was completed in two phases with two segments in each phase. The jurisdictions chosen for the sample in both phases and segments are representative of the various cultural and geographical differences within the state of Kentucky. The first segment of Phase One included the pretrial interview and case information from 844 defendants arrested in February and March 2005 in Madison, Marshall, Johnson, Lawrence, Letcher and Martin counties. The second sample in Phase One consisted of 2403 defendants arrested in February and

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March 2003 in Campbell, Johnson, Kenton, Lawrence, Letcher, Madison, Marshall and Martin counties. The first segment of Phase Two included the pretrial interview and case information from 1093 defendants arrested in July 2005 in Campbell, Johnson, Kenton, Lawrence, Letcher, Madison, Marshall and Martin counties. The second sample of Phase Two consisted of 1460 defendants arrested in the same jurisdictions.

The first set of data was collected to measure the developed instrument's validity in assessing risk while a defendant is out on bond and his or her case is pending. The risk assessment instrument was completed on each defendant using the information from the pretrial interview and the initial record check. Based on the instrument's weighted scale, defendants were categorized as low, moderate or high risk. Using Courtnet, each case was examined between April and June 2005 to determine if the defendant failed to appear or was charged with another criminal offense while the case was pending.

The second set of data was collected to measure the validity of the risk factors used, especially as they relate to flight risk and criminal behavior. The risk instrument was completed using the information on the pretrial interview and initial record check. Like the first segment, defendants were categorized as low, moderate or high risk. Criminal history checks were completed between April and June 2005 and each case was reviewed to determine if the defendant committed another criminal offense or failed to appear in court at any time during the two years since their original arrest.

For Phase One of the study all cases were counted and placed into one of the following categories:

Clear:
No new charges or failure to appears.

New Charges/Convictions:
Defendant was charged and/or convicted of an additional criminal offense. Traffic cases that are classified as misdemeanors such as DUI, no insurance and no operator's license were considered however, mere traffic violations were not (speeding etc).

FTA:
Defendant failed to appear at a scheduled court proceeding on the initial charge.

FTA + New Charge/Convictions:
Defendant was charged and/or convicted of an additional criminal offense and failed to appear at a scheduled court proceeding on the initial case and/or subsequent cases.

Eliminated Cases:
Defendants who were incarcerated on the initial case and were not released from custody by the completion of this study were eliminated.

For Phase two of the study the data was put into the statistical program SPSS and analyzed to determine the significance of each variable. The results of these studies are found on the following pages, and reflect a high degree of confidence that the pretrial risk assessment is a valid tool to predict the likelihood of success or failure of a release recommendation decision.

Validation Study Phase One Results

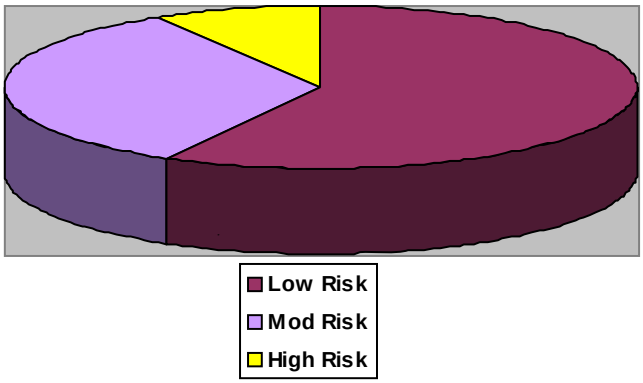
For pending cases:

Low Risk Defendants
- 89.86% Had no new arrests and did not fail to appear
- 2.96% Failed to appear in court
- 6.77% Had a new arrest
- .43% Failed to appear and had a new arrest

Moderate Risk Defendants
- 75.21% Had no new arrests and did not fail to appear
- 8.13% Failed to appear in court
- 14.64% Had a new arrest
- 2.04% Failed to appear and had a new arrest

High Risk Defendants
- 54.40% Had no new arrests and did not fail to appear
- 12.80% Failed to appear in court
- 24.80% Had a new arrest
- 8.00% Failed to appear and had a new arrest

Clear (No New Arrests/Convictions or FTAs)



Validation Study Phase One Results

For cases two years after disposition:

Low Risk Defendants
- 63.18% Had no new arrests and did not fail to appear
- 3.86% Failed to appear in court
- 27.57% Had a new arrest
- 5.41% Failed to appear and had a new arrest

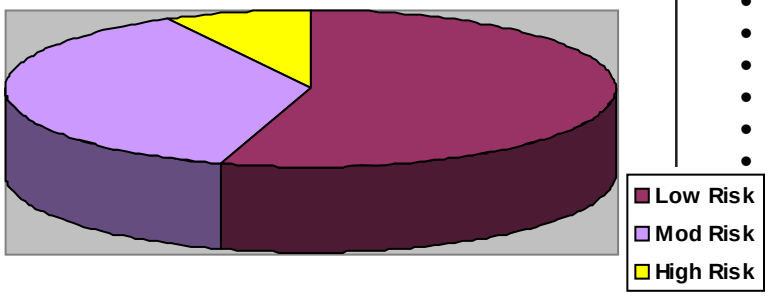
Moderate Risk Defendants

- 43.78% Had no new arrests and did not fail to appear
- 6.06% Failed to appear in court
- 36.26% Had a new arrest
- 13.92% Failed to appear and had a new arrest

High Risk Defendants

- 13.56% Had no new arrests and did not fail to appear
- 6.95% Failed to appear in court
- 57.86% Had a new arrest
- 21.66% Failed to appear and had a new arrest

Clear (No New Arrests/Convictions or FTAs)



Pretrial Services Risk Assessment Factors

Risk factors for <u>both</u> Flight and Anticipated Criminal Conduct

- Active Bench Warrants for failure to appear or prior failure to appear
- Pending Cases

Flight Risk Factors

- Not having a local address for the past twelve months

Anticipated Criminal Conduct Risk Factors

- History of drug or alcohol abuse
- Prior misdemeanor or felony convictions
- Prior violent crime convictions
- Severity of Current Charge
- Not having a sufficient means of support
- No expectation of a friend or family member at arraignment

Interview Recap Report

DOE, JOHN WAYNE FAYETTE

123-45-6789 03/08/2006 **ACCEPTED INTERVIEW** MALE - WHITE - MARRIED

Case Information

3/08/2006 FAYETTE 6H3729379 03/07/2006

Charge Information

03/08/2006 FAYETTE 6H3729379 03/07/2006
0021014 FACILITATION *OBSOLETE* OPER VEH UNDER INFLU,DRUGS,2ND OFF/5YRS

Address Information

Present:	123 MAIN STREET ANYTOWN, KY 12345	(123) 456-7890 OWN	0 year(s) 6 month(s)
Prior:	1223 ELM STREET ANYTOWN, KY 12345	 OWN	3 year(s) 0 month(s)

Income Information

Present:	PRETRIAL SERVICES 100 MILLCREEK PARK FRANKFORT, KY 40601	(505) 573-2350 FULL-TIME EMPLOYEE	10 year(s) 0 month(s)

Contact Information

SPOUSE	**PARENT**	**OTHER RELATIVE**
DOE, JANE	DOE, MARY 123 PLUM STREET NEW YORK, NY	DOE, BAMBI
456-7890 Can Contact : Yes	(112) 345-6789 Can Contact : Yes	(124) 567-8910 Can Contact : Yes

***** End of File *****

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Criminal History
Low Risk Defendant

02-T-00001 OPERATING MV U/INFLUENCE OF INTOX BEV-1ST OFF
***GUILTY**
COST $217.50; FINE $200.00; A-D-E;
memo; 4/8/02 OWES $437.50 PAY AND RELEASE OL TO BE TURNED IN BY NOON
2/11/02 5/4/02 PD

Criminal History
Mod Risk Defendant

02-T-00066 OPERATING MV U/INFLUENCE OF INTOX BEV-1ST OFF
***GUILTY**
COST $217.50; FINE $200.00; A-D-E;

02-M-00467 VIOLATION OF KENTUCKY E.P.O./ D.V.O.
***GUIILTY**
COST $125.50; FINE $250.00; 37 DAYS JAIL; 37 DAYS SUSP; OTHER

01-M-00224 LICENSE TO BE IN POSSESSION
***FAILURE TO APPEAR**
FINE $100.00

Criminal History
High Risk Defendant

02-T-00043 OPERATING MV U/INFLUENCE OF INTOX BEV-1ST OFF
***GUILTY**
COST $217.50; FINE $200.00; A-D-E;

00-T-00148 1ST DEGREE POSSESSION OF CS/ COCAINE, 1ST OFF
***GUILTY**
COST $151.00; 1 YRS. PRISON; 183 DAYS CREDIT TIME;

99-T-00766 FAILURE TO OR IMPROPER SIGNAL
***FAILURE TO APPEAR**

00-T-01267 NO INSURANCE
***FAILURE TO APPEAR**

06-M-00023 ALCOHOL INTOXICATION
***PENDING**
memo: Jury Trial 04/15/06

02-M-00123 ALCOHOL INTOXICTION
***GUILTY**
FINE $25.00; COSTS $57.50 ■

Kentucky Constitution Section 16. Right to bail – Habeas corpus. All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.

AWARDS AND ACCOLADES GIVEN DURING THE 34TH ANNUAL PUBLIC DEFENDER AWARDS DINNER

By Dawn Jenkins, Executive Advisor

The Department of Public Advocacy's 34th annual awards dinner was an exceptional celebration of DPA moving to the *next level* in indigent defense. An unprecedented number of public defenders and staff, nearly 400, and leaders of two of Kentucky's three branches of government, including Governor Fletcher, recognized those who contributed most toward improving indigent defense in Kentucky during 2005-06.

Governor Fletcher joined Commissioner Ernie Lewis in awarding **Chief Justice Jospeh Lambert** with DPA's most prestigious award, *The Robert F. Stephens Award*, which was established in 2002 to honor a public servant who has worked to significantly improve Kentucky's system of indigent defense. Chief Justice Lambert was honored for his lifetime achievement in advocating a fair and impartial judicial system with equal representation for everyone.

Chief Justice Joseph Lambert receiving the Robert F. Stephens Award from Governor Ernie Fletcher and Public Advocate Ernie Lewis

Other special guests honored included:

Anthony Lewis Media Award recognizes the media's crucial role in informing the public about the importance of a fair legal process for indigent defendants. **Dan Modlin, Western Public Radio, and Burton Speakman, the *Bowling Green Daily News***, were honored for excellent and thorough coverage of DPA's efforts to assure quality indigent defense during 2005-06

Nelson Mandela Lifetime Achievement Award was established in 1997 to honor an attorney for a lifetime of dedicated services and outstanding achievements in indigent criminal defense. The **Honorable Robert G. Lawson**, professor, UK School of Law, was honored for his extensive law reform efforts, for serving as principal drafter of both the Kentucky Penal Code and the Kentucky Rules of Evidence, and helping improve the criminal justice system, particularly with regard to prison and jail reform.

Public Advocate Ernie Lewis presenting Dan Modlin, Western Public Radio, with the Anthony Lewis Media Award

Professor Robert G. Lawson accepting the Nelson Mandela Lifetime Achievement Award

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Public Advocate's Award is given to honor those in Kentucky who have worked to improve significantly Kentucky's indigent defense delivery system. Honorees included the Honorable **Christian County Judge James Adams and the Honorable Jason Fleming** for fostering a more bias-free system of justice for youth in Christian County; The **Honorable Gerard A. St. Amand**, Vice President at NKU, for advancing DPA's Kentucky Innocence Project; **Chief Judge Sara Combs** and **Justice Will Scott**, both for lifetime of public service and for advocating a judicial system that is fair and impartial with equal representation for everyone including indigent defendants.

Chief Judge Combs spoke to the attendees and honorees, "You comfort me…you inspire me." "You are the embodiment and truly the personification of Albert Schweitzer's definition of an ethical person, when he said, 'A man is ethical only when life, as such, is sacred to him, that of plants and animals as well as that of his fellow man, and when he devotes himself helpfully to all life that is in need of help.' "

Ernie Lewis presenting the Public Advocate's Award to Judge James Adams and Jason Fleming

Ernie Lewis presenting the Public Advocate Award to Judge Sara Combs and Justice Will Scott

Ernie Lewis presenting the Public Advocate's Award to Gerard A. St. Amand

Several DPA staff members received special recognition including:

Upon the 30th Anniversary of the U.S. Supreme Court's landmark decision in *Gideon v. Wainwright,* DPA established the *Gideon Award* to honor the person who has demonstrated commitment to equal justice and who has courageously advanced the right to counsel for poor people in Kentucky. The **Honorable Kate Dunn**, attorney for Fayette County Legal Aid, distinguishes herself through her extraordinary commitment to her clients as a litigator and legal advocate.

Ernie Lewis presenting Kate Dunn with the Gideon Award

The In Re Gault Award honors the person who has advanced the quality of representation for juvenile defenders in Kentucky. The **Honorable Timothy G. Arnold** has achieved distinguished success as lititigator and as a policy advocate by safe-guarding the rights of juveniles and improving the juvenile justice system.

Ernie Lewis presenting Tim Arnold with the In Re Gault Award

Professionalism & Excellence Award was given to **The Honorable Richard Chapman**, DPA Information Resource Branch Manager, for being steadfastly "prepared and knowledgeable, respectful and trustworthy, supportive and collaborative. This award celebrates individual talents and skills, and works to insure high quality representation of clients, and takes responsibility for their sphere of influence and exhibits the essential characteristics of professional excellence."

Commission Member Robert Ewald presenting Richard Chapman with the Professionalism & Excellence Award

Rosa Parks Award was established in 1995 to honor the non-attorney who has galvanized other people into action through their dedication, service, sacrifice and commitment to the poor. **Robert Hubbard**, investigator in LaGrange Post-Conviction, was honored for his dedicated service to reforming the criminal justice system by organizing and administering the Legal Aid Trainings, and his willingness to share his extensive knowledge with others.

Ernie Lewis presenting Bob Hubbard with the Rosa Parks Award

The *Furman Award* was created in 2000 to honor the person who has exhibited outstanding achievements on behalf of capital clients either through litigation or advocacy in the spirit of *Furman v. Georgia*, which abolished the death penalty in 1972 for 4 years. The Honorable **Marguerite Neil Thomas** was honored for her illustrious accomplishments in founding the Kentucky Innocence Project, litigating both capital and non-capital cases, and recognizable gifts in mentoring attorneys and staff.

Marguerite Thomas (l) and Mantilla Seawright (r) at the Statue of Liberty

An important part of the evening was the public recognition of Ben Kiper, Tim Smith, and Herman May, in attendance, and who were exonerated with the help of the Kentucky Innocence Project during 2006. Cabinet Justice Secretary Arflack, and recently appointed Deputy Secretary, Teresa Barton, were also in attendance and recognized.

