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WHAT WENT WRONG? (PART II) COERCIVE POLICE TACTICS AS A RECIPE FOR FALSE CONFESSIONS

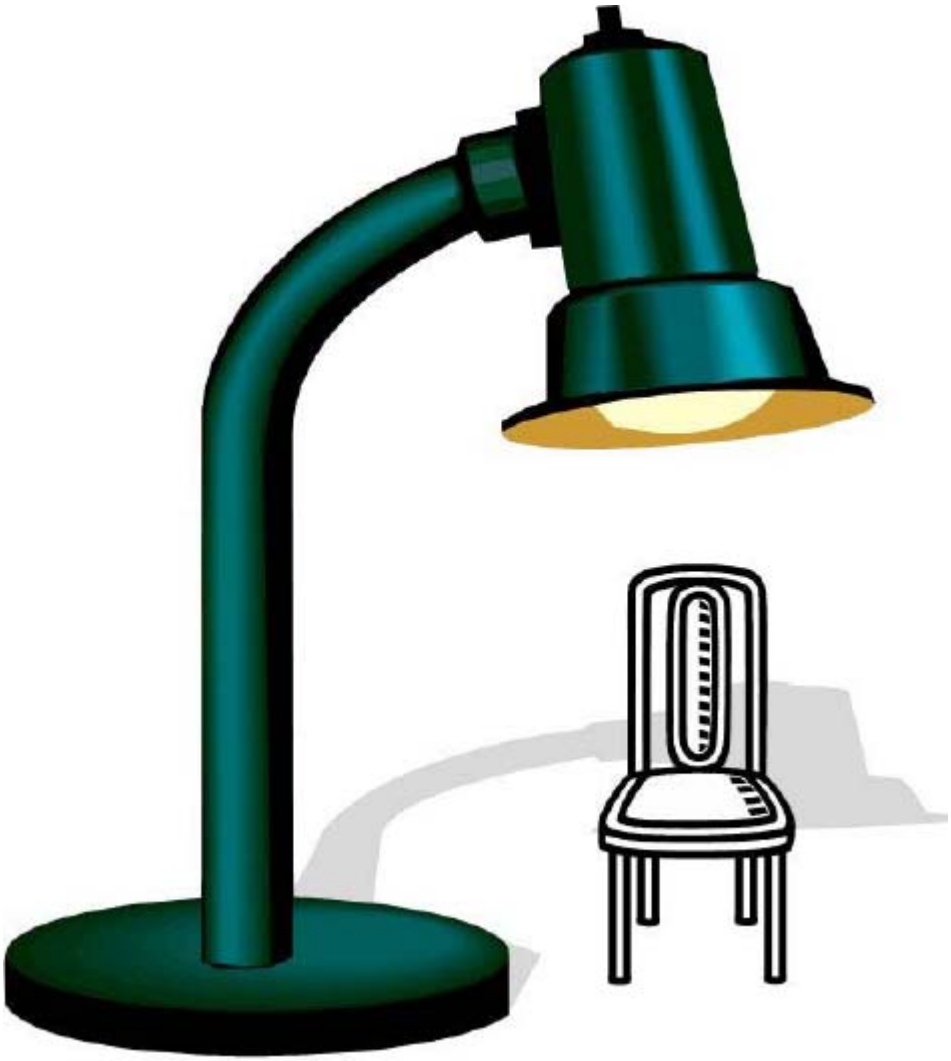

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Table of Contents

What Went Wrong? (Part II) Coercive Police Tactics as a Recipe for False Confessions — Melanie Lowe **4**

Capital Case Review — David M. Barron **9**

Recruitment of Defender Litigators **31**

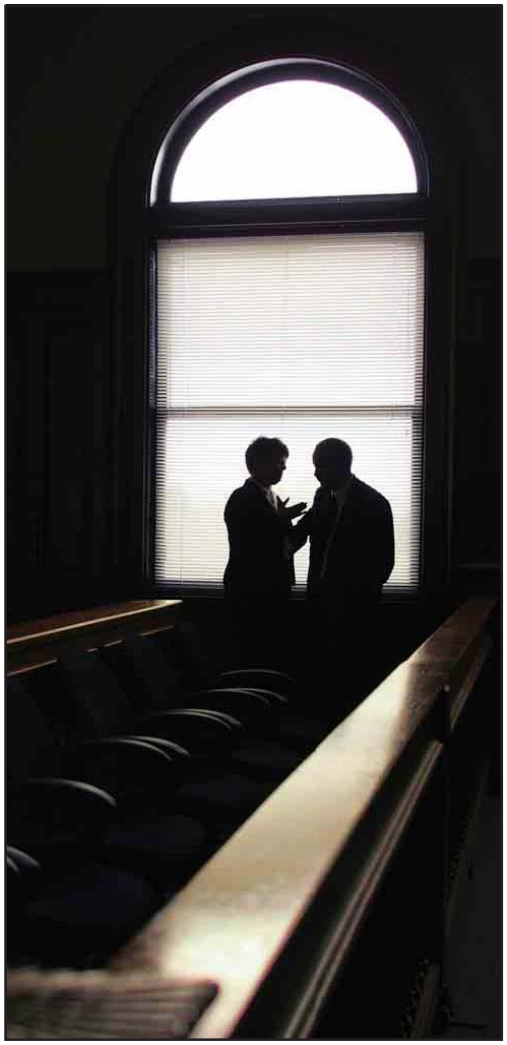
Sixth Circuit Case Review — David Harshaw **32**

Kentucky Case Review — Roy Durham **37**

Plain View — Ernie Lewis **41**

Juvenile Column **50**

Practice Corner **51**



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

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

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FROM THE EDITOR...

Jeff Sherr

Why would an innocent person confess to a crime she did not commit?

John Mark Karr's recent false confession to killing Jon Benet Ramsey brought this question to the surface on a national level. Criminal defense attorneys know this is a question that must be answered in any false confession case.

The Innocence Project's web page, at www.innocenceproject.org, provides the following regarding impact of false confessions on the criminal justice system:

"In a disturbing number of DNA exoneration cases, defendants have made incriminating statements or delivered outright confessions. These cases demonstrate that a confession or admission is not always prompted by internal knowledge or guilt, but may be motivated by external influences. Many factors arise from interrogation that may lead to a false confession, including: duress, coercion, intoxication, diminished capacity, ignorance of the law, mental impairment. Fear of violence (threatened or performed) and threats of extreme sentences have also led innocent people to confess to crimes they did not perpetrate….

"A false confession to any crime is counterintuitive and self-destructive; therefore, it requires a valid explanation. Some false confessions can be explained by the mental state of the confessor. Confessions obtained from juveniles are often unreliable, as children are easy to manipulate through positive and negative feedback and, because of their age, are not always fully cognizant of the situation. Juveniles in particular may believe that they can "go home" as soon as they admit guilt. Confessions obtained from persons with mental disabilities are often unreliable because being accommodating and agreeable, especially to authority figures, is often a survival method for such persons. Further, many law interrogators are not given any special training on questioning suspects with mental disabilities. An impaired mental state due to mental illness, drugs, or alcohol may also elicit incorrect admissions of guilt."

In this edition of *The Advocate*, Melanie Lowe, an attorney with the Kentucky Innocence Project, continues her series examining the causes of wrongful convictions with a close look at false confessions in "Coercive Police Tactics as a Recipe for False Confessions." ■

WHAT WENT WRONG? (PART II) COERCIVE POLICE TACTICS AS A RECIPE FOR FALSE CONFESSIONS

By Melanie Lowe, Kentucky Innocence Project

On September 20, 2006 DNA tests proved that Jeffrey Deskovic did not commit a rape and murder in New York for which he was convicted in 1990. He was convicted when he was 16. Now 32, he had been incarcerated ever since.

On November 17, 1989 the body of 15-year-old Angela Correa was found near a pond in Peekskill, New York. She was last seen two days earlier taking photos for her photography class. Four weeks later, detectives from the local police department approached 16-year-old Deskovic on his way to school to ask if he would accompany them to police headquarters. During this initial round of questioning, Jeffrey asserted his innocence. The detectives suggested that he take a polygraph test but he declined, saying he did not trust the test. During the next two months, Deskovic came to the police station to discuss his theories about the crime, submitted a blood sample, accompanied several detectives to the scene of the crime, and submitted to further questioning. He maintained his innocence, saying that he was speculating about the crime based on his own investigation. Soon after, Deskovic again visited the police station to show detectives a key he had found that he believed might have belonged to the victim. Again, he was asked to take a polygraph test. This time he agreed. Between sessions spent administering a polygraph, Jeffrey was questioned further by investigators, who told him he was failing the polygraph test. After six hours of questioning, the youth confessed to the crime. At the end of the interrogation, he was found sobbing and curled beneath a desk in the fetal position.

Deskovic was convicted of rape, felony murder, and related offenses on December 7, 1990. At the time of the trial, DNA testing excluded him as the source of a semen sample taken from the victim. The prosecution's theory of the case speculated that the semen belonged to the victim's consensual partner, although the partner was never tested. Earlier this year, the DA's office agreed to submit the physical evidence to modern testing and run the profile through the FBI DNA database. The result was a match with a man already incarcerated on other charges. Jeffery Deskovic's conviction was based almost entirely on the "confession" he gave after spending approximately nine hours in police custody without his parents, attorneys, and without access to food.[1]

What Went Wrong?

Melanie Lowe

As defense practitioners are well aware, the primary focus of most police interrogations is confession. Criminal justice professionals estimate that more than 80% of criminal cases are solved by obtaining a confession. Confessions are regarded as the best unequivocal evidence of guilt and a prosecutor's most damaging weapon. As the Deskovic case demonstrates, confession trumps other forms of evidence and alone generally ensures a conviction. Jurors and judges, much like casual observers, assume the motivation for the confession to be internal and tend to overlook circumstantial and situational factors. Social scientists call this "the fundamental attribution error."[2]

How often do false confessions result in wrongful conviction? With the Innocence Project movement still in its infancy in the U.S., there are limited historical statistics. However, in Great Britain, false confessions have ranked second only to misidentification in cases heard by the British Court of Appeals.[3] According to the Innocence Project, 25% of the 183 convictions over-turned by DNA testing involved some form of false confession.[4] While none of the Kentucky exonerations have involved false confessions, it is doubtless that Kentucky prisons wrongfully incarcerate individuals who have been convicted based upon false confessions.

The History of Interrogation Pressure

Historically, physical torture was routinely used to extract confessions and unquestioningly admitted at trials. Gradually, courts began to limit the admissibility of confessions during the mid-1700s leading to the exclusion of torture-produced confessions by the late 1800s. The 19th century saw a growing judicial cynicism toward physically-coerced confession evidence, culminating in the *Brown v. Mississippi*[5] decision. In that case, three black men were tortured, beaten, and threatened into signing a "confession." The three were subsequently sentenced to death. The

Supreme Court overturned their conviction determining that confessions obtained as a result of physical coercion and violence was inadmissible.

The inadmissibility equation was expanded to include mental abuse in *Chambers v. Florida*.[6] The Supreme Court adopted a "totality of the circumstances" test in *Haynes v. Washington*[7] where it was held that the defendant's "will" was overcome by the state's creation of an "atmosphere of substantial coercion and inducement." This line of cases was followed closely by the *Miranda*[8] decision, requiring that the accused be advised of his constitutional rights prior giving any incriminating statements.

Psychological Perspectives on False Confessions

In a world where rubber hoses and bright lights have ceased to be used by law enforcement, it is difficult to fathom why an innocent person would confess to a crime. Experts in the field have isolated three distinct types of false confessions.

Voluntary False Confessions

"A voluntary false confession is a self-incriminating statement purposefully offered in the absence of pressure by the police." Psychological research indicates that individuals who offer voluntary false confession are often plagued by a pathological need for "fame or recognition;" often termed a "morbid desire for notoriety." Voluntary false confessions occur most often in cases which receive much public interest. Some 60 years ago, over 200 people confessed to the kidnapping and murder of the Lindbergh baby.[9] More recently, investigators in the Jon Benet Ramsey case arrested John Mark Carr based upon a confession that turned out to be unsupported by physical evidence. Other times, a voluntary false confessions may be designed to protect a loved one, purge unconscious guilt, or avoid a (real or perceived) more severe punishment.

Coerced-Compliant False Confession

A suspect aware of his innocence who confesses due to coercive, extreme police interrogation has given a coerced-compliant false confession. The Salem Witch confessions of the 17th century are some of the best-known historical examples of this type of false confession. The confessions of the men in the *Brown v. Mississippi* case were the result of physically abusive and extremely coercive police interrogation tactics. One of the most common forms of coerced-compliant confessions result from "brainwashing" tactics employed against POWs during war.[10]

Coerced-Internalized False Confession

This type of confession occurs in innocent persons who are pressured, confused, fatigued, or anxious, then subjected to coercive police tactics causing the subject to actually believe they committed the crime. The concern with this type of false confession is that the individual's "real" memory is altered, sometimes permanently. Nearly all coerced-internalized false confession have two common factors:

(1) vulnerable suspect – "by virtue of youth, interpersonal trust, naiveté, suggestibility, lack of intelligence, stress, fatigue, alcohol or drug use"
(2) presentation of false evidence – "rigged polygraph or other forensic tests, statement supposedly made by an accomplice, or a staged eyewitness identification" designed to convince the suspect of his guilt.

Researchers in the field of eyewitness memory discovered that incorrect information provided after a traumatic event can change the memory recalled and reported. But what techniques used by police cause this result and why?

Dr. Saul Kassin, Professor of Psychology, founder Legal Studies at Williams College, and one of the leading researchers in the field of false confessions, offers some insights. Kassin specifically cites the Reid Technique, one of the more popular interrogation techniques used by law enforcement, as one of the more common and problematic interrogation formats. Understanding the way in which this interrogation technique can cause false confessions can aid attorneys from both sides in preventing wrongful conviction.

Pre-Interrogation

Kassin notes that the Reid Technique prescribes the interrogation may only take place once an initial determination has been made the suspect is lying. Often this judgment is based upon non-verbal cues (slouching, lack of eye contact, unmoving posture), verbal behaviors (paused speech, verbal qualification, rehearsed response), and attitudes (lack of concern, anxiety, guardedness). The Reid Technique directs investigators to use "behavior provoking questions" structured to elicit responses indicative of guilt ("What do you think should happen to the person who did this?" or "Under what circumstances do you believe the person who committed this offense should be given a second chance?"). Using this method, proponents of the Reid Technique claim an 85% accuracy in lie-detection – a statistic which far out-paces the best performance in any laboratory tests. Large numbers of empirical studies have been conducted world-wide over the years and results have demonstrated that individuals can detect deception at a level approximately the same as chance average. When trained, even professionals experience only minor inconsistent improvements, resulting in minor increases in lie-detecting abilities to slightly better than chance averages, if at all.[11]

Continued on page 6

Continued from page 5

Saul Kassin and his associates have conducted numerous studies to test the Reid Technique and its efficacy. The following is a description of one of Kassin's more recent studies, published in 2005:

> "College students and police investigators watched or listened to 10 prison inmates confessing to crimes. Half the confessions were true accounts; half were false – concocted for the study. Consistent with much recent research, students were generally more accurate than police, and accuracy rates were higher among those presented with audio taped than videotaped confessions. In addition, investigators were significantly more confident in their judgments and also prone to judge confessors guilty. To determine if police accuracy would increase if this guilty response bias were neutralized, participants in a second experiment were specifically informed that half the confessions were true and half were false. This manipulation eliminated the investigator response bias, but it did not increase accuracy or lower confidence."[12]

It comes as no surprise to researchers and defenders that the police are not better at detecting deception than the rest of us. The problem is the belief in training and abilities resulting in a slant in the investigative process.

The problem with the Reid Technique's analysis with regard to verbal and non-verbal cues is that the system has a fatal flaw. The cues Reid classifies as evidence of deception – nervousness, fear, confusion, hostility – are also symptomatic of human stress response. The non-verbal cues Reid looks for are in contention with recent psychological research indicating that lying is an effortless cognitive activity. The "behavior-provoking questions" suggested by Reid presuppose that innocent persons will be "punitive, uncompromising and self-confident" and co-operative with investigative requests. These simplistic assumptions lack consideration for the complexity of human behavior and experience, resulting in a determination that the subject is lying ultimately leading to a suggestive and psychologically pressured interrogation.[13]

Interrogation

Dr. Kassin's research determined that Reid and its progeny of interrogation methods are based upon a definition of an interrogator which is guilt presumptive: "The successful interrogator must possess a great deal of inner confidence in his ability to detect truth or deception, elicit confessions from the guilty, and stand behind decisions of truthfulness." When success is defined by the ability to extract an admission and guilt is pre-judged, innocent persons are caught in a game where the rules are anything but fair.

