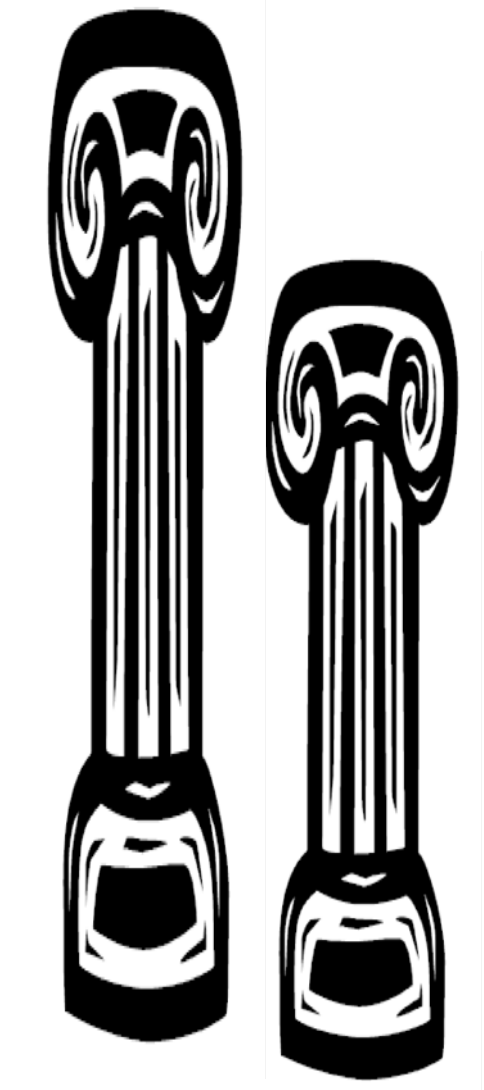
The Advocate

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

Volume 28, Issue No. 5 September 2006

IS DEMONSTRABLY FALSE, DEMONSTRABLY FAIR? SEXUAL ABUSE CROSS-EXAMINATION RULES LIMIT THE AVAILABILITY OF CONFRONTATION AND JUSTICE



- ***ROPER V. SIMMONS*** **AND ITS APPLICABILITY TO YOUTHFUL OFFENDER TRANSFER HEARINGS**
- **JUVENILE COURT SUCCESS STORIES**
- **NATIONAL INSTITUTE ON DRUG ABUSE PRINCIPLES OF DRUG ABUSE TREATMENT FOR CRIMINAL JUSTICE POPULATIONS**
- **STUDY OF YEAR-LONG PILOT PROJECT SHOWS THAT KEY EYEWITNESS IDENTIFICATION REFORMS ARE EFFECTIVE**

DPA ON THE WEB

DPA Home Page http://dpa.ky.gov/default.php

DPA Education http://dpa.ky.gov/education.php

DPA Employment Opportunities:
http://dpa.ky.gov/eo.php

***The Advocate* (since May 1998)**:
http://dpa.ky.gov/library/advocate.php

Legislative Update:
http://dpa.ky.gov/library/LegUpdate.php

Defender Annual Caseload Report:
http://dpa.ky.gov/library/caseload.php

Please send suggestions or comments to DPA Webmaster
100 Fair Oaks Lane, Frankfort, 40601

****

DPA'S PHONE EXTENSIONS

During normal business hours (8:30a.m. - 5:00p.m.) DPA's Central Office telephones are answered by our receptionist, Alice Hudson, with callers directed to individuals or their voicemail boxes. Outside normal business hours, an automated phone attendant directs calls made to the primary number, (502) 564-8006. For calls answered by the automated attendant, to access the employee directory, callers may press "9." Listed below are extension numbers and names for the major sections of DPA. Make note of the extension number(s) you frequently call — this will aid our receptionist's routing of calls and expedite your process through the automated attendant.

Appeals - Cheryl Nolan	#138
Capital Trials - Connie Holland	#220
Computers - Ann Harris	#130
Contract Payments - Kim Perron	#403
Education - Lisa Blevins	#236
Frankfort Trial Office	(502) 564-7204
General Counsel - Tracy Hughes	#108
Human Resource Manager - Marcia Allen	#139
LOPS Director - Al Adams	#116
Post-Trial Division - Jennifer Withrow	#201
Juvenile Dispositional Branch - Hope Stinson	#106
Law Operations - Carol Hope	#110
Library - Will Geeslin	#119
Payroll/Benefits - Chuck Curd	#136
Personnel - Cheree Goodrich	#114
Post Conviction	(502) 564-3948
Properties - Kay Stivers	#218
Protection & Advocacy	(502) 564-2967 or #276
Public Advocate - Tracy Hughes	#108
Recruiting - Londa Adkins	#124
Travel Vouchers - Renee Cummins	#118
Trial Division - Sherri Johnson	#165

Table of Contents

The National Juvenile Defender Center has just published the 2nd Edition of the Juvenile Defender Notebook. This guide, updated and improved for 2006, describes in detail and with practical explanations how to zealously and effectively represent youth in delinquency cases. The notebook is an invaluable tool for new juvenile defenders or attorneys looking to improve their advocacy in many areas of juvenile defense. It serves as a basis for NJDC training sessions introducing defenders to skills and strategies for handling juvenile cases. It is available online at:
http://www.njdc.info/publications.php

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

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

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Justice & Public Safety Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

The Advocate strives to present current and accurate information. However, no representation or warranty is made concerning the application of the legal or other principles communicated here to any particular fact situation. The proper interpretation or application of information offered in *The Advocate* is within the sound discretion and the considered, individual judgment of each reader, who has a duty to research original and current authorities when dealing with a specific legal matter. *The Advocate*'s editors and authors specifically disclaim liability for the use to which others put the information and principles offered through this publication.

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

Paid for by State Funds. KRS 57.375

FROM THE EDITOR...

Jeff Sherr

September marks the 100th Anniversary of Kentucky's juvenile court system. Beginning with this edition and continuing through the year, the Advocate will feature more than the usual number of articles on juvenile practice. The Supreme Court's landmark decision, *Roper v. Simmons*, and the impact of this case on non-death penalty cases is examined in an article by Dawn Fesmier and Amy Robinson Staples. The authors also provide a sample motion for use in juvenile transfer cases. Several **Juvenile Success Stories** are shared in an article by Juvenile Post Disposition Branch paralegals Barb Bingham and Pam McDowell.

In **Is Demonstrably False, Demonstrably Fair? Sexual Abuse Cross-Examination Rules Limit the Availability of Confrontation and Justice** Somerset Directing Attorney Jim L. Cox and law clerk David N. Nice argue that the "demonstrably fair" standard does not give an adequate indication of what types of evidence may be introduced in a case in which the defense seeks to introduce prior allegations of sexual contact. They propose a new rule to allow questioning of witnesses such as social workers, doctors, and psychiatrists, as well as allow for cross-examination of the accuser when there are claims of prior sexual abuse that are unsubstantiated in some way – no prosecution, dismissal, acquittal, recantation, and inconsistency. This evidence must be also relevant and admissible under the rape shield law.

The National Institute on Drug Abuse has release a public domain publication entitled **Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide**. This guide is intended to describe the treatment principles and research findings that are of particular relevance to the criminal justice community and to treatment professionals working with drug abusing offenders.

Throughout the country, law enforcement agencies are reforming eyewitness identification techniques to improve the accuracy of police lineups and other identification procedures. A new study published in the *Cardozo Public Law and Ethics Journal* concludes that a new protocol used in Hennepin County, Minnesota "is both efficient to implement and effective in reducing the potential for misidentifications." A summary of the study and a link to the complete article are available in this edition. ■

Is Demonstrably False, Demonstrably Fair? Sexual Abuse Cross-Examination Rules Limit the Availability of Confrontation and Justice

by
Jim L. Cox, Directing Attorney, Somerset
David N. Nice, Law Clerk; University of Kentucky

I

For the admission of any evidence, the initial test is relevance. The Kentucky Supreme Court, in *Barnett v. Commonwealth*, 828 S.W.2d 361 (Ky. 1992), stated, "The purpose of the Rape Shield Statute ... is to insure that [the victim] does not become the party on trial through the admission of evidence that is neither material nor relevant to the charge made." *Bamett v. Commonwealth,* 828 S.W.2d at 361, 363. The defendant in *Barnett* was convicted of rape, sodomy, and sexual abuse of a minor less than 12 years of age.

The issue for the court on appeal was whether the appellant was denied a fair trial as a result of excluded evidence of sexual contact between the alleged victim and her brother. The court cited subsection three of K.R.S. 510.145. Under that subsection, evidence may be admitted regarding the complaining witnesses' prior sexual conduct or habits with parties other than the defendant if that evidence is material to the charged act or acts and is found to be relevant. The court held that the evidence in that case would be relevant. The court elaborated, "in the case of a female child who is presumed not to be sexually active, and with whom any sexual contact is prohibited, a medical finding of frequent sexual activity establishes the relevance of evidence that the perpetrator is one other than the person charged." *Barnett* at 363. A case where there is a minor female with signs of frequent sexual activity, evidence is relevant if it suggests that it was not the defendant who engaged in that sexual activity under the Kentucky Rape Shield Law. In all cases of this nature, the first step is to find a category in the Rape Shield Law that pertains to the potential evidence. However, when the proposed evidence is not of prior sexual conduct but of prior allegations of sexual conduct, there arc further requirements.

II

After determining the proposed evidence is relevant to the instant case, there must be a determination of falsity of the prior allegations. The requisite finding a court must make is whether or not the prior allegations were "demonstrably false." In *Hall v. Commonwealth*, 956 S.W.2d 224 (Ky. Ct. App. 1997), the court adopted a rule for this scenario:

> If the unrelated accusations are true, or reasonably true, then evidence of such is clearly inadmissible primarily because of its irrelevance to the instant proceeding. Additionally, unrelated allegations which have neither been proven nor admitted to be false are properly excluded. If *demonstrably false,* the evidence must still survive a balancing test, *i.e.*, the probative value must outweigh the prejudicial effect. *Hall v. Commonwealth*, 956 S.W.2d at 224, 227.

Berry, in *Berry v. Commonwealth*, argued that evidence of one alleged victims prior allegations of sodomy with adult males should have been admitted. In the third trial of this case, after two mistrials, the adult male, a preacher, testified under oath that the allegations previously made against him were false. There were not criminal charges against this preacher. By putting the preacher under oath and questioning him, it would seem that this satisfies the demonstrably false test. However, the Kentucky Court of Appeals held that this evidence was not admissible. First, they cite that since the alleged victim was over sixteen years old, it was not a crime to have sex with the victim, and second, the court held that a denial under oath does not make an allegation demonstrably false. *Berry* at 91.

The probative-prejudicial dichotomy is used to protect the defendant; however, in this instance, the court is trying to protect the complaining witness. The court in *Berry v. Commonwealth*, 84 S.W.3d 82 (Ky. Ct. App. 2001), somewhat clarified the probative- prejudicial aspect of this test. The court quoted *Hall*, which was quoting *Barnett*, "[The evidences] admission would undermine the purpose of KRE 412, shifting focus from the real issues, and effectively put the victim on trial." *Berry* at 91. Thus, the court in *Berry* suggests that the protection exists for the complaining witness, which prevents a trial of the alleged victim.

But it is arguable that by protecting an evaluation of the witness' character, the court is denying the defenses one clear chance to give rise to reasonable doubt. If the jury is able to hear testimony of a child witness without any valuable cross-examination from the defense, the trial itself is a mere for-

mality on the path to prison. A child, in today's culture, is exposed to society's vulgarity by many avenues - television, internet, even radio. For a jury to be able to understand all aspects of a case, the defense must be given a chance to cross-examine the prosecutions witnesses. Anything less is a violation of the confrontation clause, as well as dissolution of the adversarial system of law.

III

The question that arises from the *Hall* and *Berry* rule is, "What is demonstrably false?" Unfortunately, there does not seem to be one answer. This question has been addressed by courts on a case-by-case basis. Thus, the answer is varied, not only in regard to each scenario this issue may arise, but varied between jurisdictions. The trend is to increase protection for the child prosecutrix and reduce the availability of the right to confrontation for the accused. This trend mirrors society's need to feel they are protecting children from those who are abusing them. However, what is the cost of this protection? Are innocent people incarcerated, labeled as sex offenders for like and subject to the other punishments of being a convicted felon? The answer to this question lies in where the bar is set in defining "demonstrably false."

In *State v. Padilla*, 329 N.W.2d 263, (Wis. Ct. App., 1986), a prosecution for sexual contact with a minor, the court found the rape shield evidence law barred introduction of evidence of prosecuting witness' prior sexual conduct. This rule barred evidence of a prior allegation of sex with the witness' stepfather, because the defense offered no proof that the allegations were false. This case illustrates an example of when this rule is useful. If the defense cannot provide any evidence of falsity, then the evidence is properly excluded. A defendant cannot merely probe the witness for prior sexual conduct without any basis for the cross-examination. This is exactly what the court was anticipating in protecting a witness from a trial of their character. Demonstrably false, therefore, must be more than a mere allegation by the defense that false accusations have been made in the past.

However, in *Peoples v. State*, 681 So.2d 236 (Ala. 1995), the Alabama Supreme Court held that when a child victim makes an accusation and then recants that accusation to a counselor, evidence of the recantation should not be excluded. Thus, the demonstrably false requirement may be met by providing evidence of a recantation. The other scenarios that allow admissible evidence are those involving inconsistent or mutually exclusive statements by the accuser, or when another accused was convicted for a similar charge and the evidence is relevant to the instant charge.

In *State v. Rains*, 118 S.W.3d 205, 214 (Mo. Ct. App. *2003)*, the court found that, "the record does not indicate that A.E. ever recanted her claim that her then-husband had raped her. **That charges were never filed against him does not mean the charge was false**, for there are many reasons rape charges might not be filed, including, *e.g.*, that the prosecutor declined to pursue the charges (emphasis added)." Further, the court held that because it would be possible for the trial court to conclude that the allegations were not false, and that cross-examination on this issue could confuse the jury, the evidence was properly excluded.

In *Raines*, the Missouri Supreme Court outlined the Federal Courts' stance on the issue of confrontation in light of rape shield law. The preeminent case is *Davis v. Alaska*, 415 U.S. 308 (1974). In *Davis*, the Supreme Court, with regard to evidence proffered to reveal a general propensity to lie, distinguished attacks on general credibility and those "revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis v. Alaska*, 415 U.S. at 316. The evidentiary rules allow for evidence into motives and biases of a witness, but do not allow for a general survey of a witness' past. *See also Kittelson v. Dretke*, 426 F.3d 306 (5th Cir. 2005) (More recent case dealing with recantation of prior allegation by child witness).

There are numerous scenarios that have not been dealt with uniformly by courts including: accusations that are later denied; accusations that were not recanted, denied, nor prosecuted; prior accused acquitted or charges dismissed; and prior charges' disposition is unknown. Among these areas, there are courts which have held evidence both admissible and inadmissible under each scenario. Nancy M. King, **Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons**. 71 A.L.R 4th 469 (1989).

The result of the inconsistency is an absence of a true guideline for trial courts to follow in determining the admissibility of evidence. Without having a firm definition of "demonstrably false," there is no way to protect a right to confrontation from case to case. Defendants may have evidence of prior allegations of similar abuse by their child accusers, but if that evidence is not "proven" false by one of the accepted ways, the right of confrontation on that issue is lost. Justice, in turn, may also be lost. Therefore, the next question is, "How are the courts to best provide protection of both the victim and the constitutional right to confrontation?"

IV

In *Fowler v. Sacramento*, 421 F.3d 1027 (9th Cir. 2005), the defendant was convicted of annoying or molesting Charla Lara. She had made two prior allegations of a similar nature. Fowler admitted that he had applied lotion to Charla, but not inappropriately. Further, Fowler admitted that he had a sexually charged conversation with Charla based on the

Continued on page 6

Continued from page 5

fact that Charla's biological father had informed Fowler, the stepfather, that she may be doing inappropriate things with her stepbrothers. Fowler filed a writ of *habeas corpus*. The 9th Circuit Court of Appeals held in favor of Fowler, reversing the state court and remanding for a new trial. *Fowler v. Sacramento*, 421 F.3d 1027 (9th Cir. 2005).

Trial judges have wide latitude in their power to reasonably limit testimony insofar as the confrontation clause is concerned. The limitations may be based upon *inter alia*, confusion, harassment, time, and embarrassment. *Olden v. Kentucky*, 488 U.S. 230. In *Olden*, the Supreme Court affirmed that a trial court has the power to limit the testimony proffered under the Confrontation Clause. Alternatively, the Supreme Court found that the trial court had improperly excluded testimony; thus, the court declared the trial judge had been unreasonable in the application of those limitations. Founded on prejudicial effect, the trial court had attempted to limit the testimony, and the Supreme Court held that the court could not justify its exclusion where it had "such strong potential to demonstrate the falsity of [the prosecution's witness's] testimony." *Olden v. Kentucky*, 488 U.S, 230.232. The trial judge, subject to standard of reasonableness, has to determine if the testimony would be relevant and if there are countervailing reasons to limit or preclude testimony in order to justify a preclusion of evidence proffered by the defense.

The evidence precluded in *Fowler* may well have led a reasonable juror to conclude that Lara was hypersensitive to physical contact by men. The jury could have concluded that she had a propensity to exaggerate or embellish the reality of the male's actions. The prior incidents were not dissimilar from the instant charge. All three charges revolved around alleged inappropriate, sexual, male contact with Lara. The 9th Circuit concluded that this satisfied the requirements of *Penn*, *infra*.

In addressing the issue of countervailing reasons to preclude evidence, the trial court in *Fowler* cited time, confusion, prejudice and embarrassment as their reasoning. The 9th Circuit disagreed.

In considering the issue of time, the Court of Appeals held that "there is no reason to believe that cross-examination as to the two prior incidents necessarily would have [consumed an inordinate amount of time]." *Fowler v. Sacramento*, 421 F.3d 1027, 1040 (9th Cir. 2005). The Court of Appeals suggests that there is no reason that the trial judge could not have imposed limits to ensure a brief, to-the-point cross-examination of the witness.

With regard to the possibility of confusion, the court in *Fowler* held that the issues presented in this case would have been no more confusing than the issues in many other criminal cases that require a jury to sort through lengthy testimony and numerous issues of fact. The court held, "Indeed, with respect to the potential confusion it might cause the jury, the introduction of evidence regarding the [prior incidents] is rather like the routine introduction of evidence of so-called prior bad acts against defendants charged with certain sex offenses-" *Fowler*, 421 F.3d 1027, 1040 (9th Cir. 2005)*; See,* Fed.R.Evid.414 (Evidence of prior child molestation).

The court in *Fowler* held that only the witness' testimony could have been prejudiced by the evidence of the prior incidents. Further, the court opined, "Any disgust or hostility that jurors might have felt would have been lodged not with Lara, but with [the prior men charged]." *Fowler*, 421 F.3d 1027, 1041 (9th Cir. 2005). The court continued, "Indeed, if anything, the jurors would have been more likely to sympathize with Lara." *Fowler*, 421 F.3d 1027, 1041 (9th Cir. 2005).

When concluding this discussion, the court dealt briefly with the issue of embarrassment, but summarily dismissed that claim stating, "if by 'prejudice' the trial court meant embarrassment to Lara, it is not clear how the testimony would be any more embarrassing than Lara's testimony regarding the alleged incident involving Fowler. Such minimal-if any-embarrassment cannot serve as the basis to preclude relevant cross-examination." *Fowler v. Sacramento*, 421 F.3d 1027 (9th Cir. 2005).

Fowler supports the conclusion that the 6th Amendment right to confrontation is a broad right with great discretion given to the trial judge. Also, the 9th Circuit Court of Appeals supports the reasonableness standard that must be applied in determining the preclusion of evidence. Therefore, trial judges must provide defendants in sex abuse cases their right to confrontation as long as the evidence proffered is relevant. The evidence may be limited or precluded at the courts discretion, but that limitation or preclusion must be based upon reasonable standards consistent with established law.