The Governor spoke about the necessity for an equal justice system funded adequately to meet the needs of those who most need us. He commended awardees for answering the call to take care of those LOMB's "the least of these my brethren." (For more information, see additional article with Governor Fletcher's Remarks)

Justice Scott's words resonated when he spoke to the connection between caseloads and equal justice He said "[T]hat 400 cases, even 409 that you're going to be down to in the next two years, is still too much and if you're overworked then possibly somebody doesn't achieve justice." ■

Governor Fletcher's Remarks, Well Received at the 34th Annual Public Defender Awards Dinner

By Dawn Jenkins, Executive Advisor

An unprecedented number of public defenders gathered for the Department of Public Advocacy's 34th annual awards dinner. Gov. Ernie Fletcher attended, the first sitting governor to do so in over 30 years, and delivered a keynote address.

In his speech, Gov. Fletcher recognized our low pay and hard work when he stated, [you are] "underpaid and…overworked and…an essential part of the justice system." His words were well received especially when he reflected a somewhat holistic and deep-seeded understanding of our clients, who cannot take care of themselves because of lack of resources and other barriers. He called them LOMB, "the least of these my brethren."

The evening was a celebration of an exceptional year for DPA. We celebrated Kentucky becoming one of approximately 15 states nationwide that feature a full-time system at the trial and post-trial levels. And, we celebrated the $6.2 million additional dollars added to DPA's biennial budget placed into the budget by Gov. Fletcher and funded by both the Democratic House and Republican Senate. The Governor credited the additional funding to Ernie Lewis' one-on-one approach to educating him and others about the problems with the indigent defense system.

Governor Fletcher's remarks reflected a sincere understanding of attorneys' burgeoning caseloads. "Many of you are working at a level above the 483 average. A good attorney knows how essential counsel is before a trial begins and now you are working approximately 3.8 hours per case. It's just physically an impossibility to put more time into these cases when you have that many cases in your caseload. The Supreme Court in *Gideon v. Wainwright* recognized the need for equity and there are only so many cases you can physically handle."

As a result of the additional funding, DPA will be able to reduce defender caseloads by 15 percent, moving from 483 new cases per lawyer in Fiscal Year 2005, which was almost double the recommended number, to a more reasonable 409 in FY 2008. In addition, DPA will be able to implement a social worker pilot project that is predicted to increase treatment and reduce recidivism, saving precious tax dollars as well as human lives now being lost to the scourge of substance abuse.

Governor Ernie Fletcher

Those attending this year's awards dinner seemed to especially appreciate Governor Fletcher's remarks about the need for a balanced indigent defense system that protects the innocent. He recognized, as did other speakers and attendees, Ben Kiper, Tim Smith, and Herman May, the three men who were exonerated with the help of the Kentucky Innocence Project. He added, "[B]y following a case through …by ensuring that the side of some of Kentucky's most vulnerable citizens is fully heard before their liberty is taken from them … you are dutifully upholding the constitutional system of justice. That system, although imperfect, is intended to find the truth, apply the law and protect the innocent." ■

[I]t's ... extremely important to take care of those that need our help in our system that cannot take care of themselves.

— Governor Fletcher

EXCERPTS FROM GOVERNOR FLETCHER'S SPEECH

There was a physician I worked with, his name was Pat Snyder. Pat Snyder was a family physician, a fellow family physician, and we worked at St. Joseph Hospital in Lexington, Kentucky. And we used to pull call at the emergency room at night for patients that had no physician or anyone to take care of them. And we were talking about that one night because a lot of physicians, well, frankly find that a little bit of a burden because often times they don't get paid anything and you all are familiar with that. Well, secondly, the fact is that sometimes these are very difficult patients because they come from difficult situations and backgrounds. But he always used an expression about those patients that stuck with me, he called them, "LOMB's." It happens to be from the scripture, but it was, "The least of these, my brethren." And he said our duty and our job here was to take care of these LOMB's. And that's what you do. And that's why when I was presented with the facts and the caseloads that you have in the work you do that we were very receptive to supporting your efforts.

. . .

It reminds me of another story and why would we do this and I think it's because of the dignity of humanity. It was a mentor of mine whose name was Charlie Sagiatella. Dr.Sagiatella was from the northeast, Italian obviously. He did his training – he went to school – he was an individual that was from the other side of the tracks, if you will - very poor blue-collar family. But he was a brilliant individual and ended up and got an opportunity –a scholarship to Yale. He went to Yale University and then he went to Vanderbilt where he did his residency in general surgery. He was recruited by Happy Chandler to the Albert Chandler Medical Center and was one of the first surgeons that came in there. When he came there, he worked for a number of years there, and I worked with him as a resident when I went through the surgical part of my training. And I got to know this individual. He eventually went out into private practice and we worked together at St. Joseph Hospital as well. I remember one evening where an individual who we'd cared for together before, came into the emergency room. Dr. Sagiatella saw him and the next morning, I went in and followed up, checked on the individual. He was what you might say was one of those "LOMB's" – he was a homeless individual and had an extreme problem with alcoholism. And when I looked at the emergency room slip, according to the diagnostic criteria, there was no test there that would have justified an admission. But the guy was down on his luck, he was covered with filth, no place to go, nothing to do and the diagnosis on the admission was "admitted for the dignity of humanity." That has stuck with me ever since.

. . .

There is a responsibility that we have. There are those that for whatever reason – we may point our fingers and say, "They could've done better. They could've done more." But the fact of the matter is we that have been put into positions that are blessed for one reason or another, well beyond our control or doing, have a responsibility to take care of that because of humanity's dignity. And that's what you do.

. . .

We've gotten, "tough of crime" – and believe me, I want to be tough on crime. But I also, more importantly, want to be *effective* on crime. I want to make sure that we do something that's going to work – that's going to turn around individual's lives. I've said, "there's no 'throw-away' people." And everyone, and certainly the justice system who understands it much better than I do, but it's like government and the fact that there are three parts of government and they're a balance that they bring to government. And they really, if you will, help cover the failures that sometimes we humans express and that's by that cross-check of that area. The same way in the justice system when you have somebody who is prosecuting and somebody who is defending, it is a delicate balance that is very important. You have to have adequate emphasis on both sides if you're going to execute real justice in our societies and that balance is extremely important. ■

It's not always the most comforting thing for a physician to stand up among 500 attorneys. But I do feel tonight that I am among friends and fellows that share my belief that we are called – each of us are called – to take care of those LOMB's.

— Governor Fletcher

JUDGE SARA COMBS REMARKS UPON RECEIVING THE *PUBLIC ADVOCATE'S AWARD*

Judge Sara Combs

If the Governor was overwhelmed as a doctor standing in front of 500 lawyers, I can add to that by saying I'm overwhelmed by standing in front of 500 of the *best* lawyers in Kentucky. Not because of your professional skills which I see all the time and I know to be of the very highest – truly incomparable – but because of the quality of your heart to motivate you to use those skills.

For the last 15 years, I've lived alone on a farm in eastern Kentucky. And the driving forces in my life have been two-fold: to take care of every stray animal that toddles onto the farm (there have been quite a few) and to do work that matters to the overall well-being of mankind in the law which was always so dear to my husband's heart. I couldn't think of a better way to memorialize him. I lost a battle with one of those creatures this morning at 4 o'clock and almost didn't come here today. And by being here, I realized that it was meant to be. You comfort me. You inspire me. To see these three lives restored tonight – that was all that it took for me to realize that all is well with the world after all. You are the embodiment and truly the personification of Albert Schweitzer's definition of an ethical person, when he said, "A man is ethical only when life, as such, is sacred to him, that of plants and animals as well as that of his fellow man, and when he devotes himself helpfully to all life that is in need of help." That is you. That is what you do and I thank you for including me in your numbers tonight. ■

JUSTICE WILL SCOTT'S REMARKS UPON RECEIVING THE *PUBLIC ADVOCATE'S AWARD*

Justice Will Scott

Some very wise people have said some very moving words here tonight, so I won't try and compete with them. I agree with almost all of what has been said. But it would take somebody that didn't know what they were doing in the practice of the law to know that you all needed them - that 400 cases, even 409 that you're going to be down to in the next two years is still too much and if you're overworked then possibly somebody doesn't achieve justice.

So I was glad when Ernie Lewis called and asked me to come up to the meeting in Prestonsburg I was glad to come down and I was really happy to get the opportunity to get up and speak and say what was on my heart. And I want you to know, that I am very happy to get this award from you all tonight and if I can help in the future, you just let me know. ■

CAPITAL CASE REVIEW

By David M. Barron

David M. Barron

Supreme Court of the United States

Holmes v. South Carolina,
126 S.Ct. 1727 (May 1, 2006)
(Alito, J., for a unanimous court)

In this capital case, Holmes attempted to introduce evidence that a third-party committed the murder. The trial court and South Carolina Supreme Court prevented Holmes from doing so because "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." The Supreme Court of the United States granted *certiorari* and reversed.

The United States Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. This right is abridged when evidence rules infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve. South Carolina's rule barring the admission of third-party culpability evidence was based on the following logic: "Where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak." This logic depends on an accurate evaluation of the prosecution's proof, which cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact. South Carolina's rule on the admissibility of third-party culpability evidence, however, determines whether to admit the evidence by evaluating the strength of only one party's evidence - - without considering the strength of contrary evidence offered by the other side to rebut or cast doubt. Thus, South Carolina's rule is arbitrary and thus violates a criminal defendant's right to have a meaningful opportunity to present a complete defense.

Day v. McDonough,
126 S.Ct. 1675 (April 25, 2006) (non-capital)
(Ginsburg, J., for the court; joined by, Roberts, C.J., Kennedy, Souter, and Alito, JJ.; Stevens, J., dissenting; joined by Breyer, J.,; Scalia dissenting; joined by Thomas and Breyer, JJ.).

This case deals with the authority of a United States District Court to *sua sponte* dismiss as untimely a petition for a writ of habeas corpus. The Anti-Terrorism and Effective Death Penalty Act establishes a one-year limitation period for filing a petition for a writ of habeas corpus that begins to run on the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. The one-year clock is statutorily tolled during the time the petitioner's properly filed application for state post conviction relief is pending. Here, the state conceded to the district court that Day's habeas petition was timely filed. The district court, however, recognized that the state had miscalculated the number of non-tolled days that had elapsed, which established that Day's habeas petition was not timely filed. After recognizing this, the district court, on its own initiative, dismissed Day's habeas petition. The Supreme Court of the United States granted *certiorari* to determine whether a federal court lacks authority, on its own initiative, to dismiss a habeas petition as untimely, once the State has answered the petition without contesting its timeliness. Because the state's waiver of the statute of limitations defense was unintelligent as a result of a miscalculation of the number of days that had elapsed, the Court held that the district court had the discretion to correct the state's error and dismiss Day's habeas petition.

The court ruled that the statute of limitations defense is similar to other threshold barriers to relief, including failure to exhaust state remedies, procedural default, and nonretroactivity that a court may, but need not, address *sua sponte*. Because each of these defenses can be raised *sua sponte*, the Court saw no reason to treat the statute of limitations defense differently. Thus, although the Court stressed that lower courts have no obligation to assist attorneys representing the state or to recheck their calculation of the number of days remaining on the filing clock, the Court held that a lower court may dismiss a habeas petition on its own initiative as untimely. But before doing so, the court "must accord the parties fair notice and an opportunity to present their positions." Further, "the court must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitations issue and determine whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time barred. Because the lower court followed these requirements, the Court affirmed the decision dismissing Day's habeas petition as time-barred.

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Scalia dissenting: The Federal Rules of Civil Procedure apply to habeas cases to the extent that the rules of civil procedure are not inconsistent with the rules governing habeas cases. The Federal Rules of Civil Procedure apply a forfeiture rule for unpleaded limitations defenses. Forfeiture of the limitations defense is demonstrably not inconsistent with traditional habeas practice, because habeas practice included no statute of limitations until 1996. Instead, it is consistent with Habeas Rule 5(b), which now provides that the State's answer must state whether any claim in the petition is barred by the statute of limitations. Forfeiture is also consistent with Habeas Rule 4, which provides for *sua sponte* screening and dismissal of a habeas petition only prior to the filing of the State's responsive pleading. Thus, Scalia would hold that the state waives a statute of limitations defense by not raising it and that a court cannot *sua sponte* dismiss a habeas petition as untimely.

Stevens dissent: Stevens believes that the court should announce its opinion, but postpone the entry of judgment pending the Court's decision in *Lawrence v. Florida*, — U.S. ——, 126 S.Ct. 1625, 164 L.Ed.2d 332 (cert.granted, Mar. 27, 2006), which will determine whether the one-year statute of limitations for filing a habeas petition is statutorily tolled during the period of time between a state's highest court's ruling on the post conviction action and the Supreme Court of the United States decision on the petition for a writ of *certiorari*. As the majority opinion notes, the answer to this issue will decide whether Day's federal habeas petition was timely filed. Thus, Stevens believes that the Court's ruling in this case should not take effect until *Lawrence* is decided. Because the majority refused to adopt this position, Stevens said, "the Court of Appeals may avoid a miscarriage of justice by keeping this case on its docket until after we decide *Lawrence*."

Allen v. Ornoski,
126 S.Ct. 1139, 1140 (Jan. 16, 2006)
(Breyer, J., dissenting from the denial of a stay of execution)

Relying on the dissents in *Knight v. Florida*, *Elledge v. Florida*, and *Lackey v. Texas*, Justice Breyer would have granted the stay of execution because the fact that Allen is 76 years old, suffers from diabetes, is confined to wheelchair, and has been on death row for 23 years raises a significant question as to whether his execution would constitute "cruel and unusual punishment."

Supreme Court of the United States *Certiorari* Grants

***Ornaski v. Belmontes*, No. 05-493, case below,**
414 F.3d 1094 (9th Cir. 2005), granted on 5/1/06

1. Does *Boyde* confirm the constitutional sufficiency of California's "unadorned factor (k)" instruction where a defendant presents mitigating evidence of his background and character which relates to, or has a bearing on, his future prospects as a life prisoner?

2. Does the 9th Circuit's holding, that California's "unadorned factor (k)" instruction is constitutionally inadequate to inform jurors they may consider "forward looking" mitigation evidence constitute a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989)?

***Carey v. Musladin*, No. 05-785, case below,**
427 F.3d 985 (9th Cir. 2005), granted on 4/17/06

In the absence of controlling Supreme Court law, did the Court of Appeals for the 9th Circuit exceed its authority under 28 U.S.C. 2254(d)(1) by overturning respondent's state conviction of murder on the ground that the Courtroom spectators included three family members of the victim who wore buttons depicting the deceased?

Stays of Execution

Percy Walton: On June 8, 2006, the Governor of Virginia granted Percy Walton a 6-month reprieve from execution so that an independent evaluation of his competency to be executed could be conducted. Walton's competency has been raised throughout his case and the United States Court of Appeals for the 4th Circuit found him competent to be executed based on evaluations conducted in 2003. In Governor Kaine's statement granting the reprieve, he expressed concerns about whether Walton's mental status has gotten worse since 2003.

Sedley Alley: Tennessee Governor Bredesen granted Alley a 15-day reprieve so he could return to state court to ask for DNA testing on evidence that was not part of Alley's previous request for DNA testing.