Years of psychological research has demonstrated that once individuals reach a conclusion or belief, they are more likely to interpret new information in a way that reinforces the belief and minimizes contradictory evidence. Kassin cites an example of the man suspected of murdering his wife. Convinced of the subject's guilt, interrogators confronted the man with a "bluff" of evidence to be DNA tested. When the man confessed at the end of a lengthy interrogation process, the interrogators were confident that the bluff worked by simply underscoring the futility of continued denial. After acquittal, the man explained that he falsely confessed to end the interrogation and because he knew DNA would later clear him.

Aside from the guilt presumption, the Reid interrogation process is psychologically coercive. Interrogators are instructed to "remove the suspect from familiar surroundings and place him or her in a small, barely furnished, soundproof room housed within the police station" before commencing the multi-step process. Kassin says that the approach gets suspects to confess by steadily increasing anxiety connected with denial, force the subject into despair, and minimize the perceived consequences of self-incrimination. While the specific processes differ among methods, all have three primary elements in common:

(1) Isolation – "for an indefinite period of time, which increases stress and the incentive to relieve the stress;"
(2) Confrontation – "in which the interrogator accuses the suspect of the crime, expresses certainty in that opinion and blocks all denials, sometimes citing real or manufactured evidence to support the charge;"
(3) Minimization – "in which the sympathetic interrogator morally justifies the crime in the form of an alternative version of events (*e.g.*, that it was spontaneous, accidental, provoked, or peer pressured)."

The effect of this method is to cage the suspect with confession as the only means of escape.[14]

Additional research produced the Gudjonsson Suggestibility Scale (GSS), an instrument designed to assess the risk of a false confession.[15] Application of the scale has produced the following conclusions helpful to criminal defense practitioners:

(1) Suggestibility correlates with cognitive variables and an inverse relationship between intelligence and memory. This means that clients of lower intelligence are more suggestible and these same clients have difficulty maintaining stable memories.
(2) Lower intelligence makes subjects more susceptible to leading questions, aided confabulation, and are more likely to acquiesce. Translated: lower intelligence in clients makes them easy to subject to Reid and other interrogation methods.

(3) The more nervous a client is in the interrogation setting the easier it is to persuade him to change his mind and recollection through applied pressure.
(4) Clients under age 12 are extremely suggestible and easily influenced by negative feedback. Clients between the ages of 12 and 16 score similar to adults in suggestibility but are much more likely to change recollections under pressure. After age 16, clients score nearly identically to adults.
(5) Warning normal adults of misleading or tricky interrogation tactics significantly reduces suggestibility.
(6) Sleep deprivation, alcohol,and drug use increases suggestibility markedly.
(7) Suggestibility has not been correlated with clients suffering from some mental illnesses inducing hallucinations, adjusted reality, and depression.
(8) Clients with low IQ are more likely to think that falsely confessing will have little or no consequences. This factor combined with naiveté causes subjects to depend upon their knowledge of the truth, and believe the truth will ultimately win out.
(9) Younger age and substance abuse, within 24 hours before interrogation, make a false confession more likely, while having an attorney present, or previous incarceration, make false confession less likely.[16]

Kassin highlights two additional problems concerning police tactics – use of fabricated "evidence" of guilt and use of polygraph examinations. Where the psychological research indicates that, when a client's decision to confess is related to the individual's expectations of consequences, dishonest tactics create a greater risk of false confessions. Undoubtedly, the methods which make guilty persons more likely to confess have the unfortunate consequence of also ensnaring innocent and compromised clients. Certainly, the police are more likely to have direct and circumstantial evidence of guilt against those who are actually guilty then those who are innocent. As illustrated by the Deskovic case, another disturbing trend is the introduction of polygraph into the interrogation equation. The tactic has become so common, it has earned its own moniker, "fourth degree." While the polygraph is best-known as a diagnostic tool otherwise inadmissible at trial, law enforcement has seized upon the popular confidence in the polygraph to aid in securing confessions. Officers either feign administration of a polygraph or submit an actual examination to the client. In both instances, the subject is told that he has failed the test. The National Research Counsel Committee has warned against this use of the polygraph as a cause of false confessions.[17]

Finally, Kassin notes that the Reid Technique encourages interrogators to use confessions to create the illusion of credibility. For example, when interrogators write the confessions, Reid recommends purposely placing minor errors unrelated to the crime (incorrect name, address or date) in the text. These errors are either located by the subject or pointed out by the interrogator and the subject is told to correct the error and initial it. This tactic makes it more difficult for clients to distance themselves or attack the confession at trial. Reid further advises detectives to strategically insert or have the suspect insert irrelevant personal facts (like grammar school attended or hospital born at) in the confession. For the guilty suspect, these tactics have no effect. However, when located in a false confession it has "no diagnostic effect" but creates an illusion of credibility.[18]

Future Reforms

Saul Kassin offers the criminal justice community a wealth of suggestions for improving interrogation techniques and preventing false confessions.[19] As with most serious internally-driven reforms, any changes to the interrogation training will be a long time coming; in large part because the Reid Technique and progeny gets police what they want most – confessions. The Innocence Project mounted an immediate reform movement to prevent false confessions including:

- Taping the **entire** interrogation procedure as a means of creating a true objective record of the proceedings (including *Miranda* warnings and waiver).
- When confessions are not completely recorded, the confession should either be excluded or a mandatory instruction requiring the jury to disregard the confession if they believe it to be coerced.
- The recording requirement should be implemented through legislation, action of the highest court in the jurisdiction, or by adoption of policy within police agencies/organizations.

Skeptics argue these reforms will never happen. However, to date, Illinois, Maine, New Mexico, and D.C. have required the taping of custodial interrogation. The highest courts in Alaska, Massachusetts, Minnesota, New Hampshire, New Jersey, and Wisconsin have acted in favor of taped statements. Perhaps most surprising, over 250 jurisdictions have voluntarily adopted policies in favor of recording.[20]

Practical Suggestions for Defense Practitioners

In the absence of reforms, criminal defense practitioners must be the line of defense for clients against coercive police tactics. But what should we do? Here are a few suggestions:

(1) Talk to your client about the circumstances of their interrogation as soon as possible.
(2) Be on the lookout for the "non-confession." Law enforcement is apt to refer to statements in which clients admit to circumstances but not the crime as "confessions." Be prepared to file appropriate pre-trial

Continued on page 8

Continued from page 7

motions preventing both law enforcement and prosecutors from calling your client's statement a "confession" when it is not.

(3) Document and investigate. Corroboration is essential to successful challenges to confessions. Include other investigative officers, transporting officers, and jail staff in the investigation. Time is of the essence if you are to preserve this type of evidence and once the suppression is filed it may difficult to obtain.

(4) Look for patterns in an individual officer's interrogation technique. Often, officers use the same coercive tactics in interrogations providing the defense with essential corroboration. The individual officer's training history may include training in specific interrogation techniques like Reid.

(5) Utilize the district court preliminary hearing to flesh out the officer's version of the interrogation and confession circumstances.

(6) Educate yourself. There is a wealth of information about the various interrogation techniques and years of empirical research on numerous aspects of interrogation. Guidelines set for these methods may be invaluable to suppression. For example, the Reid Technique is not recommended for a variety of mentally compromised subjects. Be sure to visit Saul Kassin's website: ww.williams.edu/Psychology/Faculty/Kassin/research/confessions.htm.

(7) File the suppression and have the hearing. Object early and often.

(8) Use a false confession expert.

(9) Utilize internal police policies at the suppression hearing. Most agencies have policies involving proper treatment of arrested persons. Deviations from these policies may signal coercive procedures.

(10) If the suppression is denied and the client wants to consider a plea, a conditional plea may be a possibility.

In speaking about wrongful convictions, false confessions are an integral part of the system's dirty, little secret. "The difference between the third degree and psychological interrogation is akin to the difference between getting mugged and getting scammed," said Peter Carlson of the Washington Post.[21] Understanding the psychological tactics that contribute to false confessions may prevent the next Jeffrey Deskovic conviction.

ENDNOTES:

1. The Innocence Project website: http://www.innocenceproject.org.
2. Richard P. Conti, "The Psychology of False Confessions," *The Journal of Credibility Assessment and Witness Psychology*, Vol. 2, No. 1., p. 14-15 (1999).
3. Supra 15.
4. "False Confessions and Recording of Custodial Interrogations", http://www.innocenceproject.org.
5. 297 U.S.278 (1936).
6. 309 U.S. 277 (1940).
7. 373 U.S. 503 (1963) at 513.
8. *Miranda v. Arizona*, 384 U.S. 436 (1966).
9. Conti, 20-21.
10. Conti, 22.
11. Saul M. Kassin, "A Critical Appraisal of Modern Police Interrogations" *Investigative Interviewing: Rights, Research, Regulation*, Tom Williamson ed., Wilan, 210-212 (2005).
12. Saul M. Kassin, Christian A. Meissner & Rebecca J. Norwick, "I'd know a False Confession if I Saw One: A Comparative Study of College Students and Police Investigators", *Law and Human Behavior*, Vol. 29, No. 2 (April 2005).
13. Kassin, "A Critical Appraisal of Modern Police Interrogations," 213.
14. Supra 215-216.
15. Meets or exceeds both Frye and Daubert admissibility standards.
16. Joe Wheeler Dixon, "False Confessions: Annotated Clinical Research" *False Confessions Annotated Research*, www.psychologyandlaw.com/false.htm
17. Saul M. Kassin, "A Critical Appraisal of Modern Police Interrogations," 216-218.
18. Supra 220-221.
19. Supra 221-225.
20. "False Confessions and Recording of Custodial Interrogations" www.innocenceproject.org.
21. Jim Dwyer, Peter Neufeld, Barry Scheck, *Actual Innocence*, Doubleday, 92 (2000). ■

A wealth of information regarding false confessions including model pleadings, cases, research articles and web links can be found at the National Legal Aid and Defender Association's Forensics Library at http://www.nlada.org/Defender/forensics/for_lib/Index/Confessions#Confessions

CAPITAL CASE REVIEW

By David M. Barron, Post Conviction Branch

Supreme Court of the United States

Kansas v. Marsh,
126 S.Ct. 2516 (2006)
(Thomas, J., for the Court, joined by, Roberts, C.J., Scalia, Kennedy, and Alito, JJ.; Scalia, J., concurring; Stevens, J., dissenting; Souter, J., dissenting, joined by, Stevens, Ginsburg, and Breyer, JJ.)

The Court granted *certiorari* to decide: 1) whether Kansas' statute requiring the imposition of a death sentence when the aggravating and mitigating circumstances are in equipoise is unconstitutional; 2) whether the Court has jurisdiction to review the Kansas Supreme Court's decision since Marsh's case is not final; and, 3) whether the Kansas Supreme Court's decision was based on adequate and independent state grounds. The Court held that the state court decision was based on federal law thereby giving the Court jurisdiction, and that mandating death when the aggravators and mitigators are in equipoise does not violate the 8th Amendment.

The Court has jurisdiction under 28 U.S.C. §1257: 28 U.S.C. §1257 authorizes the Court to review, by writ of *certiorari*, the final judgment of the highest court of a state when the validity of a state statute is questioned on federal constitutional grounds. Supreme Court precedent permits review under §1257 of the judgment of the highest court of a state, even though the state court proceedings are not complete, where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Here, the Kansas Supreme Court's ruling that Kansas' death penalty statute is facially unconstitutional is final and binding on the lower state courts. Thus, the state will be unable to obtain further review of its death penalty law later in this case, or in any other case. Accordingly, the Court has jurisdiction to review the state court's final determination of the federal issue presented in this case.

The Kansas Supreme Court's decision does not rest on independent and adequate state grounds: The Kansas Supreme Court's decision in this case rests on a prior decision of that Court which was decided on federal grounds and struck down the portion of the Kansas death penalty statute at issue here, but only as applied in that case. In *Marsh*, the Kansas Supreme Court relied on the prior case to strike down the Kansas statute on its face. Thus, the Kansas Supreme Court's decision rested on federal constitutional law.

David M. Barron

The 8th Amendment does not prohibit death when the aggravators and mitigators are in equipoise: The Court held that its decision in *Walton v. Arizona*, 497 U.S. 639 (1990), governs this case and mandates upholding Kansas' statute. In *Walton*, the Court held, "[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." A finding by the jury that the aggravators and mitigators are in equipoise means that the defendant did not prove that the mitigating circumstances were sufficiently substantial to call for leniency. *Walton* suggests that the only capital sentencing systems that would be impermissibly mandatory were those that would automatically impose death upon conviction for certain types of murder. Thus, under *Walton*, a statute that requires a death sentence when the aggravators and mitigators are in equipoise does not violate the Constitution.

Aside from *Walton*, the Court's 8th Amendment jurisprudence does not prevent the imposition of a death sentence when the aggravators and mitigators are in equipoise. A state capital sentencing system must: 1) rationally narrow the class of death-eligible defendants; and, 2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime. Once these requirements are satisfied, a state has a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are weighed. The use of mitigating evidence is a product of the requirement of individualized sentencing. A sentencer cannot be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. A sentencer may not categorically refuse to consider any relevant mitigating evidence. Nothing in this jurisprudence or any of the Court's opinions say or suggest that the Constitution requires a specific method for balancing mitigators and aggravators in capital sentencing

Continued on page 10

Continued from page 9

proceedings. Rather, discretion in this regard is left to the individual states. Thus, Kansas' death penalty statute cannot violate the federal constitution solely because it mandates death when the aggravators and mitigators are in equipoise.

Scalia, J., concurring: Scalia attacks the studies suggesting innocent people have been executed and says that the cases of innocent inmates being exonerated establishes that the system works.

Souter, J., dissenting: Because the death penalty is reserved for the worst of the worst and a finding by the jury that the aggravators and mitigators are in equipoise necessarily means that the defendant is not one of the worst of the worst, the 8th Amendment prohibits imposition of a death sentence when the aggravators and mitigators are in equipoise. In the words of Justice Souter, "[a] law that requires execution when the case for aggravation has failed to convince the sentencing jury is morally absurd, and the Court's holding that the Constitution tolerates this moral irrationality defies decades of precedent aimed at eliminating freakish capital sentencing in the United States."

***Hill v. McDonough*,**
126 S.Ct. 2096 (2006)
(Kennedy, J., for a unanimous Court)

In *Nelson v. Campbell*, 541 U.S. 637 (2004), the Supreme Court of the United States held that a challenge to the "cut down" procedure as a means of venous access to carry out a lethal injection is akin to a conditions of confinement suit and thus does not have to be raised as a habeas action but rather can be challenged in a civil rights action under 42 U.S.C. §1983. A habeas action challenges the lawfulness of a conviction or the duration of the sentence while a §1983 action challenges only the circumstances of confinement, *i.e.*, relief will not invalidate the conviction or prevent the sentence from being carried out. Relying on this and *Nelson*, Hill filed a §1983 suit challenging the chemicals and procedures that were to be used to carry out his execution by lethal injection. The federal district court construed the suit as a habeas petition and dismissed the petition as an unauthorized successive petition. The 11th Circuit affirmed. After Hill was strapped to the gurney and had the I.V.s inserted into his body, the Supreme Court of the United States stayed Hill's execution, granted *certiorari*, and reversed the 11th Circuit, holding that Hill's suit was governed by *Nelson* and thus cognizable as a §1983 suit.

A challenge to the chemicals and procedures used in lethal injection is like *Nelson*: In *Nelson*, the Court held that the action was cognizable in a §1983 suit because, if successful, the suit would not necessarily prevent the state from executing him. The same is true for Hill's suit. His complaint makes this clear - - it only seeks to enjoin the state "from executing him in the manner they currently intend." Specifically, Hill contended that the lethal injection protocol causes a foreseeable risk of unnecessary pain and he conceded that other methods of lethal injection would be constitutional. In addition, the state does not contend that granting Hill an injunction would leave the state without any practicable, legal method of executing Hill by lethal injection, and Florida law does not require the state to use the challenged procedure. Thus, as in *Nelson*, a grant of injunctive relief could not be seen as barring the execution of Hill's sentence.