The stigma associated with an allegation of sexual abuse extends throughout the legal system. In *Miller v. Tennessee Board of Paroles*, not reported in S.W.2d, 1999 WL 43263 (Tenn. Ct. App. 1999), Miller's parole was revoked based upon hearsay testimony of the accuser given by a social worker at the revocation hearing. Miller was on parole following a murder conviction. He had been following his parole guidelines, gained steady employment and become friends with many of his neighbors. The accuser stated that Miller had touched her in various inappropriate places. When Miller was questioned about the allegations, he stated that he had not done anything inappropriate. Furthermore, he stated that he believed the accuser to be upset with him. Miller had told the accusers mother that she had been getting into cars with boys. Miller had been seeing the accusers

mother socially, and he believed the accuser disapproved. The accusers mother did not believe the statements made by her daughter. The accusers sister was present at some of the alleged incidents and she did not corroborate the accusers testimony.

At the hearing, only two witnesses were called. Two other witnesses failed to appear despite being subpoenaed. The remainder of the evidence was the statement given by Miller and the transcript of the conversation between the accuser and a social worker. Miller testified on his own behalf denying the allegations. After the hearing, Miller's parole was revoked and he filed a common-law writ of *certiorari* in the Chancery Court for Davidson County.

The court held that testimony attempting to provide grounds for revoking a parole should be treated more rigorously, because the testimony was offered to prove the truthfulness of the allegations and could result in the deprivation of liberty. *Miller v. Tennessee Board of Paroles*, not reported in S.W.2d, 1999 WL 43263 (Tenn. Ct. App. 1999) at 5. The court referenced *Dutton v. Evans*, 400 U.S. 74 (1970)., "Ever since the treason of Sir Walter Raleigh in 1603 in which Raleigh was convicted and executed based on the written confession of an alleged co-conspirator, our law has favored rigorous adversarial testing of testimonial evidence." *Miller* at 5. Lord Chief Justice Hale commented on adversarial questioning stating that it "beats and boults out the truth much better than when the witness only delivers a formal series of his knowledge without being interrogated." Matthew Hale, *History of the Common Law (1680)*, quoted in 5, John H. Wigmore, *Evidence in Trials at Common Law* Sect. 1367, at 34 (Chadbourn rev.1974). The preference for adversarial questioning has continued and been the hallmark of our system of law.

The court in *Miller* found three requirements to establish good cause for dispensing with Miller's opportunity to confront or cross-examine his accuser. First, the parole board must find that the out-of-court statements were inherently reliable. Second, they must determine whether the statements had been tested for truthfulness through then adversarial system. And third, they must determine if there was a serious emotional distress that the accuser would be unable to testify fully and truthfully in the presence of the accused. *Miller* at 6. The court in *Miller* found that there was not good cause to dispense with the right of confrontation because (1) children's reports of sexual abuse are no longer perceived to be inherently accurate; (2) the accuser's statements were inconsistent; and (3) the accuser's statements to her mother were not consistent with her statements to authorities.

Traditionally, it was assumed that children did not have knowledge of sexual acts, and thus, children would be ineffective in lying to authority figures about sexual abuse. However, because of the large number of erroneous sexual abuse allegations and the concern that techniques used to interview children regarding the allegations are unreliable, there is no longer any basis - empirical or otherwise - to assume that children's testimony is inherently reliable. *Valmonte v. Bane*, 18 F.3d 992, 1003-04 (2nd Cir. 1994); Jacqueline Beckett, Note, *The True Value of the Confrontation Clause: A Study of Child Sex Abuse Trials*, 82 Geo.L.J. 1605, 1606-07, 1632, 1636 (1994); *Maryland v. Craig*, 497 U.S. 836 (1990).

In conclusion, the court's opinion states that, "these proceedings present sensitive and difficult procedural problems because of the competing interests at stake. Like judicial proceedings in which child sexual abuse is at issue, administrative proceedings must be conducted according to a fundamentally fair legal procedure." *Miller* at 8.

V

There is a need for rape shield type evidence law. There is also a need for a right to confrontation and cross-examination. Both serve their purpose to protect one of the parties in a criminal action. Which has greater weight? The Constitution of the United States of America is the highest law. Therefore, in favor of justice, there must be times when some law is left behind in favor of protecting those rights provided for by our founding fathers.

In *Lewis v. Wilkinson*, 307 F.3d 413 (6th Cir., 2002), a diary was found that contained written evidence of a scheme of deception by the complaining witness. The writing was vague at times, but the appellate court found that exclusion of this evidence was reversible error based on an infraction of the 6th Amendment right to confrontation. The court determined that, under *Davis v. Alaska*, the entries were not going toward generalized credibility, but to specific evidence of motive. The court fashioned a test for review of such cases. First, the appellate court must determine whether there was enough evidence presented to the jury despite the limits imposed by the trial court to assess the defenses theory. Second, the appellate court must apply a balancing test of the rape shield law and the confrontation clause. In *Lewis*, the court weighed the total lack of cross-examination on the diary with the danger of undue prejudice - trial of the victims character. The court held, "[t]he constitutional violations in this cast are significant enough to outweigh any violation of the rape shield law, whose purposes can be served by the instructions of the trial court." *Lewis* at 422.

VI

Child sexual abuse is a delicate area, as many interests are in the balance. However, while it is important to protect children from predators, protection of the innocent must also be

Continued on page 8

Continued from page 7

at the forefront of our criminal justice system. The standard "demonstrably false" does not give an adequate indication of what types of evidence may be introduced at trial. Another standard is needed to protect the accused from children who have learned how to manipulate men, mothers, and the criminal justice system. Requiring such determinations of prior allegations is unrealistic, and evidence that is pertinent for juries and for justice is being excluded because of this rule. Furthermore, the penalty instituted for sexual offenses is life long because even after the prison term, a person is branded as a felon and as a sexual offender. When a person is charged with murder, the requirements for a conviction and penalty of death is higher than for a penalty of prison. The same level of protection should be afforded to those charged with sexual offenses. The penalty is life long, and the defense is limited. This problem must be corrected.

A new rule should allow for questioning of witnesses such as social workers, doctors, and psychiatrists, as well as allow for cross-examination of the accuser when there are claims of prior sexual abuse that are unsubstantiated in some way – no prosecution, dismissal, acquittal, recantation, and inconsistency. This does not mean that any prior lie that a child told will be scrutinized. All evidence must be relevant and admissible under the rape shield law. The prior allegation evidence will only serve to question the motive in the current case by a comparison to alleged motives in past instances.

Assuming *arguendo*, a child of a single mother who has alleged sexual abuse on every serious boyfriend the mother has had and none of those allegations resulted in criminal charges, must be cross-examined to test the veracity of the child's allegations in the present action. If a piece of evidence is probative into the instant charges, then it is imperative to have that evidence heard by a jury. Justice simply demands it. ■

ROPER V. SIMMONS AND ITS APPLICABILITY TO YOUTHFUL OFFENDER TRANSFER HEARINGS

By Dawn Fesmier & Amy Robinson Staples
Juvenile Post Disposition Branch

Introduction

In a landmark decision handed down in March of 2005, the United States Supreme Court dramatically changed the state of the law as it applies to juvenile offenders. In *Roper v. Simmons*, 125 S.Ct. 1183 (2005), the Court ruled that the execution of offenders under the age of 18 is prohibited by the Eighth and Fourteenth Amendments to the United States Constitution. Acknowledging the evidence of a national consensus against the death penalty for juveniles, including the fact that a majority of States had already "rejected the imposition of the death penalty on juvenile offenders under 18," and the evolving standards of decency, the Court explicitly noted that adolescents are different than adults – both physiologically and emotionally. This article will explore the Court's analysis of those differences in the *Roper v. Simmons'* decision and the holding's potential impact on attorneys representing juvenile clients at youthful offender transfer hearings.

The *Roper v. Simmons* Decision

In holding that the juvenile death penalty is unconstitutional, the Supreme Court specifically identified three significant differences between youth and adults that impact juveniles' culpability and which "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." First, "as any parent knows and as the scientific and sociological studies…tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" Secondly, the Court noted that juveniles are more susceptible to outside influences and peer pressure than adults.

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment…[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.

Third, the Supreme Court noted that the character of juveniles is not well formed. Thus, juvenile personality traits are more transitory and less fixed than those of adults.

Relying upon these differences and the unique emotional and physical susceptibility of juveniles to harmful influences as a result of emotional and legal constraints, the Court explained the reasons for the lesser culpability of youth: the susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult; juveniles' vulnerability and comparative lack of control over their immediate surroundings mean they have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment; the reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character; and from a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Additionally, the Court noted how a juvenile's immaturity, irresponsibility, and susceptibility to negative influences prevent the "two distinct social purposes served by the death penalty" - retribution and deterrence of prospective offenders – from being satisfied. "Once the diminished culpability of juveniles is recognized, it is evidence that the penological justification for the death penalty apply to them with lesser force than to adults."

The *Roper v. Simmons* Decision As It Applies to Transfer Hearings

The reasoning and analysis in *Simmons* can, and should, be applied to transfer hearings. Under KRS 635.020(2), a juvenile is eligible for transfer if the juvenile is over the age of 14 years of age and if the juvenile committed a Class A or B felony offense or capital offense. Likewise, Under KRS 635.020(3), a juvenile age 16 or older, who has a separate prior felony public offense and who is charged with a Class C or D felony, is eligible for transfer. However, this transfer is not mandatory, but rather, is discretionary. Arguing *Simmons* is critical in transfer hearing proceedings.

While the *Simmons* Court focused on the death penalty, a close reading of it demonstrates several reasons why juveniles are not appropriate for transfer. For one, the Court recognized the fact that juveniles and adults are different, specifically in regards to their physiological and emotional makeup. Juveniles are more immature and do not look at long term consequences of their actions. They have the mentality that they are invincible and nothing bad will happen to them, including any possible sanctions they may face. This problematic scenario was what the *Simmons* court was trying to avoid – punishing a juvenile with an adult sentence when they have not achieved the brain development necessary to fully weigh the gravity of their actions.

Another reason the Court gives for its decision in *Simmons* is that sentencing a juvenile to the death penalty fails to serve the purposes for which the death penalty was designed: retribution and deterrence. This argument can be applied to any adult sentence a juvenile may receive. The Unified Juvenile Code was created to insure that juveniles were held to a different standard than adults, one where they would receive treatment and not simply punishment and retribution. By allowing the juvenile to enter the adult system, the purpose of the Code is dismissed and discarded for the juvenile. The *Simmons* Court recognized that a sentence involving retribution and deterrence, which is what an adult sentence consists of, is not appropriate for a juvenile.

In sum, based upon the fact that juveniles have a lesser culpability due to their adolescent brain development, and the fact that the goals of the death penalty are not met by executing those with a lesser culpability, *Roper v. Simmons* held that "the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." This can and should be used in arguments against transfer from district to circuit court.

Continued on page 10

National Juvenile Defender Center, *Encouraging Judges to Support Zealous Defense Advocacy from Detention to Post Disposition*, Summer 2006, http://www.njdc.info/pdf/ncjfcj_fact_sheet.pdf

Practice Recommendation on Elements of Zealous Defense

- Meet with the child prior to the detention or initial hearing
- Have the opportunity, in every hearing, to cross-examine prosecution witnesses, present evidence, and make arguments
- Inform the court of each youth's special needs
- Zealously represent each child client's expressed interests
- File appropriate pre-trial motions
- Actively pursue discovery
- Appear in all hearings where the attorney would appear for an adult accused of the same crime
- Know the available disposition resources
- Secure the child's appeal rights and explain them to the child

Continued from page 9

COMMONWEALTH OF KENTUCKY
_____ COUNTY DISTRICT COURT
JUVENILE DIVISION
CASE NO. ____- J - _____

IN THE INTEREST OF _____, A CHILD

****

MOTION FOR THE COURT TO APPLY THE CATEGORICALLY LESS CULPABLE STANDARD TO ITS DECISION UNDER KRS 640.010(2)(a),(b)

Comes now _____, by and through counsel, under *Roper v. Simmons*, 125 S.Ct. 1183, 543 U.S. 551 (2005), *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002), Sections 2 and 11 of the Kentucky Constitution, the Fifth, Fourteenth, and Eighth Amendments to the U.S. Constitution, and all other relevant state and federal authority, and moves this Court to enter the following attached order mandating that it will apply the categorically less culpable standard, as a mitigator, to any decision it makes under KRS 640.010 in this case. In support of this motion _____ states as follows:

1. _____, DOB _____, stands accused of the public offense(s) of _____ by his/her Juvenile Petition 00__.

2. The Asst. or the _____ County Count Attorney, _____, has consulted with the Commonwealth Attorney of this judicial Circuit (proof in the file) about making a motion to transfer jurisdiction of _____'s Petition 00__.

3. _____, has made a motion in writing to transfer jurisdiction of _____'s Juvenile Petition 00__ under KRS 635.020(__).

4. In *Roper v. Simmons*, 125 S.Ct. 1183, 543 U.S. 551 (2005), the U.S. Supreme Court held that the government would violate the Eighth and Fourteenth Amendments to the U.S. Constitution by executing anyone who stands convicted of a capital offense committed before the defendant turned 18 years old. In reaching this landmark holding, the Supreme Court made an absolute finding that juveniles are "categorically less culpable than the average criminal." *Simmons* at 1194 [Quoting *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct 2242, 2249 (2002) (Holding that it is unconstitutional to execute a mentally retarded person as punishment for conviction of a capital crime, and basing this holding on the premise that retarded people are "categorically less culpable than the average criminal.")

5. Without making the categorically less culpable finding, the *Simmons* could not have made its seminal holding against the juvenile death penalty. One might legitimately debate whether the categorically less culpable standard applies retroactively to any case other than the death sentence for a juvenile, youthful offender. On the other hand, as an absolute finding in a United States Supreme Court case, the categorically less culpable standard has to apply to any youthful offender or juvenile delinquent case since the Court rendered *Simmons* in March 2005. (Question whether this standard will now apply to any civil case involving an actor less than 18 years of age as *Batson v. Kentucky*, 476 US 79, 106 S.Ct. 1712, now applies to jury selection in civil cases.)

6. KRS 640.010(2)(a)(b) calls for a bifurcated hearing on the county attorney's motion to transfer jurisdiction under KRS 635.020(2). _____ asserts that the categorically less culpable standard applies to both sections of the bifurcated hearing under KRS 640.010(2).

7. Accordingly, this Court should apply the *Simmons* categorically less culpable standard and note this application in the record with its decision to transfer or not to transfer jurisdiction in _____'s Juvenile Petition 00__ case.

8. _____ submits that not using the *Simmons* categorically less culpable standard in making a decision to transfer jurisdiction of his Juvenile Petition 00__ constitutes violations of his Sections 2, 3, and 17 Kentucky constitutional rights not to receive arbitrary treatment, not to receive cruel punishment, and to equal treatment under the law.

9. _____ submits that not using the *Simmons* categorically less culpable standard in making a decision to transfer jurisdiction of his Juvenile Petition 00__ constitutes violations of his Fourteenth and Eighth Amendment rights to due process and not to receive cruel and unusual punishment.

WHEREFORE, _____ respectfully asks this Court to enter the following attached order ruling that the *Simmons* categorically less culpable standard applies to transfer of jurisdiction decisions made under KRS 640.010(2).

Respectfully submitted,

_____
Name
Assistant Public Advocate
Address
Address
Phone
Fax

CERTIFICATE OF SERVICE

COMMONWEALTH OF KENTUCKY
_____ COUNTY DISTRICT COURT
JUVENILE DIVISION
CASE NO. ____- J - _____

IN THE INTEREST OF _____, A CHILD

****

ORDER

Motion having been made, and this Court being sufficiently advised;

IT IS HEREBY ORDERED THAT the finding that juveniles are "categorically less culpable than the average criminal" standard articulated by *Roper v. Simmons*, 125 S.Ct. 1183, 1194, 543 U.S. 551 (2005) shall apply to the transfer decision in this case.

_____ Date: _____
Judge, ____ County District Ct

Copies to:

The attached is a sample motion tendered by Timothy Shull that may prove to be useful in your juvenile court practice. ■

JUVENILE COURT SUCCESS STORIES

By Barb Bingham and Pam McDowell
Juvenile Post Disposition Branch

Since the inception of Juvenile Courts, Kentucky children who are found to be delinquent are provided services and treatment, allowing them to take responsibility for their behavior without the stigma attached to a public record of their adjudications. With the focus on rehabilitation rather than punishment, many of these children have the opportunity to go on to lead productive, law-abiding, and successful lives. Following is a profile of three Kentuckians who have faced charges in juvenile courts:

Adam* was adjudicated in juvenile court and placed at a residential treatment center. Deciding to make the best of his situation, Adam worked the program at the treatment center to the best of his ability. Adam's dream was to join the military, so he contacted a recruiter while he was in state custody. Knowing that he would need college credit, Adam took 15 hours of correspondence courses through a state university. In addition, Adam took and passed the ASVAB and, upon his release from commitment, enlisted in the National Guard.

Jason* was adjudicated on felony offenses and required to complete a treatment program. He managed to complete a year long program in nine months and earn his high school diploma, graduating at the top of class. Jason was released from his commitment with the Department of Juvenile Justice and has been consistently employed full time in his community.

Casey* was charged with serious felony offenses, transferred to circuit court to face trial as an adult, convicted and sentenced to a long prison sentence. However, the Kentucky Revised Statutes provide for young people who are sentenced as adults to receive treatment in juvenile facilities until their eighteenth birthdays. At that time, they are returned to their sentencing court with three possible outcomes. The Court can probate their sentence, remand them to the custody of the Department of Corrections, or return them to the juvenile facility for additional treatment. Casey spent nearly 3 years in a juvenile facility and was a model resident, taking advantage of everything the Department of Juvenile Justice had to offer. At the eighteen-year-old sentencing hearing, the Court was impressed with all that Casey had accomplished, but was reluctant to probate due to the seriousness of the offense. The Court allowed Casey to return to the juvenile facility for an additional six months and then probated Casey's sentence. Casey has been employed full time, and is now married with a child. Casey has had no further contact with the court system, other than regular meetings with a probation officer.

Juvenile courts have been successful in providing rehabilitation and a second chance to children across Kentucky. Without the intervention of the juvenile courts we would see a much higher number of inmates in our adult correctional system. Most juvenile are amenable to treatment and it is our duty to ensure they continue to receive the treatment they need and deserve.

*not actual names ■

Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham

On January 12-14, 2006, nearly 100 lawyers, youth advocates, professors, judges and mental health professionals convened at the William S. Boyd School of Law, UNLV to explore the opportunities and challenges of providing legal representation to children while accounting for their deep connections to families and communities. That conference, *Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, produced Recommendations regarding the complexities of seeking justice for children in legal and policy settings and, along with the *Recommendations of the Fordham Conference on Ethical Issues in the Representation of Children*, chart a course for children's attorneys to discern and amplify children's voices in all of their complexity and in light of the contradictions of client-directed, multi-disciplinary, holistic, and contextual representation.

These recommendations were recently published and can be found on the following website: http://rcif.law.unlv.edu/

National Institute on Drug Abuse Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide

Principles of Drug Abuse Treatment For Criminal Justice Populations

1. **Drug addiction is a brain disease that affects behavior.** Drug addiction has well-recognized cognitive, behavioral, and physiological characteristics that contribute to continued use of drugs, despite the harmful consequences. Scientists have also found that chronic drug abuse alters the brain's anatomy and chemistry and that these changes can last for months or years after the individual has stopped using drugs. This transformation may help explain why addicts are at a high risk of relapse to drug abuse even after long periods of abstinence, and why they persist in seeking drugs despite deleterious consequences.