United States Court of Appeals for the Sixth Circuit

Alley v. Key,
No. 06-5552 (6th Cir. May 14, 2006) (unpublished)
(Boggs, C.J., for the Court; joined by, Ryan and Batchelder, JJ.)

While under an execution warrant, Alley filed a 42 U.S.C. 1983 suit seeking to have the court clerk turn over physical evidence so Alley could have that evidence DNA-tested at his own expense. In an opinion that the court stated does not encourage a definitive ruling on all aspects of the matter, the court denied Alley's suit, ruling that there is no constitutional right to post-judgment DNA testing. Specifically the court held: 1) there is no federal procedural due process right to post-conviction DNA testing and that Tennessee's DNA statute does not create a procedural due process right; 2) because there is no substantive due process right to clemency proceedings, there is not constitutional right to access to evidence for DNA testing for the purpose of a clemency petition; 3) the prosecution's obligation to disclose material exculpatory evidence does not reach post-conviction access to evidence for DNA testing where it is speculative as to whether the evidence to be tested will exculpate or otherwise prove favorable to Alley; and, 4) although a majority of the

Supreme Court of the United States has held that the 8th Amendment prohibits executing an innocent person, even favorable DNA results could not result in Alley being considered actually innocent of the crime because of compelling evidence of his guilt, including his confession, his description to law enforcement authorities of his acts, and the eyewitness testimony against him.

***Alley v. Little*,**
No. 06-5650 (6th Cir. May 12, 2006) (unpublished)
(Boggs, C.J., for the Court; joined by, Ryan and Batchelder, JJ.)

Alley filed a 42 U.S.C. Section 1983 suit challenging the chemicals and procedures Tennessee planned to use to carry out his execution. The federal district court held the suit in abeyance pending the Supreme Court of the United States decision in *Hill v. McDonough* on whether a challenge to lethal injection chemicals and procedures is cognizable in a 1983 suit. The federal district court then enjoined Alley's execution because *Hill* would decide if the court had jurisdiction to address the claim and because the four-factor analysis for granting a preliminary injunction favored Alley. The four factors are: 1) irreparable harm to the moving party; 2) the relative absence of harm to other parties following an injunction; 3) the quantum of public interest in granting the injunction; and, 4) the likelihood of success on the merits. The Tennessee Department of Corrections appealed to the United States Court of Appeals for the Sixth Circuit, which held that the district court abused its discretion in ruling that these four factors favored granting an injunction and by granting an injunction pending the decision in *Hill*.

The Sixth Circuit obviated the need for an injunction pending *Hill* by assuming that Alley's action is properly filed under Section 1983 and then proceeding to the four-factor test for determining whether to grant an injunction. The court held that Alley will suffer irreparable injury without an injunction but ruled that the likelihood of success on the merits and Alley's delay in filing were the factors that would determine whether the injunction should be upheld. As for likelihood of success on the merits, the court ruled that any likelihood of success on the merits of this claim is unsupported by current law, which offers no basis for finding lethal injection protocols unconstitutional. As for delay, the court held that waiting until thirty-six days before his scheduled execution date to file suit was unreasonable, because lethal injection had been the only method of execution in Tennessee (unless the inmate selects electrocution) since 2000 and because Abdur'Rahman's lethal injection lawsuit in Tennessee put Alley on notice of the chemicals and procedures that would be used to carry out his execution and the potential problems with those chemicals and procedures. Thus, the court held that Alley "needlessly and inexcusably" withheld his lethal injection claim. Because of this delay and the court's belief that Alley had no chance of prevailing on the merits, the court vacated the injunction granted by the district court.

***Alley v. Little*,**
2006 WL 1320433 (6th Cir. May 16, 2006) (to be published)
(Martin, J., joined by, Daughtrey, Moore, Cole, and Clay, JJ., dissenting from the denial of rehearing en banc in No. 06-5650 concerning Alley's challenge to the lethal injection chemicals and procedures)

In determining whether to grant an injunction, a court must consider: 1) whether the petitioner will suffer irreparable injury if an injunction is not granted; 2) whether others will be harmed by the granting of an injunction; 3) the public interest in an injunction; and, 4) the likelihood of success on the merits. To the dissenters, "this balancing of interests weighs heavily in favor of upholding the [injunction] entered by the district court."

Irreparable injury: The dissenters ruled that it is clear that irreparable injury would be suffered without an injunction because Alley would be dead.

Whether others will be harmed by the injunction: Noting that "death is different," the dissenters ruled that a delay of less than two months, awaiting the Supreme Court of the United States decision in *Hill* is "worth the wait when human life is at stake."

Public interest: The dissenters ruled that an injunction is in the best interest of the public because the public has an interest in not carrying out cruel and unusual punishment or terminating human life prematurely, and because the public has an interest in uniform adjudication by the federal courts on this issue.

Likelihood of success on the merits: The dissenters believe there is a likelihood that Alley will be able to show that lethal injection amounts to cruel and unusual punishment, particularly in light of evidence from recent executions, including one last week. Although not expressly saying it, the dissenters are referring to the execution of Joseph Clark in Ohio. The execution team had difficulty inserting an I.V. After they finally got the I.V. in, the vein collapsed. In all, it took approximately an hour and a half to carry out his execution, and Clark's moans and groans throughout the process were heard by the witnesses.

An injunction is also warranted because the Supreme Court of the United States will soon decide whether 42 U.S.C. Section 1983 is the proper vehicle for raising challenges to the lethal injection chemicals and procedures: Because some federal courts have granted injunctions barring executions pending the decision in *Hill*, the dissenters believe that Alley was entitled to an injunction so that uniformity in the court system could be maintained. In the words of Judge Martin, "the dysfunctional patchwork of stays and executions going on in this country further undermines the various states' effectiveness and ability to properly carry out death sentences." Currently, condemned inmates are bringing

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identical challenges to lethal injection. Some are granted injunctions while others are not. "This adds another arbitrary factor into the equation of death and thus far, there has been no logic behind the Supreme Court's decision as to who lives and who dies." Thus, "the current administration of the death penalty in light of the pending decision of *Hill* is more like a march in dozens of different directions." As a result, "until the Supreme Court sorts this out, [the dissenters] would uphold the stay issued in this case, and all cases that come before this Court."

***Alley v. Bell*,**
No. 05-6876 (6th Cir. May 9, 2006)
(Boggs, C.J., for the Court; joined by, Ryan and Batchelder, JJ.)

Alley filed a Federal Rules of Civil Procedure, Rule 60(b) motion in the federal district court, asking the federal district court to reopen the habeas proceedings, or in other words, grant relief from the habeas ruling for the following reasons: 1) evidence withheld by the state showed that fraud, misconduct, or misrepresentation by the state led the district court to reach an improper conclusion on a particular claim; and, 2) a change in state law involving the admissibility of evidence. The district court construed the 60(b) motion as a successive habeas petition, which can only be filed with authorization of the circuit court of appeals.

The Sixth Circuit affirmed because: 1) a habeas petition cannot use a Rule 60(b) motion to apply a purported change in the substantive law governing the claim; 2) a claim in a 60(b) motion that seeks to reassert a claim already denied on the merits is a prohibited successive habeas petition; 3) the denial of a certificate of appealability cannot be appealed through the use of 60(b) motion.

The court also ruled that the "Act for the Relief of the Parents of Theresa Marie Schiavo" is limited to the Schiavo case, and thus has no relevance to this case and cannot serve as a basis to excuse a procedural default or to exempt a petitioner from the standard of review set forth in 28 U.S.C. §2254(d).

***United States v. Doe*,**
2006 WL 1208070 (6th Cir. May 3, 2006) (unpublished) (per curiam)
(Daughtrey, Sutton JJ., Forester, by designation)

Twenty-six days before the date of trial, the government filed notice of intent to seek the death penalty. The trial was continued and six days later, the defendant file a motion to strike the death notice, claiming that the 26-day period between the filing of the death notice and the original trial date was unreasonable. The trial court denied the motion. An interlocutory appeal was taken. Rather than discuss the merits of case as did the district court, the Sixth Circuit decided the case on the jurisdictional grounds of mootness and ripeness. A matter becomes moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome of the dispute." The ripeness doctrine "dictates that courts should decide only existing, substantial controversies," rather than "events that may not occur as anticipated, or at all." Applying the mootness and ripeness doctrines, the court dismissed the appeal for lack of jurisdiction, holding that the issue was moot because the trial date had already been continued and premature (unripe) because no new trial had been set.

***Filiaggi v. Bagley*,**
445 F.3d 3d 851 (6th Cir. 2006)
(Batchelder, J., for the Court; joined by, Gibbons, J.; Cole, J., dissenting)

On the first day of Filiaggi's trial, the stun belt used to restrain Filiaggi malfunctioned, shocking him. As a result of this, Filiaggi argued that his waiver of the right to trial by jury was invalid because he was incompetent and because the court did not engage him in an adequate colloquy, and that he was substantively incompetent to stand trial. The Sixth Circuit denied both claims.

Standard of review for waiving the right to trial by jury: Because the right to a jury is fundamental, the waiver of this right must be knowing, intelligent, and voluntary. At the time of Filiaggi's waiver, this required only that the waiver be consented to by the government, sanctioned by the court, and reflect the express and intelligent consent of the defendant. Filiaggi thus has the burden of demonstrating that he did not expressly and intelligently consent to waive a jury trial and that the Ohio Supreme Court's judgment to the contrary is either an unreasonable application of clearly established Supreme Court precedent or contrary to that precedent, or resulted from an unreasonable interpretation of the evidence presented to the state courts.

Discussing appellate consequences of waiving a jury trial is not required: Because no Supreme Court precedent conditions the validity of a jury waiver upon a defendant's understanding of the appellate process, the court denied Filiaggi's claim that his waiver was not intelligent and voluntary because his counsel and the court failed to discuss with him the appellate consequences of waiving a jury trial.

The electrical shock did not leave Filiaggi too disoriented to waive a jury trial: Because the trial court held a competency hearing after Filiaggi was electrically shocked and both experts who testified at the hearing found that Filiaggi understood the proceedings against him and was able to consult with his attorneys and to assist him in preparing his defense, the court ruled that there was no evidence in the record to suggest that Filiaggi was incompetent and that the trial court did not err by refusing counsel's request to have Filiaggi reevaluated for competency to stand trial.

Standard for determining competency to stand trial: The due process right to a fair trial is violated by a court's failure to hold a proper competency hearing where there is substantial evidence that a defendant is incompetent. To be adjudged competent, a defendant must have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as functional understanding of the proceedings against him. This test requires the court to determine whether a reasonable judge situated as was the trial court judge, whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial. A determination of competency is a factual finding, to which deference must be paid.

The state court ruling that Filiaggi was competent was not unreasonable: Because the trial court applied the correct legal standard and because the evidence supporting Filiaggi's incompetency came solely from Filiaggi's attorneys and was contradicted by other witnesses suggesting that Filiaggi was competent, the state court's decision that Filiaggi was competent to stand trial was not contrary to or an unreasonable application of clearly established law.

Cole, J., dissenting: Cole believed that the majority erred by combining two distinct legal issues - - the ultimate factual issue of competency and the procedural matter of determining competency. Under clearly established Supreme Court law, evidence of competency does not absolve a trial court of its obligation to hold a competency hearing. In addition, although a defendant's observable behavior might be relevant to an ultimate decision on competency, it cannot be relied upon to dispense with a hearing on that very issue. A state court that fails to give proper weight to the information suggesting incompetence which comes to light during trial violates the Constitution. Here, two court officers, a medical doctor, and a court appointed forensic psychologist agreed that a further competency evaluation was in order. In addition, trial counsel, one of whom was a licensed physician, repeatedly requested a competency evaluation, claiming that Filiaggi was hallucinating. In light of this evidence, Cole believed that a trial judge is not free to focus exclusively upon whatever evidence suggests competence and otherwise turn a deaf ear. Instead, the trial court was required to hold another competency hearing.

Van Hook v. Anderson,
444 F.3d 830 (6th Cir. 2006)
(Merritt, J., for the Court; joined by, Martin and Moore, JJ.)

In this pre-Anti-Terrorism and Effective Death Penalty Act-case, the court reversed Van Hook's conviction and death sentence because his constitutional rights were infringed when the police started an interrogation anew with Van Hook after he had requested legal counsel.

Legal standard: Under *Edwards v. Arizona*, 451 U.S. 477 (1981). Once a suspect is in custody and invokes his right to counsel, law enforcement may not further interrogate him until counsel has been made available, or unless the suspect initiates further conversations or exchanges with the police. Interrogation is defined as any exchange between police and a suspect in custody reasonably likely to elicit an incriminating response. Thus, initiation of conversation is permissible only when, "without influence by the authorities, the suspect shows a willingness and a desire to talk generally about his case." The state bears the burden of proving that a defendant voluntarily, knowingly, and intelligently waived his right to silence and counsel.

Van Hook's confession was unconstitutionally obtained: Van Hook was given his *Miranda* rights after he was arrested and in custody in a Florida jail. Because Van Hook asked for an attorney, the police ceased asking him questions. Upon arriving at the jail later that day, two Ohio detectives knew that Van Hook had invoked his right to counsel and that the Florida detectives had thus ceased questioning him. The Ohio detectives then informed Van Hook that they had a lot to talk with him about and that they had been in touch with his mother. The detective did not tell Van Hook that he could not be questioned because Van Hook had requested counsel. The detective also testified at a hearing that he had not received any direct communication that would indicate that Van Hook desired to speak with him or any law enforcement official. Further testimony revealed that detectives had contacted Van Hook's mother in order to obtain information on Van Hook's location and to obtain her assistance in inducing Van Hook to talk to police.

Applying the legal standard to the facts of this case, the court ruled that "no one but a suspect himself can initiate further discussions with police after counsel has been requested but not yet furnished." Because Van Hook gave a statement after the detectives told him that they spoke to his mother, without Van Hook affirmatively reinitiating discussions with the police, the court held that Van Hook's incriminating statements were obtained in violation of his constitutional rights.

Admission of the confession was not harmless: Relying on Justice Stevens concurrence in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the court ruled that an error is harmless only if one can say "with fair assurance that the judgment was not substantially swayed by the error." Applying this standard, the court held that the admission of Van Hook's confession was not harmless, because "a confession can be the most probative and damaging evidence that can be admitted against a defendant," and because Van Hook's statements "were self-incriminating and among the most significant evidence marshaled against him by the state."■

SIXTH CIRCUIT CASE REVIEW

By Dennis J. Burke, Post-Conviction Branch

Pogue v. Diabetes Treatment Centers of America,
444 F.3d 462 (6th Cir. 2006)
(Contempt of Court; Writ of Mandamus)

The District Court ordered Appellee to turn over documents in discovery, which the Appellee insistd were privileged attorney-client communications. The Sixth Circuit considered whether a writ of mandamus would be appropriate.

The decision whether to grant mandamus relief involves consideration of five factors:

> (1) The party seeking the writ has no other adequate means, such as direct appeal to obtain the relief desired; (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) The district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error or manifests a persistent disregard of the federal rules; (5) the district court's order raises new and important problems and issues of first impression.