The condemned inmate is not required to identify an alternative, authorized method of execution: The state argued that a §1983 suit challenging a portion of an execution procedure should be allowed to proceed as a 1983 action only if the condemned prisoner identifies an alternative, authorized method of execution. The Court disposed of this argument quickly on the grounds that: 1) although Nelson's affirmative identification of an acceptable alternative means for obtaining venous access supported the Court's holding, it was not decisive to the Court; and, 2) imposition of heightened pleading requirements are mandated by the Federal Rules of Civil Procedure not, as a general rule, through case-by-case determinations of the federal courts.

A stay of execution is not automatic: Filing an action that can proceed under §1983 does not entitle the plaintiff to a stay of execution as a matter of course. As stated in *Nelson*, a stay of execution is an equitable remedy. Thus, as with other stay applicants, inmates seeking time to challenge the manner in which the state plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits. A court considering a stay of execution must also apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay."

Note: The standard for granting a stay of execution is different depending on: 1) whether the stay is being sought in state court;2) the U.S. Supreme Court; 3) a federal court other than the U.S. Supreme Court; 4) on direct appeal; 5) on state post conviction; 6) on federal habeas review; or, 7) on a successive habeas petition. For more information on this, please contact the author of this article.

Note: In the wake of this decision, the Governor of Florida re-scheduled Hill's execution. The federal district court denied Hill an injunction on the basis that by filing his suit shortly before his scheduled execution, Hill unduly delayed. The Eleventh Circuit affirmed and the Supreme Court of the United States denied Hill a stay of execution, without acting on his petition for a writ of certiorari, by a vote of 5-4. Hill was executed. Although only four votes are necessary to grant certiorari, five votes are required to stay an execution or to vacate a stay of execution. For more information on the "Rule of 4," or what to do when you have four votes and need the fifth, please contact the author of this article.

House v. Bell,
126 S.Ct. 2064 (2006)
(Kennedy, J. for the Court, joined by, Stevens, Souter, Ginsburg, and Breyer, JJ; Roberts, C.J., concurring in part and dissenting in part, joined by, Scalia and Thomas, JJ; Alito took no part in the consideration of this case)

On appeal of the denial of state post conviction relief, House raised only a jury instruction claim, thereby defaulting his ineffective assistance of counsel and prosecutorial misconduct claims. In an attempt to excuse the default so the federal courts could reach the merits of House's defaulted claims, House argued in federal court that he satisfied the miscarriage of justice/actual innocence exception for excusing a procedural default. After holding an evidentiary hearing on this, the district court ruled that the miscarriage of justice standard had not been satisfied. The decision was affirmed by the Sixth Circuit and the Supreme Court granted *certiorari* and reversed, sending the case back to the federal court to review the merits of House's defaulted claims for relief.

[T]he court must make "a probabilistic determination about what reasonable, properly instructed jurors would do."

Actual innocence standard for excusing procedural default: Generally, claims not reviewed in state court because of the failure to comply with state rules for raising the claim cannot be reviewed in federal court unless the cause for the default and prejudice from the asserted error or a miscarriage of justice has been established. A miscarriage of justice occurs when the petitioner can show actual innocence of the crime or innocence of the death penalty. A petitioner asserting innocence of the crime as a gateway to defaulted claims must establish that, in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. In determining whether this standard is satisfied, a habeas court must consider "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." Based on this total record, the court must make "a probabilistic determination about what reasonable, properly instructed jurors would do."

The AEDPA does not replace the more likely than not standard with the clear and convincing evidence standard: The portions of the AEDPA that deal with the clear and convincing evidence standard deal with either obtaining an evidentiary hearing on claims the petitioner failed to develop in state court or filing a successive habeas petition that does not involve a retroactively applicable new law. Because neither of these provisions deal with the issue presented by this case - - a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence - - the clear and convincing evidence standard used in some provisions of the AEDPA are inapplicable here.

Clarity of district court's factual findings determines whether to rely upon the findings: Factual findings by a federal district court acting in a habeas proceeding are given deference when the findings are based on evidence presented to the district court. Reliance on the determinations of a district court is weakened when an appellate court is uncertain about the basis for some of the district court's conclusions.

House has satisfied the actual innocence standard for excusing the default of his constitutional claims: In an attempt to satisfy the actual innocence gateway to review of his defaulted claims, House presented evidence establishing: 1) that in contradiction to evidence presented at trial, the semen on the victim's clothing came from her husband, not from House; 2) that the victim's husband beat his wife and confessed to more than one person that he killed the victim; and, 3) that the blood on House's clothing that, according to trial testimony belonged to the victim, ended up on the House's clothing because it spilled on the clothing while at the crime lab. Although the Court held that the contaminated blood and semen not belonging to House was not enough by itself to satisfy the actual innocence exception to procedural default, the Court held that the cumulative effect of this new evidence satisfies the standard. In support of this, the Court noted: 1) "when identity is in question, motive is key"; 2) that particularly in a case based on circumstantial evidence, a jury would give great weight to the prosecutor's suggestion that House committed an indignity on the victim and the evidence supporting that; 3) because society demands accountability when a sexual offense has been committed, the trial evidence showing that semen on the victim came from House likely was a factor in persuading the jury to convict House of murder; 4) the sentencing jury found that the murder was committed in the course of a rape or kidnapping; 5) the jury was advised that House had a previous conviction for sexual assault; 6) the fact that House did not sexually assault the victim destroys the motive presented at trial that House went to the victim's residence and lured her away in order to commit a sexual offense; 7) the prosecution argued at trial that House could not explain what blood was doing on his jeans; 8) the victim's husband had the opportunity to commit the murder; 9) the record indicates no reason why the two women who came forward saying the victim's husband confessed to the murders would want to frame the victim's husband or to help House; and, 10) because the confession

Continued on page 12

Continued from page 11

by the victim's husband was a spontaneous statement recounted by two eyewitnesses with no evident motive to lie, it is more probative than incriminating testimony from inmates, suspects, or friends or relatives of the accused.

Note: The Court noted that because the federal district court held an evidentiary hearing and the state did not challenge the decision to hold a hearing, the Court has no occasion to elaborate on an observation in a prior decision that when considering an actual innocence claim in the context of a request for an evidentiary hearing, the district court need not test the new evidence by a standard appropriate for deciding a motion for summary judgment but rather may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence.

Note: *The Court noted that it need not decide the issue of whether a freestanding actual innocence claim is viable as the Court assumed in Herrera v. Collins, 506 U.S. 390 (1993), but stated that the standard is higher than the standard for excusing procedural default and that House does not satisfy whatever the high standard would be.*

United States Court of Appeals for the Sixth Circuit

***Holton v. Bell*,**
No. 06-6178 (6th Cir. Sept. 18, 2006)
(unpublished order)
(Merritt, Gibbons, Griffin, JJ.)

Holton waived his appeals and volunteered for execution. His attorneys, however, filed a habeas petition and an accompanying motion for a stay of execution in the federal district court, arguing that Holton was not competent to make a rational decision to waive appeals and volunteer for execution. The federal district court denied the petition, but granted a certificate of appealability on the issue of whether Holton's attorneys failed to demonstrate, under the standard established in *Harper v. Parker*, 177 F.3d 567, 572 (6th Cir. 1999), reasonable cause to believe that Holton is not competent to make a rational decision to dismiss his pending federal habeas corpus petition. Under *Harper*, a petitioner is not competent to waive appeals and volunteer for execution when the petitioner lacks the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand[,] ··· is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." While this appeal was pending in the Sixth Circuit, Holton filed a *pro se* petition for an original writ of habeas corpus in the Supreme Court of the United States. The Sixth Circuit granted the motion for a stay of execution for two reasons: 1) to permit briefing on whether Holton's attorneys demonstrated that Holton is not competent to make a rational decision to dismiss his pending habeas petition; and, 2) Holton filed an original petition for a writ of habeas corpus in the Supreme Court of the United States, in which Holton himself requested a stay of execution and raises new issues.

Note: A petitioner is entitled to a stay of execution on an initial habeas petition if the federal district court cannot resolve the merits of that petition prior to the scheduled execution. Lonchar v. Thomas, 517 U.S. 314, 320 (1996). Likewise, a petitioner is entitled to a stay of execution on the appeal from the denial of an initial habeas petition if the appellate court is unable to decide the merits of the appeal prior to the scheduled execution date. Barefoot v. Estelle, 463 U.S. 880, 889 (1983).

Note: *In Awkwal v. Mitchell, 2006 WL 559370 (6th Cir. 2006) (unpublished), Judge Gilman questioned whether the Harper standard, which relies on Rees v. Peyton, 384 U.S. 312 (1966), or the standard articulated in 18 U.S.C. §4241, whether the petitioner "is able to understand the nature and consequences of the proceedings and able to assist his defense," is the proper standard to apply in determining competence to waive appeals and volunteer for execution.*

***Williams v. Anderson*,**
460 F.3d 789 (6th Cir. 2006)
(Clay, J., for the Court, joined by, Moore, J.; Siler, J. concurring)

Standard of review under the AEDPA: Legal conclusions of the district court are reviewed de novo, but habeas relief can be granted only if the state court ruling resulted in a decision that is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or, 2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. A state court decision is "contrary to" if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. A state court decision unreasonably applies clearly established law if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

A state court's failure to articulate reasons to support its decision is not grounds for reversal. In such a case, the Sixth Circuit conducts an independent review of the claims and must uphold the state's summary disposition unless the court's independent review of the record and pertinent federal law persuades the Court that its result contravenes or unreasonably applies clearly established federal law, or is based on an unreasonable determination of the facts in light of the evidence presented. By its own terms, the AEDPA standard applies only to habeas claims that were adjudicated

on the merits. Thus, where the state court fails to adjudicate a claim on the merits or fails to adjudicate a portion of a claim on the merits, AEDPA's limitations on granting habeas relief do not apply.

The law of procedural default: Federal court will not consider the merits of procedurally defaulted claims, unless the petitioner demonstrates cause for the default and prejudice resulting therefrom, or that failing to review the claim would result in a fundamental miscarriage of justice. A claim is procedurally defaulted if the petitioner fails to comply with state procedural rules in presenting a claim in state court and, because of that, the state court declines to reach the merits of the claim, or if the petitioner fails to raise the claim through the state's ordinary appellate review process and at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim. A claim is adequately raised in state court if it was fairly presented to the state court by asserting both the legal and factual basis for the claim. This is accomplished by doing one of four things: 1) relying on federal cases employing constitutional analysis; 2) relying on state cases employing federal constitutional analysis; 3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or, 4) alleging facts well within the mainstream of constitutional law.

Williams' claim involving improper testimony is defaulted: On direct appeal, Williams argued a violation of the Ohio Rules of Evidence. Because his brief did not mention due process, the federal constitution, the Fourteenth Amendment, or cite to a Supreme Court case, Williams defaulted his claim.

Direct appeal counsel's ineffectiveness satisfies the cause and prejudice standard for excusing the default of petitioner's IAC claim for failing to investigate mitigating evidence: Petitioner raised trial counsel's ineffectiveness for failing to investigate and present mitigating evidence on both direct appeal and in post conviction, where additional evidence that could not be presented on direct appeal was submitted in support of the claim. The state court denied the claim on the merits on both direct appeal and in post conviction, but because the state court cannot address a claim already decided on the merits on direct appeal, the Sixth Circuit decided that it must only review the decision of the state court on direct appeal. Yet, relying on ineffective assistance of direct appeal counsel, the Sixth Circuit considered evidence submitted in post conviction that supported the claim. Under Ohio law, IAC claims must be brought on direct appeal if the appellant has new counsel on appeal and the trial record contains sufficient evidence to support the claim. Where the trial court record does not contain sufficient evidence to support the claim, it must be brought in post conviction, where evidence from outside the record may be introduced. If an IAC claim is brought on direct appeal, under Ohio law, it cannot be re-raised in post conviction. Direct appeal counsel raising the IAC claim despite the absence of evidence in support of the claim in the record falls below an objective standard of reasonableness and thus constitutes cause to excuse the default, particularly because IAC claims based on trial counsel's failure to investigate and present mitigating evidence can never be proven based solely on evidence in the record because the record necessarily does not contain evidence of prejudice. An independent finding of prejudice is unnecessary because where the cause is ineffective assistance of counsel, the showing of prejudice to prevail on the underlying IAC claim will also establish prejudice to excuse the default.

Trial counsel's failure to investigate and present mitigating evidence was deficient performance: The decision to forego the presentation of mitigating evidence cannot be reasonable trial strategy unless the decision is made after a reasonable investigation into mitigating evidence. In other words, the failure to investigate before deciding not to present mitigating evidence is deficient performance as a matter of law. Thus, trial counsel's decision to focus on reasonable doubt at the sentencing phase was not a reasonable trial strategy because defense counsel never conducted an investigation into mitigation before deciding to pursue this strategy - - a finding that cannot be refuted by the fact that the affidavit from trial counsel did not expressly state that he did not conduct an investigation. Such a negative inference is inappropriate and unpersuasive, particularly because it assumes trial counsel was willing to help with the ineffective assistance of counsel claim.

Trial counsel's failure to investigate and present mitigating evidence was prejudicial: Because the state court failed to reach the issue of prejudice, the prejudice prong of the ineffective assistance of counsel standard is addressed *de novo*. In addressing prejudice, a court must reweigh the mitigating evidence against the aggravating evidence and consider all the mitigating evidence, including evidence presented in habeas proceedings. In post conviction, petitioner submitted affidavits from six friends and family members and a psychologist establishing that: 1) Petitioner's mother was an alcoholic, who neglected him and hit him; 2) Petitioner's father left his mother when Petitioner was young; 3) Petitioner's Uncle, who was his primary male role model, was a career criminal; 4) Petitioner grew up in an environment, in which there was an expectation that violence can and sometimes needs to be used, that people are constantly attempting to exploit others, and that illegal activities are often to be admired; 5) Petitioner was dependent on cocaine at the time of the murder, and the cocaine induced paranoid fears that Petitioner could not distinguish from reality; 6) Petitioner suffered from Dyssocial Reaction, Mixed Personality Disorder with Anti-social and Narcissistic Features; 7) Petitioner was once committed to the Afro-Set, a black Nationalist organization; and, 8) Petitioner treated

Continued on page 14

Continued from page 13

his wife's autistic son like his own. Not only was this evidence mitigating, but Petitioner's friends and family would have humanized him. Thus, the evidence listed above creates a reasonable probability that at least one juror would have voted against death, thereby satisfying the prejudice prong and requiring reversal of petitioner's death sentence.

Unanimous-life instruction was constitutional: The trial court's instruction to the jury that any verdict recommending life would have to be unanimous properly reflected Ohio law, and thus did not violate the Eighth Amendment by misleading the jury in a way that made the jury feel less responsible for its sentencing verdict.

Acquittal-first jury instructions violate the Eighth and Fourteenth Amendments: An acquittal-first jury instruction is an instruction that requires a jury to unanimously reject the death penalty before it can consider a life sentence. This type of instruction violates the Eighth Amendment because it precludes individual jurors from giving effect to mitigating evidence. It may also violate due process by denying a defendant the right to a fair trial by creating the risk that a lone juror improperly imposed a death sentence on a defendant because the juror mistakenly believed that he or she was prohibited from considering life unless all of the jurors rejected death. But because petitioner did not raise this claim in state court, it is defaulted, barring the Court from granting relief.

Cumulative trial error not reversible under AEDPA: The Supreme Court has repeatedly stated that fundamentally unfair trials violate due process and common sense dictates that cumulative errors can render trials fundamentally unfair. Additionally, the Supreme Court has expressly cumulated prejudice from distinct errors under the Due Process Clause. Yet, Sixth Circuit law is that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on the issue. As a result, "no matter how misguided this case law may be," the Court cannot grant relief for cumulative error.