2. **Recovery from drug addiction requires effective treatment, followed by management of the problem over time.** Drug addiction is a serious problem that can be treated and managed throughout its course. Effective drug abuse treatment engages participants in a therapeutic process, retains them in treatment for an appropriate length of time, and helps them learn to maintain abstinence over time. Multiple episodes of treatment may be required. Outcomes for drug abusing offenders in the community can be improved by monitoring drug use and by encouraging continued participation in treatment.

3. **Treatment must last long enough to produce stable behavioral changes.** In treatment, the drug abuser is taught to break old patterns of thinking and behaving and to learn new skills for avoiding drug use and criminal behavior. Individuals with severe drug problems and co-occurring disorders typically need longer treatment (*e.g.*, a minimum of 3 months) and more comprehensive services. Early in treatment, the drug abuser begins a therapeutic process of change. In later stages, he or she addresses other problems related to drug abuse and learns how to manage the problem.

4. **Assessment is the first step in treatment.** A history of drug or alcohol use may suggest the need to conduct a comprehensive assessment to determine the nature and extent of an individual's drug problems; establish whether problems exist in other areas that may affect recovery; and enable the formulation of an appropriate treatment plan. Personality disorders and other mental health problems are prevalent in offender populations; therefore, comprehensive assessments should include mental health evaluations with treatment planning for these problems.

5. **Tailoring services to fit the needs of the individual is an important part of effective drug abuse treatment for criminal justice populations.** Individuals differ in terms of age, gender, ethnicity and culture, problem severity, recovery stage, and level of supervision needed. Individuals also respond differently to different treatment approaches and treatment providers. In general, drug treatment should address issues of motivation, problem solving, skill-building for resisting drug use and criminal behavior, the replacement of drug using and criminal activities with constructive non-drug using activities, improved problem solving, and lessons for understanding the consequences of one's behavior. Treatment interventions can facilitate the development of healthy interpersonal relationships and improve the participant's ability to interact with family, peers, and others in the community.

6. **Drug use during treatment should be carefully monitored.** Individuals trying to recover from drug addiction may experience a relapse, or return, to drug use. Triggers for drug relapse are varied; common ones include mental stress and associations with peers and social situations linked to drug use. An undetected relapse can progress to serious drug abuse, but detected use can present opportunities for therapeutic intervention. Monitoring drug use through urinalysis or other objective methods, as part of treatment or criminal justice supervision, provides a basis for assessing and providing feedback on the participant's treatment progress. It also provides opportunities to intervene to change unconstructive behavior—determining rewards and sanctions to facilitate change, and modifying treatment plans according to progress.

7. **Treatment should target factors that are associated with criminal behavior.** "Criminal thinking" is a combination of attitudes and beliefs that support a criminal lifestyle and criminal behavior. These can

Continued on page 14

Continued from page 13

include feeling entitled to have things one's own way; feeling that one's criminal behavior is justified; failing to be responsible for one's actions; and consistently failing to anticipate or appreciate the consequences of one's behavior. This pattern of thinking often contributes to drug use and criminal behavior. Treatment that provides specific cognitive skills training to help individuals recognize errors in judgment that lead to drug abuse and criminal behavior may improve outcomes.

8. **Criminal justice supervision should incorporate treatment planning for drug abusing offenders, and treatment providers should be aware of correctional supervision requirements.** The coordination of drug abuse treatment with correctional planning can encourage participation in drug abuse treatment and can help treatment providers incorporate correctional requirements as treatment goals. Treatment providers should collaborate with criminal justice staff to evaluate each individual's treatment plan and ensure that it meets correctional supervision requirements as well as that person's changing needs, which may include housing and childcare; medical, psychiatric, and social support services; and vocational and employment assistance. For offenders with drug abuse problems, planning should incorporate the transition to community-based treatment and links to appropriate post release services to improve the success of drug treatment and re-entry. Abstinence requirements may necessitate a rapid clinical response, such as more counseling, targeted intervention, or increased medication, to prevent relapse. Ongoing coordination between treatment providers and courts or parole and probation officers is important in addressing the complex needs of these re-entering individuals.

9. **Continuity of care is essential for drug abusers re-entering the community.** Those who complete prison-based treatment and continue with treatment in the community have the best outcomes. Continuing drug abuse treatment helps the recently released offender deal with problems that become relevant only at re-entry, such as learning to handle situations that could lead to relapse; learning how to live drug-free in the community; and developing a drug-free peer support network. Treatment in prison or jail can begin a process of therapeutic change, resulting in reduced drug use and criminal behavior postincarceration. Continuing drug treatment in the community is essential to sustaining these gains.

10. **A balance of rewards and sanctions encourages prosocial behavior and treatment participation.** When providing correctional supervision of individuals participating in drug abuse treatment, it is important to reinforce positive behavior. Nonmonetary "social reinforcers" such as recognition for progress or sincere effort can be effective, as can graduated sanctions that are consistent, predictable, and clear responses to noncompliant behavior. Generally, less punitive responses are used for early and less serious noncompliance, with increasingly severe sanctions issuing from continued problem behavior. Rewards and sanctions are most likely to have the desired effect when they are perceived as fair and when they swiftly follow the targeted behavior.

11. **Offenders with co-occurring drug abuse and mental health problems often require an integrated treatment approach.** High rates of mental health problems are found both in offender populations and in those with substance abuse problems. Drug abuse treatment can sometimes address depression, anxiety, and other mental health problems. Personality, cognitive, and other serious mental disorders can be difficult to treat and may disrupt drug treatment. The presence of co-occurring disorders may require an integrated approach that combines drug abuse treatment with psychiatric treatment, including the use of medication. Individuals with either a substance abuse or mental health problem should be assessed for the presence of the other.

12. **Medications are an important part of treatment for many drug abusing offenders.** Medicines such as methadone and buprenorphine for heroin addiction have been shown to help normalize brain function, and should be made available to individuals who could benefit from them. Effective use of medications can also be instrumental in enabling people with co-occurring mental health problems to function successfully in society. Behavioral strategies can increase adherence to medication regimens.

13. **Treatment planning for drug abusing offenders who are living in or re-entering the community should include strategies to prevent and treat serious, chronic medical conditions, such as HIV/AIDS, hepatitis B and C, and tuberculosis.** The rates of infectious diseases, such as hepatitis, tuberculosis, and HIV/AIDS, are higher in drug abusers, incarcerated offenders, and offenders under community supervision than in the general population. Infectious diseases affect not just the offender, but also the criminal justice system and the wider community. Consistent with Federal and State laws, drug-involved offenders should be offered testing for infectious diseases and receive counseling on their health status and on how to modify risk behaviors. Probation and parole officers who monitor offenders with serious medical conditions should link them with appropriate healthcare services, encourage compliance with medical treatment, and re-establish their eligibility for public health services (*e.g.*, Medicaid, county health departments) before release from prison or jail.

Preface

Since it was established in 1974, the National Institute on Drug Abuse (NIDA) has supported research on drug abuse treatment for individuals who are involved with the criminal justice system. This guide is intended to describe the treatment principles and research findings that are of particular relevance to the criminal justice community and to treatment professionals working with drug abusing offenders. The guide is divided into three main sections: (1) the first distills research findings on the addicted offender into 13 essential principles; (2) the second contains a series of frequently asked questions (FAQs) about drug abuse treatment for those involved with the criminal justice system; and (3) the third is a resource section that provides Web sites for additional information. A summary of the research underlying both the principles and the FAQs is available on NIDA's Web site at www.drugabuse.gov.

Research on drug abuse and addiction runs the gamut from basic science to applied studies. We now understand the basic neurobiology of many addictions, along with what constitutes more effective treatment processes and interventions to help individuals progress through the stages of recovery. Increased understanding of the neurological, physiological, psychological, and social change processes involved will help us develop interventions to improve therapeutic engagement, stabilization of recovery, motivation for change, prevention of relapse, and long-term monitoring of the substance use problem over its course.

Scientific investigations spanning nearly four decades show that drug abuse treatment is an effective intervention for many substance abusing offenders. Because the goals of drug abuse treatment—to help people change their attitudes, beliefs, and behaviors—also apply to reforming criminal behavior, successful treatment can help reduce crime as well. Legal pressure can be important in getting a person into treatment and in improving retention. Once in a program, even those who are not initially motivated to change can eventually become engaged in a continuing therapeutic process. Through this process of change, the individual learns how to avoid relapse and to successfully disengage from a life of substance abuse and crime.

This booklet will provide a complement to NIDA's Principles of Drug Addiction Treatment, A Research-Based Guide, which was prepared to assist those dealing with drug addiction both in and out of the criminal justice system. It relies primarily on drug abuse treatment research supported by NIDA, and focuses largely on individuals for whom drug addiction is a debilitating disease.

Nora D. Volkow, M.D.
Director
National Institute on Drug Abuse

Acknowledgments

NIDA wishes to thank the following individuals for their guidance and comments during the development and review of this publication:

Steven Belenko, Ph.D.
Center on Evidence-based Interventions for Crime and Addiction Treatment Research Institute

Peter J. Delany, Ph.D.
Division of Treatment and Recovery Research National Institute on Alcohol Abuse and Alcoholism

Richard Dembo, Ph.D.
Department of Criminology University of South Florida

Gary D. Field, Ph.D. (Retired)
Mental Health Alignment Work Group Oregon Department of Corrections

Kevin Knight, Ph.D.
Institute of Behavioral Research Texas Christian University

Douglas Longshore, Ph.D.
UCLA Integrated Substance Abuse Programs

Roger H. Peters, Ph.D.
Department of Mental Health Law & Policy Florida Mental Health Institute University of South Florida

This publication was written by Bennett W. Fletcher, Ph.D. and Redonna K. Chandler, Ph.D., National Institute on Drug Abuse. Additional guidance was provided by Jack B. Stein, Ph.D., National Institute on Drug Abuse.

Introduction

The connection between drug abuse and crime is well known. Drug abuse is implicated in at least three types of drug-related offenses: (1) offenses defined by drug possession or sales, (2) offenses directly related to drug abuse (*e.g.*, stealing to get money for drugs), and (3) offenses related to a lifestyle that predisposes the drug abuser to engage in illegal activity, for example, through association with other offenders or with illicit markets. Individuals who use illicit drugs are more likely to commit crimes, and it is common for many offenses, including violent crimes, to be committed by individuals who had used drugs or alcohol prior to committing the crime, or who were using at the time of the offense.

Continued on page 16

Continued from page 15

In 2003, nearly 6.9 million adults were involved with the criminal justice system, including 4.8 million who were under probation or parole supervision (Glaze & Palla, 2004). In its 1997 survey, the Bureau of Justice Statistics (BJS) estimated that about 70 percent of State and 57 percent of Federal prisoners used drugs regularly prior to incarceration (Mumola, 1999). A 2002 survey of jails found that 52 percent of incarcerated women and 44 percent of men met the criteria for alcohol or drug dependence (Karberg & James, 2005). Juvenile justice systems also report high levels of drug abuse. A survey of juvenile detainees in 2000 found that about 56 percent of the boys and 40 percent of the girls tested positive for drug use at the time of their arrest (National Institute of Justice, 2003).

The substance abusing offender may be encouraged or legally pressured to participate in drug abuse treatment. Even so, few drug abusing offenders actually receive treatment. The 1997 BJS survey showed that fewer than 15 percent of incarcerated offenders with drug problems had received treatment[1] in prison. Nearly 36 percent of adult probationers who regularly abused drugs prior to incarceration said they had received treatment during their current sentences; only 17 percent said they were currently in a drug treatment program. Untreated substance abusing offenders are more likely to relapse to drug abuse and return to criminal behavior. This can bring about re-arrest and re-incarceration, jeopardizing public health and public safety and taxing criminal justice system resources. Treatment offers the best alternative for interrupting the drug abuse/criminal justice cycle for offenders with drug abuse problems. Drug abuse treatment can be incorporated into criminal justice settings in a variety of ways. These include treatment as a condition of probation, drug courts that blend judicial monitoring and sanctions with treatment, treatment in prison followed by community-based treatment after discharge, and treatment under parole or probation supervision.

Drug abuse treatment can benefit from the cross-agency coordination and collaboration of criminal justice professionals, substance abuse treatment providers, and other social service agencies. By working together, the criminal justice and treatment systems can optimize resources to benefit the health, safety, and well-being of individuals and the communities they serve.

[1] Excludes participation in self-help (*e.g.*, Alcoholics Anonymous) or drug education, alternatives that are often provided in addition to or in lieu of treatment.

Frequently Asked Questions (FAQS)

1. Why do people involved in the criminal justice system continue abusing drugs? The answer to this perplexing question spans basic neurobiological, psychological, social, and environmental factors. The repeated use of addictive drugs eventually changes how the brain functions. Resulting brain changes, which accompany the transition from voluntary to compulsive drug use, affect the brain's natural inhibition and reward centers, causing the addict to use drugs in spite of the adverse health, social, and legal consequences. Craving for drugs may be triggered by contact with the people, places, and things associated with prior drug use, as well as by stress. Forced abstinence without treatment does not cure addiction. Abstinent individuals must still learn how to avoid relapse, including those who have been incarcerated and may have been abstinent for a long period of time.

Potential risk factors for released offenders include pressures from peers and even family members to return to drug use and a criminal lifestyle. Tensions of daily life—violent associates, few opportunities for legitimate employment, lack of safe housing, even the need to comply with correctional supervision conditions—can also create stressful situations that can precipitate a relapse to drug use. Research on how the brain is affected by drug abuse promises to help us learn much more about the mechanics of drug-induced brain changes and their relationship to addiction. Research also reveals that with effective drug abuse treatment, individuals can overcome persistent drug effects and lead healthy, productive lives.

2. Why should drug abuse treatment be provided to offenders? The case for treating drug abusing offenders is compelling. Drug abuse treatment improves outcomes for drug abusing offenders and has beneficial effects for public health and safety. Effective treatment decreases future drug use and drug-related criminal behavior, can improve the individual's relationships with his or her family, and may improve prospects for employment.

Outcomes for substance abusing individuals can be improved when criminal justice personnel work in tandem with treatment providers on drug abuse treatment needs and supervision requirements. Treatment needs that can be assessed after arrest include substance abuse severity, mental health problems, and physical health. Defense attorneys, prosecutors, and judges need to work together during the prosecution and sentencing phases of the criminal justice process to determine suitable treatment programs that meet the offender's needs. Through drug courts, diversion programs, pretrial release pro-grams conditional on treatment, and conditional probation with sanctions, the offender can participate in community-based drug abuse treatment while under criminal justice supervision. In some instances, the judge may recommend that the offender participate in treatment while serving jail or prison time or

require it as part of continuing correctional supervision postrelease.

3. How effective is drug abuse treatment for criminal justice-involved individuals? Treatment is an effective intervention for drug abusers, including those who are involved with the criminal justice system. However, the effectiveness of drug treatment depends on both the individual and the program, and on whether interventions and treatment services are available and appropriate for the individual's needs. To amend attitudes, beliefs, and behaviors that support drug use, the drug abuser must engage in a therapeutic change process. Longitudinal outcome studies find that those who participate in community-based drug abuse treatment programs commit fewer crimes than those who do not participate.

4. Are all drug abusers in the criminal justice system good candidates for treatment? A history of drug use does not in itself indicate the need for drug abuse treatment. Offenders who meet drug dependence criteria should be given higher priority for treatment than those who do not. Less intensive interventions, such as drug abuse education or self-help participation, may be appropriate for those not meeting criteria for drug dependence. Services such as family-based interventions for juveniles, psychiatric treatment, or cognitive-behavioral "criminal thinking" interventions may be a higher priority for some offenders, and individuals with mental health problems may require specialized services (see FAQ Nos. 6 and 12).

Low motivation to participate in treatment or to end drug abuse should not preclude access to treatment if other criteria are met. Motivational enhancement interventions may be useful in these cases. Examples include motivational interviewing and contingency management techniques, which often provide tangible rewards in exchange for meeting program goals. Legal pressure that encourages abstinence and treatment participation may also help these individuals by improving retention and catalyzing longer treatment stays.

Drug abuse treatment is also effective for offenders who have a history of serious and violent crime, particularly if they receive intensive, targeted services. The economic benefits in avoided crime and costs to crime victims (*e.g.*, medical costs, lost earnings, and loss in quality of life) may be substantial for these high-risk offenders. Treating them requires a high degree of coordination between drug abuse treatment providers and criminal justice personnel to ensure that treatment and criminogenic needs are appropriately addressed.

5. Is legally mandated treatment effective? Often the criminal justice system can apply legal pressure to encourage offenders to participate in drug abuse treatment; or treatment can be mandated, for example, through a drug court or as a condition of pretrial release, probation, or parole. A large percentage of those admitted to drug abuse treatment cite legal pressure as an important reason for seeking treatment. Most studies suggest that outcomes for those who are legally pressured to enter treatment are as good as or better than outcomes for those who entered treatment without legal pressure. Those under legal pressure also tend to have higher attendance rates and to remain in treatment for longer periods, which can also have a positive impact on treatment outcomes.

6. Are relapse risk factors different in offender populations? How should drug abuse treatment deal with these risk factors? Often, drug abusing offenders have problems in other areas. Examples include family difficulties, limited social skills, educational and employment problems, mental health disorders, infectious diseases, and other medical problems. Treatment should take these problems into account, because they can increase the risk of drug relapse and criminal recidivism if left unaddressed.

Stress is often a contributing factor to relapse, and offenders who are re-entering society face many challenges and stressors, including reuniting with family members, securing housing, and complying with criminal justice supervision requirements. Even the many daily decisions that most people face can be stressful for those recently released from a highly controlled prison environment.

Other threats to recovery include a loss of support from family or friends, which incarcerated people may experience. Drug abusers returning to the community may also encounter family, friends, or associates still involved in drugs or crime and be enticed to resume a criminal and drug using lifestyle. Returning to environments or activities associated with prior drug use may trigger strong cravings and cause a relapse. A coordinated approach by treatment and criminal justice staff provides the best way to detect and intervene with these and other threats to recovery. In any case, treatment is needed to provide the skills necessary to avoid or cope with situations that could lead to relapse.

Treatment staff should identify the offender's unique relapse risk factors and periodically re-assess and modify the treatment plan as needed. Generally, continuing or re-emerging drug use during treatment requires a clinical response—either increasing the "dosage" or level of treatment, or changing the treatment intervention.

7. What treatment and other health services should be provided to drug abusers involved with the criminal justice system? One of the goals of treatment planning is to match evidence-based interventions to individual needs at each stage of drug treatment. Over time, various combinations of treatment services may be required. Evidence-based interventions include cognitive-behavioral therapy to help participants learn positive social and coping skills, contingency management approaches to reinforce

Continued on page 18

Continued from page 17

positive behavioral change, and motivational enhancement to increase treatment engagement and retention. In those addicted to opioid drugs, agonist medications can also help normalize brain function, and antagonist medications can facilitate abstinence. For juvenile offenders, treatments that involve the family and other aspects of the drug abuser's environment have established efficacy.

Drug abuse treatment plans for incarcerated offenders can anticipate their eventual re-entry into the community by incorporating relevant transition plans and services. Drug abusers often have mental and physical health, family counseling, parenting, educational, and vocational needs, so medical, psychological, and social services are often crucial components of successful treatment. Case management approaches can be used to provide assistance in obtaining drug abuse treatment and community services.