Addressing only the first prong of the test the two members of the panel held that the writ should be denied because Appellee has "a clear alternate route to achieve review of the order." Specifically, the alternative is to defy the district court's order and be cited for contempt of court. Then, the Appellee can proceed with an interlocutory appeal of the contempt citation.

Fulcher v. Motley,
444 F.3d 791 (6th Cir. 2006)
(Confrontation Clause violated in murder/robbery/burglary trial)

Fulcher was sentenced to life in prison. Evidence against him at trial included a taped statement from a police station interview of Fulcher's then girlfriend, Patricia Sue Ash. Fulcher married Ash before trial and invoked the marital privilege. Ash was thus unavailable to testify, but the government introduced her taped statement at trial.

In granting the petition, the Court of Appeals concluded that the Kentucky Supreme Court decision affirming the conviction was contrary to clearly established law in effect at the time of the decision. (1996).

Of greater interest for Confrontation Clause petitions in the near future is that the two-judge majority on the panel declined to consider whether *Crawford v. Washington*, 541 U.S. 36 (2004), should have been retroactively applied under the Supreme Court's retroactivity analysis in *Teague v. Lane*, 489 U.S. 288 (1990). In *Crawford*, the Court concluded that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional concerns is the one the Constitution actually prescribes: confrontation." *Crawford* at 69. On May 16, 2006, the Supreme Court agreed to consider the retroactivity of *Crawford* in a 9th Circuit case, which held that it should be retroactively applied. *See Bockting v. Bayer*, 3099 F.3d 1010 (9th Cir. 2005).

McCalvin v. Yukins,
444 F.3d 713 (6th Cir. 2006)
(Voluntariness of Confession)

Traci McCalvin ran over her ex-boyfriend's girlfriend with her car. She insisted it was an accident. However, over a 7-and-a-half-hour period (beginning at 1:30 a.m.), police convinced her that unless she changed her story she would be charged with murder and likely never see her husband and children again. The police detective offered McCalvin three alternatives to the accident version of what happened and McCalvin adopted the version assigning to her the least responsibility for the death.

The district court granted McCalvin's request for habeas relief finding the state court's ruling affirming the conviction to be contrary to, or an unreasonable application of clearly established federal law. The district court compared the facts surrounding McCalvin's confession to *Lynumn v. Illinois*, 372 U.S. 528 (1963). In *Lynumn*, the police told her that her state financial aid for her infant child would be taken away unless she cooperated with them. The Supreme Court held that under the circumstances Lynumn's confession was involuntary.

By a 2-1 majority, the Court of Appeals panel reversed. It found McCalvin to be distinguishable from Lynumn in several ways. First, Lynumn was interrogated in her kitchen while surrounded by three police officers and the twice convicted snitch who set her up. McCalvin was never interrogated by more than two officers at a time. (The Court made no mention of fact that McCalvin, was interrogated at the police station and unable to leave.)

Second, *Lynumn* was decided prior to *Miranda v. Arizona*, 384 U.S. 436 (1966) but McCalvin signed a *Miranda* waiver. Third, and most important according to the majority, the police officers in Lynumn threatened the financial well being of the child and made promises of leniency to Lynumn if she cooperated. Whereas in this case, police merely threatened the long term emotional well being of the children by snatching their mother away forever.

Not surprisingly there were discrepancies between McCalvin's version of events and the police version. McCalvin testified at a suppression hearing that the police detective lied. He promised her that he was only trying to help her and that if she changed her story just a little tiny bit, then she could go home and the prosecutor would probably not charge her. The police officer "never admitted to promising McCalvin anything." He testified that McCalvin suddenly looked at him and said: "I did it." McCalvin told him that she drove her car toward the victim to scare her.

The majority accepted the police story as true yet disregarded McCalvin's testimony even though neither the state court nor the district court made factual findings regarding the credibility of the witnesses. Judge Cole pointed out in dissent, at a minimum the case should have been remanded for factual findings.

In concluding its opinion, the majority proclaimed that the case should not be read to endorse the interrogation techniques used by the police.

Giles v. Schotten,
__F.3d _(2006)
(Right to expert examination of alleged sexual abuse victim.)

Appellant was accused of sexually molesting his two daughters. The director of the Child Protection Program at Case Western University, a pediatrician, conducted a physical examination and testified to finding evidence "consistent with sexual abuse." In addition, a state Human Services social worker conducted a psychological examination, using anatomically correct dolls, and testified that one of the children told her that the Appellant sexually abused her. A defense request for an independent physical and sexual examination of the two girls was denied. Appellant did consult with an expert regarding the testimony of the pediatrician. Appellant was convicted of two counts and sentenced to life in prison.

Appellant filed a petition for a writ of habeas corpus claiming that the state court denied him the right to present evidence and therefore the right to present a defense. A panel of the Court considered the case for the second time. On appeal before the original panel, the district court order denying relief was reversed and remanded with instructions for the court to make specific findings from the existing record, or if necessary, to conduct an evidentiary hearing as the record did not support the district court's initial findings.

Upon remand, the district court did not make factual findings. Instead, it entertained the government summary judgment motion and granted it. In the present appeal, a different panel affirmed, without any factual findings. It found that a change in "litigation strategy" is a legitimate "change in circumstances" and not a deliberate decision to ignore the rule which "compels compliance with the dictates of the superior court" *See United States v. O'dell*, 320 F.3d 674, 679 (6th Cir. 2003) (Internal citation omitted).

Addressing the underlying issue of the right to a physical and psychological examination of Appellant's accusers, the majority held that because Appellant had an opportunity to cross-examine both of the government's expert witnesses, that his right to present a defense was not violated.

United States v. Guzman,
___ F.3d ___ (6th Cir.)
(Jury Voir Dire)

During group voir dire, the court allowed questioning of jurors regarding earlier jury service on criminal cases and the verdict. Appellant objected to the verdict questions. The jury pool heard fifteen separate instances of unrelated criminal prosecutions. All but one resulted in a conviction. Appellant argued that the questions (and answers) contaminated the entire venire with a belief that the overwhelming majority of defendants are guilty.

The Appeals panel affirmed the District Court denial of relief. The Court acknowledged the Sixth Amendment right to be tried by an impartial jury. However, as a reviewing court it can overturn a finding of juror impartiality only with a finding of manifest error. *Mu'min v. Virginia*, 500 U.S. 415, 428 (1991).

There is a presumption of juror impartiality. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). Essentially, Appellant was arguing that the jurors became "indoctrinated" by the fourteen positive responses. Only in an extreme case will a habeas petition alleging juror partiality be granted. The Court pointed only to one instance, *Mach v. Stewart*, 137 F.3d 360 (9th Cir. 1997). That case involving a sexual-assault allegation. A potential juror who had worked for many years as a social worker remarked in group voir dire that she would have a difficult time remaining impartial because every one of her client's allegations of sexual abuse were later confirmed. The Court of Appeals vacated the conviction finding that at a minimum the trial court needed to conduct further voir dire around the ability of the other jurors to remain impartial. The Court in *Guzman* distinguished that case even further, because the jurors comments were "expert-like" in nature.

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***United States v. Fraser*,**
___ F.3d ___ (6th Cir.)
(FRE 403, 404(b); Rebuttal evidence.)

Appellant convinced a woman he met in a chat room to deposit checks for him in her checking account. He claimed he did not have an account. The checks, totaling in excess of $38,000.00, were fraudulent. The woman agreed to deposit the checks and withdrew all of the money in cash, which she then delivered to Appellant at a local hotel. The next day the woman took the Appellant to the airport and she never saw him again until she testified at his trial.

Upon learning of the counterfeit checks, the U.S. Attorney's office traced the checks to the Appellant. In the course of the investigation, it was discovered through the Appellant's website that he had self-published an autobiography and was selling it on Amazon.com. The title of the book was *Birth of a Criminal.* The cover of the book displayed Appellant's picture and it was published by Gutter Publishing, founded by the Appellant. In one of the chapters, of the autobiography, was a detailed description of the very scheme that Appellant was accused of committing.

The government sought to introduce that segment of the book to establish proof of intent, knowledge, planning or preparation under FRE 404(b). Upon consideration of undue prejudice, the trial court denied the government's request, finding the book to be "the most damning piece of evidence I have ever seen."

After the ruling, the parties gave opening statements. The defense counsel told the jury that Appellant knew nothing about the fraud. He told them that the woman concocted the counterfeiting scheme herself and, if anything, Appellant was guilty of having been set-up in case something went wrong. The government urged the Court to reconsider the original ruling. It did and allowed (part of) *Birth of a Criminal* into evidence.

The Court unanimously affirmed. ■

The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy.

— Martin Luther King Jr.

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PLAIN VIEW . . .

Ernie Lewis, Public Advocate

Brigham City v. Stuart
126 S.Ct. 1943 (2006)

Let me start with Justice Stevens' concurring opinion. "This is an odd flyspeck of a case. The charges that have been pending against respondents for the past six years are minor offenses—intoxication, contributing to the delinquency of a minor, and disorderly conduct—two of which could have been proved by evidence that was gathered by the responding officers before they entered the home. The maximum punishment for these crimes ranges between 90 days and 6 months in jail. And the Court's unanimous opinion restating well-settled rules of federal law is so clearly persuasive that it is hard to imagine the outcome was ever in doubt."

A second oddity here: at a time when the Court often divides, this is a unanimous decision written by the new Chief Justice. The facts are simple. Officers in Brigham City, Utah, received an early morning report of a loud party. Four officers went to the house and watched an altercation through the window of a house, including a blow by a juvenile to an adult and the spitting of blood by the adult. The officers went inside and twice announced their presence, resulting in the altercation dying down. Arrests were made and the defendants were charged with contributing to the delinquency of a minor, disorderly conduct, and intoxication. Motions to suppress were granted and those decisions were affirmed by the Utah Court of Appeals. The Utah Supreme Court also affirmed, holding that the warrantless entry into the home was illegal and not justifiable by the emergency aid doctrine. The United States Supreme Court granted *certiorari*.

The Court reversed, holding that indeed the search was consistent with the Fourth Amendment in that there was an emergency that justified an entry without a warrant. The Court first rejected the argument that the officers entered not to protect lives but instead to enforce the law. "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'"

The Court also rejected the contention that the emergency was not serious enough to warrant an entry. "[T]he officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning. Nothing in the Fourth Amendment required them to wait until another blow rendered someone 'unconscious' or 'semi-conscious' or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided."

Parks v. Commonwealth
2006 WL 1358368, 2006 Ky. LEXIS 137 **(Ky. 2006)**

Parks lived in Leitchfield in Grayson County with his wife and three-year-old daughter. He was on probation, and had signed a consent form allowing for the search of his person and residence while on probation. He received a call from Morris and Blakeman in February of 2002 that they needed a ride in order to move clothing and other personal belongings to another residence. Parks took his wife and daughter and went to 408 Peonia Road and loaded plastic bags and a black shoulder satchel into his car. He left his wife and daughter behind and drove with Morris and Blakeman. The black plastic bag contained a propane tank filled with anhydrous ammonia.

At the time that Parks picked up Morris and Blakeman, Detective Tony Willen of the Grayson County Sheriff's Department was seeking to obtain a search warrant for 408 Peonia Road. He had heard from a confidential informant that Morris and Blakeman were manufacturing methamphetamine and selling it at 408 Peonia Road. Det. Willen asked Officer Shawn Lee of the Clarkson Police Department to watch 408 Peonia Road while he was obtaining the warrant. Lee later called Willen and told him that Morris and Blakeman were in a car with another man. A warrant was then issued by a district judge. Once Det. Willen heard that, he contacted Officer Shawn Lee and told him that he had the search warrant and asked him to stop Parks' car. Lee stopped the car. Willen arrived and arrested Parks, Morris, and Blakeman and conducted a search of the car. The search of the vehicle resulted in the three of them being charged with manufacturing methamphetamine and possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine. Morris and Blakeman pled guilty to criminal facilitation to manufacturing methamphetamine and received 3 years in prison. Parks filed a motion to suppress at which the trial court held that Parks had consented to the search in order to obtain probation. Parks was convicted on each charge and PFO 2nd and received 40 years in prison.

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In an opinion written by Justice Cooper, the Supreme Court reversed. The Court rejected the trial court's finding that the search was justifiable as a result of Parks' consent at the time of probation. "Such prior consent will support a warrantless search if the officer has a 'reasonable suspicion' that the person who gave the consent is presently engaged in criminal activity." The Court noted that there was no testimony at the suppression hearing detailing any suspicion of criminal activity by Parks at the time of the stopping. Further, "even if it were otherwise, the fruits of even a consensual search must be suppressed if the search was conducted pursuant to an unlawful stop or detention."

The Court went on to find that the stopping of Parks' vehicle was unlawful. The warrant did not authorize the stopping of a vehicle with Blake and Morris in it, but rather to search a residence. "Clearly, the purpose of the warrant was to authorize a search of both the premises and those persons suspected of conducting illegal activity on the premises. The warrant did not authorize the arrest and search of Blakeman and Morris five miles away from the searchable premises."

The Court also rejected the Commonwealth's position that the good faith exception should apply. "[T]he 'good faith' exception applies to evidence obtained under an invalid warrant where error was made by a detached and neutral magistrate and the officers relied in good faith on the validity of the warrant…Here, the warrant was valid; it simply was improperly executed. The 'good faith' exception will not save an improperly executed search warrant."

Justice Wintersheimer dissented, joined by Justice Scott. The dissent believed that the stop was justified as a *Terry* stop "because there was a reasonable suspicion that a subject is involved or about to become involved in some criminal activity. Parks had signed a waiver in exchange for probation…Here, police had a reasonable, independent basis for suspicion in which to make the investigatory stop."

Ragland v. Commonwealth
2006 WL 733983, [Not Available on Lexis] (Ky. 2006)

This case addresses one search and seizure issue amidst a focus on many other issues resulting in reversal. Here, Ragland challenged the seizure of evidence pursuant to a federal search warrant prepared by a Special Agent of the FBI. The affidavit in support of the search warrant detailed a number of DUI arrests when Ragland had marijuana and one of which he had a pistol in his possession, trash pulls during which marijuana was found, and information from Ragland's former girlfriend concerning her knowledge of marijuana-growing operations as well as the location of a rifle alleged to be the murder weapon. Ragland challenged the search in a suppression motion stating that the affidavit was insufficient to establish probable cause by being stale. Justice Cooper's majority opinion rejected Ragland's claim. The Court noted that "whether information contained in an affidavit is stale 'must be determined by the circumstances of each case.'" While information from the girlfriend about marijuana growing operations was said to be "arguably 'stale,'" the Court noted that all of the evidence in combination supported the idea that marijuana would be found at the two residences listed in the warrant. Further, the Court noted that while the analysis of staleness is appropriate for the marijuana, it is not as appropriate for the rifle. "[W]e do not believe the 'staleness' test applies to Appellant's continued possession of the .243 caliber rifle at his mother's residence, which could be more accurately categorized as a 'secure operational base' than a 'mere criminal forum of convenience.' One could surmise that if the rifle was the murder weapon and Appellant intended to dispose of it, he would have done so shortly after the offense was committed, and it was, therefore, 'of enduring utility to its holder.'"