Note: Counsel should continue raising cumulative error claims and should argue that cumulating trial error is clearly established law under Chambers v. Mississippi, 410 U.S. 284, 298 (1973), where the Supreme Court granted relief based on the cumulative effect of the errors. An explicit statement of a particular rule by the Supreme Court is not necessary to make a rule clearly established. Rather, "relevant precedents include not only bright-line rules but also the legal principles and standards flowing from precedent." Getsy v. Mitchell, 456 F.3d 575 (6th Cir. 2006), quoting, Ruimveld v. Birkett, 404 F.3d 3d 1006, 1010 (6th Cir. 2005). Thus, counsel should argue that Chambers stands for the legal principle that the prejudice from trial errors should be cumulated.

The Court also denied a Brady claim and a biased trial judge claim.

[T]he Supreme Court has specifically held that a petitioner shows cause for the failure to raise a *Brady* claim in state court "when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence."

Siler, J., concurring: Because the Court granted the writ as to Williams' death sentence, Siler believes the Court should not have addressed the other sentencing phase issues raised in this case.

***Bell v. Bell*,**
460 F.3d 739 (6th Cir. 2006)

(Clay, J., for the Court, joined by, Cole, J.; Gibbons J., concurring in the denial of relief on the IAC claim but dissenting from granting relief on the Brady claim)

Standard for determining whether a claim is barred from review by procedural default: A four-part test applies: 1) the court must ascertain whether there is an applicable state procedural rule; 2) the court must determine whether the state courts actually enforce the rule; 3) the court must decide whether the state procedural forfeiture is an adequate and independent state ground on which the state can rely to foreclose review of a federal constitutional claim; and, 4) if the defendant did not comply with the rule, the defendant must demonstrate that there was cause for him to not follow the procedural rule, and that he was actually prejudiced by the alleged constitutional error. But if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, the claim is procedurally defaulted for purposes of federal habeas.

Bell satisfies the cause and prejudice standard to excuse the procedural default of his *Brady* claim: Because Bell did not present his *Brady* claim (state's failure to disclose material, exculpatory evidence) to the state courts, it is procedurally defaulted. However, the Supreme Court has specifically held that a petitioner shows cause for the failure to raise a *Brady* claim in state court "when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence." Here, Bell requested any exculpatory or impeachment evidence that the prosecution had in its possession and the prosecution provided nothing. Bell thus could not have made his *Brady* claim in state court because he had no way of knowing that the prosecution failed to disclose such evidence. Moreover, once the prosecution responded to Bell's request for exculpatory evidence with an empty hand, Bell was under no duty to engage in further investigation to determine whether the prosecution withheld evidence. Thus, to deny

cause in this case would be to allow the prosecution to doubly benefit from its actions: the prosecution could ignore its constitutional duty to provide exculpatory evidence, and it could evade review for its behavior by asserting state procedural default. This result must be rejected. Because the merits of a *Brady* claim involve a prejudice analysis - - a showing of materiality of the suppressed evidence - - the prejudice analysis to excuse the default is consumed by the standard for granting relief on a *Brady* claim.

Standard for prevailing on a claim that the prosecution withheld evidence: Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution has a constitutional duty under the Due Process Clause to disclose exculpatory evidence, including impeachment evidence, that is material to either guilt or punishment. In order to prevail, a petitioner must establish that: 1) the evidence at issue is favorable to the accused; 2) the evidence was suppressed by the state either willingly or inadvertently; and, 3) prejudice, which is defined as materiality, must have ensued. Materiality is established "if there is a reasonable probability that, had the suppressed evidence been disclosed to the defense, the result of the proceeding would have been different." In making this determination, four points must be recognized: 1) a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal, but rather when in the absence of the suppressed evidence, the defendant received a trial resulting in a verdict worthy of confidence; 2) materiality is not a sufficiency of the evidence test, meaning that it is the lack of confidence in the verdict, not the ability to support the verdict with the entirety of the evidence, that is critical; 3) once a reviewing court has found constitutional error, there is no need for further harmless error review, because no *Brady* violation is harmless; and, 4) the suppressed evidence must be considered collectively, not item by item, meaning that when the prosecution decides whether it must disclose evidence under *Brady*, the prosecution must determine whether the cumulative effect of such evidence would rise to the threshold level of materiality.

Tacit agreements must be disclosed under *Brady*: Bell's case presented an issue of first impression in the Sixth Circuit that has also not been addressed in any capacity by the Supreme Court - - whether an express agreement between the prosecution and a witness is required under *Brady* before the prosecution must disclose evidence of potential or actual lenient agreement. Specifically, a witness approached the prosecution to testify against Bell, motivated by his desire for a transfer of facilities or for a work release program, the prosecution *nolle prosequied* unrelated charges against the witness, and the prosecution wrote a letter to the parole board on behalf of the witness. In determining whether the failure to disclose this violated *Brady*, the Sixth Circuit recognized that "[n]o principled reason exists for differentiating between spoken and unspoken agreements between the prosecution and a witness. The relevant fact under *Brady* is whether the evidence is exculpatory or impeaching. An express agreement between the prosecution and a witness is impeaching because it is evidence that the witness has an interest at stake. . . . This same interest in partiality exists under a tacit agreement and so this evidence would be equally impeaching and thus subject to disclosure under *Brady*." Thus, the Court held that "if a petitioner proves that a witness approached the prosecution to testify with the expectation of some benefit, and that the prosecution understood this expectation and fulfilled the expectation by actually bestowing some benefit, the petitioner has sufficiently demonstrated a tacit agreement that must be disclosed under *Brady*. Because that is exactly what happened in this case, Bell has established a *Brady* violation, requiring reversal of his conviction if he can establish materiality. Because the witness negated Bell's identity defense by specifically naming Bell as the shooter and because the witness provided the only evidence as to premeditation, evidence that could impeach the witness was material.

The Court, however, went further than necessary in addressing the requirement to disclose tacit agreements that are fulfilled. The Court also held that a tacit agreement must be disclosed regardless of when the prosecution acts upon that agreement, because it is the formation of the agreement, not the execution of the agreement that matters, and that the fact that a witness was shopping to exchange his testimony for benefits was impeaching information that should have been disclosed because it impacts the witness' credibility, even absent any agreement.

Even if the suppressed material could be located, no obligation to search for it exists when the prosecution represents that it has disclosed all *Brady* material.

Bell defaulted his IAC claim for failing to investigate and present evidence that he lacked the *mens rea* necessary for first degree murder: In state post conviction, Bell raised an IAC claim based on counsel's failure to object to and raise on appeal the admissibility of a lay opinion offered by a state's witness on the mental condition of the dying victim, and counsel's failure to raise the issue as to whether a rational trier of fact could find beyond a reasonable doubt that Bell was guilty of murder in the first degree absent proof of deliberation. In determining whether a claim had been fairly presented to the state courts, federal courts look to whether the petitioner asserted both a factual and legal basis for his claim in state court. An IAC claim based on one ground does not exhaust state court remedies with respect to an IAC claim based on another ground. Thus, because none of the claims Bell presented in state court raised the factual basis of his trial counsel's failure to investigate or present evidence of alcoholism and mental illness, Bell's claim is defaulted. As cause to excuse the default, Bell asserts that

Continued on page 16

Continued from page 15

the state court did not provide funding for expert witnesses and IAC of post conviction counsel. Both of these assertions fail, because: 1) Bell could have made a viable claim as to IAC of counsel due to counsel's failure to investigate and present mitigating evidence of Bell's alcoholism and mental illness by introducing written records; 2) IAC can only be cause if counsel's error meets the threshold for a Sixth Amendment violation of the right to effective assistance of counsel; because there is no right to effective assistance of counsel, this cannot constitute cause, despite Bell's argument that IAC of trial counsel is a claim that can first be brought in a state post conviction proceeding; and, 3) counsel conducted a reasonable investigation by requesting a mental health examination of Bell, by obtaining Bell's mental health records from various facilities; and, by abandoning an intoxication defense only because after having this defense explained to him, Bell insisted on an identity defense.

Slagle v. Bagley,
457 F.3d 501 (6th Cir. 2006)
(Rogers, J., for the Court, joined by, Boggs, C.J.; Moore, J., dissenting)

As a post-AEDPA case, the court applied the AEDPA standard discussed in *Williams* above, and reviewed the district court's legal conclusions de novo and did the same with the district court's factual findings since the district court made no independent factual findings. At trial, Slagle's defense was that his voluntary intoxication prevented him from forming the intent to commit intentional murder. Before the Sixth Circuit, because Slagle only raised a due process claim stemming from allegedly improper comments by the prosecutor rather than individual violations of constitutional rights, such as the Fifth Amendment privilege against self-incrimination, the only issue on appeal was whether the improper comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. The Ohio Supreme Court applied this standard, which means that the state court decision was not contrary to clearly established Supreme Court law. Thus, relief can be granted only if the state court unreasonably applied this law. In making this determination, the court considered four factors: 1) the likelihood that the remarks would mislead the jury or prejudice the accused; 2) whether the remarks were isolated or extensive; 3) whether the remarks were deliberately or accidentally presented to the jury; and, 4) whether other evidence against the defendant was substantial. Based on these factors, the court held that the prosecutor's improper comments were not so egregious as to constitute a denial of due process.

The state's procedural default defense does not bar review: Procedural default does not bar review of the improper prosecutorial comment claim, for two reasons: 1) by merely saying that 17 of the statements of prosecutorial misconduct are procedurally defaulted, the respondent did not identify with specificity which claims were defaulted and therefore waived the affirmative defense of procedural default; and, 2) it is unclear the extent to which the state court reached the merits of the prosecutorial misconduct claim rather than relying on a procedural bar.

Proper comments by the prosecutor: The Sixth Circuit held that the following comments were proper: 1) questioning Slagle about selling drugs to children and whether Slagle ever broke into a house to get money, because both questions went to Slagle's economic condition, which was relevant to whether he had a motive or the intent to commit robbery; 2) questioning Slagle about whether he ever contributed to his family, because this inquiry was relevant to Slagle's mental state; 3) questioning Slagle about whether he prayed and liked prayer, because it was not introduced to attack Slagle's religious beliefs but rather as evidence to prove that Slagle told one of the victim's he did not like to hear prayers; 4) questioning Slagle as to whether he would have stabbed the police officer in the back if he had a chance and asking Slagle if he did not want anyone to be able to tell the story of what he did that night, because these questions were relevant to whether Slagle had formed the intent to commit murder; 5) saying that the victim was ready to meet God, because it was a reasonable inference from the evidence that the victim was praying during the ordeal; 6) referring to circumstances of the offense, which counsel argued amounted to non-statutory aggravators, because circumstances of the crime are admissible to rebut the existence of any mitigating circumstances and because consideration of non-statutory aggravators, even if contrary to state law, does not violate the federal constitution; and, 7) arguing that defense counsel was in a "mad scramble at this point to salvage Slagle's credibility," because it was a comment on the defense's trial strategy.

Improper comments by the prosecutor: The Sixth Circuit held that the following comments were improper: 1) saying in closing argument that Slagle had the nerve to tell the jury, "I pray"; 2) asking Slagle if he took the scissors from the bedroom after the murder so he could use them in his next …; 3) asking Slagle if policemen scratch; 4) saying that the "body does not lie" in reference to a statement by the coroner outside the courtroom about the number of wounds suffered by the victim, because this comment was referring to an out-of-court statement of an expert witness to contradict Slagle's testimony; 5) saying "it's a damn good thing the kids didn't wake up" and "it is a good thing Slagle didn't know that Howard could identify him," because a prosecutor cannot express opinions having no basis in the record; 6) posing questions with, Slagle was keyed in to not remember; 7) saying "Slagle and his kind today represent some of the greatest threats against community and civilization as we know it"; 8) referring to Slagle's expert's theory as liberal quack theories," 9) saying that the defense experts were "trying to promote a bit of sympathy for Slagle"; and, 10) saying "I put my money on the homicide detectives," "I do

very much stand behind the police work," "I put our trust in Patrolmen," and "Bloxham is not going to come in here and tell something that is not true," because each of these statements was a personal belief of the prosecutor that he interjected into the presentation of the case.

The prosecutor's improper comments did not violate due process: The Court held that the improper comments did no so infect the trial with unfairness that Slagle was deprived due process, because: 1) the evidence against Slagle was strong; 2) Slagle's counsel mitigated the prejudice from the improper statements by successfully objecting to the majority of the improper comments; 3) the comments were isolated; 4) the comments do not appear intentional; and, 5) the comments were not as egregious as the comments in other cases in which a due process violation was found - - the prosecutor did not repeatedly tell the jurors they would cause another to be murdered if they did not impose death, the prosecutor did not tell the jury that the absence of evidence by the defense was sufficient to impose death, the prosecutor did not denigrate the defense for objecting, the prosecutor did not comment on the defendant's refusal to testify, the prosecutor did not tell the jury that a death sentence was the only way to prevent Slagle from being paroled, and the prosecutor did not make any misleading arguments.

Note: The court made a big deal out of the fact that Slagle did not challenge any prosecutorial conduct as violating an independent constitutional ground, citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974), where the Supreme Court distinguished between prosecutorial misconduct claims where the state has denied the defendant the benefit of a specific provision of the Bill of Rights and prosecutorial misconduct claims where the misconduct violates only the due process clause. Counsel should raise all claims involving improper prosecutorial comments both as a violation of due process and as individual violations of specific constitutional rights.

Moore dissenting: Moore would grant relief because of the persuasiveness of the improper prosecutorial comments - - both in number and in subject matter - - because the improper comments were flagrant, and because she believes the evidence of Slagle's guilt was not overwhelming in light of his voluntary intoxication defense and evidence establishing that he had consumed an excessive amount of alcohol shortly before the murders. Together, Moore concluded that the egregious and inflammatory nature and behavior of the prosecutor throughout the trial leaves the court with grave doubt as to whether the prosecutorial errors had substantial and injurious effect or influenced the jury's verdict, which is all that needs to be established to require reversal.

Getsy v. Mitchell,
456 F.3d 575 (6th Cir. 2006)
(Merritt, J., for the Court, joined by, Moore J.; Gilman, J., dissenting)

In this post-AEDPA case, Getsy was sentenced to death despite the person hiring him to commit the murder receiving a lesser sentence. The Sixth Circuit held that the inconsistent sentences meant that Getsy's death sentence is arbitrary and capricious in violation of the 8th Amendment and violates the rule of consistency. In addition to granting relief on this ground, the Court remanded for an evidentiary hearing on whether the trial judge was biased because he and the prosecutor attended the same party during the trial.

The *Furman* principle that a death sentence must be reversed if it is imposed arbitrarily is clearly established law: Clearly established law refers to the holdings, as opposed to the dicta of Supreme Court decisions as of the time of the relevant state court decision. The relevant precedents from the Supreme Court include not only bright-line rules but also the legal principles and standards flowing from the precedent. A rule of law that requires a case-by-case examination of the evidence allows a court to tolerate a number of specific applications without saying that those applications create a new rule. A rule designed for the specific purpose of evaluating a myriad of factual contexts will rarely be so novel that it forges a new rule - - one not dictated by precedent. The *Furman* arbitrariness principle, as supplemented by the rules against disproportionate sentences and irreconcilable jury verdicts in the same case falls well within this category and thus constitutes clearly established law.

Getsy's death sentence violates the *Furman* principles because the more culpable co-defendant did not receive death: In *Furman v. Georgia*, 408 U.S. 238 (1972), the U.S. Supreme Court established that the 8th and 14th Amendments cannot tolerate the infliction of a death sentence under legal systems that permit death to be arbitrarily and capriciously imposed. This doctrine has evolved to prevent the infliction of a death sentence discriminatorily on the basis of illegitimate and suspect factors, such as the race or socioeconomic status of the defendant and the victim, and its inconsistent and random imposition. Over the years, the Supreme Court has issued rulings that have made these doctrines well-settled, including statements that "the qualitative difference of death from all other punishments requires a correspondingly greater need for reliability, consistency, and fairness in capital sentencing decisions," and that "it is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Thus, courts "must carefully scrutinize sentencing decisions to minimize the risk that the penalty will be imposed in error or in an arbitrary and capricious manner. There must

Continued on page 18

Continued from page 17

be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced death. This principle means that inconsistent and disproportionate sentences in the same case violate the clearly established principle against arbitrary death sentence and thus violate the 8th Amendment.