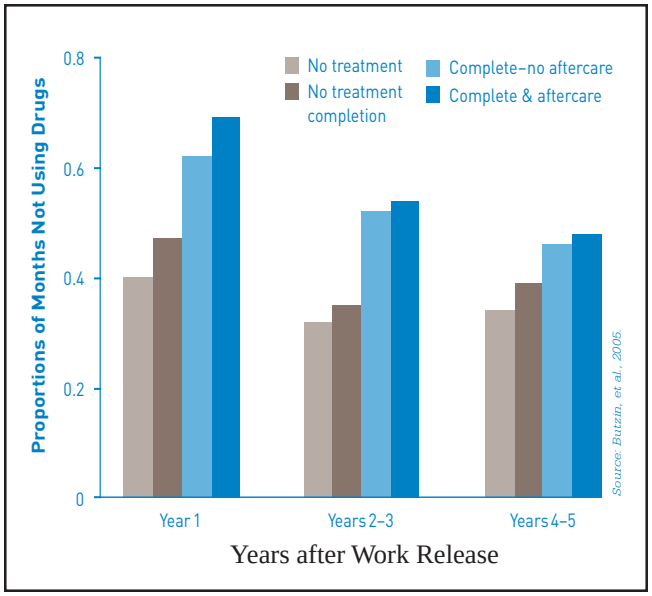
8. How long should drug abuse treatment last for individuals involved in the criminal justice system? While individuals progress through drug abuse treatment at different rates, one of the most reliable findings in treatment research is that lasting reductions in criminal activity and drug abuse are related to length of treatment. Generally, better outcomes are associated with treatment that lasts longer than 90 days, with the greatest reductions in drug abuse and criminal behavior accruing to those who complete treatment. Again, legal pressure can improve retention rates.

A longer continuum of treatment may be indicated for individuals with severe or multiple problems. Research has shown that participation in a prison-based therapeutic community followed by community-based treatment after release can reduce the risk of recidivism to criminal behavior as well as relapse to drug use.

Early phases of treatment help the participant stop using drugs and begin a therapeutic process of change. Later stages address other problems related to drug abuse and, importantly, help the individual learn how to self-manage the drug problem.

Because addiction is a chronic disease, drug relapse and return to treatment are common features of an individual's path to recovery, so treatment may need to extend over a long period of time and across multiple episodes of care. It is also the case that those with the most severe problems can participate in treatment and achieve positive outcomes.

9. How can rewards and sanctions be used effectively with drug-involved offenders in treatment? The systematic application of behavioral management principles underlying reward and punishment can help individuals reduce their drug use and criminal behavior. Rewards and sanctions are most likely to change behavior when they are certain to follow the targeted behavior, when they follow swiftly, and when they are perceived as fair.



It is important to recognize and reinforce progress toward responsible, abstinent behavior. Rewarding positive behavior is more effective in producing long-term positive change than punishing negative behavior. Nonmonetary rewards such as social recognition can be as effective as monetary rewards. A graduated range of rewards given for meeting predetermined goals can be an effective strategy when used in conjunction with behavioral management approaches such as contingency management. In community-based treatment, contingency management strategies may use voucher-based incentives or rewards, such as bus tokens, to reinforce abstinence (measured by negative drug tests) or to shape progress toward other treatment goals, such as program session attendance or compliance with medication regimens. Contingency management is most effective when the contingent reward closely follows the behavior being monitored.

Graduated sanctions, which invoke less punitive responses for early and less serious noncompliance and increasingly severe sanctions for more serious or continuing problems, can be an effective tool in conjunction with drug testing. The effective use of graduated sanctions involves consistent, predictable, and clear responses to noncompliant behavior.

Drug testing can determine when an individual is having difficulties with recovery. The first response to drug use detected through urinalysis should be clinical—for example, an increase in treatment intensity or a change to an alternative treatment. This often requires coordination between the criminal justice staff and the treatment provider. (Note that more intensive treatment should not be considered a sanction, but rather a routine progression in healthcare practice when a treatment appears less effective than expected.)

Behavioral contracting can employ both rewards and sanctions. A behavioral contract is an explicit agreement between the participant and the treatment provider or criminal justice monitor (or all three) that specifies proscribed behaviors and associated sanctions, as well as positive goals and rewards for success. Behavioral contracting can instill a sense of procedural justice because both the necessary steps toward progress and the sanctions for violating the contract are specified and understood in advance.

10. What is the role of medications in treating substance abusing offenders? Medications can be an important component of effective drug abuse treatment for offenders. By allowing the body to function normally, they enable the addict to leave behind a life of crime and drug abuse. Opiate agonist medications, which work by replacing neurotransmitters in brain cells that have become altered or desensitized as a result of drug abuse, tend to be well tolerated and can help an individual remain in treatment. Antagonist medications, which work by blocking the effects of a drug, are effective but often are not taken as pre-scribed. Despite evidence of their effectiveness, addiction medications are underutilized in the treatment of drug abusers within the criminal justice system. Still, some jurisdictions have found ways to success-fully implement medication therapy for drug abusing offenders.

Effective medications have been developed for opiates/ heroin and alcohol:

- **Opiates/Heroin.** Long-term opiate abuse results in a desensitization of the brain's opiate receptors to endorphins, the body's natural opioids. *Methadone* replaces these natural endorphins, stabilizing the craving that otherwise results in compulsive use of heroin or other illicit opiates. Methadone is effective in reducing opiate use, drug-related criminal behavior, and HIV risk behavior. *Buprenorphine* is a partial agonist and acts on the same receptors as morphine (a full agonist), but without producing the same high, level of dependence, or withdrawal symptoms. Suboxone is a unique formulation of buprenorphine that contains *naloxone*, an opioid antagonist, which limits diversion by causing severe withdrawal symptoms in those who inject it to get "high," but has no adverse effects when taken orally. *Naltrexone*, an opiate antagonist, blocks the effects of opiates.

- **Alcohol.** *Disulfiram* (also known as Antabuse) is an aversion therapy that induces nausea if alcohol is consumed. *Acamprosate* works by restoring normal balance to the brain's glutamate neurotransmitter system, helping to reduce alcohol craving. *Naltrexone*, which blocks some of alcohol's pleasurable effects, is also FDA-approved for treatment of alcohol abuse.

11. How can the criminal justice and drug abuse treatment systems reduce the spread of HIV/AIDS, hepatitis, and other infectious diseases among drug abusing offenders? It is critical for the criminal justice and drug abuse treatment systems to be involved in efforts to reduce the spread of HIV/AIDS and other infectious diseases, which occur at higher rates among drug abusers in the criminal justice system than among the general population. The prevalence of AIDS has been estimated to be approximately five times higher among incarcerated offenders than the general population, and rates of HIV are also higher than in the general population. In addition, individuals in the criminal justice system represent a significant portion of hepatitis B, hepatitis C, and tuberculosis cases in the United States. Although most infectious diseases are contracted in the community and not in correctional settings, they must be treated in the correctional setting once diagnosed.

Infectious diseases among offenders who are re-entering or living within the community present a serious public health challenge. While incarcerated, offenders often have access to adequate healthcare, which offers opportunities for integrating strategies to address medical, mental health, and drug abuse problems. Offenders with infectious diseases who are returning to their communities should be linked with community-based medical care prior to release. Community health, drug treatment, and criminal justice agencies should work together to offer education, screening, counseling, prevention, and treatment programs for HIV/AIDS, hepatitis, and other infectious diseases to offenders in or returning to the community. Drug abuse treatment can decrease the spread of infectious disease by reducing high-risk behaviors such as needle sharing and unprotected sex.

The need to negotiate access to health services and adhere to complex treatment protocols places a large burden on the addicted offender, and many offenders fall through the cracks. Untreated or deteriorating medical or mental health problems increase the risk of relapse to drug abuse and to possible re-arrest and re-incarceration.

12. What works for offenders with co-occurring substance abuse and mental disorders? It is important to adequately assess mental disorders and to address them as part of effective drug abuse treatment. Many types of co-occurring mental health problems can be successfully addressed in standard drug abuse treatment programs. However, individuals with serious mental disorders may require an integrated treatment approach designed for treating patients with co-occurring mental health problems and substance use disorders. Although not readily available, specialized therapeutic community "MICA" (for "mentally ill chemical abuser") programs are promising for patients with co-occur-ring mental and addictive problems.

Much progress has been made in developing effective medications for treating mental disorders, including a number

Continued on page 20

Continued from page 19

of antidepressants, mood stabilizers, and antipsychotics. These medications may be critical for treatment success with offenders who have co-occurring mental disorders such as depression, anxiety disorder, bipolar disorder, or psychosis. Cognitive-behavioral therapy can be effective for treating mental health problems, particularly when combined with medications. Contingency management can improve adherence to prescribed medications, and intensive case management may be useful for linking severely mentally ill individuals with drug abuse treatment, mental health care, and community services.

13. Is providing drug abuse treatment to offenders worth the financial investment? In 2002, it was estimated that the cost to society of drug abuse was $180.9 billion (Office of National Drug Control Policy, 2004), a substantial portion of which—$107.8 billion—is associated with drug-related crime, including criminal justice system costs and costs borne by victims of crime. The cost of treating drug abuse (including research, training, and prevention efforts) was estimated to be $15.8 billion, a fraction of these overall societal costs.

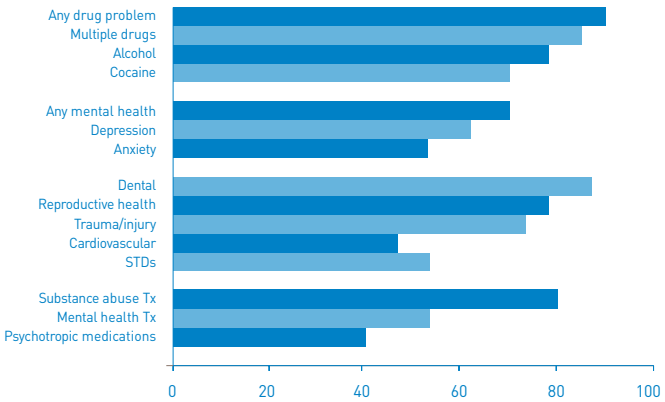
Drug abuse treatment is cost effective in reducing drug use and bringing about associated healthcare, crime, and incarceration cost savings. Positive net economic benefits are consistently found for drug abuse treatment across various settings and populations. The largest economic benefit of treatment is seen in avoided costs of crime (incarceration and victimization costs), with greater economic benefits resulting from treating offenders with co-occurring mental health problems and substance use disorders. Residential prison treatment is more cost effective if offenders attend treatment postrelease, according to research. Drug courts also convey positive economic benefits, including participant-earned wages and avoided incarceration and future crime costs.

14. What are unique treatment needs for women in the criminal justice system? Although women are incarcerated at far lower rates than men, the number and percentage of incarcerated women have grown substantially in recent years. Between 1985 and 1995, the number of men in prisons and jails doubled, while the number of incarcerated women tripled. Women in prison are likely to have a different set of problems and needs than men. Surveys indicate that female offenders used more drugs more frequently prior to incarceration than males, and a higher percentage of females (54 percent compared to 50 percent) had used drugs in the month before committing their offense. In addition to being more likely to have a substance abuse problem, approximately 50 percent of female offenders are likely to have his-tories of physical or sexual abuse. Women are also more likely than men to be victims of domestic violence. Past or current victimization can contribute to drug or alcohol abuse, depression, post-traumatic stress disorder, and criminal activity. Female offenders are also more likely to have mental illnesses, employment problems, and childrearing responsibilities. The largest economic benefit of treatment is seen in avoided costs of crime.

Treatment programs serving both men and women can provide effective treatment for their female clients. However, gender-specific programs may be more effective for female offenders, particularly those with histories of trauma and abuse. Female offenders are more likely to need medical and mental health services, childcare services, and assistance in finding housing and employment. Following a comprehensive assessment, women with mental health disorders should receive appropriate treatment and case management, including victim services as needed. For female offenders with children, parental responsibilities can conflict with their ability to participate in drug treatment. Regaining or retaining custody of their children can also motivate mothers to participate in treatment. Treatment programs may improve retention by offering childcare services and parenting classes.

Substance abuse, mental health, and health problems and treatment in a sample of incarcerated women (N=60)

Note: Graph shows lifetime percentages except for multiple drugs, alcohol, and cocaine, which are the percent reporting use in the 30 days prior to incarceration.



15. What are the unique treatment needs of juveniles in the criminal justice system? In recent years, there has been a dramatic increase in the number of juveniles with substance abuse problems involved in the criminal and juvenile justice systems. From 1986 to 1996, drug-related juvenile incarcerations increased nearly threefold. In 2002, about 60 percent of detained boys and nearly half of the girls tested positive for drug use. The number of juvenile court cases involving drug offenses more than doubled between 1993 and 1998, and 116,781 adolescents under the age of 18 were arrested for drug violations in 2002. One study found that about one-half of both male and female juvenile detainees met criteria for a substance use disorder (Teplin et al., 2002).

Juveniles entering the criminal justice system can bring a number of serious issues with them—substance abuse, academic failure, emotional disturbances, physical health issues, family problems, and a history of physical or sexual abuse. Girls comprise nearly one-third of juvenile arrests, a high percentage reporting some form of emotional, physical, or sexual abuse. Effectively addressing these issues requires their gaining access to comprehensive assessment, treatment, case management, and support services appropriate for the age and developmental stage. Assessment is particularly important, because not all adolescents who have used drugs need treatment. For those who do, there are several points in the juvenile justice continuum where treatment has been integrated, including juvenile drug courts, community-based supervision, juvenile detention, and community re-entry.

Families play an important role in the recovery of substance-abusing juveniles, but this influence can be either positive or negative. Parental substance abuse or criminal involvement, physical or sexual abuse by family members, and lack of parental involvement or supervision are all risk factors for adolescent substance abuse and delinquent behavior. Thus, the effective treatment of juvenile substance abusers often requires a family-based treatment model that targets family functioning and the increased involvement of family members. Effective adolescent treatment approaches include Multisystemic Therapy, Multidimensional Family Therapy, and Functional Family Therapy. These interventions show promise in strengthening families and decreasing juvenile substance abuse and delinquent behavior.

Resources

Many resources are available on the Internet. The following are useful links:

General Information
NIDA Web site: www.drugabuse.gov

Inquiries about NIDA's research on drug abuse treatment and the criminal justice system: Division of Epidemiology, Services and Prevention Research (301) 443-6504

General Inquires:
NIDA Public Information Office (301) 443–1124

Federal Resources
National Institute of Mental Health (NIMH)
www.nimh.nih.govNational

Institute on Alcohol Abuse and Alcoholism (NIAAA)
www.niaaa.nih.govNational

Institute of Justice (NIJ)
www.ojp.usdoj.gov/nij

The Office of Juvenile Justice and Delinquency Prevention (OJJDP)
www.ojjdp.ncjrs.org

National Institute of Corrections (NIC)
www.nicic.org

Federal Bureau of Prisons Substance Abuse Treatment
www.bop.gov/inmate_programs/substance.jsp

National Criminal Justice Reference Service
www.ncjrs.gov

Bureau of Justice Assistance Residential Substance Abuse Treatment (RSAT)
www.ojp.usdoj.gov/BJA/evaluation/psi_rsat

Other Resources
Drug Strategies
www.drugstrategies.org

Re-Entry Policy Council
www.reentrypolicy.org

University of Washington Alcohol and Drug Abuse Institute
www.adai.washington.edu/instruments

American Society of Addiction Medicine
www.asam.org

TASC (Treatment Accountability for Safer Communities)
www.nationaltasc.org

National Drug Court Institute
www.ndci.org

Statistics
Bureau of Justice Statistics (BJS)
Statistics on Drugs and Crime
www.ojp.usdoj.gov/bjs/drugs.htm

Office of Applied Studies, Substance Abuse and Mental Health Services Administration (SAMHSA)
www.oas.samhsa.gov

Research Centers and Programs
NIDA Criminal Justice Drug Abuse Treatment Studies (CJ-DATS)
www.cjdats.org

Institute of Behavioral Research at Texas Christian University (IBR-TCU)
www.ibr.tcu.edu

UCLA Integrated Substance Abuse Programs (ISAP)
www.uclaisap.org

University of Delaware Center for Drug and Alcohol Studies (CDAS)
www.udel.edu/cdas

University of Maryland Bureau of Governmental Research
www.bgr.umd.edu

University of New Mexico Center on Alcoholism, Substance Abuse, and Addictions
http://casaa.unm.edu

Continued on page 22

Continued from page 21

Rutgers University Center for Mental Health Services & Criminal Justice Research
www.cmhs-cjr.rutgers.edu

Urban Institute
www.urban.org

The National Center on Addiction and Substance Abuse at Columbia University
www.casacolumbia.org

Screening and Assessment—Adults

Institute of Behavioral Research, Texas Christian University (TCU) Assessment Instruments: Researchers in the Institute of Behavioral Research at TCU have developed a number of useful instruments to screen individuals for drug use, to identify problem areas and determine client service needs, and to track progress through treatment.

There are also tools to measure the program's need for training and to help program directors and staff improve the quality of treatment. These measurement tools, which are listed below, can be found through the Web site listed.

www.ibr.tcu.edu/resources/rc-correvaltrt.html

- TCU Drug Screen II (TCUDS) (Available in English and Spanish)
- TCU Survey of Program Training Needs (PTN-S and PTN-D for Criminal Justice)
- TCU Survey of Organizational Functioning
- TCU-CJ-CESI (Client Evaluation of Self at Intake) Pretreatment Survey of Correctional Populations (Available in English and Spanish)
- CJ-CEST Survey of Correctional Populations(Client Evaluation of Self and Treatment) (Available in English and Spanish)
- Criminal Thinking Scales (CTS)

Chestnut Health Systems Global Appraisal of I ndividual Needs (GAIN)
www.chestnut.org/LI/gain

Treatment Research Institute -
The Addiction Severity Index (ASI)
www.tresearch.org/asi.htm

Screening and Assessment—Adolescents
Overview of screening and assessment tools
www.drugstrategies.org/teens/screening.html

Economic Resources
Drug Abuse Treatment Cost Analysis Program (DATCAP)
www.datcap.com

References

Butzin, C.A.; Martin, S.S.; and Inciardi, J.A. Treatment during transition from prison to community and subsequent illicit drug use. *Journal of Substance Abuse Treatment* 28(4):351–358, 2005.

Glaze, L.E. and Palla, S. *Probation and parole in the United States, 2003.* Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2004.

Karberg, J.C. and James, D.J. *Substance dependence, abuse, and treatment of jail inmates, 2002.* Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2005.

Mumola, C.J. *Substance abuse and treatment, state and federal prisoners, 1997.* Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 1999.

National Institute of Justice. *2000 Arrestee Drug Abuse Monitoring: Annual Report* (pp. 135–136). Washington, DC: U.S. Department of Justice, Office of Justice Programs, 2003.

Office of National Drug Control Policy. *The Economic Costs of Drug Abuse in the United States, 1992–2002.* Washington, DC: Executive Office of the President, 2004.

Staton, M.; Leukefeld, C.; and Webster, J.M. Substance use, health, and mental health: Problems and service utilization among incarcerated women. *International Journal of Offender Therapy and Comparative Criminology* 47(2):224–239, 2003.

Teplin, L.A.; Abram, K.M.; McClelland, G.M.; Dulcan, M.K.; and Mericle, A.A. Psychiatric disorders in youth in juvenile detention. *Archives of General Psychiatry* 59(12):1133–1143, 2002.

Volkow, N.D.; Hitzemann, R.; Wang, G.J.; Fowler, J.S.; Wolf, A.P.; and Dewey, S.L. Long-term frontal brain metabolic changes in cocaine abusers. *Synapse* 11:184–190, 1992.

Volkow, N.D.; Fowler, J.S.; Wang, G.J.; Hitzemann, R.; Logan, J.; Schlyer, D.; Dewey, S.; and Wolf, A.P. Decreased dopamine D2 receptor availability is associated with reduced frontal metabolism in cocaine abusers. *Synapse* 14:169–177, 1993.