Whisman v. Commonwealth
2006 WL 1195944, 2006 Ky. App. LEXIS 131 (Ky. Ct. App. 2006)

Doctors became suspicious that Whisman was obtaining prescriptions illegally. They requested a KASPER search and received Whisman's prescription drug records. This led to an indictment for obtaining prescription drugs in violation of KRS 218A, motions to suppress that were denied, and a conditional plea of guilty. Whisman appealed to the Court of Appeals.

In an opinion by Judge Buckingham and joined by Judges Henry and VanMeter, the Court of Appeals affirmed. The Court first of all held that KRS 218A.202(6)(a)-(b)is constitutional as an administrative search. "An administrative search is reasonable if (1) there exists a substantial government interest in regulating the particular industry, (2) the regulation providing for the search reasonably serves to advance that interest, and (3) the regulation informs participants in the industry that searches will be made and places appropriate restraints upon the discretion of the inspecting officers," citing *Thacker v. Commonwealth*, 80 S.W.3d 451, 455 (Ky. Ct. App. 2002). The Court rejected the appellant's argument that the search here was more similar to that condemned in *Ferguson v. City of Charleston*, 537 U.S. 27 (2001), where the Court had held that it violated the Fourth Amendment to turn over patients' records to the police involving blood tests taken at birth. The Court noted that the records involved here are not individual patient records but rather KASPER records involving pharmacy records, the date of the prescription and dispensing. "In short, Whisman's arguments in this case ignore two significant distinctions. The first is between private medical data (diagnosis, treatment options, etc.) and prescription drug information. Second, Whisman does not distinguish between disclosures of information to proper

authorities and disclosures to the general public. In short, KRS 218A.202 serves the substantial state interest of monitoring the distribution of controlled substances and provides adequate notice and protection regarding disclosures of private data to the general public. Therefore, we conclude that the statute is not unconstitutional."

Commonwealth v. Spalding
2006 WL 1360873, 2006 Ky. App. LEXIS 149 (Ky. Ct. App. 2006)

The Lebanon Police Department received information that an abandoned car and screaming were taking place at a particular location and they investigated. When a car passed, they radioed the Kentucky State Police to stop a vehicle that had just passed. The KSP Trooper stopped the car—whether he activated his emergency lights was a disputed fact. He talked with Spalding, the driver, and noticed that he had blood shot eyes and slurred speech. He then gave Spalding field sobriety tests, which Spalding failed. Spalding was arrested on charges of DUI and other offenses. After his motion to suppress was denied he entered a conditional plea of guilty. The circuit judge reversed the decision of the district judge, and the Commonwealth took the case up to the Court of Appeals on discretionary review.

In an opinion written by Judge Minton joined by Judges Knopf and Barber, the Court of Appeals reversed the decision of the Marion Circuit Judge. The Court found that the circuit judge had improperly substituted his view of the facts as found by the district judge. The Court found there to be substantial evidence supportive of the fact that the trooper had not stopped Spalding. As a result, the Court held that there was no seizure of Spalding's person.

Thereafter, there developed probable cause to believe that that Spalding was guilty of DUI and the arrest was legal. "So we are faced with a situation where an officer who was responding to a call regarding an abandoned vehicle and a possible screaming female in a remote area late at night met another vehicle on the narrow road coming from the area under investigation. The officer does not activate his emergency lights, nor is there any indication that he used any indicia of authority or force (such as standing in the middle of the road waving his badge or brandishing his weapon) to get the other vehicle to stop. Indeed, the vehicles passed so close to each other that Trooper Smith and Spalding each remained in his vehicle when the initial conversation took place. Under these unique facts, we do not believe that Trooper Smith seized Spalding when he flagged him down for brief questioning. Rather, this case falls under the general rule that the Fourth Amendment is not implicated if, in a public setting, an officer asks a citizen routine questions. Once Trooper Smith, hearing Spalding's slurred speech and seeing his bloodshot eyes, asked him to step out of his vehicle and to perform field sobriety tests, the consensual encounter unquestionably became a seizure. But at that point, Trooper Smith had at least a reasonable suspicion to detain Spalding, based upon the trooper's own observations, under the plain view exception to the general prohibition against warrantless searches and seizures. The plain view doctrine also encompasses an officer's sense of hearing. When Spalding failed the field sobriety tests, then Trooper Smith clearly had probable cause to arrest Spalding."

Tucker v. Commonwealth
2006 WL 358260, 2006 Ky. App. LEXIS 54 (Ky. Ct. App. 2006)

The pertinent facts are set out succinctly in the Court's opinion. "On December 1, 2003, law enforcement authorities received a phone call from a person identifying himself as Jason Piercy stating that Robert Tucker had been threatening people with a gun, that Tucker was intoxicated, and that Tucker had driven away with a female companion. In addition, the caller described the vehicle Tucker was driving as being a green 'Blazer-type' or 'Jimmy-type' vehicle." Dispatch contacted the Wayne County Sheriff's Office with the above information, and Deputy Lester went to an area near Tucker's apartment. He located Tucker's truck, and stopped it. Knowing that Tucker was a convicted felon and aware that Tucker was said to have a gun, once Tucker and a companion got out of their truck, Lester seized the gun from Tucker's pocket. Tucker was indicted for a variety of offenses, and after losing a suppression motion, entered a conditional plea of guilty.

The Court of Appeals affirmed in a decision written by Judge Buckingham and joined by Judges Johnson and Tackett. First, the Court held that the failure to call the dispatcher to the stand at the suppression hearing was not dispositive. Instead, the question for the Court was whether there was a reasonable and articulable suspicion supportive of the stopping and seizure of the gun. "Deputy Lester considered the totality of circumstances he faced. First, the officer knew the facts passed through dispatch. Second, he knew that those facts came from an identified, or an identifiable, witness to the action alleged. Third, he had personal knowledge that Tucker was a convicted felon. Thus, regardless of what actually occurred concerning the prior threats, Deputy Lester was faced with possible ongoing offenses of driving under the influence and of possession of a handgun by a convicted felon. In short, we conclude that the testimony of the dispatcher as a witness was not necessary in order for the court to determine whether there was a reasonable suspicion of criminal activity sufficient to justify the investigatory stop."

Next, the Court rejected Tucker's argument that this was an anonymous tip case and the tip needed corroboration prior to the stopping. The Court noted that the caller had identified himself to the dispatcher, and that identification did not have to be given to Deputy Lester. The key here is in noting that the Court analyzes the evidence that was in the hands of the police agency, not one particular police officer.

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Finally, because there was reasonable suspicion, and because Deputy Lester had information that Tucker had a gun on him and was a convicted felon, the taking of the gun from Tucker's person was not violative of the Fourth Amendment.

Commonwealth v. Baldwin
2006 WL 437386, 2006 Ky. App. LEXIS 63 (Ky. Ct. App. 2006)

An informant told a member of the Northern Kentucky Drug Strike Force that Baldwin was cooking methamphetamine in a storage unit in Boone County. A Deputy Sheriff then obtained a search warrant based upon that information. The affidavit in support read in part as follows: "On the 5th day of September, 2002, at approximately 4:30 p.m., affiant received information from Brian Cochran of the Northern Ky. Drug Strike Force that a reliable confidential informant had informed Cochran that a white male was cooking meth in the storage units at Mt[.] Zion Storage after dark. Affiant then went to the storage units at 10:45 p.m., Sept. 5, 2002, and saw two white males come out of a unit jumped into a truck and left upon realizing someone was outside the building. Acting on the information received, affiant conducted the following independent investigation: Affiant ran the plates from the truck and found the truck registered to Jason Baldwin. Affiant on Sept. 6, contacted Cochran with this information and Cochran verified that Jason Baldwin was the person named by the informant. On Oct. 14, 2002, at 11:47 p.m., Affiant saw the truck earlier identified as that of Jason Baldwin parked in front of unit 826. Affiant called for assistance and while waiting for other officers and a drug sniffing dog to arrive, the door of 825 opened and two white males and a white female came out. Affiant and other officer, Pete Schierloh, asked for identification and were given drivers licenses identifying one male as Jason Baldwin who claimed ownership of Units 825, 826, and 828. Tim Adams and his dog Niko came to the scene. Niko is a certified narcotics dog. Niko indicated that there were drugs in 825 after being walked by four other units which the dog did not identify as containing drugs."

The search revealed evidence of drugs, and Baldwin was indicted. However, the trial court suppressed the evidence after finding that Niko was unreliable. The trial court further held that Niko had failed to meet the *Daubert* standard, which was pertinent to the probable cause determination in the opinion of the court.

In a decision by Judge VanMeter, and joined by Judges Knopf and Johnson, the Court reversed the granting of the suppression motion by the trial court. The Court held that there was probable cause based upon the corroborated informant's tip. The Court further rejected the trial court's use of the *Daubert* standard, and indeed stated that the standard was not relevant to the decision on whether probable cause existed or not. "While the informant's information alone may have been insufficient in and of itself to support the issuance of a search warrant, sufficient probable cause was established when that information was corroborated by the independent police investigation. More specifically, the initial investigation corroborated the informant's tip that Baldwin would be at a particular location after dark, and Baldwin then was observed at the same location late at night some five weeks later. Further, additional corroboration was provided when Niko alerted to Unit 825." "We simply cannot agree with the circuit court's judicial imposition of such certification requirements by means of the "Shaw Balancing Test for Use of Narcotic Detection Dogs" which it unilaterally created and applied to the situation herein.

Contrary to the circuit court's conclusion, a review of the totality of the circumstances shows that there was more than a substantial basis to establish that drug evidence would be found in the place named in the affidavit. An alleged confidential informant provided information regarding possible drug activity, an independent investigation was conducted by law enforcement officers, and Niko alerted on the storage unit where the drugs were found. While any one of those three elements might have been inadequate, in and of itself, to provide probable cause for the issuance of the search warrant, when viewed as a whole those elements provided more than enough evidence to show that "a substantial basis" existed for the search."

Garcia v. Commonwealth
185 S.W.3d 658 (Ky. Ct. App. 2006)

Garcia and his passenger Letkeman were driving on I-64 in Franklin County when a KSP trooper noticed them, and specifically noticed a rapid lane change, a "death grip" on the steering wheel, not making eye contact, and a cracked windshield. The trooper pulled Garcia over, and after citing him for the cracked windshield pursuant to KRS 189.110, asked for consent to search the van. The subsequent search revealed 5 bricks of marijuana. Garcia and Letkeman were indicted for trafficking in marijuana. After losing their motions to suppress, they entered conditional pleas of guilty.

In an opinion by Judge Taylor and joined by Judges Minton and Schroeder, the Court of Appeals reversed as to Garcia and affirmed as to Letkeman. The Court held that KRS 189.110 did not prohibit driving with a cracked windshield unless it impaired the visibility of the driver, which according to pictures was not the case here. Thus, the initial stopping could not be justified based upon the cracked windshield.

Nor could the stopping be justified on the basis of there being a reasonable suspicion sufficient to justify the stopping of Garcia's vehicle. "[T]he articulated facts set forth by Trooper Devasher were Garcia's nervousness, lane change, failure to make eye contact, 'death grip' on the steering wheel, and out-of-state license plate. We believe these facts

describe a substantial number of drivers on our highways and constitute an innocuous mirage created in an attempt to retrospectively justify the stop. If we were to accept the Commonwealth's argument, ordinary law abiding citizens could be subjected to a stop by police based upon routine driving habits. Simply put, such routine driving habits do not warrant a police stop under *Terry*. As such, we do not believe that Trooper Devasher possessed the requisite reasonable suspicion to justify an investigatory stop of Garcia's vehicle."

On the other hand, the Court held that Letkeman would not receive relief. Because he was a passenger in the car, he did not have standing to complain of the stopping of Garcia's vehicle. Further, he did not have a reasonable expectation of privacy that society was prepared to honor in the bricks of marijuana in the car. Finally, the Court rejected Letkeman's complaint that 30 minutes was too long of a time to justify the detention prior to the arrest. "[T]he record indicates that Trooper Devasher questioned Letkeman and Garcia, checked the vehicle's registration and license plate, and checked Garcia's out-of-state driver's license. Upon the whole, we believe the continued detention of Letkeman for some thirty minutes after the initial traffic stop was reasonable."

Birch v. Commonwealth
2006 WL 659306, 2006 Ky. App. LEXIS 84 (Ky. Ct. App. 2006)

Lexington Police Officers were hanging around an apartment building that was known for drug trafficking when Birch walked up. They began to talk with him. At a later suppression hearing, it was disputed whether Birch consented to the police entry into his apartment. However, during that entry, Birch revealed his name which led to the discovery of an outstanding arrest warrant. During the search incident to the arrest on the warrant, the police discovered cocaine. Birch was indicted, and lost his suppression motion. He entered a conditional plea of guilty.

In an opinion by Judge Minton, joined by Judges Miller and VanMeter, the Court of Appeals affirmed. They did not resolve the factual dispute. Instead, they held that the fact that an arrest warrant was discovered during the entry into the apartment dissipated the taint of the illegality. They adopted the following test: "We adopt the opinion of our sister court in Alaska as the best summation of this rule: 'If, during a non-flagrant but illegal stop, the police learn the defendant's name, and the disclosure of that name leads to the discovery of an outstanding warrant for the defendant's arrest, and the execution of that warrant leads to the discovery of evidence, the existence of the arrest warrant will be deemed an independent intervening circumstance that dissipates the taint of the initial illegal stop vis-à-vis the evidence discovered as a consequence of a search incident to the execution of the arrest warrant.'"

Stephens v. Commonwealth
2006 WL 751990, [Not Available on Lexis] (Ky. Ct. App 2006)

This is an important case due to the fact that this specific scenario occurs often. This is a highly fact bound decision, with the facts summarized by the Court as follows: "[W]hile surveilling the building for drug activity the officer saw Stephens enter the second breezeway of the building; remain out of sight for three minutes; come out of the breezeway; approach the lady's car that was pulled alongside the police car; converse with the lady's daughter regarding the whereabouts of her sister; walk away from the lady's car; and return at the officer's request; and, in answer to the officer's initial question as to what she was doing, answer that she was looking for her sister." Thereafter, Stephens gave consent to the officer, who found a crack pipe on her person. Stephens was arrested and taken to jail, where cocaine was found again on her person. She was indicted for possession of cocaine as well as other offenses. When her motion to suppress was denied, she entered a conditional plea of guilty.

In a decision written by Judge Miller and joined by Judges Schroder and Guidugli, the Court of Appeals reversed. The Court held that the officer lacked a reasonable and articulable suspicion for stopping Stephens. The Court rejected the articulable suspicion advocated by the Commonwealth—that she was acting nervously in a high crime neighborhood. The Court rejected the contention that Stephens was "loitering," but rather states that she was looking for her sister, that she was acting purposely, and that she was in the "high crime apartment" for only a brief period of time. "[T]he inferences from the mere presence of a person in a high drug traffic area, that person's glance at a patrol car, and the officer's testimony that the person acted nervous with the person's actions conflicting with that testimony, fail to support a reasonable articulable suspicion to support an investigative stop."