In evaluating whether a death sentence is arbitrary, the Supreme Court has directed courts to evaluate a defendant's culpability both individually and in terms of the sentences of codefendants and accomplices in the same case. The Supreme Court has ruled that the Eighth Amendment is violated when defendants with plainly different culpability received the same capital sentence. Although the instant case presents the reverse situation - - where defendants with plainly similar culpability received different sentences - - reasonable symmetry between culpability and the sentencing of codefendants is required under this Supreme Court precedent. Thus, in a capital case with respect to the same crime stemming from the same facts, the 8th Amendment does not permit codefendants with plainly similar culpability to receive different sentences. The Supreme Court's ruling that proportionality review is not required by the federal constitution has no impact on this, because Supreme Court law in this regard deals only with systematic proportionality review of a particular sentence imposed on others for the same general type of crime but in unrelated cases. Thus, in light of the fact that the person who hired Getsy to commit murder did not receive death, Getsy's death sentence is arbitrary and disproportionate under the 8th Amendment.

Getsy's death sentence violates the principle against inconsistent verdicts: The Supreme Court has ruled that inconsistent verdicts are both scandalous and inequitable and thus inconsistent verdicts are evidence of arbitrariness that undermines confidence in the quality of the jury's conclusion. The rule of consistency, which the U.S. Supreme Court has followed, requires that where two people are charged with jointly committing a crime that requires at least two participants, the acquittal of one defendant requires the acquittal of the other defendant. Under this rule, because the person who hired Getsy to commit murder was acquitted of murder for hire, Getsy's murder for hire conviction is irreconcilable with the verdict acquitting his co-defendant. Thus, Getsy's conviction is unconstitutional and the state court's failure to identify this area of law or applying the Eighth Amendment principles from *Furman* was contrary to clearly established Supreme Court law.

Getsy was entitled to a hearing on his judicial bias claim: The Due Process Clause of the 14th Amendment requires that a defendant be afforded a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case. To prevail on this type of claim, a petitioner must establish either actual bias or that an appearance of bias created a conclusive presumption of actual bias. Here, Getsy's claim centers on the fact that during the trial, the judge attended a party that was also attended by the prosecutor. Although requested, no hearing on this was held in state court. Thus, the Sixth Circuit believed it did not have enough information to decide the claim, meaning that an evidentiary hearing should be held. Under 28 U.S.C. §2254(e)(2), an evidentiary hearing can be held only if certain requirements are satisfied. But this statute applies only to petitioners who have failed to develop the factual basis of the claim in state court proceedings. Only a lack of diligence or some greater fault by a petitioner constitutes failure to develop. Diligence requires only that the petitioner make a reasonable attempt in light of the information available at the time, to investigate and pursue claims in state court. At a minimum, this means the petitioner must request an evidentiary hearing. In state court, Getsy requested but was denied both a hearing and the ability to question individuals about the contact between the judge and the prosecutor. Thus, 2254(e)(2) does not prohibit a hearing. Because the record fails to clarify facts essential to the claim, the court remanded for an evidentiary hearing.

Note: As the dissent point out, the majority did not require Getsy to satisfy the pre-AEDPA requirements for holding an evidentiary hearing that apply when 2254(e)(2) does not prohibit holding an evidentiary hearing. Yet, as the Sixth Circuit held in Harries v. Bell, 417 F.3d 631 (6th Cir. 2005), the Court always has the ability to hold an evidentiary hearing even if the factors requiring a hearing are not satisfied.

Getsy also raised the following issues: 1) involuntary confession; 2) he was denied the right to a fair and impartial jury drawn from a representative cross-section of the community; and, 3) selective prosecution.

Keith v. Mitchell,
455 F.3d 662 (6th Cir. 2006)
(Boggs, C.J., for the Court, joined by, Gibbons, J.; Clay, J., concurring in part, dissenting in part)

Noting that, under the AEDPA, relief is available if the state court decision either unreasonably extends or unreasonably refuses to extend a legal principle from the Supreme Court precedent to a new context, the court applied the AEDPA and clearly established law principles discussed above, in *Williams* and *Getsy*, to deny relief on all of Keith's IAC claims.

Counsel was not ineffective for failing to investigate or present mitigating evidence: Assuming that counsel's failure to conduct any mitigation investigation and counsel's failure to present mitigation at the sentencing phase was deficient performance, prejudice cannot be established because much of the unpresented mitigating evidence was before the jury in the presentence report provided to them and because the evidence against Keith was strong - - he committed multiple murders, his victims included children, there was significant

evidence of premeditation, and the murders were for revenge or to silence witnesses.

Presenting the jury with the presentence investigation and psychological report was not IAC: Although the reports contained negative information, because the reports demonstrate that Keith did not have a history of violence, had maintained employment, that he was pleasant and cooperative, that he did not have trouble with controlling his temper, and that he had been progressing well on parole, trial counsel could have reasonably concluded that this favorable information made it worthwhile to admit the reports.

Because Keith does not say how the services of a mitigation expert would have altered the outcome of the sentencing . . . Keith's IAC claim for failing to request the assistance of a mitigation expert fails.

Keith presents no evidence explaining why not retaining a mitigation expert was IAC: Because Keith does not say how the services of a mitigation expert would have altered the outcome of the sentencing and because the court is not obligated to speculate about how a mitigation expert might have swayed the jury, Keith's IAC claim for failing to request the assistance of a mitigation expert fails.

Counsel was not ineffective for failing to adequately explain mitigation to Keith: Keith's claim that he did not know what mitigation was until after trial and that if trial counsel had explained mitigation to him, he would not have waived mitigation fails for a lack of prejudice and because an otherwise constitutionally ineffective strategy is not a ground for habeas relief if the client knowingly directed the strategy.

Keith defaulted his claim that excluding jurors based on death penalty viewpoints without providing an opportunity for rehabilitation was unconstitutional: Because this claim was not objected to at trial and because the state court reviewed the claim only under the plain error rule, which does not constitute a waiver of procedural default, Keith's claim is defaulted. The court admitted that cause to excuse the default was a close question, but that prejudice could not be established because Keith cannot show that he was tried before a biased jury or that the jurors would have been rehabilitated. Because of the difficulty of establishing prejudice, Keith argued that the automatic reversal rule for wrongfully excluding a juror based on the juror's death penalty viewpoints or the failure to exclude a juror who should have been excluded because of death penalty viewpoints should apply to the failure to attempt to rehabilitate jurors. The court disagreed, noting that the automatic reversal rule has never been extended to the context of procedural default of a claim in a habeas petition, thereby meaning that the state court's decision cannot be unreasonable under the Anti-Terrorism and Effective Death Penalty Act, that the failure of counsel to lodge an objection has never been held to constitute automatic IAC, and that the automatic reversal rule involving the exclusion of jurors based on death penalty viewpoints applies mainly on direct appeal.

Keith's IAC for excluding jurors based on death penalty viewpoints is meritless: Keith also raised the claim discussed above in the context of IAC. Because he presented this claim to the state court, it is not defaulted. But because Keith cannot establish a reasonable probability that a differently empaneled jury would not have imposed death, he cannot satisfy the prejudice prong of an IAC claim.

Clay, J., dissenting: Because counsel failed to investigate mitigating evidence, counsel's decision not to present mitigating evidence at sentencing was deficient performance as a matter of law, making the state court's determination otherwise contrary to Supreme Court precedent. Clay then discussed the unpresented mitigating evidence in detail and reached the conclusion that a reasonable probability exists that at least one juror would have voted for less than death if presented with this evidence. Clay also believes that submitting the presentence and psychological reports to the jury was IAC, because of the damaging information contained within and because counsel made no effort to insure that the information in the reports was accurate. Clay also believes that trial counsel's failure to attempt to rehabilitate jurors was IAC.

***Martiniano v. Reid*,**
454 F.3d 616 (6th Cir. 2006)
(Siler, J., for the Court, joined by, Batchelder, J.; Clay, J., concurring in part, dissenting in part)

Paul Reid dropped his appeals and volunteered for execution without filing a federal habeas petition. A relative of Reid filed a "next friend" petition, arguing that Reid was not competent to drop his appeals and volunteer for execution, and that because of Reid's lack of competence, she should be allowed to litigate on his behalf. The federal district court held an abbreviated hearing to determine whether to grant a stay of execution because of this. At the hearing, the putative "next friend" presented expert testimony from one mental health expert and affidavits from others. The State asked for an opportunity to evaluate Reid and claimed it could not complete the evaluation prior to Reid's scheduled execution. The State then argued that Reid was not entitled to a stay of execution because the "next friend" petition was filed on the eve of execution. Disregarding this argument, the federal district court found that there was sufficient evidence to raise a reasonable doubt about Reid's competency to waive his appeals and volunteer for execution and that the parties

Continued on page 20

Continued from page 19

are entitled to a full evidentiary hearing on the question of competence. The State moved the Sixth Circuit to vacate the stay of execution.

Reasonable doubt about Reid's competency to drop his appeals exists: Relying on the reasoning of *Kirkpatrick v. Bell*, 64 Fed. Appx. 495 (6th Cir. 2003), in which a next friend attempted to litigate on behalf of Reid during a previous attempt to waive his appeals and volunteer for execution, the Court held that the district court did not abuse its discretion in staying Reid's execution. In *Kirkpatrick*, the court reaffirmed that it's holding in *Harper v. Parker*, 177 F.3d 567 (6th Cir. 1999), was still valid and governs this situation. Under *Harper*, when an inmate decides to drop his appeals and volunteer for execution, a preliminary hearing must be held to determine if there is any evidence that would raise a reasonable doubt about the inmate's competence to waive appeals and volunteer for execution. If there is, a full evidentiary hearing on the issue must be held. In *Kirkpatrick*, the Sixth Circuit held that the burden to establish "reasonable cause" is on the person challenging the inmate's competency and that the lower court's ruling on this is reviewed for an abuse of discretion. Because the purported "next friend" in *Kirkpatrick* presented unrebutted evidence of Reid's lack of competency to waive his appeals, the district court abused its discretion in not holding a full evidentiary hearing on the issue and staying Reid's execution until that hearing could be held. Likewise, here, the unrebutted evidence of Reid's lack of competency discussed above, necessitates a stay of execution until a full evidentiary hearing on Reid's competency can be held. Thus, the Sixth Circuit upheld the district court's stay of execution.

Interplay between exhaustion of state remedies and competency to waive appeals: The Sixth Circuit ordered the district court that, before proceeding further, it should determine whether there is a state post conviction cause currently ongoing that would suggest that Reid had not exhausted his state remedies before filing the petition in this case. If the district court determines that state remedies are exhausted, the court must then hold a full evidentiary hearing on Reid's competency, which is relevant to whether the purported "next friend" may proceed on Reid's behalf and which may have a bearing on whether Reid is competent to be executed. If Reid is found competent, the purported "next friend" has no standing so this action would have to be dismissed.

Clay, J., concurring in part and dissenting in part: Clay agreed that the district court did not abuse its discretion by staying Reid's execution to enable the district court to adjudicate Reid's competency to waive his appeals, but dissented from the majority raising the issue of exhaustion *sua sponte* and requiring the district court to address exhaustion as a threshold matter before holding an evidentiary hearing concerning Reid's competency. "Without a full evidentiary hearing on competency immediately upon remand, the district court is left without direction as to the appropriate party to represent Reid's interests in any further proceedings. The district court has not yet found Reid to be incompetent; therefore, Petitioner does not yet have the authority to proceed as Reid's next friend on any matter in federal court. At the same time, Reid is alleged to be incapable of making rational decisions on his own behalf. Without an initial decision on the competency issue, the district court will be left in doubt as to the appropriate party to litigate the issue of exhaustion, or any other issue, on Reid's behalf."

In addition, Clay believes that the "absence of available State corrective process or circumstances exist that render such process ineffective to protect the rights of the applicant" exception to the exhaustion requirement applies here because Tennessee scheduled Reid's execution before he had an opportunity to timely litigate his claims as permitted by federal law and because Tennessee refused to agree to a stay of execution pending the resolution of "next friend" status. Thus, Clay believes Reid's claim can proceed in federal court even if his competency claim is unexhausted in the state courts.

***Poindexter v. Mitchell*,**
454 F.3d 564 (6th Cir. 2006)
(Suhrheinrich, J., for the Court; Boggs, C.J., concurring; Suhrheinrich, J., separate concurring opinion; Daughtrey, J., separate concurring opinion)

The court reversed the district court's grant of habeas relief on numerous guilt phase claims, but affirmed the grant of sentencing phase relief because of trial counsel's failure to adequately investigate mitigating evidence.

The mitigating evidence presented at trial: Trial counsel presented four witnesses at the sentencing phase: 1) Poindexter's sister; 2) Poindexter's close friend and father figure; 3) Poindexter's mother; and, 4) Poindexter's grandmother. Collectively, this evidence established that Poindexter: 1) was a good student; 2) was peaceful and quiet; 3) got along with everyone; 4) read the Bible a lot; and, 5) went to work every day. In an unsworn statement to the jury, Poindexter denied killing his ex-wife's girlfriend, and said: 1) he had known his ex-wife since she was six years old and had lived with her as husband-and-wife for two years; 2) he has two sons; 3) other than domestic violence charges, he has never been in trouble with the law; 4) he loves his children and family; 5) he is religious; and, 6) he does not use profanity, drugs, or alcohol.

Because trial counsel's mitigation investigation was unreasonable, counsel's mitigation strategy was unreasonable: Trial counsel's investigation was deficient in many regards: 1) counsel did not request medical, educational, or governmental records that would have given insight into Poindexter's background; 2) counsel did not

request funds for a psychiatric or psychological expert to evaluate Poindexter, despite the fact that Poindexter exhibited odd behavior; 3) counsel did not consult with an investigator or mitigation specialist, who could have assisted in reconstructing Poindexter's social history; 4) counsel failed to interview many key family members and friends who could have described Poindexter's upbringing; and, 5) counsel did not begin to prepare for the sentencing phase until Poindexter was convicted, which was only five days before the sentencing phase began. In all of these areas, trial counsel's performance fell below that of prevailing professional norms. Thus, any mitigation strategy to portray Poindexter as a peaceful person was unreasonable because that strategy was the product of an incomplete investigation, which cannot be excused by the fact that Poindexter himself could have provided counsel with much of the unpresented mitigating evidence. If counsel had conducted a reasonable investigation, counsel would have learned: 1) that Poindexter's father beat Poindexter, his mother, and his sister; 2) that Poindexter's mother ignored him, did not cook for him, and sent him to school in dirty clothes; 3) that Poindexter's mother beat him; 4) that Poindexter's mother tried to kill the entire family by shutting them in the house and turning on a gas stove; 5) that Poindexter's mother was a heavy drinker and used marijuana almost daily; 6) that Poindexter's mother was frequently involved in violent fights in front of her children; 7) that Poindexter functioned at the borderline range of intelligence, with a full scale IQ of 76, placing him in the fifth percentile of the population; 8) that the incongruity between the Poindexter's scores on the verbal and performance portions of the IQ test suggest that Poindexter is more likely to act out in a far more primitive manner than a situation would warrant; and, 9) that Poindexter suffers from a paranoid personality disorder. Based on this evidence, the court held that "had counsel investigated and presented a fuller and more accurate description of Poindexter's troubled childhood, and paranoid personality disorder, there is a reasonable probability that the jury would not have recommended the death sentence."

The court also denied the following claims: 1) IAC for failing to cross-examine a witness; 2) IAC for conceding guilt during closing argument; 3) IAC of appellate counsel; 4) prosecutorial misconduct for referencing statutory mitigating factors to the jury that Poindexter did not raise or argue at the sentencing phase; 5) a *Brady* claim; 6) improper jury instructions; and, 7) IAC for not presenting a coherent defense by failing to request a continuance to pursue an alibi defense, telling the jury during opening statements that there would be an alibi defense and then failing to present one, and for failing to present a crime of passion defense.

Boggs, C.J., concurring: Although Boggs concurred because he believed the law required him to do so, Boggs wrote separately to point out that the number of cases reversed for failing to investigate and present mitigating evidence establishes that it is more likely that a death sentence will not be carried out if trial counsel does not investigate mitigating evidence than if counsel presents mitigating evidence involving a troubled and violent childhood. In addition, Boggs believes it is speculative to conclude that evidence of a troubled or violent childhood would have resulted in juries not imposing death sentences.

Note: Anyone practicing before the Sixth Circuit should read Boggs concurrence in its entirety.