For more information about other research-based publications on drug abuse and addiction, visit NIDA's Web site at **www.drugabuse.gov**, or call the National Clearinghouse for Alcohol and Drug Information at 1-800–729–6686. ■

STUDY OF YEAR-LONG PILOT PROJECT SHOWS THAT KEY EYEWITNESS IDENTIFICATION REFORMS ARE EFFECTIVE

Results of a new study published in an academic review show that eyewitness identification reforms advocated by a cross-section of organizations and leaders can help protect innocent people and improve the accuracy of police lineups and other identification procedures. The study is the first to use scientifically valid research techniques to evaluate the eyewitness identification reform in the field – in a "real world" application, rather than an academic setting.

"The study of Hennepin County's pilot project produces solid, reliable data that other cities, counties, and states should look to when considering how to improve the accuracy of eyewitness identification," says Innocence Project Co-Director Barry Scheck

Results of a year-long pilot program using blind sequential lineups – those where the official administering the lineup doesn't know who the suspect is, and subjects are presented to the witness one at a time, rather than all together – in Hennepin County, Minnesota, are published in the new issue of the Cardozo Public Law, Policy and Ethics Journal at Benjamin N. Cardozo School of Law at Yeshiva University in New York. The Hennepin County Attorney's office spearheaded the effort to improve eyewitness identification procedures, and the data was analyzed by Nancy Steblay, an eyewitness scientist at Augsburg College in Minneapolis, who co-wrote the article with Amy Klobuchar, who is now serving her second term as Hennepin County Attorney, and Hilary Lindell Caligiuri, an Assistant Hennepin County Attorney.

The article, "Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project," reports that the scientific evaluation of the year-long pilot project resulted in fewer witnesses identifying "fillers" (or lineup subjects who are not the actual suspect), which shows that blind sequential lineups reduce the number of witnesses who guess when identifying a suspect – and reduce the number of innocent people identified in lineups.

"There is a generation worth of peer-reviewed, scientific research that demonstrates the power of blind sequential lineups to improve the accuracy of eyewitness identifications – and this study shows that when properly administered in the field, law enforcement can employ these reforms to protect the innocent and apprehend the guilty," said Barry Scheck, Co-Director of the Innocence Project. "This is the first of what we hope will be a number of field studies that use scientifically sound techniques to evaluate blind sequential lineups."

The year-long pilot project in Hennepin County involved four police departments (in Minneapolis, two large suburban communities, and one smaller community). The newly published article explains that while the departments were initially concerned about implementing the procedures, they all implemented creative solutions and adapted quickly – and they all embraced the study's findings.

"This new study shows what can happen when solid reforms are implemented by open-minded police departments whose top priority is making law enforcement more effective. The result is lineups that are more accurate, which only strengthens police investigations while also protecting the innocent," Scheck said. "The study of Hennepin County's pilot program produces solid, reliable data that other cities, counties, and states should look to when considering how to improve the accuracy of eyewitness identification procedures."

The Hennepin County pilot project sought to answer two questions: whether the number and quality of identifications would change with the blind sequential lineup procedure, and whether police departments could smoothly and effectively implement the procedure. "Analysis of the data and anecdotal responses from the participating police agencies led to the conclusion that the new protocol is both efficient to implement and effective in reducing the potential for misidentifications," the Cardozo Public Law, Policy and Ethics Journal article says.

According to the Innocence Project, 183 people nationwide have been exonerated through DNA testing, and eyewitness misidentification was a factor in 75 percent of those wrongful convictions.

Blind sequential eyewitness identification reforms are recognized by police, prosecutorial and judicial experience, as well as national justice organizations, including the National Institute of Justice and the American Bar Association. The benefits of these reforms are corroborated by over 25 years of peer-reviewed scientific research. A range of jurisdictions – including the State of New Jersey and cities such as Winston Salem, NC, Boston, MA, and Virginia Beach, VA – have implemented the reforms as standard procedure.

For the full text of the new article in the **Cardozo Public Law, Policy and Ethics Journal**, http://www.innocenceproject.org/docs/SteblayIDStudy.pdf. ■

PLAIN VIEW . . .

Ernie Lewis, Public Advocate

Hudson v. Michigan,
126 S.Ct. 2159 (2006)

The exclusionary rule just got smaller. Again. The Court has held that the exclusionary rule will not be available when the police violate the knock and announce provisions of the Fourth Amendment. "In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified."

It got smaller in *Hudson v. Michigan*. This case began when the Michigan Police got a warrant for Hudson's house to search for drugs and firearms. They knocked at Hudson's door and entered 3-5 seconds later, finding both drugs and cocaine inside. The trial court suppressed, finding a violation of the knock and announce rule of *Wilson v. Arkansas*, 514 U.S. 927 (1995), but the Michigan Court of Appeals reversed. After Hudson was convicted, the Court of Appeals affirmed, and the United States Supreme Court granted *cert*.

Justice Scalia wrote the opinion for himself and Justices Roberts, Thomas, Alito, and Kennedy. Justice Scalia recounted how the exclusionary rule had only become an effective remedy in federal court in *Weeks v. United States*, 232 U.S. 383 (1914), and that the rule did not apply to the states until *Mapp v. Ohio*, 367 U.S. 643 (1961). He also acknowledged that in *Mapp*, the Court established a broad and expansive view of the exclusionary rule. "'[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.'" Having said that, Justice Scalia went over the past forty years in which successive Courts have backed away from an expansive view of the exclusionary rule as articulated in *Mapp*.

Today, the exclusionary rule is a shadow of the robust remedy for violations of the Fourth Amendment established in *Mapp*. Today, "[s]uppression of evidence…has always been our last resort, not our first impulse." "[E]xlusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence." "The exclusionary rule generates 'substantial social costs'…which sometimes include setting the guilty free and the dangerous at large."

The question today is whether, "'granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun v. United States*, 371 U.S. 471 (1963). Attenuation can come when the causal connection is remote, or when "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."

The Court held that the interests inherent in the knock and announce rule would not be served by applying the exclusionary rule under these circumstances. Knock and announce rules protect human life and limb, the protection of property, privacy and dignity. "What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable."

The Court used not only an attenuation analysis in rejecting the use of the exclusionary rule, it also used the familiar balancing test. "Quite apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except 'where its deterrence benefits outweigh its "substantial social costs…"'". Here, the Court finds the benefit of excluding the evidence small while the cost to society is "massive." The Court rejects Hudson's claim that the police will no longer be deterred from violating the Constitution in knock and announce situations once the exclusionary rule is removed. The Court notes that civil rights suits are now common, the number of public-interest law firms expanding, and colorable claims of violations of knock and announce are occurring.

All is not lost. The Court continues to emphasize the importance of warrants, and hold the police to a different standard when no warrant is obtained. However, the Court, as they did in *United States v. Leon*, 468 U.S. 897 (1984), is increasingly reluctant to invoke the exclusionary rule in the context of a search pursuant to a warrant.

Justice Kennedy, increasingly playing the role left by Justice O'Connor, wrote a concurring opinion. His opinion

emphasized that the principles invoked in *Wilson v. Arkansas* remain strong. "The Court's decision should not be interpreted as suggesting that violations of the requirement are trivial or beyond the law's concern." He also wrote to state that the exclusionary rule is not dead. "[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt. Today's decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression."

Justice Breyer wrote a dissenting opinion joined by Justices Stevens, Souter, and Ginsburg. In Breyer's view, the Court in its opinion had destroyed the "strongest legal incentive to comply with the Constitution's knock-and-announce requirement." Further, it "represents a significant departure from the Court's precedents. And it weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection."

To the dissenters, the evidence should have been excluded as unreasonable. "For one thing, elementary logic leads to that conclusion. We have held that a court must 'conside[r] whether officers complied with the knock-and-announce requirement 'in assessing the reasonableness of a search or seizure.'" Further, the dissenters believed that the exclusionary rule was necessary to deter unlawful police misconduct. Harking back to *Mapp*, the dissenters noted that remedies short of exclusion of the evidence had proven to be "'worthless and futile.'" "Without such a rule, as in *Mapp*, police know that they can ignore the Constitution's requirements without risking suppression of evidence discovered after an unreasonable entry. As in *Mapp*, some government officers will find it easier, or believe it less risky, to proceed with what they consider a necessary search immediately and without the requisite constitutional (say, warrant or knock-and-announce) compliance." The dissenters noted that there had been no evidence produced of civil suits resulting in allocating civil damages in cases of violation of the knock-and-announce rule. The dissenters also rejected the "social costs" argument of the majority. "The majority's 'substantial social costs' argument is an argument against the Fourth Amendment's exclusionary principle itself."

***Samson v. California*,**
126 S.Ct. 2193 (2006)

The end of the term was bad for the Fourth Amendment. First, in *Hudson v. Michigan*, the Court severely diminished the exclusionary rule. And in *Samson v. California*, the Court removed the protection of the Fourth Amendment altogether from a significant portion of our population, the millions of persons on probation or parolee.

Samson was on parole in California. California has a statute allowing for the warrantless and suspicionless search of anyone on parole. Samson was walking down the street with a woman and child when a police officer came up to him. After a period of questioning in which Samson denied there being a warrant out for him (correctly), the officer searched him, finding methamphetamine in a cigarette box. Samson was charged with possession of methamphetamine and received a 7 year prison term. The California Court of Appeals affirmed, holding that the suspicionless search of a parolee does not violate the Fourth Amendment. The United States Supreme Court granted *cert*.

Justice Thomas wrote the opinion for the 6-person majority, including Roberts, Scalia, Kennedy, Alito, and Ginsburg. The opinion noted that in *United States v. Knights*, 534 U.S. 112 (2001), the Court had left open the question of "whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." *Knights* had involved a person on probation who had been searched under both a condition of probation and based upon reasonable suspicion. The Court noted that Knight's expectation of privacy was "significantly diminished" as a result of his probation status.

Building upon *Knights*, the Court noted that a person on parole has even less of an expectation of privacy than one on probation. Indeed, based upon the California statute allowing for a suspicionless search of all persons on parole, the Court held that a parolee in California, like an incarcerated inmate, does "not have an expectation of privacy that society would recognize as legitimate." The state, on the other hand, has "substantial" interests in their parole regime. As a result, the Court upheld the California statute and ruled that a suspicionless search of a parolee does not violate the Fourth Amendment.

Justice Stevens wrote the dissenting opinion joined by Justices Souter and Breyer. "What the Court sanctions today is an unprecedented curtailment of liberty. Combining faulty syllogism with circular reasoning, the Court concludes that parolees have no more legitimate an expectation of privacy in their persons than do prisoners." "The logic, apparently, is this: Prisoners have no legitimate expectation of privacy [under *Hudson v. Palmer*]; parolees are like prisoners; therefore, parolees have no legitimate expectation of privacy." The dissenters noted that this allowed for a suspicionless search, "the very evil the Fourth Amendment was intended to stamp out." The dissenters further accused the majority of approving of the deprivation of Fourth Amendment rights as "part and parcel of any convict's punishment."

Continued on page 26

Continued from page 25

One added observation: Given the enormous number of people on probation and parole in this country, particularly persons of color, the implications are enormous for the families of persons on probation and parole. Depending upon how law enforcement reads this opinion, it could be open season on the homes, persons, and vehicles of persons on probation and parole and their loved ones.

***Commonwealth v. Hatcher*,**
2006 WL 1358363, 2006 Ky. LEXIS 131 (Ky. 2006)

This is a case out of Paducah. The police received an anonymous tip that a child had been abandoned. Two officers went to the house and knocked on the door. A minor answered. At that point, the police could see a pipe on a table inside. Suspecting that the pipe was used to smoke marijuana, they asked the minor if they could enter. The minor answered that they could, and the police entered, picked up the pipe and smelled it. When Hatcher came home, she was arrested and charged with possession of drug paraphernalia, second offense. The trial court denied Hatcher's motion to suppress, and she appealed to the Court of Appeals, which reversed. The Supreme Court granted discretionary review.

In an opinion written by Justice Johnstone, the Supreme Court affirmed the decision of the Court of Appeals. The Court held that the officers violated Hatcher's Fourth Amendment rights by going into the apartment without probable cause. The police did not have probable cause at the time they saw the pipe because its characteristic of being contraband was not immediately apparent. In this holding, the Court relied upon *Arizona v. Hicks*, 480 U.S. 321 (1987). Nor were there exigent circumstances for their entry into the house. The Court did not consider the issue of whether there was consent because the Commonwealth had not raised that issue below.

Justice Graves wrote a dissenting opinion joined by Justice Wintersheimer. In the dissenters' opinion, this search was justified by the plain view exception to the warrant requirement, with the officers being where they had a right to be as a result of consent given by the minor.

***Penman v. Commonwealth*,**
194 S.W.3d 237 (Ky. 2006)

Controlled buys were made from Penman. After the third such buy, the police decided to arrest him. He stopped his car and ran a block before being caught. He was arrested. The police proceeded to search his car, finding cocaine. Penman's motion to suppress was overruled. After he was convicted, he appealed to the Kentucky Supreme Court on numerous issues, including one Fourth Amendment issue.

In an opinion by Justice Scott, the Supreme Court affirmed the decision of the trial court. The Court held that the defendant's car could be searched despite the fact that the defendant was a block away at the time of his arrest. Relying upon *Thornton v. United States*, 541 U .S. 615 (2004), the Court stated "that in light of the criminal conduct observed by the officers concerning Appellant over the weeks before his arrest, the fact that Appellant's vehicle was an instrumental part of the drug transactions and was the actual location of the March 28, 2003 sale, coupled with the fact that the officers were there to arrest Appellant, sufficient justification existed for searching Appellant's vehicle at the time of the arrest. Thus, the arrest and search of the Appellant's vehicle under these circumstances was proper, notwithstanding that he fled the vehicle, and the trial court properly ruled that the evidence seized should not be suppressed."

Justice Cooper wrote a concurring opinion. He expressed that *Thornton*'s "recent occupant" holding was erroneous, allowing for one's car to be searched incident to arrest despite being only a recent occupant of the car. However, he also stated that Section 10 and the Fourth Amendment should be consistent, and as a result concurred in the opinion. He was joined by Justice Johnstone.

***Monin v. Commonwealth*,**
2006 WL 1790115, 2006 Ky. App. LEXIS 186 (Ky. Ct. App 2006)

Monin was stopped at a checkpoint on November 19, 2003. After he was stopped, he was charged with DUI. His motion to suppress was denied, and he was ultimately convicted. His appeal to circuit court was denied. The Court of Appeals granted discretionary review and reversed the circuit court in an opinion by Chief Judge Combs and joined by Judges Knopf and Buckingham. The Court held that the stop had occurred pursuant to an alleged checkpoint that appeared not to be a checkpoint but rather a stop based upon no suspicion.

Monin had filed an affidavit stating that he had not been stopped pursuant to a checkpoint. Rather, he stated that "he had driven behind Trooper Cornett's cruiser on Kentucky Highway 327 from a bar to the location where he was eventually stopped. Monin recounted that Trooper Cornett had illuminated only the headlights of his cruiser and that there was no indication that he was approaching a vehicle checkpoint."

Judge Combs found that the traffic checkpoint conducted by KSP was "not conducted according to the standards established by OM-E-4. There was no indication that specific media announcements were made regarding the presence and the nature of the checkpoint. There was no indication that one of the troopers was duly designated as the officer in

charge of the operation…In light of the conflicting and incomplete evidence in this case, we conclude that this vehicle checkpoint was not properly conducted so as to limit the troopers' discretion at the scene or to maximize public safety in any way. It appears to have been an isolated stop later characterized as a checkpoint detention. The Commonwealth has failed to show how this stop otherwise complied with any exemption to a warrant requirement based on an individualized suspicion of wrongdoing. Absent such an exception, the search and seizure must fail under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution."

Quintana v. Commonwealth,
2006 WL 2088424, 2006 Ky. App. LEXIS 246 (Ky. Ct. App. 2006)

The Kentucky State Police received information that Quintana was cultivating marijuana at his house in Nelson County. Believing that they did not have enough evidence to secure a warrant from a judge, they went to his house for a "knock and talk." They knocked on the front door, and when no one answered the door, they went to the side of the house to knock on a back door. While going to the back, KSP Trooper Stroop smelled marijuana coming out of an air conditioner. The officers left to obtain a search warrant based upon this additional information. When they executed the warrant later, they found 104 marijuana plants. Quintana was indicted, and ultimately entered a conditional plea of guilty after losing his motion to suppress.

In an opinion by Judge Huddleston joined by Judges Johnson and Taylor, the Court of Appeals affirmed the decision of the circuit court below denying the motion to suppress. The Court rejected Quintana's argument that the officers had invaded the curtilage by going to the side of the house, that they were not where they had a right to be, and thus they had obtained information in violation of Quintana's reasonable expectation of privacy. The Court stated that the officers had a right to go to Quintana's house to "knock and talk," and that the side of the house was a place where they also had a right to be. The Court relied upon *Cloar v. Commonwealth*, 679 S.W. 2d 827 (Ky. App. 1984), which had stated that a "police officer in the furtherance of a legitimate criminal investigation has a legal right to enter those parts of a private residential property which are impliedly open to public use. We limit the permissible scope of this right, however, to driveways, access roads, and as much of the property's sidewalks, pathways, and other areas as are necessary to enable the officer to find and talk to the occupants of the residence." As a result, the officers had not violated Quintana's Fourth Amendment rights when they smelled an odor coming from the air conditioner.

United States v. Thomas,
430 F.3d 274 (6th Cir. 2005)

Christopher Thomas was suspected of having stolen anhydrous ammonia from a company's tank in Lauderdale County, Alabama. The police went to his house in Tennessee and knocked on the back door, telling him that Alabama investigators wanted to speak with him. He came out of the house onto his front porch and refused to talk and asked for an attorney. After being arrested and found with meth on him, he was charged with a federal offense in Tennessee. The district judge suppressed the evidence, finding a violation of *Payton v. New York*, 445 U.S. 573 (1980) in that Thomas had been arrested at his home without a warrant. The court found that the police had constructively entered Thomas' house. The government appealed.

In an opinion by Judge Sutton joined by Judges Siler and Sharp, the Sixth Circuit reversed. They examined the undisputed facts to determine whether this was more like a legal "knock and talk" or more like a constructive entry. "The difference between the two—between a permissible consensual encounter and an impermissible constructive entry—turns on the show of force exhibited by the police." The Court held that the facts here indicated that a knock and talk had occurred. The factors relied upon were that the officers had not drawn their guns, they had not raised their voices, they had not made coercive demands. Rather, the officers asked Thomas to come out of his house and he did so, at which point he was arrested.

United States v. Wagers,
452 F.3d 534 (6th Cir. 2006)

This is a case about a Lexington lawyer convicted of the possession of child pornography. Federal agents obtained evidence that Wagers' was purchasing pornography from several pornography sites. The federal agents obtained a search warrant on his home, and found child pornography on his home computer. They obtained a warrant for his office, and a third warrant for his AOL e-mail account. After he was arrested, he filed a motion to suppress. When it was denied, he entered a conditional plea of guilty and appealed to the Sixth Circuit.

The Sixth Circuit affirmed the trial court in an opinion by Judge Boggs and joined by Judges Batchelder and Weber. The Court found that there was probable cause in the affidavits based upon the proximity in time between Wagers' subscriptions to the alleged pornographic sites and the agents' purchase of the same subscriptions from a few weeks to 5 months thereafter. The Court rejected Wagers' position that the purchase of subscriptions to online pornography did not give probable cause to believe that evidence of such could be found in his home or his office.

Continued on page 28

Continued from page 27

United States v. Hython,
443 F.3d 480 (6th Cir. 2006)

A municipal judge in Steubenville, Ohio, issued a warrant to search 241 S. 5th Street. This was based upon information provided in an affidavit that a confidential informant had purchased cocaine from a female who stated that her source was in Steubenville, Ohio. The affidavit recounted that they had followed the female to 241 S. 5th Street, where she had purchased cocaine. The affidavit did not state when this purchase had occurred. The warrant was executed, and Hython was found in the house with cocaine in his pocket as well as cash. Hython was charged with a federal offense. His motion to suppress was denied, and he entered a conditional plea.