The Court also rejected the Commonwealth's contention that Stephens had not been seized until after the patdown. "These findings of fact by the trial court are conclusive: Stephens was in the high drug traffic area for a few minutes with a stated noncriminal purpose when the officer asked her what she was doing and she responded, cooperatively, that she was looking for her sister. It is undisputed that had Stephens refused to answer the officer's initial inquiry, *he would have detained her*. Further, Stephens testified that she did not feel free to leave. At that point, all evidence points to Stephens' presence for a few minutes in a high drug traffic area with a stated noncriminal purpose, and cooperative attitude toward the officer. In view of the surrounding circumstances, not only would a reasonable person have believed that he was not free to leave,…but the officer said he would have detained her. As such, under the facts of this

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case the initial investigative stop occurred when the officer called to Stephens and asked what she was doing, and not when she was patted down."

Dunn v. Commonwealth
2006 WL 1045642, 2006 Ky. App. LEXIS 99 (Ky. Ct. App. 2006)

A car was stolen from World Class Auto in Nicholasville. After it was returned, individuals came by to look at it. The salesman was suspicious and called the police. When the police arrived, they smelled the strong odor of marijuana coming from the car driven by Dunn. They required Dunn to get out, along with his passengers. Cocaine was found on Dunn's person, and he was indicted for possession of cocaine. After his motion to suppress was denied, he entered a conditional plea of guilty.

In an opinion by Judge VanMeter joined by Judges Taylor and Tackett, the Court of Appeals affirmed the trial court's denial of the motion to suppress. The Court held that the strong odor of marijuana coming from the car created probable cause allowing for a search of both the occupants of the car and the car itself.

Armstrong & Rowland v. Commonwealth
2006 WL 1045709, 2006 Ky. App. LEXIS 97 (Ky. Ct. App. 2006)

In July of 2003, Rowland was found passed out in his car. He was taken to a hospital, where he denied the police request for a blood test. He agreed to treatment and in the course of treatment, his blood was taken. Thereafter, the prosecution sought to obtain the results of the tests taken from U of L Hospital. The trial court denied the request and a petition for writ of *mandamus* was taken to the circuit judge, who granted the Commonwealth's petition.

The Court of Appeals affirmed the decision of the circuit judge in an opinion by Judge Buckingham joined by Judges Johnson and Taylor. The Court held first that HIPAA did not protect the defendant's medical records in the context of a criminal prosecution. "The parties and the courts below have discussed the issue in terms 45 C.F.R. 164.512(f), rather than in terms of 45 C.F.R. 164-512(e). This section is directed at disclosure for law enforcement purposes. The pertinent language in the regulation allows covered entities to disclose protected health information: "In compliance with and as limited by the relevant requirements of: (A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer[.] See 45 C.F.R. 164.512(f)(1)(ii)(A). As this dispute arose in the context of the Commonwealth seeking a court order within a judicial proceeding, 45 C.F.R. 164.512(e) is the applicable section. Regardless, the comments to the final regulation make it clear that: This regulation does not change current requirements on or rights of covered entities with respect to court orders for the release of health information. Where such disclosures are required today, they continue to be required under this rule. 65 Fed. Reg.2 82462,82682 (2000)."

The Court went on to hold that nothing in the Fourth Amendment prohibited the granting of the subpoena by the Commonwealth. "This case does not involve the obtaining of a blood or urine sample from a defendant who has refused to consent to testing. Rather, it involves the Commonwealth's right to obtain evidence in the form of medical records that are in the possession of a hospital after a defendant's blood sample has been taken voluntarily in the course of medical treatment. We conclude that our holding in the *Osborne* case gives the Commonwealth this right."

Dunlap v. Commonwealth
2006 WL 891090, 2006 Ky. App. LEXIS 107 (Ky. Ct. App. 2006)

The Kentucky State Police conducted a roadblock to check for seatbelt usage in Carrollton, Kentucky, in 2003, in a high traffic area. In the process of conducting the roadblock, Dunlap drove up to them smelling of alcohol. After he failed the field sobriety tests, he was arrested and taken to jail. The roadblock ended shortly after the arrest. He filed a motion to suppress, and after losing the motion he entered a conditional plea of guilty.

The Court of Appeals affirmed the denial of the suppression motion in a decision written by Judge Johnson joined by Judges Buckingham and Tackett. Dunlap made two arguments: first, that the roadblock violated KRS 189.125, and second that the arrest violated the Fourth Amendment and Section Ten. The Court held that while KRS 189.125 prohibited stopping of person for failing to wear a seatbelt, that Dunlap had not been primarily stopped for failing to wear a seatbelt but rather as part of a seatbelt education roadblock. "We conclude that section (7) of KRS 189.125 prohibits a police officer from making a routine traffic stop for a seatbelt usage violation, but that it does not prohibit a roadblock that checks for general motor vehicle safety violations. Such roadblocks advance an important highway safety interest, with limited personal interference."

The Court also rejected the Fourth Amendment argument. The Court utilized *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), and *City of Indianapolis v. Edmond*, 10 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000), to analyze the issue. *Prouse* held that a roadblock to check licenses were a legitimate highway safety technique and was minimally intrusive. *Edmond* held that a roadblock as a law enforcement mechanism, on the other hand, would violate the Fourth Amendment. The Court held that a seatbelt roadblock under the circumstances of this case resembled more closely *Prouse* than *Edmond*. "We conclude that the roadblock was solely used to promote Kentucky's strong

interest in preventing traffic accidents and to promote the highway safety of its citizens; and therefore, we hold that the roadblock in question was statutorily and constitutionally valid." The Court further held that once Dunlap was appropriately stopped, evidence of his drunkenness was in plain view, and that his arrest was thus consistent with the Constitution.

United States v. McClain, Brandt, Davis
444 F.3d 37 (6th Cir. 2006)

The Hendersonville, Tennessee Police Department received a call from a neighbor regarding a light being on at 123 Imperial Point. Officer Germany went to the home and found that the front door was ajar. After backup arrived, the officers went into the house and ultimately found what appeared to be a marijuana growing operation. They left the house and began watching it. Based upon their surveillance, they eventually obtained a warrant to search 123 Imperial Point and 5 other houses which revealed 348 marijuana plants and growing equipment. McClain, Brandt, and Davis were ultimately indicted for conspiring to manufacture and to possess with intent to distribute more than 1000 marijuana plants and other charges. They moved to suppress the evidence taken from 123 Imperial Point and the other residences. After the motion was granted, the government appealed.

In a decision written by Judge Batchelder and joined by Judges Gibbons and Boggs, the Sixth Circuit reversed. The Court agreed that the warrantless search of 123 Imperial Point violated the Fourth Amendment. "In our view, a neighbor's phone call indicating that the owners had moved out of the house at 123 Imperial Point several weeks earlier and that there was a light on in the house that had not been on before, even coupled with the officers' discovery of a slightly ajar front door, does not present the type of objective facts necessary to establish probable cause that a burglary was in progress at the house."

However, the Court went on to find that the evidence did not have to be suppressed due to the application of the good faith exception. In this case the Court noted that the warrants relied upon by the officers were themselves the "fruit of the poisonous tree" of the initial warrantless search. "The question therefore becomes whether the good faith exception to the exclusionary rule can apply in a situation in which the affidavit supporting the search warrant is tainted by evidence obtained in violation of the Fourth Amendment." The Court noted that there was a split in the circuits on the question and that it was a matter of first impression in the Sixth Circuit.

The Court ultimately decided that the good faith exception should apply based upon the fact that the line between legality and illegality was close enough to justify the officers' reliance upon the warrant. "The facts surrounding these officers' warrantless entry into the house at 123 Imperial Point were not sufficient to establish probable cause to believe a burglary was in progress, but we do not believe that the officers were objectively unreasonable in suspecting that criminal activity was occurring inside McClain's home, and we find no evidence that the officers knew they were violating the Fourth Amendment by performing a protective sweep of the home. More importantly, the officers who sought and executed the search warrants were not the same officers who performed the initial warrantless search…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 independently to say that he did not believe that the initial entry into 123 Imperial Point was illegal. He reflected on his views on the meaning of probable cause. He believes that "probable cause" does not mean more than 50% probability of evidence being found in a particular location. "However, to be more than a hunch or a supposition, in my own mind, requires a legitimate belief that there is more than a 5 or 10 percent chance that a crime is being committed or that evidence is in a particular location. Using this standard, my 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."

United States v. Dillard
438 F. 3d 675 (6th Cir. 2006)

Cleveland police developed a reason to believe that Dillard was selling cocaine out of his apartment in January of 2004. They arrested Dillard and then went to the apartment he shared with Holton. The apartment was a two-story duplex, and Dillard and Holton lived in the upper story. A common door opened into a hallway and stairway. The police would later testify at a suppression hearing that the front door was ajar and they went upstairs to the apartment where Holton let them in. Holton signed a consent to search form and the police found 293 grams of crack cocaine. Holton testified differently at the suppression hearing, stating that instead the officers entered the locked door at the first floor using keys they had obtained by previously arresting Dillard. They entered her apartment with guns drawn. She agreed that she signed a consent to search form in order to avoid being arrested. She denied smelling crack cocaine or knowing that cocaine was in the apartment.

Based upon the evidence seized, Dillard was indicted for conspiring to distribute cocaine base, distributing cocaine base, and possession with intent to distribute cocaine base.

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After a three-day suppression hearing, the district judge denied Dillard's motion, agreeing with the account given by the officers rather than by Holton. Dillard entered a plea of guilty and appealed the suppression decision to the Sixth Circuit.

In an opinion by Judge Rogers joined by Cole and Gibbons the Sixth Circuit affirmed. The Court first adopted the district court's findings of fact, saying that they were not clearly erroneous. The Court assumed that "(1) the police officers found both doors on the first floor of Dillard's duplex unlocked and open, (2) the officers knocked and were let into the apartment voluntarily by Holton, and (3) Holton voluntarily consented to the search of the apartment."

As a result of the Court's factual findings, the Court looked only at whether the police had violated Dillard's rights by entering into the apartment building itself. The Court held that Dillard did not have a reasonable expectation of privacy in the common area on the first floor and the stairway despite having a possessory interest in it. "[B]ecause Dillard made no effort to maintain his privacy in the common hallway and stairway, he did not have an objectively reasonable expectation of privacy in those areas."

The Court acknowledged that their holding was contrary to previous cases decided by the Sixth Circuit, notably *United States v. Carriger*, 541 F. 2d 545 (6th Cir. 1976) and *United States v. King*, 227 F. 3d 732 (6th Cir. 2000). In *Carriger*, the common area was entered by the police through a locked door. The Court in *Carriger* stated that when "an officer enters a locked building, without authority or invitation, the evidence gained as a result of his presence in the common areas of the building must be suppressed." Likewise, in *King* the Court found the defendant to have a reasonable expectation of privacy in the basement of a duplex. "This case, however, is different from *King* because the common area at issue is not a basement but rather a hallway and stairway. Unlike a basement, a duplex common hallway and stairway are used by people other than the tenants. There may have been fewer people regularly entering Dillard's duplex than in a multi-unit building, but, because the doors were unlocked, those people would still use the hallway and stairway to gain access to Dillard's apartment. It is much less likely that those people would have any reason to enter a duplex basement. For these reasons, Dillard did not have an objectively reasonable expectation of privacy in the unlocked and open common hallway and stairway of his duplex."

SHORT VIEW . . .

1. *State v. Porting*, 130 P.3d 1173 (Kan. 2006). Using the case of *Georgia v. Randolph*, 2006 WL 707380, 2006 U.S. LEXIS 2498 (U.S. 2006), the Kansas Supreme Court has held that the persons in a parolee's home did not assume the risk that their home would be subject to search if the parolee returned home there. Thus, the evidence seized during the execution of a search conducted pursuant to parole conditions resulting in a drug charge against one of the occupants of the house should have been suppressed.
2. *State v. Williams*, 185 S.W.3d 311 (Tenn. 2006). Turning on blue lights and pulling in behind a parked car constitutes a seizure, according to the Tennessee Supreme Court. "While the officer may have subjectively intended to activate his blue lights solely for his safety and the safety of the others on the road, the litmus test is the objective belief of a reasonable person in the position of the defendant, not that of the officer."
3. *People v. Castro*, 41 Cal. Rptr. 3d 533 (Cal. Ct. App. 2006). The police did not violate the Fourth Amendment when they stopped the defendant's truck in response to an anonymous tip saying that the person fitting the defendant's description was going to kill someone without first verifying the reliability of the tip. This is justified under the emergency aid exception allowing for a stopping in the absence of a reasonable suspicion. The Court noted that "the facts of this case require us to hold only that an anonymous tip that includes some basis for the tipster's knowledge and an alleged threat to a person's safety suffices to justify a *Terry* stop even if it lacks corroborated predictive information…."
4. *State v. Hayes*, 188 S.W.3d 505 (Tenn. 2006). The Tennessee Supreme Court has held that a common technique for searching pedestrians around housing projects is violative of the Fourth Amendment. Here, the police were conducting a checkpoint of persons on privatized streets and asking them for their resident identification. The Court compared this checkpoint to the drug interdiction checkpoint condemned in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). ■

Coming in the next Plain View:

Review and analysis of new Supreme Court Fourth Amendment decisions *Georgia v. Randolph* and *Hudson v. Michigan*. These decisions can be found at http://www.law.cornell.edu/supct/index.html

KENTUCKY CASE REVIEW

By Sam Potter, Appeals Branch

Sam Potter

John Combs, Sr. v. Commonwealth
Rendered 4/20/06, To Be Published
2006 WL 1044165
Affirming in Part, Reversing in Part, and Remanding
Opinion by J. Cooper, Dissent without opinion by J. Wintersheimer

Combs received a 20 year sentence following his conviction on one count of first-degree unlawful transaction with a minor less than 16 and first-degree sexual abuse. H.A., Combs' step-granddaughter, testified that he "touched me on my private parts . . . my breast and my vagina." She said he digitally penetrated her vagina with his finger. She described an incident where Combs' masturbated in front of her while they were in his truck. She said he asked her to touch his penis on that occasion but she refused.

The evidence stated above did not support a conviction of first-degree unlawful transaction with a minor. KRS 530.064(1) declares it to be unlawful for a person who "knowingly induces, assists or causes a minor to engage in illegal sexual activity." Induced means a successful persuasion. Engage means to employ oneself or to take part in. "Thus, to complete the offense, the minor must consent to and actively participate in the activity." (Slip opinion, p. 4)

H.A.'s testimony about Combs' touching her constitutes first-degree sexual abuse, not unlawful transaction with a minor. Only the masturbation incident could have supported a conviction for unlawful transaction with a minor. However, she did not consent to it or actively participate in it. While this testimony would have supported a criminal intent instruction, one was not requested.