Suhreinrich, J., concurring - - agrees with Boggs statement on the difficulty of the ineffective assistance of counsel at the sentencing phase of capital cases but does not share his suggestion that trial counsel are intentionally not investigating mitigating evidence because that increases the likelihood that a death sentence will not be carried out.

Daughtrey, J., concurring - - wrote separately to express her dismay at Judge Bogg's "unjustified attack directly on both the capital defense bar and indirectly on the members of this court, . . . "for the chief judge of a federal appellate court to state that it is virtually inevitable that any mildly-sentient defense attorney would consider playing Russian roulette with the life of a client is truly disturbing. Such a comment is an affront to the dedication of the women and men who struggle tirelessly to uphold their ethical duty to investigate fully and present professionally all viable defenses available to their clients. It also silently accuses of the judges on this court of complicity in the alleged fraud by countenancing the tactics outlined." Based on her experience, Daughtrey concluded that lawyers representing death sentenced inmates are "frequently hamstrung by a critical lack of relevant experience, an obvious lack of time and resources, or both." Daughtrey concluded by saying, "[i]f Judge Boggs truly wishes to bring finality to murder prosecutions in this circuit, I would invite him to spend less time denigrating the dedicated, but often overwhelmed, attorneys who have accepted the responsibility of representation in these very difficult cases, and more time working for improvement of the system."

***Dickerson v. Bagley*,**
453 F.3d 690 (6th Cir. 2006)
(Merritt, J., for the Court, joined by, Martin, J.; Siler, J., concurring in part, dissenting in part)

What AEDPA's limitation on relief means: 28 U.S.C. 2254(d) prevents the court from granting habeas relief unless the state court adjudication was contrary to or an unreasonable application of clearly established Supreme Court law, or was based on an unreasonable determination of the facts. Relevant Supreme Court precedent creating such AEDPA law includes "not only bright-line rules but also the legal principles and standards flowing from precedent and cases establishing a rule designed for the specific purpose of evaluating a myriad of factual contexts." A state court decision is contrary to clearly established Supreme Court

Continued on page 22

Continued from page 21

precedent if the state court applies a rule that contradicts the governing law set forth in the Supreme Court's cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from its precedent. A state court unreasonably applies clearly established Supreme Court precedent if the state court identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular state prisoner's case or if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. When a state court fails to review a claim or a portion of a claim on the merits, federal courts must conduct de novo review.

Ineffective assistance of counsel standard: To prevail on an ineffective assistance of counsel claim, a petitioner must show: 1) that counsel's performance was deficient; and, 2) that the deficiency prejudiced the defense. Deficient performance is satisfied by showing that counsel's representation fell below an objective standard of reasonableness. In making this determination in capital cases, for the required norms and duties of counsel, the Supreme Court has relied on the 1989 and 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Under Sixth Circuit precedent, this means that "counsel for defendants in capital cases must fully comply with these professional norms, most specifically Guideline 10.7 involving investigation. It is also clear that, under Supreme Court law, "a thorough and complete mitigation investigation is absolutely necessary in capital cases." Accordingly, strategic decisions made after less than complete investigation will not pass muster as an excuse when a full investigation would have revealed a large body of mitigating evidence. As the Supreme Court has made clear, an incomplete mitigation investigation resulting from inattention, not reasoned strategic judgment, is unreasonable, as is abandoning an investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible. Prejudice is established if there is a reasonable probability that at least one juror would have struck a different balance if not for counsel's deficient performance, or in other words, when applied to mitigating evidence, the available mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of the defendant's moral culpability.

Trial counsel's failure to investigate mitigating evidence cannot be attributed to trial strategy and thus was deficient performance: The district court held that trial counsel did not perform a full mitigation investigation, despite presenting sentencing phase testimony from eight witnesses, but denied relief because counsel's decision to not conduct any mitigation investigation of facts concerning Dickerson's medical history, family and social history, educational history, or any of the other factors listed in the ABA Guidelines was a strategic decision. If counsel had conducted a more thorough investigation, counsel would have learned the following: 1) Dickerson's father denied his biological relationship with Dickerson; 2) Dickerson's siblings may all have different fathers; 3) Dickerson experienced early problems with bed wetting and stuttering; 4) Dickerson's mother referred to him as "the moron"; 5) Dickerson had an ideational attachment to his mother that resulted in his failure to develop a meaningful relationship with another woman; 6) Dickerson was continuously teased at school and became quiet and withdrawn; 7) Dickerson was raised in an atmosphere of pimps, prostitutes, and drug dealers; 8) several homosexual advances were made upon Dickerson; 9) Dickerson's relationships with women were unsuccessful; 10) Dickerson's relationship with his girlfriend centered around prostitution and drugs; 11) Dickerson has an I.Q. of 77, placing him in the lower seven percent of cognitive ability; and, 12) psychological testing would have explained Dickerson's primitive thinking, how it developed and the effect the combination of the above had on his ability to make appropriate choices, and would have revealed that Dickerson has a borderline personality disorder. In light of this evidence, the court ruled that had a sufficient investigation been conducted, reasonable counsel would not have limited the mitigation proof in this case to an effort to show only that Dickerson was provoked by jealousy and could not control his impulses, and therefore suffered diminished capacity at the time of the crime. Instead, counsel would have put on proof that Dickerson's low IQ brought him close to the line of retardation and that his family background and educational and social history showed extreme deprivation that affected his moral culpability.

Trial counsel's deficient performance prejudiced Dickerson: Because the state court did not reach the prejudice prong of Dickerson's IAC claim, the Sixth Circuit reviewed the prejudice element de novo. Noting that the fact finder might have imposed the death penalty even if all the mitigating evidence had been revealed, the court ruled that the likelihood of a different result is sufficient to undermine confidence in the outcome, particularly since the sentencer did not know that Dickerson's father denied being Dickerson's father, Dickerson's mother called him a moron, Dickerson was surrounded by pimps, prostitutes, and drug dealers, and that Dickerson functioned at an intellectual level little above the retarded level, which is now a categorical exemption from execution.

Siler, J., dissenting: Citing *Slaughter* (discussed below), Siler dissented because much of Dickerson's family background was introduced through the trial testimony of eight mitigation witnesses, including two psychiatrists, preventing a finding of IAC particularly since post conviction counsel did not uncover any previously undiagnosed psychological or physical conditions.

***Alley v. Little*,**
452 F.3d 621 (6th Cir. 2006)
(Martin, J., dissenting from the denial of rehearing en banc, joined by, Daughtrey, Moore, Cole, and Clay, JJ.; Gilman, J., dissenting from the denial of rehearing en banc, joined by, Cole, J.)

Martin dissented from the denial of rehearing en banc of the affirmance of the dismissal of suit and denial of an injunction to litigate a challenge to chemicals and procedures used in Tennessee lethal injections on four grounds: 1) the panel improperly relied on the fact that no court has found lethal injection unconstitutional; 2) Alley has established a substantial likelihood of success on the merits; 3) Alley did not unduly delay in filing his suit; and, 4) the haphazard state of affairs where injunctions are granted in some jurisdictions to litigate challenges to lethal injection and not in others has resulted in the arbitrary imposition of the death penalty.

Prior rulings on the constitutionality of lethal injection are irrelevant: Martin believes that Alley did not need to rely on prior cases finding the lethal injection protocol to be cruel and unusual punishment because requiring a litigant to do so would prevent any method-of-execution challenge from ever going forward, simply because nobody has successfully challenged the procedure before. Rather, to prevail, a litigant only needs to prove that the current protocol amounts to cruel and unusual punishment based on the evolving standards of decency.

Likelihood of success on the merits: The fact that Tennessee allows a chemical to be used in executing humans that it prohibits for use in euthanizing animals suggests that the state's own evolving standards of decency find its procedure offensive. This combined with an affidavit concluding that the only person executed by lethal injection in Tennessee consciously suffered excruciating pain during his execution, facts ignored by the majority when it substituted its own judgment for that of the district court, is more than a sufficient showing of likelihood of success on the merits to justify granting an injunction.

Alley did not unduly delay in filing suit: When Alley filed his lethal injection suit, five weeks before his scheduled execution, the law in the Sixth Circuit was that the suit has to be construed as a habeas petition and dismissed as an unauthorized successive habeas petition. This changed while Alley's suit was pending when the Supreme Court of the United States decided *Hill v. McDonough*, 126 S.Ct. 2096 (2006). Thus, by filing before *Hill* was decided and seeking a stay to await its result, Alley showed an eagerness to litigate his claim as soon as possible, thereby preventing a finding of undue delay. In addition, because a method of execution challenge does not become ripe until the method of execution is determined, Alley's claim did not become ripe until he was approached by the Department of Corrections to choose between lethal injection and electrocution and refused to make a choice, thereby resulting in the default method of lethal injection being used. Because Alley filed suit shortly after being approached about the selection, he did not unduly delay. Finally, the fact that Alley immediately sought information about the lethal injection protocol upon learning of his execution date and filed suit shortly after the Commissioner of the Department of Corrections refused to respond to this request shows that Alley did not unduly delay in filing suit.

Note: *The majority opinion holding that Alley unduly delayed in filing suit assumed that Nelson overruled Sixth Circuit law and permitted the filing of this suit under 42 U.S.C. §1983 as early as late June 2004.*

The arbitrary and inconsistent patchwork across the country on whether to stay executions to address the lethal injection protocols necessitates staying all executions until the constitutionality of the lethal injection chemicals and procedures are decided: Alley has raised troubling allegations abut the suffering involved in death by lethal injection, which should entitle him to his day in court. "The panel's attempt to short-circuit his claim . . . does a disservice to the Constitution and its prohibition of cruel and unusual punishment."

Gilman, J., dissenting, joined by Cole, J.: According to Gilman, in order to have a ripe claim regarding the lethal injection protocol, the execution date must be set, and the warden must have presented Alley with the choice of the method of execution. Because when Alley's execution was originally scheduled in 2004, he was never presented with the selection form, the majority unjustly faults Alley for not challenging the lethal injection chemicals and procedures in 2004. Gilman also noted that rehearing en banc should be granted because the majority failed to properly weigh an affidavit from an expert stating that the chemical cocktail that is to be administered to Alley is insufficient to completely anesthetize him, producing a reasonably high probability of suffering a cruel and inhumane death. This affidavit, according to Gilman, makes success on the merits at least a possibility.

***Alley v. Little*,**
452 F.3d 620 (6th Cir. 2006)
(Martin, J., dissenting from the denial of initial en banc consideration, joined by, Daughtrey, Moore, Cole, and Clay, JJ.)

Because, in a prior lethal injection opinion involving Alley, the panel of the Court had already unequivocally expressed its view that Alley unnecessarily delayed in filing his lethal injection litigation and expressed its concern about the deliberations of the Sixth Circuit and the district court in delaying Alley's execution, and because of the short window of time between his current appeal and his pending execution,

Continued on page 24

Continued from page 23

Martin believes Alley's appeal of the dismissal of his lethal injection challenge on grounds of undue delay should be given initial en banc consideration.

Alley v. Little,
2006 WL 1736345 (6th Cir. June 24, 2006) (unpublished)
(Boggs, C.J., for the Court, joined by, Ryan and Batchelder, JJ.)

In light of the Supreme Court of the United States' decision that a challenge to the chemicals and procedures used to carry out lethal injections is cognizable as civil rights action under 42 U.S.C. §1983, but that the filing of such an action does not automatically entitle a litigant to an injunction, the Sixth Circuit held that the timeliness of a petitioner's filing is an important factor but not the only factor to consider in determining whether to grant an injunction. Although untimeliness of filing suit is not necessarily a compelling factor in deciding whether to grant an injunction, it is sufficient grounds to deny an injunction. Because Alley filed his suit only five weeks before his execution date, the district court did not abuse its discretion in denying Alley an injunction.

Because Alley filed his suit only five weeks before his execution date, the district court did not abuse its discretion in denying Alley an injunction.

Alley attempted to justify his late filing by arguing that the claim did not become ripe until his execution became imminent and he was presented with a form to select between lethal injection and electrocution as a method of execution. In so arguing, Alley compared his lethal injection suit to *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), where the Supreme Court of the United States held that a competency to be executed claim could be raised in a habeas petition even though Martinez-Villareal's first habeas petition had already been denied. The Sixth Circuit distinguished *Martinez-Villareal* from this case on the ground that, unlike Alley, Martinez-Villareal raised his claim in his first habeas petition only to end up having it dismissed for lack of ripeness. The Sixth Circuit also noted that claims involving mental competency are inherently different from §1983 suits because mental competency is subject to variance over time, meaning that last-minute first-instance mental competency petitions could be justified by a change in the defendant's mental health.

Note: This ruling suggests that competency to be executed claims should be raised in the first-in-time habeas petition if there is any evidence that suggests a lack of competency to be executed. Otherwise, the claim may be found to be defaulted.

Slaughter v. Parker,
450 F.3d 224 (6th Cir. 2006)
(Batchelder, J., for the Court, joined by, Boggs, C.J.; Cole, J., dissenting)

The court upheld the district court's denial of relief on all guilt phase claims and reversed the sentencing phase grant of relief.

Trial counsel's mitigation investigation was deficient: Trial counsel's investigation was deficient because he: 1) relied on the state's background report; 2) spent an insufficient amount of time preparing for the penalty phase; 3) made no effort to research Slaughter's family background; 4) failed to ask Slaughter's aunt whether she knew of any other family members who might be willing to testify on Slaughter's behalf; 5) made no effort to pursue Slaughter's birth, school, or medical records; and, 6) made no effort to obtain an independent psychological evaluation of Slaughter.

Slaughter was not prejudiced by counsel's deficient performance: If counsel had conducted a sufficient investigation, the jury would have heard testimony from Slaughter's family members that Slaughter was abandoned by his father, abused by his mother and step-father, and frequently left in charge of his children. Because the jury heard this testimony from Slaughter himself, the court held that Slaughter has not established a reasonable probability that the additional testimony would have influenced the jury's decision. In addition, the school records would have only shown that Slaughter was a poor student, and the expert psychological testimony presented at the post conviction hearing was largely the same as that presented at trial.

Slaughter's claim that he was denied due process when the court allowed a juror to question him was defaulted because the only reference to federal law in his state court brief was a citation to the 14th and 6th Amendments.

The court also denied the following claims: 1) the Commonwealth violated Slaughter's Eighth and Fourteenth Amendment rights by refusing to instruct the jury on the offenses of wanton murder and second degree manslaughter; 2) the Commonwealth failed to prove the absence of extreme emotional disturbance, which Slaughter alleged was an essential element of murder at the time of his conviction; 3) the mitigation instructions impermissibly led members of the jury to believe that they could consider only mitigating factors as to which they agreed unanimously; 4) Slaughter's constitutional rights were violated when the jury was instructed that they would only recommend a sentence during the penalty phase; and, 5) the verdict form violated

due process by requiring the jury to writing the aggravating factors they found on the jury form but not requiring the same with the mitigating factors they found, which according to Slaughter, implicitly instructed the jurors not to consider the mitigating factors.

Cole, J., dissenting: In a lengthy and detailed dissent, Cole explains why he believes Slaughter was prejudiced by trial counsel's failure to sufficiently investigate mitigating evidence, and why merely citing the Sixth and Fourteenth Amendment is sufficient to preserve a claim for federal habeas review.

Note: *Cole's dissent should be read in detail by anyone raising an IAC claim involving the failure to investigate and present mitigating evidence, and anyone who needs to know how to federalize a claim and argue in habeas proceedings that a claim was properly presented to state court on federal grounds.*

***Henderson v. Collins*,**
2006 WL 1675074 (6th Cir. June 9, 2006)
(unpublished)
(Norris, J., for the Court, joined by, Batchelder, J.; Clay, J., concurring)

Henderson filed a Federal Rules of Civil Procedure, Rule 60(b) motion requesting the district court to grant him relief from judgment because appellate counsel was ineffective for failing to argue that the acquittal-first jury instruction, which was challenged in his initial habeas petition, was improper. Henderson later filed a supplemental 60(b) motion in which he requested access to biological material in the state's possession so that DNA tests could be performed. Although the 60(b) motion raised claims addressed in Henderson's original habeas petition, in light of a Sixth Circuit decision rendered after the district court denied Henderson's habeas petition that cast substantial doubt on the acquittal-first rationale used to uphold Henderson's conviction, the district court granted the 60(b) motion on the acquittal-first jury instruction claim. Both parties appealed. The Sixth Circuit held that the 60(b) motions should have been construed as habeas petitions and transferred to the Sixth Circuit for authorization to file a successive habeas petition.