The Sixth Circuit reversed in an opinion by Judge Daughtrey joined by Judges Gilman and Russell. The Court agreed with the district judge that the warrant was invalid because it had not connected the sale at 241 S. 5th Street with the issuance of the warrant, and thus was stale. The Court noted that the affidavit had not demonstrated that there was an ongoing narcotics operation at the 241 S. 5th Street address. The affidavit had not stated when the one sale had occurred. "[W}ithout a date or even a reference to 'recent activity,' etc., there is absolutely no way to begin measuring the continued existence of probable cause."

The Court disagreed that the evidence was admissible under the good faith exception to the warrant requirement, saying that the "affidavit supporting the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." The Court relied upon *United States v. Laughton*, 409 F. 3d 744 (6th Cir. 2005) to state that there was no good faith reliance here. In *Laughton* the Sixth Circuit had held that the "determination of good-faith reliance, like a determination of probable cause, must be bound by the four corners of the affidavit.' *Laughton* instructs that 'the relevant question is whether the officer reasonably believed that the warrant was properly issued, not whether probable cause existed in fact…This bright-line rule is in harmony with the objective nature of the good-faith test and prevents reviewing courts from delving into an analysis of the subjective knowledge of affiants." Because no "well-trained officer could have reasonably relied on a warrant issued on the basis of this affidavit," good faith did not apply, and the trial court should have suppressed the evidence."

SHORT VIEW . . .

1. *United States v. Pope*, 452 F.3d 338 (5th Cir. 2006). A police officer may not obtain a warrant based upon an old crime in order to search for evidence of a newer crime where he does not have sufficient probable cause to obtain a warrant for the newer crime and fails to inform the magistrate. Here, an officer received a tip that Pope was cooking meth, but did not believe he had probable cause. Instead, he went to the magistrate and asked for a warrant on a 78 day old prescription drug case. He did not tell the magistrate that he was really investigating the meth case. He received the warrant, searched, and based upon what he found, went back to the magistrate for a second warrant. In overruling the defendant's suppression motion, the district judge held the first warrant to be stale, but held that the good faith exception would allow for admission of the evidence. The Fifth Circuit reversed, saying that the officer had deliberately misled the magistrate and thus could not have relied in good faith upon the warrant. It "is critical that we suppress evidence obtained pursuant to a warrant that was procured only by misleading the magistrate as to the purpose of the intended search. This is because a judicial officer cannot properly perform his gate-keeping function of making the probable cause determination if the stated *object* of the requested search is false or incomplete: The *facts* supporting probable cause and the *object* of the search are inextricably linked in the probable cause calculus. Thus, for a judicial officer to determine properly whether probable cause exists to conduct a search, law enforcement must forthrightly inform such magistrate of, *inter alia*, the actual purpose of the search."
2. *Greenstreet v. State*, 392 Md. 652 (Md. 2006). An officer on April 15, 2004 applied for a search warrant saying he had made a trash pull on April 14, 2003. The warrant was granted. However, at the suppression hearing on whether the evidence was stale, the officer sought to testify that the he had made a typographical error that should have read "2004." The Court held that the four-corners rule would not allow consideration of the testimony, and that the evidence was stale. This was affirmed by the Maryland Supreme Court, which also held that the good faith exception would not apply under these circumstances. "The error committed by the issuing judge, authorizing a warrant with stale probable cause on the basis of the affidavit as written, is not a mere technical deficiency of the warrant or an immaterial error that should escape the notice of a reasonable well-trained officer…"
3. *United States v. Thomas*, 447 F.3d 1191 (9th Cir. 2006). A person whose name is not on the contract to rent a car nevertheless has a reasonable expectation of privacy in

the car if he has permission to possess the car from one whose name is on the contract. "This approach is in accord with precedent holding that indicia of ownership—including the right to exclude others—coupled with possession and the permission of the rightful owner, are sufficient grounds upon which to find standing."

4. *State v. Schwarz*, 136 P.3d 989 (Mont. 2006). A child under 16 may not consent to the search of her parents' home, according to the Montana Supreme Court. In so deciding, the Court relied upon the Montana Constitution's analogue to the Fourth Amendment.
5. *State v. Groshong*, 135 P.3d 1186 (Kan. 2006). The Kansas Supreme Court has held that "a law enforcement officer may search a passenger's purse left in the vehicle when the passenger exits, if the passenger makes no effort to retrieve the purse before probable cause to search the vehicle develops." Here, the car was stopped for a bad tail light. The officer ordered everyone in the car to get out and said he was going to search the car. Groshong left her purse behind. After the officer found marijuana in the car, Groshong asked to retrieve her purse from the car, and this request was denied. The officer searched the purse and found drugs. The Court noted that Groshong waited to retrieve her purse until probable cause to search the car had developed by the finding of the marijuana.
6. *People v. Brendlin*, 136 P.3d 845 (Cal. 2006). The California Supreme Court has held that the stopping of a car is not a seizure of the passengers, and thus suppression of evidence found as a result of the illegal stopping of the car was not required. The defendant here argued that under *Maryland v. Wilson*, 519 U.S. 408 (1997), the police have the authority to order passengers in a legally stopped car either to remain or get out of the car and thus a seizure has occurred. The Court rejected this argument, taking a minority position that a driver of a car is affected differently by a stopping, and that a passenger has the right to leave the scene. Henceforth the standard in California is that a "seizure occurs when the police, by the application of physical force or show of authority, seek to restrain the person's liberty…the police conduct communicated to a reasonable innocent person that the person was not free to decline the officer's request or otherwise terminate the encounter…and the person actually submitted to that authority for reasons not 'independent' of the official show of authority." ■

The John D. and Catherine T. MacArthur Foundation funded the development of Understanding Adolescents: A Juvenile Court Training Curriculum, training materials for juvenile justice professionals, as a joint project of the Youth Law Center, Juvenile Law Center, and the American Bar Association Juvenile Justice Center. The result was a training curriculum that applies the findings of adolescent development and relates research to practice issues confronted by juvenile court practitioners at the various decision-making stages of the juvenile justice process.

The National Juvenile Defender Center has used the modules for training across the country and continues to organize sessions for defenders, prosecutors, probation officers, judges, and other juvenile justice professionals.

The Curriculum is comprised of six modules, each focused on a different topic.

1. **Kids are Different**:
   How Knowledge of Adolescent Development Theory Can Aid Decision-Making in Court
2. **Talking to Teens in the Justice System**:
   Strategies for Interviewing Adolescent Defendants, Witnesses, and Victims
3. **Mental Health Assessments in the Justice System**:
   How to Get High-Quality Evaluations and What to Do With Them in Court
4. **The Pathways to Youth Violence**:
   How Child Maltreatment and Other Risk Factors Lead Children to Chronically Aggressive Behavior
5. **Special Ed Kids in the Justice System**:
   How the Recognize and Treat Young People with Disabilities That Compromise their Ability to Comprehend, Learn, and Behave
6. **Evaluating Youth Competence in the Justice System**

http://www.njdc.info/macarthur.php

KENTUCKY CASE REVIEW

by Sam Potter, Appeals Branch

Sam Potter

Joshua McIntire v. Commonwealth
Final 6/15/06, To Be Published
192 S.W.3d 690 (Ky. 2006)
Reversing and Remanding
Opinion by J. Johnstone, Dissent by J. Roach

McIntire was convicted of complicity to murder and first degree criminal abuse and received a total sentence of 20 years imprisonment. McIntire began a relationship with Chantal Roach in early 2001. Roach gave birth to their child on October 9, 2001. The three of them moved into a small apartment three weeks after the child's birth. Bruises and burns appeared on the child shortly thereafter. Social services investigated the case on December 28 and concluded the reported abuse was unsubstantiated. Visits to several doctors and several visits by a social worker over the next several weeks reinforced this conclusion. On February 7, 2002, they took the baby to the ER because he was wet, limp, and would not wake up. A helicopter transported the child to Kosair Children's Hospital in Louisville, where doctors identified the injuries as abuse. The child died six days later.

Reversible error occurred when the trial court admitted testimony given by Dr. Spivack as expert testimony because it did not satisfy the four part test for admitting expert testimony. For expert testimony to be admissible, (1) the witness must be qualified, (2) the subject matter must satisfy *Daubert*, 509 U.S. 579 (1993), (3) the evidence must satisfy KRE 401 and 403, and (4) the opinion must assist the trier of fact. Opinion, p. 10 (citing KRE 702 and *Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (Ky. 1997)). The Court found no error in admitting Dr. Spivack's testimony that the impact that caused the child's head injury would have been noisy since that is a common sense conclusion.

The Court found error in admitting her testimony that a non-abusing parent would be aware that their child was being abused. This testimony did not satisfy the reliability prong of *Daubert*. Dr. Spivack, despite her "impressive" credentials, was not qualified as an expert to render this type of opinion. Further, any probative value of this testimony is far outweighed by its prejudicial effect. Given the circumstantial nature of the evidence against McIntire, the Court could not say this error was harmless beyond a reasonable doubt and reversed his convictions.

For those of you who have had to deal with Dr. Spivack before, one passage should prove rather gratifying. The Court wrote, "Furthermore, the attitude and tone of her responses cannot be overlooked. When a medical expert sarcastically asks defense counsel if 'the evil fairy' abused the child, the only impression given is that it would be utterly outrageous or unfathomable that the parent would not be aware of the abuse." Opinion, p. 17(emphasis original). If you face her in the future, bring a copy of this case with you and use it to control her.

Nick Ratliff v. Commonwealth
Final 7/6/06, To Be Published
194 S.W.3d 258 (Ky. 2006)
Affirming in Part, Vacating in Part, and Remanding
Unanimous Opinion by J. Cooper

Ratliff's "domestic companion" was Tammy Kirk, who had a 20 month old daughter. Ratliff was not the father. The child was admitted to the hospital on January 27, 2002 with a broken arm. The child was discharged on February 1. The child was presented to the hospital on February 4 with lesions and bruises. The child was presented to the hospital again on February 8, where upon examination, she was pronounced dead. Ratliff was convicted of intentional murder and seven counts of first degree criminal abuse.

All of Ratliff's charges were properly tried together with his codefendant. Ratliff moved the trial court to sever his charges from Kirk's and to sever his murder charge from his criminal abuse charges. Joinder of offenses is proper where the crimes are closely related in character, circumstances, and time. The movant must show that the antagonism between the codefendants will mislead or confuse the jury. Here, the injuries were similar in nature and occurred within two weeks of the child's death. Also, Ratliff's and Kirk's defenses of complete denial were consistent with each other. The Court affirmed the trial court's denial of his motions.

Jurors should be excused for cause when they cannot conform their views to the requirements of the law and render a fair and impartial verdict. One juror's daughter had been friends with Kirk, but had not had any contact for over three years. Another juror had raised a child who had been removed from an abusive home for reasons of neglect. A third juror had heard of the child's death but could not remember any details. Because all three jurors said they could render a fair and impartial verdict, the Court affirmed the trial court's decision not to remove them for cause.

Expert testimony by Dr. Spivack that the burns on the child's body resulted from a cigarette lighter were properly admitted. The child had eight identical arch shaped burn marks on her abdomen and wrist. Dr. Spivack, the same doctor from the *McIntire* case, testified that these burns were probably inflicted by heating a BIC cigarette lighter and pressing it against the child's skin. She was familiar with published case reports of these kinds of burn injuries as well as from her professional experience. This evidence satisfied *Daubert*, and the trial court did not error by admitting it.

A photograph that is admissible will not become inadmissible simply because it is gruesome and the crime is heinous. Ratliff challenged two particular photographs. One showed the child's bowel that revealed an abdominal hemorrhage. The other was of the child's skull with the scalp pulled back to reveal deep tissue bruising. When a photograph is altered by human manipulation that is necessary to present relevant evidence, the photograph remains admissible.

Not merging the criminal abuse charges was proper because it is a result offense. Legislative intent assists in determining whether an act, transaction, or course of conduct shall be considered multiple offenses or a single offense. Criminal abuse is a result offense, proscribing an injury to a child. The child had more than seven clearly identifiable injuries. The seven counts of criminal abuse did not merge together and conviction on all seven counts did not violate double jeopardy.

Lesser included offense jury instructions should only be given when they are supported by the evidence. The trial court must instruct on the whole law of the case. A lesser included offense is in fact and principle a defense against the higher charge. However, Ratliff's defense was alibi and complete denial of knowing about or causing the abuse. All of the Commonwealth's evidence supported only the finding of intentional death and injury. Because no evidence supported a wanton or reckless mental state, the trial court properly refused to instruct the jury on lesser included offenses.

A trial court must clearly state whether multiple sentences are to run concurrently or consecutively. The final judgment failed to clearly state whether the sentences were to be run concurrently or consecutively. Normally, when a trial court fails to make this determination, the sentences will run concurrently as a matter of law pursuant to KRS 532.110(2). The trial court in this case said he would run the sentences consecutively "insofar as possible for a total of 120 years." However, the sentences can not exceed seventy years according to KRS 532.110(1)(c). The Court remanded the case to the trial court to fix this error.

Binta Maryam Baraka v. Commonwealth
Final 7/6/06, To Be Published
194 S.W.3d 313 (Ky. 2006)
Affirming
Opinion by J. Graves, Dissent by J. Johnstone

Baraka was indicted for murdering Brutus Price. The Commonwealth alleged that stress related to a physical altercation between them cased Brutus to suffer a fatal heart attack. Baraka entered a conditional guilty plea to second degree manslaughter and second degree PFO. She received a 10 year sentence. The only issue presented on appeal was the trial court's *Daubert* ruling that allowed the medical examiner's theory of "homicide by heart attack."

Homicide by heart attack is a reliable expert opinion. This theory is over 100 years old and widely accepted in the scientific community. The doctor had read several articles and attended a lecture about it. The doctor had performed autopsies on more than 500 heart attack victims. Baraka put forth no evidence that homicide by heart attack was not reliable. Thus, the Court upheld the trial court's ruling that this met the requirements of *Daubert*.

Shawn O. Thacker v. Commonwealth
Final 7/6/06, To Be Published
194 S.W.3d 287 (Ky. 2006)
Affirming
Opinion by J. Graves, Dissent by J. Cooper

Thacker brought a package of crackers to the counter of a gas station in Elizabethtown. As the clerk was processing the purchase, Thacker placed a gun on the counter with the barrel pointing towards the clerk and asked for the money in the drawer. Thacker took the money and drove off with an accomplice. Thacker and his accomplice robbed another gas station north of Elizabethtown in Bullitt County less than two hours later. The police stopped Thacker based on the descriptions from the clerks shortly after the second robbery. Thacker confessed to both robberies.

In first degree robbery cases, the jury must determine whether the object used in the robbery was a deadly weapon because it is an essential element of the crime. First degree robbery occurs when a person uses or threatens physical force upon the victim while armed with a dangerous weapon with the intent to commit a theft. *Hicks v. Commonwealth*, 550 S.W.2d 480 (Ky. 1977), held that a deadly weapon did not have to be defined for the jury because whether an object was a deadly weapon was a question of law to be determined by the trial court.

However, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that the jury must determine guilt on each and every element of the charged crime. The Court agreed with Thacker that *Apprendi* required the Court to overrule *Hicks*. The Court proffered a model jury instruction that specifically identified

Continued on page 32

Continued from page 31

the deadly weapon and defined deadly weapon. Opinion, p. 5. While the Court found error, it held the error to be harmless because the object Thacker used was 22-caliber revolver. Thus, the Court affirmed his convictions in spite of the error.

Two concurrent probated sentences may be treated as two separate convictions for PFO purposes. Thacker received a two year sentence that was probated for five years for second degree burglary and felony receiving stolen property on November 13, 1998. He received the same sentence for trafficking in stolen parts on June 9, 1999, but his probation from his sentence was not revoked. The Court held that the third conviction did not merge with the first two because Thacker began serving the first sentence of the first two convictions before he was charged and sentenced for his third conviction. First degree PFO enhancement was proper in his case.

Joshua W. Bailey v. Commonwealth
Final 7/6/06, To Be Published
194 S.W.3d 296 (Ky. 2006)
Reversing
Opinion by J. Johnstone, Dissent by J. Graves

Bailey was 19 years old when the six year old daughter of his uncle's girlfriend accused him of sexual abuse. The alleged incident occurred when his uncle's girlfriend asked him to babysit her children while they went on a date. After several interviews with the police, Bailey confessed to the crime. The trial court held a suppression hearing and suppressed his confession. The Commonwealth appealed, and the Court of Appeals reversed. The Supreme Court granted discretionary review, reversed the Court of Appeals, and reinstated the trial court's order suppressing Bailey's confession.

Using a confession obtained by an interrogation that critically impaired the accused's self-determination violates due process. A confession must be the product of an essentially free and unconstrained choice by its maker. The voluntariness of a confession is assessed by considering the totality of the circumstances. The circumstances include the characteristics of the accused and the details of the interrogation.

The suppression hearing in this case lasted four hours. It revealed that Bailey is moderately mentally retarded with an IQ of 50, which places him in the bottom .07% of the population. He functions on the level of a six year old. While the police read him his *Miranda* rights, it was clear that he did not understand them. Bailey asked at one point what "an atturnity" is. The police told him he would have to take a polygraph examination or he would probably be arrested. After the polygraph, the police told him it proved his forty separate denials of any wrongdoing were lies. Through mostly yes and no questions, the police offered multiple situations of what might have happened until he finally confessed by answering yes. Given Bailey's disposition, the police tactics amounted to psychological coercion.

Anthony Peak & Patrick W. Meeks v. Commonwealth
Rendered 6/15/06, To Be Published
2006 WL 1649316
Affirming
Opinion by J. Wintersheimer, Dissent by J. Cooper

Peak and Meeks were convicted of murder, first degree robbery, conspiracy to commit murder, and tampering with physical evidence. Peak, Meeks, and Bearden conspired together to kill a person from whom they bought drugs and rob that person of a kilogram of cocaine. Meeks obtained a gun and gave it to Peak. Meeks and Bearden dropped off the unidentified victim and an abandoned farmhouse where Peak was waiting. Peak shot him multiple times and stabbed him in the back of the neck. Peak, Meeks, and another person dumped the victim's body in a dry creek bed where it was later found. Both Peak and Meeks received a sentence of life in prison without the possibility of probation or parole for 25 years.

Meeks' statement was voluntary. The police arrested Meeks at 10:45 p.m., and he signed a waiver of his *Miranda* rights at 10:55 p.m. The police questioned him from then until 2:03 a.m. and again from 5 a.m. until 6:42 a.m. Only the last half-hour of each interview was recorded. Meeks testified he had been up for 26 straight hours, that he told the detective he was scared, and that he needed to talk to an attorney. The police testified that they offered Meeks food and breaks and that he never requested a lawyer. Considering the totality of the circumstances, the Court found no error.

Meeks' unredacted statement was properly admitted in the joint trial of Peak and Meeks. Four weeks into their joint trial, the Commonwealth sought to introduce a redacted version of Meeks' statement that would not prejudice Peak. Meeks objected to the redacted version because it made him look like the triggerman, and he demanded the full statement be played. Peak requested bifurcation, mistrial, or to have the statement redacted. The trial judge allowed the statement to be played in full without redaction.

Every case involving multiple defendants raises the issue that evidence which would be properly admitted in a trial of a single defendant would be improper in a separate trial of the codefendant. Meeks' statement was clearly admissible against him pursuant to KRE 801A(b)(1). "'The Confrontation Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.' *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004)." Opinion, p. 9. Because Meeks waived his Fifth Amendment rights in order to have the tape played at trial, Peak could have called Meeks as a witness and questioned him as if on cross examination pursuant to KRE 611(c). Thus, no error existed.