The proper procedure for challenging the sufficiency of evidence on one specific count is an objection to the giving of an instruction on that charge. This rule applies only when there are two or more charges and the evidence is sufficient to support one or more, but not all, of the charges. In that event, the allegation of error can only be preserved by objecting to the instruction on the charge that is claimed to be insufficiently supported by the evidence. This rule does not apply in this case because neither charge of unlawful transaction with a minor was sufficiently supported by the evidence.

The proscription against double jeopardy only allows a retrial for first-degree sexual abuse. Because the Supreme Court ruled that a directed verdict should have been given on the unlawful transaction with a minor counts, he cannot be retried for that offense. The failure to instruct the jury on criminal attempt as a lesser included offense also precludes charging Combs with that offense as the primary offense at retrial according to KRS 505.040(1)(a).

First-degree sexual abuse can be a lesser included offense of first-degree unlawful transaction with a minor. The only element that distinguishes unlawful transaction with a minor from sexual abuse is the victim's willing participation in the illegal conduct. If there is evidence to support a finding of willing participation, which the jury could believe or disbelieve, first-degree sexual abuse is a lesser included offense of first-degree unlawful transaction with a minor.

A mere temporary separation of the jury is not grounds for reversal if it appears that no definite prejudice resulted in that there was no opportunity to tamper with the jurors. During guilt phase deliberations, the foreperson left the jury room and walked down the hall to the judge's office. He apparently intended to deliver the jury's verdict. The judge's secretary refused to accept it and told him to return to the jury room. A hearing held on the issue enabled the court to account for the foreperson's whereabouts during his entire absence from the jury room. The foreperson did not speak with anyone other than the judge's secretary. No mistrial was warranted.

Franklin Dean Powell, II v. Commonwealth
Final 5/11/06, To Be Published
189 S.W.3d 535 (Ky. 2006)
Affirming
Opinion by J. Cooper, Dissent by J. Johnstone

Billie Jolene Bennett, age 21, died in an Owensboro hospital at 10 a.m. on October 30, 1999. A jury convicted Powell of reckless homicide regarding her death.

Powell's injecting Bennett with methamphetamine justified a reckless homicide conviction. For unintentional homicides, KRS 501.060(3) frames the causation issue "in all situations in terms of whether or not the result as it occurred was either foreseen or foreseeable by the defendant as a reasonable probability." (Slip opinion, p. 6) The Supreme Court concluded that a reasonable jury could well conclude

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beyond a reasonable doubt that Powell's failure to perceive the risk of Bennett's death based on his actions constituted a gross deviation from the standard of care that a reasonable person would observe in the situation.

Powell and Bennett had been together for most of the 24 hours preceding her death. Powell testified that Bennett did not ingest any methamphetamine in his presence until 3:30 a.m. on October 30. Bennett had left Powell two separate times for about an hour each time previously that night. Powell believed she went to see her boyfriend, David Crowell, who may have injected her with methamphetamine. Crowell denied this.

At some point during the night, Bennett mixed some of Powell's methamphetamine with some water that he had bought at a convenience store and placed it in a hypodermic syringe. She injected it, but Powell believed she did subcutaneously instead of intravenously. Powell "did her a favor" by guiding the needle into a vein and injecting the methamphetamine directly into her bloodstream. After engaging in sexual intercourse, Powell fell asleep.

When Powell woke up, he noticed that Bennett did not look right. She asked him to take her to Crowell's residence, which he did. Powell fell asleep thinking she would walk in by herself. Powell woke up an hour later with Bennett still sitting next to him. She did not respond. It took him half an hour to wake up Crowell, who called 911 at 8:45 a.m.

Dr. Hunsaker, the attending pathologist, testified that the cause of Bennett's death was methamphetamine intoxication. Mike Ward, the toxicologist who tested her blood sample, stated that the methamphetamine level in her blood was 3 mg per liter. He described this as a lethal level. One side effect can be a heartbeat so rapid as to lead to arrhythmia. The autopsy revealed damage to Bennett's heart muscle. The Supreme Court believed all of this evidence supported the reckless homicide convictions.

Commonwealth v. Marcus Buford
Rendered 4/20/06, To Be Published
2006 WL 1044166
Affirming
Opinion by J. Roach, Dissent by J. Graves

Buford was a youth minister at a local United Methodist Church. The first incident occurred at Buford's home. While several members of the youth group were watching a movie, 15-year-old J.R. testified that Buford touched under her shirt and underwear for several minutes. She tried to make him stop but could not. The second incident occurred at church. While several members of the youth group were watching a video, H.S. testified that Buford kissed her and repeatedly touched her under her clothes and underwear and could not make him stop. Buford was convicted in McCracken Circuit Court of two counts of first-degree sexual abuse and received a 10 year sentence. The Court of Appeals reversed his convictions. The Supreme Court granted discretionary review and affirmed his reversal.

Evidence of prior bad acts should not have been admitted because it is not the commonality of the crimes but the commonality of the facts constituting the crimes that demonstrates a modus operandi. The Commonwealth introduced evidence that a year before these accusations that Buford had inappropriately touched his eight-year-old niece, S.B., during a camping trip. A grand jury refused to indict Buford. Significant questions about the reliability of her statements existed because the allegations arose during a bitter custody dispute between her mother and father, Buford's brother. She also testified that she could not remember the events surrounding the alleged abuse and said that it might have been a dream or that she was told by someone else what to say.

The Commonwealth sought to introduce this evidence as proof of Buford's *modus operandi*. However, KRE 404(b) has always been exclusionary in nature. The facts surrounding the prior misconduct must be so strikingly similar to the charged offense to create a reasonable probability that (1) the acts were committed by the same person, or (2) the acts were accompanied by the same *mens rea*. Stated another way, the facts must be so similar that they constitute a so-called signature crime. The burden of showing the striking similarity lies with the Commonwealth.

The Fifth Amendment cannot shield Buford's refusal to discuss the allegations with a friend who was a private citizen because the constitutional protections against self-incrimination are not triggered absent state action. Greg Waldrop, a friend of Buford, confronted him about the charges made by H.S. and J.R. Waldrop sought to get Buford's side of the story, but he refused to speak with him and retreated from his presence. The Commonwealth offered this evidence as an adoptive admission of guilt. Waldrop ultimately testified for the Commonwealth, but there is nothing in the record to suggest that he acted on behalf of or in cooperation with the government on the day he confronted Buford.

Silence can satisfy the adoptive admissions hearsay exception of KRE 801A(b)(2). Silence in the face of statements that would normally evoke denial by the party if untrue satisfies the adoptive admissions rule. A silent adoptive admission cannot be admitted unless the introducing party can prove that the person heard and understood the statement and remained silent. Additionally, a statement is not admissible if conditions that prevailed at the time of the statement deprive the party of freedom to act or speak with reference to it.

Joseph Michael Schrimsher v. Commonwealth
Final 5/11/06, To Be Published
190 S.W.3d 318 (Ky. 2006)
Affirming
Unanimous Opinion by J. Cooper

Schrimsher's six-month-old daughter was brought to the hospital on February 23, 2003 by his live-in girlfriend Erica Porter. A.S. had swelling to the back of the head, bruises and scratches on her face, five skull fractures on both sides of her head, bruises on her head, neck and thigh, multiple rib fractures on both sides, fractures of the tibia and fibula of her right leg, a lacerated liver, and was in a severe state of malnutrition. Schrimsher was convicted of three counts of first-degree wanton assault, one count of second-degree wanton assault, and one count of criminal abuse in the first degree and received a 30 year sentence.

No *Bruton* error occurred where the codefendant's statement was redacted, the codefendant testified at trial, and was subject to cross examination. Schrimsher moved to sever his case from his codefendant Porter because she had made statements inculpating him to the police. The trial judge denied the motion to sever but ordered the statements redacted. Because Porter testified in her own defense and was cross examined by Schrimsher's counsel, the Court did not evaluate the thoroughness of the redaction for error.

The indictments in this case did not violate the Due Process or Double Jeopardy clauses of the Constitution. An indictment does not have to detail the essential elements of the charged crime if it fairly informs the accused of the nature of the charged crimes, the specific offenses for which he is charged, and does not mislead him. The indictment must contain adequate specificity to allow him to plead acquittal or conviction as a defense. In this case, the indictments identified the charged crimes and the injuries that gave rise to the charges. The indictments contained no error.

The rule of completeness does not automatically allow introduction of an entire statement. The rule of completeness in KRE 106 applies only to the extent that fairness requires the introduction of additional portions of an interrogation to correct or guard against any likely misperception that would be created by an opponent's presentation of a fragmented version of the statement. In this case, Schrimsher was allowed through cross examination to introduce sufficient portions of his statement to satisfy the fairness requirement of the rule of completeness. Thus, no error occurred when the judge did not play the entire statement.

Jury instructions for assault under extreme emotional disturbance need only be given when there is a reasonable explanation or excuse for the accused's actions. Schrimsher offered as a "reasonable explanation or excuse" for his extreme emotional disturbance that the child persisted in crying and sucking her thumb in spite of his insistence that she not do so, the stress of being the primary parent for a six-month-old and a 17-month-old, and for being unemployed. The Supreme Court upheld the trial judge's refusal to instruct on assault under extreme emotional disturbance.

James Patrick Rodefer v. Commonwealth
Final 5/11/06, To Be Published
189 S.W.3d 550 (Ky. 2006)
Reversing
Per Curium

The police received a tip that a burglary would be committed at 5 a.m. on July 3, 1999 at a CVS Pharmacy. Several officers conducted a surveillance of the location and witnessed Rodefer and two others attempt to break into a nearby building. After a brief chase, Rodefer was apprehended but the other two persons escaped. A search of Rodefer revealed that he had a crack pipe, a can containing 1 gram of crack, a baggy containing 16.5 grams of powder cocaine, and $1,146 in cash. A jury convicted Rodefer of first-degree trafficking in a controlled substance, several other misdemeanor offenses, and recommended a 10 year prison sentence. The Court of Appeals reversed his conviction due to a faulty jury instruction. The Supreme Court granted discretionary review.

Possession with intent to transfer does not constitute the offense of first-degree trafficking in a controlled substance. The instructions allowed the jury to convict Rodefer of trafficking if they found "that he had the cocaine in his possession with the intent to sell, transfer, dispense, or distribute to another." KRS 218A.010(34) defines traffic as "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance." The Supreme Court recognized that "noticeably absent from the statutory definition is the 'possessed with intent to transfer' language in the trial court's instruction." (Slip opinion, p. 3)

The Supreme Court agreed with the Court of Appeals that the instruction as given was improper. However, the Supreme Court did not believe this error constituted palpable error. Thus, the Supreme Court reversed the Court of Appeals opinion and reinstated Rodefer's conviction.

Todd Edward Edmonds v. Commonwealth
Final 5/11/06, To Be Published
189 S.W.3d 558 (Ky. 2006)
Affirming
Unanimous Opinion by J. Cooper

D.P. accused Edmonds of persuading her to invite him into her home, at which point he tied her to her bed, forcibly raped and sodomized her, and remained in her home throughout the evening. D.M. accused Edmonds of

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persuading her to invite him into her home. He then bound her and forcibly raped and sodomized her. He forced her at knifepoint to drive to an ATM and withdraw $300 from her bank account, which he took. Edmonds knew that he was infected with hepatitis C when he committed these actions. He pled guilty to two counts of first-degree rape, two counts of first-degree sodomy, two counts of first-degree burglary, one count of kidnapping, one count of first-degree robbery, one count of unlawful imprisonment, two counts of wanton endangerment, one count of not notifying probation and parole of a change of address, and for being a first-degree persistent felony offender. He received a 20 year sentence.

A criminal defendant is entitled to a severance only upon a showing, prior to trial, that joinder would be unduly prejudicial. Edmonds filed a pro se motion to sever all counts in the indictment relating to the two different victims. The trial judge granted the motion to sever in relation to the failure of a convicted sex offender to report his change of address but did not sever the counts of the respective victims.

A significant factor in identifying prejudice is the extent to which evidence of one offense would be admissible in a trial of another offense. In this case, were the counts to be severed, evidence of the other victim could be introduced under KRE 404(b). The facts of the offenses were strikingly similar. Denying the motion to sever was proper.

Insufficient cause existed to grant an indefinite continuance. Edmonds filed a pro se motion for an indefinite continuance pending his treatment for hepatitis C. Edmonds' treating doctor testified that the side effects of the medicine he was taking included debilitating fatigue, memory lapses, and impaired concentration. However, the doctor testified that he was unaware of Edmonds having experienced any of these side effects. No actual need existed to grant a continuance.

If a guilty plea is found to have been entered involuntarily, considering the totality of the circumstances, a trial court must grant a defendant's motion to withdraw the plea. A guilty plea is involuntary if the defendant lacked full awareness of the direct consequences of the plea or relied on a misrepresentation by the Commonwealth or the trial court. This is a fact sensitive inquiry that is subject to the sound discretion of the trial court.

The trial court conducted a facially satisfactory *Boykin* hearing, following which Edmonds pled guilty. Edmonds moved to withdraw his guilty plea alleging that it was made involuntarily or unknowingly because he was misinformed by his lawyer on when he would be released from prison, his medications interfered with his ability to intelligently participate in the proceedings, and he was misinformed by his lawyer regarding the probable composition of the jury.

Although a defendant should be able to rely on representations by his attorney, reliance on a statement that is flatly contradicted by subsequent statements made by that same attorney, the trial court, and the Commonwealth during the plea negotiations in the *Boykin* colloquy is not reasonable and does not render the plea involuntary. The trial judge informed him several times during the *Boykin* hearing that his sentence was 20 years with an 85% parole eligibility. Edmonds answered no when the trial court asked him if he was on any medications that would affect him mentally. While Edmonds' lawyer did warn him that he would almost certainly face a nearly all-white jury, he accurately summarize the law and made a recommendation based on his experience, which did not compromise voluntariness. Therefore, the trial court's denial of Edmonds' motion to withdraw his guilty plea was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." (Slip opinion, p. 18)

Commonwealth v. Liberty Astin Walther
Final 5/11/06, To Be Published
189 S.W.3d 570 (Ky. 2006)
Certifying the Law
Unanimous Opinion by J. Cooper

Walther, a Kenton County deputy jailer, was pulled over for driving 48 mph in a 35 mph zone. The stopping officer smelled alcohol. A field sobriety test proved unsatisfactory. However, Walther admitted to drinking about 10 beers in a 5 1/2 hour period. His breath registered 0.124 on a breathalyzer machine. The trial judge suppressed the breathalyzer results because the records of maintenance and tests for the machine were testimonial in nature and inadmissible under *Crawford*. The Commonwealth asked the Supreme Court to certify the law.