Henderson's 60(b) motion must be construed as a habeas petition: A Rule 60(b) motion is distinguished from a habeas petition by the fact that the latter contains one or more claims while a 60(b) motion does not. A claim is an asserted federal basis for relief from a state court's judgment of conviction. By contrast, a Rule 60(b) motion attacks some defect in the integrity of the federal habeas proceedings. With respect to Henderson's acquittal-first issue, in Henderson's habeas petition, the district court ruled that the ineffective assistance of appellate counsel claim involving the acquittal-first jury instruction lacked merit. Because the district court reviewed the claim on the merits in a manner consistent with Sixth Circuit law on assessing ineffective assistance of appellate counsel claims, Henderson's 60(b) motion cannot be viewed as an attempt to rectify a defect in the integrity of the federal habeas proceedings. Rather, the motion reasserts the substance of the claim raised in his original habeas petition, thereby making his 60(b) motion the equivalent of a successive habeas petition. Likewise, Henderson's DNA issue is a habeas petition because he requested DNA testing before filing his initial habeas petition. Nonetheless, it would not have been helpful since Henderson was convicted of attempted rape and, at best, the DNA results would have shown that he did not have intercourse with the victim.

Because the original habeas petition was filed before the Anti-Terrorism and Effective Death Penalty Act (AEDPA) went into effect, the abuse of the writ standard governs whether AEDPA's requirements for filing a successive petition applies: Although some circuits have ruled that the AEDPA applies to all motions filed after its effective date unless the movant has reasonably relied on the previous law in holding back a ground presented in the successive motion, the Sixth Circuit applies a different standard. When, as here, the original petition was filed pre-AEDPA, because Congress did not express any clear intent to apply the AEDPA retroactively, to avoid an impermissible retroactive effect, a reviewing court must analyze whether the second or successive habeas petition would have survived under the pre-AEDPA "abuse of the writ" standard. This standard allows a second motion containing a new claim where the inmate can show cause for failing to raise the issue in the first motion and prejudice therefrom, such as the discovery of new facts or an intervening change in the law, which warrants reexamination of the same ground for relief raised in an earlier petition. Because Henderson is unable to satisfy this standard, applying the AEDPA's requirements for filing a successive habeas petition to Henderson's claims does not have an impermissible retroactive effect. Since neither of the issues raised by Henderson satisfy the stringent requirements for raising a successive habeas petition under the Anti-terrorism and Effective Death Penalty Act, authorization to file a successive habeas petition was denied.

Clay, J., concurring: Clay points out that even if a petitioner fails to show cause for raising a successive claim, he may still proceed on the claim if the petitioner can establish that a constitutional violation probably caused the conviction of an innocent person. By raising his acquittal-first claim only in respect to the sentencing phase, Henderson asserts only that he was not eligible for the death penalty. To substantiate this assertion, Henderson must "show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under applicable state law." Because even if a correct instruction was given to the jury, a reasonable juror could have found that the aggravating circumstances outweighed the mitigating circumstances, Henderson cannot satisfy this standard.

Continued on page 26

Continued from page 25

Clay also reiterated his dissenting opinion from the denial of habeas relief in Henderson's original habeas petition. Henderson's jury was told that all twelve members must agree on recommending or not recommending the death penalty before they could consider a life sentence. The jury instructions did not inform the jury that one juror could prevent the imposition of a death sentence. Thus, this jury instruction created an impermissible bias towards the death penalty, thereby violating Henderson's right to a fair trial. This reasoning, however, was rejected by the majority in Henderson's case and thus the Court is bound by its prior decision denying Henderson habeas relief.

Gillard v. Mitchell,
445 F.3d 883 (6th Cir. 2006)
(Siler, J., for the Court, joined by, Daughtrey and Sutton, JJ.) (reversing grant of habeas relief)

In this post-AEDPA case, the court denied all claims after reviewing the district court's legal conclusions de novo and its factual findings for clear error.

Gillard's trial counsel did not labor under a conflict of interest: Prior to representing Gillard, his attorney represented Gillard's brother who had been a suspect in the murders for which Gillard was convicted. To obtain relief based on this alleged conflict of interest, Gillard must establish that counsel suffered from a conflict of interest and that the conflict adversely affected counsel's performance. Because the Supreme Court has not ruled that successive representation gives rise to the presumption of prejudice that applies to simultaneous representation, the presumption of prejudice does not apply to Gillard's claim. Thus, Gillard must establish prejudice, a standard that he cannot meet since evidence of Gillard's brother's involvement in the crime is not inconsistent with Gillard's guilt.

The trial court was not required to conduct an inquiry into the potential conflict of interest: A trial court is required to conduct an inquiry where it knows or reasonably should know that a particular conflict exists. Here, the trial court went beyond this requirement by appointing separate counsel to advise Gillard's brother before he testified at Gillard's trial, after having conducted an inquiry into the potential conflict.

Trial counsel was not biased: The facts that the trial judge had been a prosecutor at the time Gillard was investigated for an unrelated murder and that the trial judge was the chief prosecutor at the time the offenses at issue were committed and when an arrest warrant for Gillard were committed is not enough by itself to establish that the trial judge was biased.

No *Brady* violation occurred: To establish a constitutional violation from the state's failure to disclose evidence, a petitioner must show that the prosecutor suppressed evidence that was favorable and material to the defense. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Here, the evidence of guilt was overwhelming. Thus, the state's failure to disclose a statement from a victim not identifying which Gillard was the shooter, although favorable to the defendant, was not material.

Trial counsel was not ineffective for failing to investigate mitigating evidence: Gillard agued and the court acknowledged that trial counsel conducted no mitigation investigation, repeatedly told the jury that there were no mitigating factors, presented no mitigating evidence, and insinuated that death should be imposed if it was sure that Gillard was guilty. In considering whether this was deficient performance, the court recognized that the inquiry must focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence was itself reasonable. Yet, the court held that counsel was not deficient because 1) the Supreme Court has recognized that residual doubt may benefit a capital defendant and thus are appropriately considered as mitigating evidence; 2) much of Gillard's mitigating evidence was presented to the jury during the guilt phase; 3) emphasizing mitigating evidence during the sentencing phase could have undermined trial counsel's sound strategy of establishing that Gillard was somewhere other than the crime scene when the murders occurred; and, 4) Gillard has not pointed to any mitigating evidence that should have been discovered but was not and the jury heard all mitigating evidence that Gillard wished to present. In addition, counsel's concession that there was no mitigating evidence and that death should be imposed if they believed Gillard was guilty was not an abandonment of the client or an abdication of advocacy, because counsel told the jury that its first mistake was finding Gillard guilty and that sentencing him to death would be a fatal mistake.

Note: This ruling is inconsistent with Williams v. Anderson, discussed above, where, relying on Supreme Court precedent, the court held that the failure to investigate mitigating evidence before deciding to pursue a reasonable doubt theory at the sentencing phase is deficient performance as a matter of law. In addition, this ruling appears inconsistent with Wiggins v. Smith, 539 U.S. 510 (2003), where the Supreme Court held that an innocence defense and mitigating evidence, including evidence of a horrible childhood, are not mutually exclusive. Finally, the ruling appears inconsistent with Oregon v. Guzek, 126 S.Ct. 1226 (2006), where the Supreme Court held that residual doubt is admissible at the sentencing phase only in limited circumstances.

The prosecutor's improprieties did not violate due process: The prosecutor asked the defendant on cross-examination whether he was referred to as "Dirty John" because he would "shoot an innocent sleeping woman on a couch," questioned the defendant's membership in several motorcycle gangs, suggested that the defendant's brother attempted to fix the trial, stated that the defendant was a "lie, "a fraud," and "a con" because he wore a suit during the trial, and displayed photographs of the crime scene during closing argument. These comments only require reversal if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Applying the same standard articulated in *Slagle* (discussed above), the court held that the prosecutor's reference to "Dirty John" and Gillard's motorcycle gang affiliation were proper because "Dirty John" was his nickname, he acquired this nickname while working on motorcycles, and the information went to Gillard's credibility. In addition, the following facts establish that no due process violation occurred: 1) the prosecutor's remarks were isolated since they occurred primarily during closing argument at the conclusion of a six-week trial; 2) the trial court gave limiting instructions to rectify many of the improper remarks and explained to the jury that counsel's arguments were not evidence; 3) the prosecutor was only summarizing the evidence rather than misstating it; and, 4) the evidence of guilt was overwhelming - - an eyewitness identified Gillard as the shooter, Gillard confessed, Gillard fled after the crimes were committed, Gillard changed his appearance, Gillard gave a false name to the arresting officer, and Gillard possessed the murder weapon two weeks before the crimes occurred.

Cumulative error cannot be grounds for habeas relief post-AEDPA: Although errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone may cumulatively produce a trial setting that is fundamentally unfair, because the Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief, relief cannot be granted in AEDPA cases on the ground of the cumulative effect of distinct constitutional claims.

Carter v. Mitchell,
443 F.3d 517 (6th Cir. 2006)
(Suhrheinrich, J., for the Court, joined by, Boggs, C.J. and Daughtrey, J.)

Standard of review: In the appeal from a denial of habeas relief under the AEDPA, the federal district court's legal conclusions are reviewed de novo and its factual findings for clear error. Where the district court does not make independent factual findings, the factual findings are reviewed de novo. Mixed questions of law and fact are reviewed under the unreasonable application prong of the AEDPA.

Trial counsel was not ineffective for waiving a mental health examination and failing to employ a mental health expert: Because prior to sentencing, counsel had already retained the services of a psychologist, counsel cannot be ineffective for waiving a mental health examination offered by the trial court prior to sentencing. Thus, the only avenue for prevailing on this claim is to show that counsel's decision to retain a vocational psychologist was objectively unreasonable. This claim also must fail, since, although a criminal defendant is entitled to the assistance of a competent psychiatrist if the defendant can demonstrate that his sanity will be a significant issue at trial - - a right the Sixth Circuit has extended to require an independent psychiatrist rather than a neutral, court-appointed psychiatrist when a defendant's mental health is at issue - - the court has never held that a defendant is entitled to a particular type of expert. Because the expert employed by trial counsel was an independent mental health expert, because Carter has not shown that his mental health was in issue, and because Carter has not shown that the expert retained by trial counsel was unqualified to conduct the types of mental health tests Carter claims was necessary, he cannot prevail on this claim.

Note: The court noted that the Sixth Circuit case extending Supreme Court law to require an independent psychiatrist rather than a neutral, court-appointed psychiatrist is a pre-AEDPA case whose holding has not been adopted by the Supreme Court. Thus, according to the Sixth Circuit, it can have no legal effect on post-AEDPA habeas cases. Despite this ruling, counsel should continue to argue that the failure to extend Supreme Court law to require an independent expert is an unreasonable application of clearly established Supreme Court law.

Trial counsel was not ineffective for failing to retain a neuropsychologist: Because the neuropsychologist used in post conviction could not establish a link between Carter's organic brain damage and the crime, Carter cannot establish prejudice from trial counsel's failure to retain a neuropsychologist.

Trial counsel was not ineffective for failing to present mitigating evidence: Because post conviction counsel did not detail trial counsel's efforts to learn of Carter's background or lack thereof, the court must assume that counsel did investigate, but ultimately decided that the best strategy at sentencing was not to present the testimony of Carter's family members. The only evidence presented at the sentencing phase was Carter's own statement, in which he described being raised by his troublesome stepfather, acknowledged his anger problems, and stated that he has since turned to prayer and religion to control his temper and counsel troubled youths. As for prejudice, because trial counsel presented some mitigation, Carter's case is distinguishable from *Wiggins v. Smith*, 539 U.S. 510 (2003), in which counsel failed entirely to seek or present mitigating

Continued on page 28

Continued from page 27

family background evidence. In addition, the mitigating evidence presented in post conviction - - testimony from family members saying that Carter had a troubled background, including his experiences with drugs and alcohol, Carter had a history of violent behavior, and that he was influenced by his alcoholic, philandering father - - is cumulative and not mitigating. Had this evidence been admitted, the prosecutor would have been free to extract testimony of Carter's criminal history, his history of drug use and alcohol abuse, and his quick temper. Thus, Carter cannot establish prejudice from counsel's failure to present this evidence as mitigation.

Note: Whether Wiggins' is limited to instances where no mitigating evidence was presented is an issue that has split the circuits and that is pending before the United States Supreme Court in Brian Keith Moore's petition for a writ of certiorari.

No constitutional violation occurred when the prosecution failed to correct false testimony: A defendant's right to a fair trial can be violated where the prosecution deliberately misleads a jury or allows misleading testimony to go uncorrected with respect to any promise offered to a key prosecution witness in exchange for his or her testimony. A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. Here, that is not the case. On direct examination, a prosecution witness admitted having an agreement with the prosecution, but then denied the agreement on cross examination. The prosecution did not correct this false testimony. Reversal, however, is not required, because the agreement with the state was in exchange for testimony in general, not specific testimony, the prosecutor told the jury that an agreement existed, and the witness' testimony was not the lynchpin of the state's case.

Kentucky Supreme Court

Epperson v. Commonwealth,
197 S.W.3d 46 (Ky. 2006)
(*Wintersheimer, J., for a unanimous Court)*

Standard of review for unpreserved errors: The court "may constitutionally require [the appellant] to demonstrate cause and prejudice or ineffective assistance of counsel."

All elements of the offense did not need to be considered by the grand jury or alleged in the indictment: An indictment need only notify the defendant of the offenses for which he was charged and not mislead the defendant. Here, the indictment was sufficient because it said Epperson committed capital murder by participating in a robbery in which the victims were killed, and because the evidence against Epperson was substantially the same as presented in his first trial for this offense.

Guilt phase jury instructions did not need to include the codefendant's name: Every issue of fact raised by the evidence and material to a defendant's defense must be submitted to the jury on proper instructions. Here, even though Epperson argued the opposite of one of the codefendant's testimony, the codefendant's name was not material to the defense because Epperson was convicted of complicity so it did not matter which codefendant he was acting in complicity with.

Epperson was not prejudiced by the improper use of other bad act evidence: Where, as here, evidence of other crimes is introduced into evidence through the non-responsive answer of a witness, this Court must look at all the evidence and determine whether the defendant has been unduly prejudiced by the statement. Considering the entire record, the court held that Epperson was neither prejudiced by a witness testifying that Epperson committed a robbery in Georgia shortly before the murders nor one of the codefendants testifying that Epperson was involved with dealing and using drugs.

Epperson was not harmed by the prosecution's refusal to disclose the whereabouts of a witness: Because the identity of the witness was not secret, in determining whether the Commonwealth's refusal to disclose the whereabouts of a witness violates a defendant's rights, the court must consider whether the defendant has shown reasonable diligence in attempting to obtain the requested information without the government's assistance, and whether the defendant has shown that the requested information would have led to the admission of otherwise undiscoverable evidence that is both material and favorable to the defendant. Here, there is no evidence that the witness was in hiding and Epperson has not shown that the witness' testimony would have been any more material and favorable had a pre-trial meeting occurred.

The co-defendants lack of memory made him unavailable for purposes of admitting his prior testimony: After the trial court prevented a former codefendant from invoking the Fifth Amendment, because the codefendant had already been convicted, the codefendant testified that he did not remember what happened and did not remember his prior testimony. As a result, the trial court allowed the codefendant's testimony from the first trial to be read into evidence. On appeal, the Kentucky Supreme Court held that the codefendant was "unavailable" for purposes of trial because he testified to a lack of memory, and that the Confrontation Clause was not implicated because Epperson had the opportunity to cross-examine the codefendant at the first trial.

Epperson does not have a right to the file of a codefendant when the file is found at the office of Epperson's attorney: Epperson's counsel informed the trial judge that a box had been found at the Department of Public Advocacy which contained papers that appeared to relate to Epperson's case,

but that the files might have originated from the codefendant's attorney. Rather than examining the entire contents of the box, counsel for Epperson sealed the box and requested that the trial court examine the box and determine whether Epperson was entitled to any of the information in the box. The trial judge refused to do so and Epperson appealed. The Kentucky Supreme Court assumed the box belonged to counsel for the codefendant and only determined whether the attorney-client privilege barred Epperson from accessing the contents of the box. The attorney-client privilege continues to remain valid not only after the case has been concluded, but even after the death of the client, and the attorney-work product privilege protects information compiled by counsel in preparation for trial. The Commonwealth's duty to disclose material and exculpatory evidence does not establish any principle for a criminal defendant to have access to information collected by counsel for a codefendant. Thus, the trial judge acted within his discretion in refusing to disclose the contents of the box to Epperson.