Meeks and Peak were not entitled to their codefendant's entire psychological report because the portion not turned over did not pertain to her ability to testify as a witness. Meeks and Peak requested the psychological records and report of Bearden that were prepared by her retained consultant to be used during sentencing if necessary. The trial court reviewed the report in camera and provided them with the portion that dealt with the crime but not the portion that dealt with the psychiatric evaluation. Meeks and Peak requested that the whole report be turned over to them. The trial court refused. The report was included in the appellate record by avowal. The Court reviewed it and found that no information in it was probative of Bearden's ability to testify as a witness.

The Commonwealth can introduce demonstrative evidence to prove its case. The Commonwealth introduced the blanket and clothes in which the victim's body decomposed. The Commonwealth sprayed them with deodorizer to mask the smell. The Commonwealth also introduced the jaw and shoulder bone of the victim. The Court upheld the trial court's admission of this evidence because the Commonwealth is entitled to introduce evidence to prove its case.

Commonwealth v. Randall Scott Lucas
Final 8/2/06, To Be Published
2006 WL 1649330
Reversing

Opinion by J. Wintersheimer, Dissent by J. Cooper
Lucas entered a conditional guilty plea to first degree sexual abuse and second degree sexual abuse for inappropriate touching of his stepdaughter and nephew. He received a one and half year sentence. The Court of Appeals reversed the trial court's ruling, finding that Lucas was subjected to custodial interrogation. The Supreme Court granted discretionary review, reversed the Court of Appeals, and reinstated Lucas' conviction and sentence.

Custody occurs only when a person has been arrested or a person's freedom of movement has been restrained to the degree associated with formal arrest. Lucas came to the police station voluntarily on February 26, 2002. He was given his *Miranda* rights and was told he was free to leave at any time. The police obtained an arrest warrant the next day for misdemeanor sexual abuse, but did not arrest him. After this, the police received a report from his nephew that Lucas abused him 20 years ago. Lucas came in voluntarily on March 1. This time the police did not give him his *Miranda* rights and did not tell him he was free to leave at any time. The police did not tell him that they had a warrant for his arrest, though they said a complaint had been filed. The police questioned him about these allegations. He confessed to the abuse of the nephew. Based on these circumstances, the Court held that Lucas was not in custody and reinstated his convictions.

Whether a person was in custody is a mixed question of law and fact, and the trial court's decision on this issue will be reviewed *de novo*. Findings of fact are reviewed under the clearly erroneous standard. Questions of law are reviewed *de novo*. Both the U.S. Supreme Court and the Sixth Circuit review mixed questions of law and fact with a *de novo* standard. The Court held it will do the same. ■

The National Juvenile Defender Center provides defenders with training, technical support, research, and advocacy to enhance indigent defense systems nationwide. The Center works closely with nine regional juvenile defender centers to provide information and assistance in every state and administers several listservs that facilitate communication between defenders throughout the United States.

National Juvenile Defender Center
1350 Connecticut Avenue NW, Suite 304
Washington, D.C. 20036
Phone: (202) 452-0010
Fax: (202) 452-1205
Email: inquires@njdc.info
Web: www.njdc.info

Central Juvenile Defender Center
Arkansas, Indiana, Kansas, Kentucky, Missouri, Ohio and Tennessee
Kim Brooks Tandy
Children's Law Center
104 East Seventh Street, 2nd Floor
Covington, KY 41011
Phone: (859) 431-3313
Fax: (859) 655-7553
Email: kimbrooks@fuse.net

6TH CIRCUIT CASE REVIEW

by David Harshaw, Post Conviction Branch

Gentry v. Dueth,
— F.3d ——, 2006 WL 2106637 (C.A.6 (Ky.)), before Boggs, Chief Judge; and Gibbons and Griffin, Circuit Judges.

The Sixth Circuit upholds the granting of an unconditional writ after the prosecution failed to retry the defendant within the specified time period. In this Kentucky case, Carrie Gentry was charged in McCracken County in 1999 with DUI and manslaughter in the second degree. At trial, the Commonwealth introduced, over Gentry's objection, the testimony of five expert witnesses to prove both that Gentry was the driver of the vehicle and that Gentry's blood alcohol level was at a level of impairment. These experts testified via two-way closed circuit television. Gentry was convicted and sentenced to five years. Her conviction was upheld on direct appeal.

In January of 2003, Gentry filed a habeas corpus petition challenging her conviction. In July of 2003, Gentry was released from prison. In deciding the petition, the district court found that the use of the two-way television violated Gentry's right to confront the witnesses against her. The court, however, found that the error was harmless. Gentry then filed a motion to alter or amend the judgment. The district court then changed its decision and granted a conditional writ of habeas corpus – conditioned on the Commonwealth retrying Gentry within ninety days of the decision or ninety days of any final opinion on appeal.

The district court's opinion was rendered in May of 2004. The Commonwealth began an appeal and then dropped it. The Commonwealth took no other action.

In January of 2005, Gentry motioned the district court to enforce its judgment. Gentry complained that she should no longer have to face the collateral consequences of being a convicted felon (such as not being able to vote). In July of 2005, the district court granted Gentry an unconditional writ, which nullified the conviction. The Commonwealth timely appealed to the Sixth Circuit.

The Commonwealth argued that the January 2005 motion was untimely, that the district court did not have jurisdiction to hear the matter, that Gentry's release rendered the case moot, that Gentry needed first to exhaust in state court her challenges to the collateral consequences of her conviction, and that the district court did not have lawful authority to absolutely grant the writ.

Chief Judge Boggs wrote the opinion for the unanimous panel.

To begin, the Court ruled that Gentry's January 2005 motion was timely. The Commonwealth argued that because Gentry specifically asked to be relieved from the collateral consequences of being a felon - relief not granted by the district court – that she was essentially asking the district court to alter its original judgment. The Commonwealth thus argued the motion should have been construed as an untimely Rule 59 motion. The Court, however, ruled that Gentry had not asked for anything except enforcement of the judgment. The Court ruled that the judgment clearly contemplated vacation of the prior conviction prior to any retrial and that vacation of the conviction naturally eliminated the adverse collateral consequences flowing from it.

The Court also found that the district court had jurisdiction to hear the matter. The Court held:

> [T]he sole distinction between a conditional and an absolute grant of the writ of habeas corpus is that the former lies latent unless and until the state fails to perform the established condition, at which time the writ springs to life.
>
> District courts rightly favor conditional grants, which provide states with an opportunity to cure their constitutional errors, out of a proper concern for comity among the co-equal sovereigns. "[C]ourts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). Absolute grants are therefore generally limited to situations where the nature of the error is simply incurable, such as a conviction under an unconstitutional statute. *See, e.g., Staley v. Jones, 108 F.Supp.2d 777, 788 (W.D.Mich.2000), rev'd on other grounds,* 239 F.3d 769 (6th Cir.2001). Conditional grants of writs of habeas corpus are final orders, *Phifer v. Warden, United States Pen., Terre Haute, Ind., 53 F.3d 859, 862 (7th Cir.1995)*, exactly like absolute grants, and they ordinarily and ideally operate automatically, that is, without the need for the district court to act further.
>
> [D]istrict courts retain jurisdiction to execute a lawful judgment when it becomes necessary…On the other hand, when a state meets the terms of the habeas court's condition, thereby avoiding the writ's actual issuance, the habeas court does not retain any further jurisdiction over the matter. (Some citations omitted).

The Court also found that the case was not moot by virtue of Gentry's release from custody. The Commonwealth argued that the release of Gentry's person was the condition of the writ. The Court disagreed:

> Although the Supreme Court had seemed to limit habeas relief to "the body of the petitioner" in *Fay v. Noia, 372 U.S. 391, 430-31 (1963)*, a stance that was in line with the writ's historical function of releasing prisoners from incarceration, the Court subsequently expanded the writ's scope in *Carafas v. LaVallee, 391 U.S. 234, 237 (1968)*, stating that the petitioner's challenge was not mooted by his release from incarceration prior to his hearing because, "in consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror." *Ibid.*

The Court pointed out that the Commonwealth was relying on cases where habeas petitioners were only challenging their sentences not their underlying convictions. The Court stated: "Post-release habeas petitions challenging the conditions of confinement are almost necessarily moot, for courts normally cannot offer any habeas redress in such circumstances."

Next, the Court found that Gentry did not have to exhaust in state court any challenges to the collateral consequences of her conviction. The Court repeated what it had previously stated - that challenging the conviction implicitly also challenged the collateral consequences that flowed from the conviction.

Lastly, the Court found that the district court had lawful authority to nullify Gentry's conviction. The Court found that to "hold otherwise would be incongruent with the writ's historical purpose and with the will of Congress, which has seen fit to empower the federal courts to dispose of habeas matters 'as law and justice requires.'" (Citing 28 U.S.C. § 2243).

Gentry, therefore, won the vacation of her conviction. However, Gentry can still be rearrested and retried. The Court stated that a successful habeas petitioner who was released after the expiration of the conditional writ period has only received what is akin to a dismissal without prejudice. Only in extraordinary circumstances does a nullified conviction turn into a reversed conviction.

***Satterlee v. Wolfenbarger*,**
— F.3d ——, 2006 WL 1788981 (C.A.6 (Mich.))
Before: Moore, Cole, and Clay, Circuit Judges.

The Sixth Circuit affirms the granting of a conditional writ based on ineffective assistance of counsel regarding a plea offer. The Court also affirms the granting of an unconditional writ after the state failed to reinstate the plea offer within the specified time period and then remands for consideration of whether reprosecution is permissible.

A Michigan jury convicted Wynn Satterlee of conspiring to deliver more than 650 grams of cocaine. Satterlee was sentenced to twenty to thirty years imprisonment. After losing his direct appeal, Satterlee filed a post-conviction action alleging that his counsel had failed to communicate to him a plea bargain offer of six to twenty years. Satterlee's post-conviction claim was not successful in the Michigan state courts.

Satterlee filed a petition for habeas corpus. The District Court granted him a hearing. After considering testimony from Satterlee, Satterlee's mother, the state prosecutor, and Satterlee's attorney, the district court granted Satterlee a conditional writ of habeas corpus. The court found that there was a reasonable probability that Satterlee would have taken the plea offer if it had been presented to him. *See Hill v. Lockhart*, 474 U.S. 52 (1985) (prejudice prong of *Strickland* test in a guilty plea case is a reasonable probability that but for counsel's error that the defendant would not have pled guilty – or in this case, but for counsel's error would have pled guilty). The court credited the testimony of Satterlee, his mother, and the prosecutor over the testimony of Satterlee's attorney.

The district court, in the conditional writ, gave Michigan sixty days to reinstate a plea offer of six to twenty years. The state appealed, arguing that Satterlee had not exhausted his state court remedies and that the district court had made clearly erroneous factual findings.

After the sixty days passed, Satterlee filed with the district court a request for his immediate release. The state moved for a stay. The district court denied the stay and then converted the conditional writ into an unconditional writ and ordered Satterlee's release as well as the expungement of his conviction. The state appealed this ruling. The two appeals were consolidated.

Judge Moore delivered the opinion of the unanimous Court.

The state's lack of exhaustion theory was premised on Satterlee's alleged failure to fairly present to the Michigan courts all the facts underlying his legal claim for relief. Satterlee was required to do this pursuant to *Whiting v. Burt*, 395 F.3d 602, 612 (6th Cir. 2005). The Court found, however, that Satterlee had fairly presented the facts of his claim. Although the main thrust of Satterlee's factual complaint in the state court had been a plea offer communicated to him by a letter, Satterlee also put the state courts on notice that he had also not received an oral offer on the morning of the trail. The failure to communicate this oral offer was the basis of the grant of the writ.

Continued on page 36

Continued from page 35

Importantly, the Court also said that Satterlee would still have met the exhaustion requirement even if the oral offer had not been mentioned in the state court pleadings. In footnote 2 of the opinion the Court stated:

> Moreover, the IAC claim would be exhausted even if the state were right on the facts (i.e., if Satterlee had not informed the state courts of the morning offer). The Supreme Court has explained that "presentation of additional facts to the district court, pursuant to that court's directions, [does not] evade[ ] the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts," so long as "the supplemental evidence presented by [the prisoner] d[oes] not fundamentally alter the legal claim already considered by the state courts." *Vasquez v. Hillery,* 474 U.S. 254, 257-58, 260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). The purportedly new evidence of the morning offer does not "fundamentally alter" the claim that Dodge failed to relay a favorable plea offer that Satterlee would have accepted, as it would fit comfortably within the rule that "[u]nder *Vasquez* and allied decisions, the petitioner may supplement and clarify the record, *inter alia,* through ··· introduction of new factual materials supportive of those already in the record [or] presentation of additional instances of the same alleged violation." 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 23.3c, at 1088-89 (5th ed.2005) (footnotes omitted).

Next, the Court addressed the state's argument that the district court's fact finding was clearly erroneous. The Court laid out the test:

> The state next objects to a factual finding made by the district court. We review for clear error a factual finding made pursuant to a habeas court's evidentiary hearing. *Carter v. Mitchell,* 443 F.3d 517, 535 (6th Cir.2006); *Sawyer,* 299 F.3d at 608. " 'A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Norris v. Schotten,* 146 F.3d 314, 323 (6th Cir.) (quoting *Anderson v. City of Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)), *cert. denied,* 525 U.S. 935, 119 S.Ct. 348, 142 L.Ed.2d 287 (1998). " 'If there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' " *Caver v. Straub,* 349 F.3d 340, 351 (6th Cir.2003) (quoting *United States v. Kellams,* 26 F.3d 646, 648 (6th Cir.1994)). We afford the district court particular deference when its factual findings are based on credibility determinations. *Moss v. United States,* 323 F.3d 445, 457 (6th Cir.), *cert. denied,* 540 U.S. 879, 124 S.Ct. 303, 157 L.Ed.2d 144 (2003); *United States v. Oliver,* 397 F.3d 369, 374 (6th Cir.2005).

Applying the test to the facts as found by the district court, the Court was not "left with the definite and firm conviction that a mistake had been committed." In light of these facts, the Court then ruled, as the district court had, that the "state courts' denial of Satterlee's IAC claim 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' i.e. *Strickland* and *Hill*. *See* 28 U.S.C. § 2254(d)(1)."

The Court then addressed the whether the district court erred in granting both Satterlee's release and the expungement of his record. The Court went through much of the analysis addressed by the *Gentry* case, above. In short, the Court found that the district court had not exceeded its power.

The Court then addressed whether the granting of the unconditional writ meant that the state was barred from reprosecuting Satterlee. The Court found that the district court's order was unclear on this point and so it remanded to the district court for clarification. In doing so, the Court stated that only extraordinary circumstances dictated a bar against reprosecution. These circumstances would exist if the state acts "inexcusably, repeatedly, or otherwise abusively" in failing to timely retry the case or if the state's delay interferes with the petitioner's ability to mount a defense at the retrial.

The Court also gave the district court guidance on what to do if reprosecution is permitted:

> If the district court permits reprosecution, it should also consider whether "law and justice require," 28 U.S.C. § 2243, the writ to include a provision mandating the state to reinstate the six-to-twenty-year offer if it ever chooses to reprosecute Satterlee. The ineffective assistance of counsel is "subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation." *United States v. Morrison,* 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981). "The only way to effectively repair the constitutional deprivation [the petitioner] suffered is to restore him to the position in which he would have been had the deprivation not occurred." *Lewandowski v. Makel,* 949 F.2d 884, 889 (6th Cir.1991). Where, as here, a defendant receives a greater sentence than one contained in a plea offer that he would have accepted if not for the ineffective assistance of counsel, the properly tailored remedy is to give the defendant the opportunity to accept the offer, because simply retrying the petitioner without making the plea offer would not remedy the constitutional violation that led to the issuance of the writ. *Turner v. Tennessee,* 858 F.2d 1201, 1208 (6th Cir.1988) ("[T]he only way to neutralize the constitutional deprivation suffered ··· would seem to be to provide [the petitioner] with an opportunity to

consider the State's two-year plea offer with the effective assistance of counsel."), *vacated on other grounds*, 492 U.S. 902, 109 S.Ct. 3208, 106 L.Ed.2d 559 (1989); *Nunes v. Mueller*, 350 F.3d 1045, 1057-58 (9th Cir.2003), *cert. denied*, 543 U.S. 1038, 125 S.Ct. 808, 160 L.Ed.2d 605 (2004); *United States v. Blaylock*, 20 F.3d 1458, 1468 (9th Cir.1994); *United States v. Rodriguez Rodriguez*, 929 F.2d 747, 753 n. 1 (1st Cir.1991); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 438 (3d Cir.1982); *see also Lewandowski*, 949 F.2d at 887, 889 (ordering release when the defendant had already served a longer sentence than would have been possible under a favorable plea offer); *Boria v. Keane*, 99 F.3d 492, 499 (2d Cir.1996) (same), *cert. denied*, 521 U.S. 1118, 117 S.Ct. 2508, 138 L.Ed.2d 1012 (1997).

***DiCenzi v. Rose*,**
452 F.3d 465 (6th Cir. 2006)
Before: Moore and Cole, Circuit Judges; Wiseman, District Judge.

The Sixth Circuit discusses the AEDPA's one-year statute of limitations in a belated appeal case.

Alfred DiCenzi pled guilty in Ohio to vehicular homicide and aggravated vehicular assault. He received the maximum punishment for both offenses - six and a half years. Because he received the maximum sentence, he had a statutory right, under Ohio law, to appeal his sentence despite his guilty plea. DiCenzi claimed that he was never informed of this right by either the trail court or his attorney.

Over two years passed, at which point DiCenzi learned from the Ohio public defender's office that he had a right to appeal his sentence. He filed a motion for a belated appeal. He exhausted this motion in the Ohio state courts getting no relief. Importantly, the Supreme Court of Ohio heard the jurisdictional merits of DiCenzi's claim rather than dismissing his application outright.

DiCenzi filed a habeas corpus petition. He alleged the failure of the Ohio courts to grant him a belated appeal. He also alleged claims attacking his sentencing procedure - claims that would have been in the appeal if he had gotten it. The district court found the whole petition to be time barred.

Judge Cole delivered the opinion of the unanimous Court.

The Court first considered whether the claim that Ohio Courts had erred in not granting a belated appeal was time-barred. The Court said that it was not.

To begin, the Court stated that the claim accrued on the day that the Ohio Court of Appeals denied DiCenzi's initial motion to file a belated appeal. Notably, the Court did not find that this claim accrued on the day that DiCenzi discovered that he had a right to appeal, but rather on the first day that this right was affirmatively denied. In support of this, the Court cited 28 U.S.C. § 2244(d)(1)(D): "initiating the one-year AEDPA requirement on the date upon which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." It also is worth mentioning that the period of time between DiCenzi's sentencing and the discovering of his lost right has no bearing on this claim. Upon reflection, this makes sense. The remedy DiCenzi seeks here is one in which that two-year period of delay would be treated as if it never existed; hence, there is no reason that the period should come into play when considering when the claim accrued.

Continuing, the Court found that DiCenzi's state appeal of the initial denial of this claim tolled his year statute of limitations. Under Sixth Circuit case law it makes a difference whether the Ohio Supreme Court makes a merits decision as opposed to a decision denying leave to file. DiCenzi did not spend more than a year out of court when litigating this claim. The Court reversed and remanded to the district court to consider the claim.

As to DiCenzi's sentencing error claims, the Court found that district court erred by not considering DiCenzi's diligence in pursuing his rights from the time of his sentencing until the time he contacted the public defender. The district court simply looked at the two-year period and found that the one-year limit had been violated. The Court remanded for a determination of DiCenzi's diligence. The Court stated that as an appellate court that it should not rule on this mater in the first instance. However, the Court did note, that given the period of time at issue and given DiCenzi's alleged condition during this time, that it was not "so clearly unreasonable" that DiCenzi did not file a motion for a belated appeal before he did. The Court stated that the district court could hold a hearing on the matter if "the dictates of 28 U.S.C. § 2254(e) are satisfied."