Maintenance and performance test records of breath analysis instruments are not testimonial. The Supreme Court noted that every jurisdiction except one that has considered this question has determined that these records are not testimonial, and their admissibility is not governed by *Crawford*. To support its ruling, the Court observed that a properly operating breathalyzer could prove innocence as well as guilt, which is not characteristic of the testimonial evidence in view in *Crawford*. In fact, there is nothing inherently accusatory about maintenance records, and their possible incidental use in a subsequent trial does not implicate *Crawford*. ■

PRACTICE CORNER
LITIGATION TIPS & COMMENTS

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

Making an Effective *Batson* Challenge: Aggressively Confronting Pretextual Grounds Given in Defense of Discriminatory Peremptory Strikes

Twenty years ago, the U.S. Supreme Court ruled in *Batson v. Kentucky*, 476 U.S. 79 (1986), that a prosecutor's purposeful discrimination in jury selection violates a defendant's constitutional rights. Most trial attorneys are familiar with *Batson* and may have even made challenges to a prosecutor's strikes at some point. It seems, though, that many attorneys remain frustrated that the promise of *Batson* has not materialized as their minority clients continue to be tried by non-diverse juries. Just as defense attorneys are familiar with the foundations of *Batson*, prosecutors wanting to strike jurors on the basis of race or gender are skilled at stating "race-neutral" or "gender-neutral" grounds justifying their strikes. Frequently, defense attorneys are at a loss as to how to pursue the challenge further, even if they believe that the reasons given are a pretext for discrimination.

Last year, in *McPherson v. Commonwealth*, 171 S.W.3d 1 (2005), the Kentucky Supreme Court provided some guidance for the defense bar to support *Batson* challenges. McPherson was charged with four counts of first-degree sexual abuse. At the end of jury selection, the prosecution used eight of its nine peremptory challenges to strike men from the jury. As an initial matter, the Court outlined the *Batson* three-prong approach to determine whether the prosecutor's strikes violated the equal protection clause: (1) the defendant must make a *prima facie* showing of a discriminatory use of strikes; (2) the prosecutor must proffer neutral explanations for the challenges; and (3) the trial court must "assess the plausibility" of the explanations in light of all relevant evidence and determine whether the given reasons were legitimate or pretextual. The Court implied that it was in this third stage where defense counsel could have been more effective in adding to the "relevant evidence" and arguing that the reasons were pretextual.

The Court compared McPherson's trial with the one in *Miller-El v. Dretke*, 545 U.S. 231 (2005), where the U.S. Supreme Court reversed a finding that the prosecutor's race-neutral reasons were not pretextual. The Kentucky Supreme Court noted five different factors present in *Miller-El* that were lacking in *McPherson*:

1. Evidence was presented that the prosecutor's office had a history of "systematically attempting to exclude minorities from juries."
2. The prosecutor questioned jurors of different races in different manners, directing questions more likely to elicit troublesome responses towards minorities.
3. Some of the prosecutor's explanations for striking minority jurors were equally applicable to white jurors who were not stricken by the prosecutor.
4. In explaining his reasons for striking minority jurors, the prosecutor mischaracterized their statements made during voir dire.
5. When the mischaracterization was pointed out, the prosecutor declined to respond to the accusation and instead offered a different reason for the strike rather than defend his initial explanation. (The Supreme Court said that the new explanation "reeks of afterthought")

Although the *Miller-El* prosecution was in Texas, some of the above practices may be present across the Commonwealth. As to the first factor, *Miller-El* made it very clear that evidence of discrimination was not limited to the facts of the case being tried. In counties where race-based or gender-based challenges are common, attorneys may want to begin keeping records so that a showing of systematic discrimination can be shown in the future. Even if such a showing is not possible, attorneys should remain aware of the other factors and aggressively challenge a prosecutor who engages in such practices.

Two decades after *Batson*, it is still not uncommon for a defendant to have his or her fate decided by 12 citizens of a race other than his or her own. In the gender context, a male charged with a sex offense may be tried by a jury that is uneven because of gender-based strikes by the prosecution. McPherson himself found out how that can turn out. He was convicted of four counts of first-degree sexual abuse and sentenced to the maximum sentence of 20 years (4 5-year sentences ran consecutively).

To ensure fairness and equal protection, defense attorneys must be diligent in raising *Batson* challenges, but it must go past the first step. Even after the prosecutor makes his "neutral" explanations, defense counsel should be prepared to respond to the explanations in a detailed and aggressive manner to ferret out any pretext. Only then can the trial court make the necessary third-step finding that the

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prosecutor's strikes were legitimate on the basis of a record that can then be reviewed on appeal.

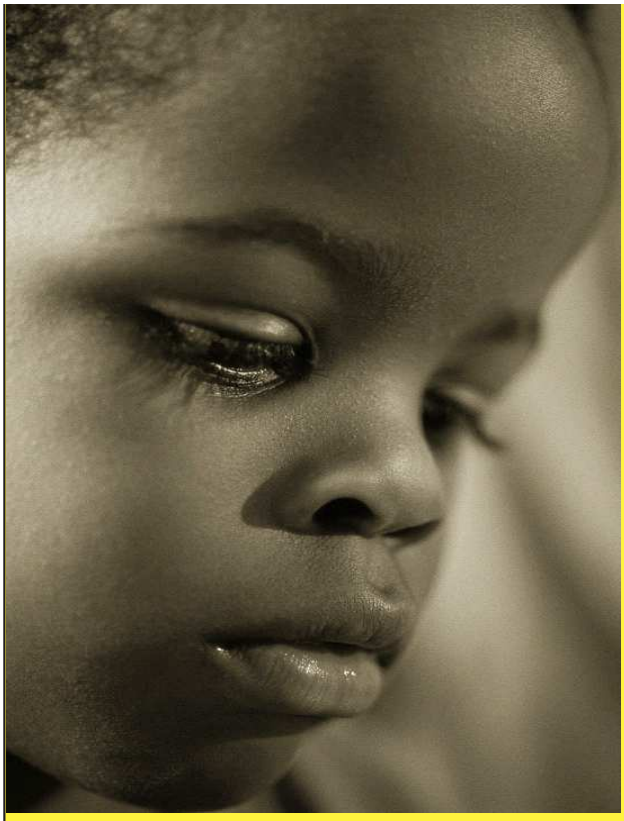
* * *

On June 15, 2006, the Kentucky Supreme Court issued an opinion in *Thacker v. Commonwealth*. Though not final at the time of this article, trial attorneys should take note of its holding. The Court overruled *Hicks*, 550 S.W.2d 480 (Ky. 1977), which had allowed a trial court to determine as a matter of law that a gun was a deadly weapon. Relying on *Apprendi*, 530 U.S. 466 (2000), the Court held that whether an item is a "deadly weapon" is a factual determination to be made only by a jury. In cases where possession of a "deadly weapon" is an element, jury instructions must include the definition of a "deadly weapon" ("any weapon from which a shot, readily capable of producing death or serious physical injury, may be discharged") and a finding that the item possessed met that definition. Until updated, *Cooper's* Jury Instructions ARE WRONG!

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. ■

The standard of justice depends on the equality of power to compel it.

- Thucydides



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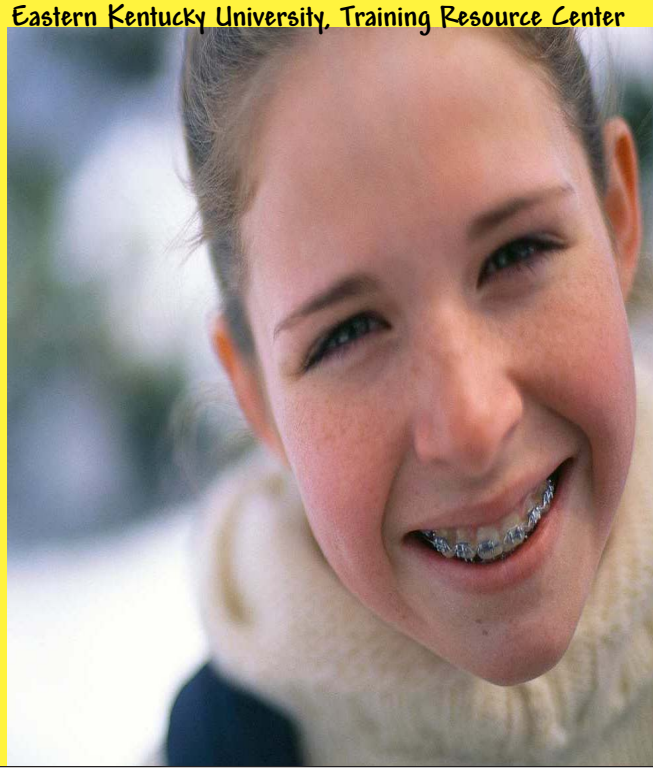

BOOK REVIEW
INDEFENSIBLE: ONE LAWYER'S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE

By Margaret Case, General Counsel

If you're a criminal defense lawyer, you probably know the syndrome. Your long-suffering spouse/child/friend cannot watch a "Law and Order" episode in peace, without you periodically interrupting in complete indignation, "Oh, puh-leeze! No judge in the entire world would suppress that evidence!!" Nor can you immerse yourself in a crime novel without half of your brain protesting, "Give me a break. No lawyer in his right mind would say that!"

But, this won't happen to you with David Feige's new book, *Indefensible: One Lawyer's Journey into the Inferno of American Justice*. It's a book about public defenders, for public defenders. Feige's real-life stories will resonate with any public defender, whether her practice is in a big city or in a small, rural town. Feige's perennial, drug-addicted client in the Bronx sounds for all the world like your own perennial, drug-addicted client in Paducah or Stanton or Wherever. Feige demonstrates, in an engaging and readable way, that there's a commonality of experience among public defenders, and that this experience is fascinating, frustrating, and ultimately very rewarding.

The author's 14 years as a public defender were rich in stories – tragic, comic, and just plain weird. Feige takes us to a bench trial where the judge instructed himself on the law and then proceeded to spin around and around in his chair, explaining that he was deliberating with himself. Then, finally, the judge stopped and announced "That's it. I'm hung."

There is the heart-wrenching account of Feige orchestrating his own client's arrest and incarceration, because there was no treatment program that would take this homeless, mentally ill, and hopelessly addicted client, and she had no place else to go other than jail. There is the murder case where the prosecution's only proof was a witness whose own wife described him as drunk much of the time, medicated nearly all of the time, and "very imaginative."

The genius of this book is a happy combination of factors: Feige's rich experiences and gift for remembering them, his apparent ability to devote part of his brain to observing his actions and feelings while they are occurring, and his skill at turning a phrase. When he tells of making a closing argument, with "my voice quavering from the potent mixture of stress and passion," public defenders will know viscerally what he's talking about.

Feige describes typically angry clients, locked up in jail:

"All the anger, fear, and frustration of a steady diet of violence and bologna sandwiches are often hurled at the only available outlet – a public defender they didn't ask for and don't trust." The central theme of *Indefensible* is how one public defender managed to deal with that reality and managed to last for years in a system seemingly designed to grind you down, chew you up, and spit you out. The book is a series of ripping good stories that explain why someone would want to last for years in a system like that.

If Feige intended his book as a PD recruitment tool, he met his goal.

Feige also presents a secondary theme: Judges, (and, to a lesser degree, prosecutors), are vested with almost unimaginable power that they choose to exercise in ways varying from the noble to the, well, . . . indefensible.

The author's credibility in this expose is enhanced by the fact that he names names. His introductory note begins:

> This book is a work of nonfiction. All of the characters in it are real, and most of them still work in and around the Bronx Criminal Courthouse. Although I have changed many client names and details to ensure privacy and privilege, most everyone else, including judges, prosecutors, and defense lawyers, is identified by his or her real name throughout the book.

Early on, we watch Feige appear in front of Judge Tona, with a client being arraigned on minor charges. Before Feige could open his mouth to begin his argument that the client should be released on his own recognizance, (after which the prosecutor would normally have a chance to respond), the judge went ahead and proclaimed summarily, "Bail is set in the amount of five hundred dollars, cash or bond. Next case, please."

> "B-but, Judge!" I stammered. "I didn't get to . . . uhhh . . . I'm asking you to release my client on his own recognizance."

From the bench:
"Be. Quiet. Mr. Feige."

"Your Honor! My client is a high school graduate, he's working full-time, and – "

"I said, next case please." Tona couldn't have been cooler.

"All the anger, fear, and frustration of a steady diet of violence and bologna sandwiches are often hurled at the only available outlet – a public defender they didn't ask for and don't trust."

"His *mother* is here, in court." I was getting frantic. As far as I was concerned, this was clearly a kid who shouldn't be going to jail – a place of violence and depredation, a place where even a single night in a cell risked robbery, mayhem, or even prison rape.

"One more word from you, Mr. Feige, and bail is going *up*. One hundred dollars a word."

"Your Honor!" I cried.

"Seven hundred dollars!" he said.

"You can't do that!"

"Eleven hundred!"

My mind was racing; I didn't know what to do. My client looked stunned. A uniformed court officer handcuffed him and led him toward the back of the courtroom, through the door that led to the largest penal colony in the world – Rikers Island.

I was panicking.

"Judge, I'm begging you. Please . . . my client deserves to be released. He's a college-bound kid. He'll come back to court. He's never been arrested before, and he has family here . . . please . . . , Judge!"

Tona looked down at me with bovine placidity. "Bail is twenty-five hundred dollars, cash or bond. Anything else, Mr. Feige?"

I was trembling. I couldn't believe it. By pushing the bail amount beyond anything my poor client could hope to post, I had effectively argued him *into* jail. I felt my forehead start to flush; tears welled up in my eyes. The bridge officer called the next case. I turned to the back of the courtroom and, spying the doors, ran.

If Feige intended his book as an indictment of the criminal justice system, he met that goal as well. For the legal system, this book is the literary equivalent of the lad who had the temerity to point out, "But, the emperor has no clothes!" The book is not without its rough spots. While judges and prosecutors, and even defense lawyers, are justifiably taken to task for their professional mistakes and foibles, Feige at times lapses into gratuitous personal attacks. There is the "sleazy" prosecutor, whose "misassembled wardrobe" contributes to an overall "look" that "is far more dowdy than cute." And, there is the judge whose "hair is processed to the color of curb cement," who evidences "an emotional palate that ranges from disagreeable to sour," and whose "Grim Reaper fingers tap out a constant rhythm of disapproval."

But, those lapses are really very few. Overlooking them, the reader is treated to a realistic glimpse into a world that few people get to see. It is a world that those of us immersed in the criminal justice system will recognize. And, not only do we recognize that world, but we read in Feige's prose a description of experiences that we sometimes find hard to communicate to others.

If you've ever stood at sentencing with your client, while a murder victim's family members vented their rage against your client and you, then you will understand Feige when he writes the following about his client, Roger, who was convicted of killing Mr. Wale: "(A)s deeply as I felt Wale's sister's anguish, I also felt, as acutely as ever, how desperately Roger and the rest of my clients – even the guilty ones – need protection from the punitive ravages of a vengeful world. . . And ultimately, protecting Roger – from a vindictive system fueled by grief and loss and anguish – ensuring that at least one person was there for him, actually felt good."

I intend soon to pay Mr. Feige and his book a major compliment. I intend to give my sister a copy of *Indefensible*. My sister is forever plying me with questions about my work and what it's like to be a public defender. But, I'm often too inarticulate or just too tired to convey the real experience in such a way that she will get it. Mr. Feige's book will answer her questions for me. ■

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