Ultimately, DiCenzi's diligence will not only be determinative of the procedural question of whether he gets his sentencing claims in the door of habeas, but it logically will also be determinative of the merits of his belated appeal claim that has already passed over the threshold.

***United States v. Newsom*,**
452 F.3d 593 (6th Cir. 2006)
Before: Cole, Gilman, and Friedman, Circuit Judges.

Evidence of gun tattoos was not relevant to prove that defendant carried a gun on any given day; however, the errors at trial were either harmless or did not affect the defendant's substantial rights.

Kelvin Mondale Newsom was driving another man's SUV when he was pulled over by the police. He was smoking a marijuana cigarette, which the officer smelled and subsequently recovered. Newsom gave the officer a false

Continued on page 38

Continued from page 37

ID. Newsom had an outstanding warrant. After Newsom was handcuffed, the officer searched the SUV and found a gun. Newsom denied knowing the gun was there. Newsom, however, did offer to the officer that the gun was not stolen. Newsom was charged with the federal crime of being a felon in possession of a gun.

At Newsom's trial, a witness testified that she had never seen Newsom with a gun. On cross, the government wanted to ask the witness about Newsom's gun tattoos. The defense objected claiming relevance ("Your honor, this is awfully far afield…This is just ridiculous"). The Court, however, ruled that the government could get into it only to challenge the witness' credibility. The government then asked the witness if she was aware that Newsom had tattoos of firearms on his body. The witness said that she did not know what type of tattoos Newsom had.

After this exchange, the defense counsel said that he felt he had no other choice but to get into this subject with subsequent witnesses. Newsom's nephew testified that he remembered tattoos of the names of Newsom's mother and brother. Newsom's sister testified about a tattoo of Newsom's father's name and about another with an image of his daugther's face.

On cross of these witnesses, the government got into the various other tattoos on Newsom's body. These included tattoos that said "f*** y'all," "feel my pain," "mob," "thug life," and one that said "live for and die for," which was wrapped around a bag of money. Also asked about were a tattoo on Newsom's neck that depicted a gun and a tattoo also on his neck that said "98 MMCG." Newsom explained this latter tattoo, when he was on the stand, as meaning "98 Main Street Mafia Crip Gang," which was to honor a friend who was the victim of a gang murder.

The district court gave an instruction to the jury that read, in part:

> You also have heard evidence that the Defendant has tatoos [sic] on his body. Evidence of these tatoos [sic] must not be considered by you in determining if the Defendant committed the offense charged in the Indictment. This evidence was admitted initially to challenge the credibility of a witness, not to prove that the Defendant is guilty of the charged offense.
>
> Remember, the defendant is on trial here only for the specific offense alleged in the Indictment, not for any other acts. Do not return a guilty verdict unless the government proves the offense charged in the Indictment beyond a reasonable doubt.

The defense did not object to the instruction.

Judge Gilman delivered the unanimous opinion of the Court.

The Court analyzed the admission of this evidence in two parts. First it analyzed the initial cross of the witness who had said she had never seen Newsom with a gun. Defense counsel having objected to the evidence's relevance, the Court analyzed the error under its abuse-of-discretion standard. The government argued that the cross was admissible because a tattoo of a gun indicated that Newsom had a "liking towards firearms." Alternately, the government argued that the witness saying she had never seen Newsom with a gun was "almost…saying that he doesn't go around firearms, and…that goes to impeach whether she knows whether or not he has tattoos with firearms on him." The Court dismissed these arguments and held:

> We conclude that the district court abused its discretion when it allowed the government to ask Craig whether she had seen Newsom's firearm-related tattoos. Her answer to the government's question was simply not relevant to the question of her credibility. Whether Craig knew that Newsom had *pictures* of firearms tattooed on his body presents a completely different issue than whether Craig had ever seen Newsom possess an *actual* firearm. Even if Newsom had a pistol tattooed on his forehead and Craig admitted that she had seen it, that does not make Craig's testimony that she had never seen Newsom with a firearm more or less believable.

The Court then analyzed whether this error was harmless. The Court found that the one response that the witness was not aware of any firearm tattoos on Newsom was insignificant compared to the entirety of the trial.

The Court then moved onto the unpreserved error regarding the cross of the other witnesses. Because it was not preserved, the Court analyzed it under the plain error doctrine.

Under this doctrine the Court first examined whether there was any error. The Court utilized FRE 403. Under FRE 403, the Court found there was no probative force to the evidence, and that the prejudicial force was large. The evidence "suggested to the jury that Newsom had a hostile, criminal disposition, and a conviction on that basis is obviously improper." The Court found error.

Next, the Court determined whether the error was plain. In order to be plain, the error must be clear or obvious. Because the district court had itself determined that the evidence of tattoo was not relevant to the only issue of importance in the trial – whether Newsom possessed the gun – the Court found that the error was "obvious even to the district court."

Lastly, the Court analyzed whether the plain error affected Newsom's substantial rights. The Court found important that the jury was instructed to not give any weight to the tattoo evidence except as to credibility. Juries are assumed to follow their instructions. The Court found that Newsom was not deprived of a fair trial. ■

Interview with Brigadier General Norman E. Arflack, Secretary of Justice and Public Safety Cabinet

by Dawn Jenkins and Jeff Sherr

What are your goals for moving the Justice Cabinet forward over the next two years?

I want to continue the success of former Justice Cabinet Secretary Steve Pence and former Deputy Secretary, Cleve Gambill. I am particularly interested in continuing the legislative work they began through passage of House Bill 3, a bill passed during the 2007 General Assembly that went into effect in July strengthening sex offender laws. I believe in giving Justice agencies and divisions the training and resources they need, for example training officers and giving them state of the art equipment to achieve their goals. This also includes training and resources for DPA to achieve your goals.

With regard to other Justice legislation, I am convening staff soon to look at the upcoming legislative session and important initiatives we might consider undertaking.

I am interested in complying with the executive order, which we would like to codify, and statutory requirements regarding strategic planning.

How have your personal and professional experiences prepared you for your new role in the Justice Cabinet?

I feel very fortunate for the appointment to the Justice Cabinet. I never dreamed I would go from being a state trooper to Justice Secretary and I am thankful for this opportunity.

All of my experiences help perform my job. Like most people in the Army National Guard, I have had a dual career path. I worked a civilian job while serving in the Army National Guard most of my life. I am from Henderson, Kentucky but moved to Richmond where I was a police dispatcher. I was then hired by the Kentucky State Police and worked in Owensboro as a uniformed trooper, Madisonville as a uniformed sergeant, and most of western Kentucky as a sergeant in Drug Enforcement/Special Investigations (West). My roles were diverse and included special investigations, white collar crime and street level narcotic investigations, and even data processing for a year. I served on executive detail under Martha Layne Collins, the first woman to be elected Governor of Kentucky, during the mid 1980s.

General Norman Arflack

After serving 5 years as an enlisted soldier I graduated from Officer Candidate School and became a Second Lieutenant. I was a track vehicle mechanic and armor officer as a traditional soldier in the National Guard. I was assigned to a number of units in western Kentucky and commanded an armor battalion at Ft. Knox and Criminal Investigative Detachment here in Frankfort.

In 1993, I retired from the Kentucky State Police as a staff officer and went to work for the National Guard Association, a 501(c)19 organization that represents the interests of National Guard members, where I worked for four years. I learned the ins and outs of lobbying and organizational management. I achieved the rank of General Officer after attending the Army War College, a nine month course. I temporarily retired in 2000 to a farm in Anderson County with my wife and children. Upon my wife's encouragement, I went back to work as a probation officer for the Department of Corrections under Ralph Dennis.

After September 11, 2001, I was mobilized to active duty and headed airport detail for all five of Kentucky's commercial airports. I was responsible for hiring the right people, training, and preparing them to insure FAA security measures where adhered to. The soldiers had full police officer power, and most of our hires were from the Department of Corrections and the civilian police agency, all were qualified military police officers. I am proud to say, there were no significant incidents during my ten month tenure. In 2003, I was promoted to Brigadier General.

I have three children, all boys, from 23 years of age down to five years of age. My oldest son just returned from Iraq where he served as an active Army soldier, he is now a member of the Kentucky National Guard and will begin Western Kentucky University this fall. My wife, Cindy Arflack, works for Homeland Security. Needless to say, our discussions at the dinner table are always interesting.

Continued on page 40

Continued from page 39

I have a Master's in Public Administration, which has given me an understanding of how to deal with complex administrative decisions. My exposure to State Police and Corrections has helped me understand the agencies within the Justice Cabinet. I understand both the prosecutorial and the defense perspective of the law. My experience with DPA has been positive. I recall working with Rodney Barnes in Franklin County when I was a probation officer. I would visit DPA. My first exposure to the internal workings of the Justice Cabinet was during the time I worked with Billy Wellman; he was a General, Justice Cabinet Secretary, and one of my mentors.

What do you believe is most important in ensuring public safety?

Ensuring public safety means making a way for everyone to receive the resources, infrastructure, and training they need. We must mold the minds of the police officers and provide continuity in training. Our employees need state of the art equipment. This applies to DPA as well as other agencies. Resources are important, and we must continue the education that was begun by the Fletcher administration. Training is high on my list of priorities as is educating the people we serve.

I see providing public safety from both sides. There are better ways than locking people up. Locking people up is an education for some, but not everyone. I see my job as keeping them from going back to the institutions. I understand it is cheaper for people to be in their community and beneficial members of society. There is also a point in time when we do all we can do and we must send them back.

Children in the home where there is illegal drug activity, for example, are subjected to drugs. Rather than money being spent on drugs, it could be used for basic necessities. We must educate the public and the people we serve. The public needs to know why we are here. I was active in the drug summits and we heard from people in the community who believed enforcement is the answer. Enforcement and prevention go hand in hand. In the Army National Guard, we have a drug demand reduction program that works. There are definitely other options than locking people away.

How do you envision a good Kentucky criminal justice system functioning and the Cabinet's role?

I hate to give you a short answer, but I am not sure there is one answer. I see new challenges everyday and a lot of options. I think I know what I want to do, continue to amplify the successes Justice has already begun and build on them. I surround myself with experienced people and rely on them. My staff are well qualified.

My staff is currently in the process of strategic planning. We want to sit down with the Commissioners and Public Advocate, not just to comply with statute requiring strategic planning, but to come up with answers. The answers will come from them. I expect Ernie will be involved in this process and the collective process of setting and prioritizing our goals. I will decide what direction we go from there.

I do not want this to be paper drill – a statutory goal. I want it to benefit the Commonwealth. I enjoy doing construction projects. I want to be involved in the actual process of "driving the nails" and building a legacy, if you will. My goal is to accomplish a couple of significant things while I am here that I can point to, like seeing a house go up. Satisfaction comes from seeing the finished product.

What is the role of the KCJC?

The Kentucky Criminal Justice Council (KCJC) has not been as involved as it needs to be. We need to get input and different views on how we can better serve the people. I see the Council playing an important role.

What steps do you believe our criminal justice system can take to prevent the wrongful convictions of innocent persons?

I want to train everybody involved in the criminal justice process within our Cabinet. I look at this from a criminologist standpoint. I believe in resources and state of the art equipment, such as the best DNA analysis. Everything takes money, money on both sides, quality defense and law enforcement. Both sides must know their business and have oversight in their investigations. Really simplified, we need to make sure everyone is doing the right thing.

The judicial system will take care of the rest. There will always be over zealous prosecutors and over-zealous defenders. We are the investigators in the Justice Cabinet. We bring the information, which should give the judge, and the jury the proper information to make the right decision.

I have been a law enforcement officer all my life. My father was a law enforcement officer. I would never advocate convicting the wrong person, but likewise, I do not want to let people free who have committed crimes against society.

The Governor spoke of the disproportionate number of KY prisoners who are addicted to alcohol and drugs. He said he didn't believe we can incarcerate ourselves out of the drug problem. What is your vision for addressing alcohol and drug addiction?

Alcohol is a drug and people addicted to alcohol and drugs will do what they have to do to get their fix. The consequences of this are great. We need a methodology for addressing this

problem. Are we winning the war on drugs, probably not, but we are holding our own. I was fortunate to be a part of a Kentucky program which has confiscated over 1 billion dollars worth of marijuana, since their creation obviously, this has helped in reducing the problem. There is always a debate about marijuana and whether or not it is a bridge drug. Regardless, the bottom line is, parents who are users could be buying diapers, food and other things families need to survive. We need to control this issue.

The *Courier-Journal* printed an article about jail overcrowding as it is related to the incarceration rate. Do you envision a solution to jail and prison overcrowding?

I agree we cannot incarcerate our way out of the drug problem in our state. I also believe we have a strong duty to protect the community. There are ways to rehabilitate those who will respond to rehabilitation. Probation and parole can help this system work. As a former probation officer, I know the system can work. Through the probation system, we can reduce the number of incarcerated and assist individuals who have a chance for rehabilitation. We must recognize some people are career criminals while others are treatable.

As for other ways to address overcrowding, the Department of Corrections' effort to release chronically, terminally ill inmates is a "very good thing to do." Commissioner Rees is a compassionate man, who has an idea about the impact of incarceration. I will be meeting with him and others soon to look at legislation and other ways to address the problem of overcrowding in prisons and jails.

The Class D felony program is pushing the problem somewhere else. The goal was to relieve the problem, but other problems surfaced. Part of this is tied to funding for jails. Governor Fletcher and I are working on creative solutions. We just delivered a check to Prestonsburg, as part of a federal initiative made available through the Office of Drug Control Policy. I am excited about the prospect of treatment.

The system has come a long way from my days with Probation and Parole when we put people in county jails where they cut grass. Cutting grass is not the best plan for rehabilitation and treatment.

What would you like to convey to DPA attorneys and staff regarding their role in the criminal justice system?

Ernie and I have talked about this…I would like DPA staff to feel a part of the Justice Cabinet; no one should ever feel left out. I am not really sure this Cabinet is the right fit given the mission of the Justice Cabinet and our agencies. On the other hand, I am not anti-DPA. I am an advocate for DPA. I hope you can understand my position.

I want to provide value to the entire agency. This is a tough job.

I recognize DPA attorneys and staff have a very tough job. One of the first appearances I made in this new position was attending the DPA Annual Banquet in Erlanger. I understand all our advocates work long hours, doing tough work and was happy to see many good DPA staff recognized for their dedication. This is important - recognizing people for a job well done.

I consider myself an advocate for the advocates. ■

BJS Report Highlights Need to Improve Responses to People with Mental Illnesses in the Criminal Justice System

http://www.ojp.usdoj.gov/bjs/abstract/mhppji.htm

- *Mental Health Problems of Prison and Jail Inmates* - has concluded that more than half of all prison and jail inmates have "mental health problems." The issues the report raises have long been pressing concerns for state and local government officials, mental health professionals and consumers, and others committed to improving the response to people with mental illnesses involved in the criminal justice system.

The results confirm what front-line professionals in law enforcement, the courts, and prisons and jails have said for years: that the number of people with mental illnesses in the criminal justice system is a growing problem that requires coordinated response.

Many specialized strategies to improve coordination among criminal justice and mental health professionals are outlined in the 2002 Criminal Justice/Mental Health Consensus Project Report. A growing number of communities across the country are now using the kinds of collaborative approaches and innovative policies the report recommends, including initiatives that help reduce injuries and arrests in law enforcement encounters, enable courts to ensure accountability while meeting the needs of individuals with mental illnesses, and help corrections professionals reduce the numbers of individuals with mental illnesses who cycle through prisons and jails.

AMERICAN COUNCIL OF CHIEF DEFENDERS
NATIONAL JUVENILE DEFENDER CENTER

TEN CORE PRINCIPLES:
FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION
THROUGH INDIGENT DEFENSE DELIVERY SYSTEMS

Ten Principles

1. **The Indigent Defense Delivery System Upholds Juveniles' Right to Counsel Throughout the Delinquency Process and Recognizes The Need For Zealous Representation to Protect Children**

2. **The Indigent Defense Delivery System Recognizes that Legal Representation of Children is a Specialized Area of the Law**

3. **The Indigent Defense Delivery System Supports Quality Juvenile Delinquency Representation Through Personnel and Resource Parity[8]**

4. **The Indigent Defense Delivery System Utilizes Expert and Ancillary Services to Provide Quality Juvenile Defense Services**

5. **The Indigent Defense Delivery System Supervises Attorneys and Staff and Monitors Work and Caseloads**

6. **The Indigent Defense Delivery System Supervises and Systematically Reviews Juvenile Defense Team Staff for Quality According to National, State and/or Local Performance Guidelines or Standards**

7. **The Indigent Defense System Provides and Supports Comprehensive, Ongoing Training and Education for All Attorneys and Support Staff Involved in the Representation of Children**

8. **The Indigent Defense Delivery System Has an Obligation to Present Independent Treatment and Disposition Alternatives to the Court**

9. **The Indigent Defense Delivery System Advocates for the Educational Needs of Clients**

10. **The Indigent Defense Delivery System Must Promote Fairness and Equity For Children**

*The **American Council of Chief Defenders** (ACCD), a section of the National Legal Aid & Defender Association, is dedicated to promoting fair justice systems by advocating sound public policies and ensuring quality legal representation to people who are facing a loss of liberty or accused of a crime who cannot afford an attorney. For more information, see www.nlada.org or call (202) 452-0620.*

*The **National Juvenile Defender Center** (NJDC) is committed to ensuring excellence in juvenile defense and promoting justice for all children. For more information, see www.njdc.info or call (202) 452-0010.* ■

Recruitment of Defender Litigators

The Kentucky Department of Public Advocacy seeks compassionate, dedicated lawyers with ex seling skills who are committed to clients, their communities, and social justice. If you are position please contact:

Londa Adkins

Londa Adkins
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
Tel:(502) 564-8006; Fax:(502) 564-7890
E-Mail: Londa.Adkins@ky.gov

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

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

Kentucky Association of Criminal Defense Lawyers

Membership Information

Annual Dues

Bar Member 1-5 Years	$75.00
Bar Member %+ Years	$150.00
DPA Bar Member 1-5 Years	$50.00
DPA Bar Member 5+ Years	$100.00
Non-Attorney	$25.00
Life Member	$1,000.00

Committees

Legislative/Rules
Membership/Nominees
Finance
Education
Amicus Curiae
Life Membership
Profile and Publicity
Strike Force

Contact:

KACDL
Charolette Brooks
Executive Director
444 Enterprise Drive, Suite B
Somerset, KY 42501
Tel: (606) 677-1687/(606) 678-8780
Fax: (606) 679-3007
Web: kacdl2000@yahoo.com

PRESORTED STANDARD
U.S. POSTAGE PAID
LEXINGTON, KY
PERMIT # 1

THE ADVOCATE

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

Upcoming DPA, NCDC, NLADA & KACDL Education

**** DPA ****

Litigation Practice Institute
Kentucky Leadership Center
Faubush, KY
October 15-20, 2006

Annual Conference
Louisville, KY
June 2007

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

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

For more information regarding KACDL programs:

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

****

For more information regarding NLADA programs:

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

****

For more information regarding NCDC programs:

Rosie Flanagan
NCDC, c/o Mercer Law School
Macon, Georgia 31207
Tel: (478) 746-4151
Fax: (478) 743-0160

**** KBA ****

Annual Seminar
Louisville, KY
June 2007

**** KACDL ****

Annual Meeting
Elizabeth, Indiana
November 17, 2006

**** NLADA ****

Annual Conference
Charlotte, NC
November 8-11, 2006

Appellate Defender Training
Chicago, IL
January 18-21, 2007