Introducing evidence of the sentence imposed on one of the codefendants in a separate case was harmless: Generally, a sentence imposed on a codefendant is not relevant evidence. But because Epperson was convicted of the same other crime as the codefendant and received the same sentence, informing the jury that Epperson's codefendant received a death sentence in another case was harmless.

The fact that a codefendant who took a plea did not receive a death sentence does not make Epperson's death sentence disproportionate, particularly since death sentences imposed on other defendants are not relevant in determining the validity of a death sentence or other sentence under K.R.S. 532.075.

Note: An argument can be made that the Kentucky Supreme Court's ruling on this issue violates the Sixth Circuit's decision in Getsy and the Furman principle relied upon in Getsy.

The Court also denied claim related to victim impact evidence at the guilt phase, a victim family member sitting at the prosecution table, and a victim family member remaining in the courtroom after testifying and then testifying in rebuttal, the use of aggravating factors not considered by a grand jury or alleged in the indictment, the sentencing phase verdict form, the use of a single transaction to convict him of multiple crimes violated due process, the use of the underlying convictions as aggravators violated double jeopardy, and testimony about the amenities and conditions in prison.

Baze v. Commonwealth,
2006 WL 1360281 (Ky. 2006) (unpublished)

At trial, Baze attempted to introduce a 20 year sentence that was pending on appeal as mitigation. Relying on Kentucky law prohibiting the use of a non-final conviction in aggravation, the trial court refused to allow Baze to introduce his non-final conviction as mitigation. Years after the appeal of Baze's state post conviction proceedings were denied, the Kentucky Supreme Court overruled itself by ruling that a non-final conviction is admissible as aggravation. In light of this, Baze filed a CR 60.02 motion, arguing that he should receive a new sentencing hearing because: 1) due process requires that when non-final convictions are admissible as aggravation, non-final convictions must also be admissible as mitigation; 2) the plain meaning of the word "conviction" and the meaning of the word "conviction" in Kentucky's death penalty statute is the same whether used as aggravation or mitigation; and, 3) it would be unfair to allow Baze's death sentence to stand when he was prevented from presenting mitigating evidence because the trial court relied on a case that the Kentucky Supreme Court now says was wrongly decided.

The Kentucky Supreme Court recognized that "[a] jury could be swayed to impose a lesser sentence if they know that a defendant is already going to be serving a significant sentence for other crimes." Yet, the Court refused to address what it characterized as a difficult question- -"whether a jury should be told and should be allowed to believe that a sentence for a prior conviction has been imposed when that judgment is not final and may in fact be overturned. Is it proper for a jury to be told that a defendant will first serve a specified term of imprisonment before commencing any sentence for the subsequent conviction, when in fact, a pending or future appeal may negate that prior conviction.?" Instead, the Court held that any error was harmless because the jury was presented with and rejected a sentence of greatly enhanced parole eligibility.

Baze v. Commonwealth,
2006 WL 1360188 (Ky. 2006) (unpublished)

During his childhood, Baze was physically and sexually abused. He also suffered numerous brain injuries and attempted suicide on multiple occasions. The jury heard none of this. Baze's original post conviction counsel uncovered this evidence and argued that trial counsel was ineffective for not presenting the testimony of certain witnesses at the sentencing phase, but as the Kentucky Supreme Court noted in Baze's first RCr 11.42 appeal, Baze failed to present any evidence of what these mitigating witnesses would have testified to and how Baze was prejudiced by their failure to testify. Thus, the Court could not find trial counsel ineffective.

Continued on page 30

Continued from page 29

In this action, Baze argued that original post conviction counsel was ineffective for failing to present readily available evidence to establish the prejudice prong of an ineffective assistance of counsel claim and that the right to effective assistance of post conviction counsel exists: 1) as an Eighth Amendment right under the evolving standards of decency; 2) under the Sixth Amendment right to counsel; 3) because the state law right to counsel in post conviction proceedings creates a procedural due right to the effective assistance of counsel; and, 4) because, by providing counsel in post conviction proceedings, Kentucky has created a state constitutional right to the effective assistance of post conviction counsel. The Court refused to address any of these issues, stating that it "need not address the issue of a state right to effective post conviction counsel," because a detailed review of the additional mitigating evidence establishes that any error does not warrant reversal of the sentence.

Note: The Supreme Court of the United States has not addressed whether a petitioner has the right to the effective assistance of counsel in a post conviction proceeding, particularly when that proceeding is the first opportunity to raise a claim. The only Supreme Court of the United States case addressing effective assistance of post conviction counsel deals with this right in the context of counsel's performance on the appeal of the denial of post conviction relief. In addition, case law holding that there is no constitutional right to post conviction counsel does not settle this issue. Once a state decides to provide post conviction counsel, that decision changes the landscape and, arguably, creates a protected interest in the performance of that counsel.

Simmons v. Commonwealth,
191 S.W.3d 557 (Ky. 2006)
(Wintersheimer, J., for a unanimous Court)

Trial counsel's comments dehumanizing Simmons did not prejudice Simmons: Because almost all of trial counsel's disparaging remarks, including referring to Simmons as a "pitiable monster," admitting that he committed "unspeakable acts," saying Simmons should be kept in a "cage," and comparing Simmons to Ted Bundy, were part of a strategy to admit guilt and argue mental illness or insanity in an attempt to avoid a death sentence, Simmons was not prejudiced by counsel's comments.

Trial counsel did not suffer from a conflict of interest: In post conviction, Simmons argued that trial counsel's extreme distaste for him created an actual conflict of interest that prevented counsel from humanizing him and developing mitigating evidence, and that counsel's friendship with Simmons' parents along with being paid by them resulted in a divided loyalty that adversely affected his defense. The Court denied both these claims, ruling that the magnitude of the crimes demonstrates the reasonableness of portraying Simmons as a serial killer whose benefit to society would come from studying him, and that no divided loyalty existed, because: 1) "the fact that the parents paid for the representation of their son in a case where the adult child is facing a death sentence is to be expected"; 2) neither Simmons nor his parents suggested an abnormal family life; and, 3) Simmons' father did not know trial counsel prior to retaining him and could not remember trial counsel's name when he testified in post conviction proceedings.

Trial counsel was not ineffective for failing to investigate mitigating evidence and emphasizing the horrible nature of Simmons' crimes: The Court held that it was reasonable to believe that the background of the defendant, contrasted with the horrible nature of his crimes, would intrigue the imagination of the jury to determine how an apparently normal person could commit such heinous crimes. Because uncovering and presenting evidence of Simmons' physiological, social and family problems would have compromised the theory presented by trial counsel that Simmons' had a normal upbringing and was worthy of scientific study to determine what could turn a person with a normal childhood into a serial killer, trial counsel was not ineffective for failing to investigate and present mitigating evidence concerning Simmons' upbringing.

Mitigation instructions did not mislead the jury: The catch-all mitigation instruction could not reasonably be construed to have been limited by the immediately following instruction, stating "in addition to the foregoing." This phrase makes it clear that that the last component of the instruction is to be considered along with the catch-all mitigation instruction.

Sentencing phase instructions did not create presumption of death: Simmons' jury was instructed, "if upon the whole case you have a reasonable doubt whether the defendant should be sentenced to death, you shall recommend a sentence of imprisonment instead." Here, Simmons argued that this instruction shifted the burden of proof to Simmons, created a presumption of death, and mandated death when the aggravators and mitigators are equal. Considering this instruction as a whole and noting that the jury the preamble of the instructions informed the jury of the four possible sentences, the Court held that the instruction was constitutionally sufficient. The Court also noted that the instructions do not mandate death upon a finding that aggravators and mitigators were equal.

Note: The Court's statement that the instructions do not mandate death upon a finding that the aggravating and circumstances are equal suggest that death is not required and should not be imposed when the aggravating circumstances and mitigating circumstances are equal. Thus, although under Kansas v. Marsh, 126 S.Ct. 2516 (2006), the federal constitution does not prohibit death under this circumstances, it appears that state law does.

Trial counsel was not ineffective for presenting an insanity defense with no evidence supporting it: The Court disregarded the fact that trial counsel made a strategic decision without any evidence to support that decision, instead ruling that no error occurred because strategic decisions are not grounds for RCr 11.42 relief and because the strategy was based on 31 years experience and the particular facts of this case which indicated strong evidence of guilt.

Note: Under Supreme Court of the United States law, strategic decisions are not automatically insulated from review. Rather, strategic decisions based on an unreasonable investigation are entitled to no weight, i.e., counsel's performance is deficient when counsel makes a strategic decision based on an insufficient investigation, and strategic decisions must be evaluated in light of professional norms to determine if the strategic decision is objectively unreasonable.

Executing a person after spending a number of years on death row is constitutional: Simmons argued that executing him after spending nearly 20 years on death row violates the Eighth Amendment for three reasons: 1) the psychological torture the wait for execution creates; 2) the time awaiting execution constitutes an additional sentence; and, 3) the purposes of the death penalty - - retribution and deterrence of prospective offenders - - are no longer satisfied. The Court disposed of this claim summarily by merely noting that any delay was necessary to permit Simmons to fully exercise his rights to challenge his conviction and sentence and that much, if not all, of the delay is attributable to Simmons for not doing anything to expedite review of his case.

Denial of a motion of extension of page limits does not violate due process.

Claims that could have been raised on direct appeal cannot be raised in RCr 11.42:
RCr 11.42 motions are limited to issues that were not and could not be raised on direct appeal. An issue raised on direct appeal cannot be raised in an RCr 11.42 motion by stating that it amounts to ineffective assistance of counsel.

Note: This portion of Simmons is contrary to and likely overruled by Martin v. Commonwealth, which remains pending on a petition for rehearing.

Raising record-based claims in post conviction when trial counsel is also direct appeal counsel: The Court denied Simmons' claim that, because of the inherent conflict of interest that exists when trial counsel serves as direct appeal counsel, issues ordinarily raised on direct appeal must be permitted in an RCr 11.42 motion when trial counsel serves as direct appeal counsel.

The Court also refused to reopen Simmons' direct appeal based on ineffective assistance of direct appeal counsel and refused to overrule case law holding that the court will not reexamine an appeal reviewed and decided by the Court even if trial counsel was so ineffective that the direct appeal amounted to no appeal at all. ■

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SIXTH CIRCUIT CASE REVIEW

By David Harshaw, Post-Conviction Branch

***Swiecicki v. Delgado*,**
— F.3d — 2006 WL 2639793 (C.A.6 (Ohio)),
before Gilman, Sutton, and Cook, Circuit Judges.

The Court discusses the First Amendment in relation to a disorderly conduct arrest.

In September of 2001, Jeffrey Swiecicki was arrested for heckling at a Cleveland Indians baseball game by an off-duty police officer for the City of Cleveland, Jose Delgado, who was working security. According to Delgado, Swiecicki yelled at Russell Branyon, an outfielder, "Branyon, you suck," and "Branyon, you have a fat ass." When Swiecicki ignored Delgado's request to desist heckling, Delgado then grabbed him by the arm and shirt and proceeded to escort him out of the stadium. While being escorted, Swiecicki asked more than ten times what he had done wrong. According to Delgado, Swiecicki then tried to break free. In response, Delgado shoved Swiecicki to the ground, stated that he was under arrest, and cuffed him. Swiecicki denies trying to break free. Delgado charged Swiecicki with disorderly conduct and resisting arrest.

In an Ohio trial court, Swiecicki was convicted of both charges. On appeal, the conviction was overturned on sufficiency of the evidence grounds. Swiecicki then filed a federal lawsuit against Delgado for, among other things, a lack of probable cause for the arrest and a violation of his free speech rights. The federal district court granted Delgado summary judgment on qualified immunity grounds. Swiecicki appealed.

Judge Gilman delivered the Opinion of the Court and was joined by Judge Cook.

The Court first established that Delgado was at all times a state actor rather than an employee of the Cleveland Indians:

> Here, we believe the record establishes that Delgado was a state actor from the beginning of the incident in question because he "presented himself as a police officer." *Parks*, 395 F.3d at 652. Our conclusion is based not only on Delgado's attire, badge, and weapons, but also on the fact that Delgado told Swiecicki that "[w]e can either do this the easy way or the hard way." We recognize that these words, standing alone, would not necessarily rise to the level of a threatened arrest. After all, if a private citizen like Labrie [an usher involved in the case], or a fellow Indians fan, had warned Swiecicki in a similar manner, no threat of arrest would have been present. And if Delgado had simply asked Swiecicki to calm down or risk being ejected from the game, we would be unable to conclude that Delgado acted under color of state law. *See Watkins v. Oaklawn Jockey Club*, 183 F.2d 440, 443 (8th Cir.1950) (holding that an off-duty deputy sheriff who worked as a security guard at a race track was not acting under color of state law when he ejected a patron because the deputy sheriff acted in the same manner that a civilian employee of the track would have acted).

The Court then went on to find that the district court had erred when it found that Delgado was entitled to qualified immunity. The test employed by the Court was two-fold. First, while viewing the facts in the most favorable light for Swiecicki, a court must establish whether a constitutional right was violated. Second, a court must establish that this right was clearly established.

The Court found that Swiecicki's claim that Delgado did not have probable cause to arrest him could go forward. The Court found that a potential constitutional right was violated and that this right, not to be arrested without probable cause, was clearly established. It is bedrock First Amendment law that Delgado could not have arrested Swiecicki for disorderly conduct based on the content of his speech. Citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court found that Swiecicki's speech was protected because it did not rise to the level of fighting words (Notably, there was no allegation that Russell Branyon, the baseball player, had heard Swiecicki's heckling or that he would be even be offended by it). The Court then explained that while the manner of a person's speech was not protected, taking the facts in the light most favorable to Swiecicki, there was sufficient evidence to suggest that Swiecicki's speech was normal ballfield banter. Swiecicki's version of events had his whole section of the stands engaged in similar speech.

The Court also found that there was a potential violation of Swiecicki's First Amendment rights. Swiecicki alleged, and there was sufficient evidence to suggest, that Delgado arrested him either based on the content of his heckling or in retaliation for protesting his being escorted out of the stadium. The Court found regarding Swiecicki's protestations:

> With regard to Swiecicki's verbal protests during his forcible removal from the game and subsequent arrest, this court held in *McCurdy v. Montgomery County*, 240 F.3d 512, 520 (6th Cir.2001), that "[t]here can be no doubt that the freedom to express disagreement with state action, without fear of reprisal based on the expression, is unequivocally among the protections provided by the First Amendment." "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462-63, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987).

Judge Sutton dissented in part regarding Swiecicki's First Amendment claim. He stated that it was incredulous that Delgado arrested Swiecicki based on the content of his heckling. He also found it unbelievable that Delgado arrested Swiecicki based on Swiecicki's questioning of Delgado. Judge Sutton would let the probable cause claim go forward.

It should be noted that this summary does not encapsulate an excessive force claim that is also interesting.

***Bell v. Bell*,**
460 F.3d 739 (C.A.6 (Tenn.)),
before Cole, Clay, and Gibbons, Circuit Judges.

The Court rules that tacit agreements between the prosecution and witnesses are subject to *Brady* analysis.

In this *habeas corpus* case, Stephen Bell appeals his denial of a writ by the district court. Bell was convicted in Tennessee of two murders based in part on the testimony from a jailhouse informant, William Davenport. Davenport provided the prosecution with a confession and the only evidence of premeditation regarding one of the victims. Absent the snitch testimony, the Court characterized the evidence against Bell as "somewhat insubstantial and entirely circumstantial."

Davenport testified that while in custody with Bell that Bell confessed to both murders. He also stated that Bell said he killed the second victim because she was a witness to the first victim's death. Bell was convicted of the first degree murder of the second victim but only the second degree murder of the first victim. Bell had made a pre-trial *Brady* request.

Post-trial it was discovered that just prior to Bell's trial that Davenport had settled a pending charge with the same prosecutor's office in a plea bargain that resulted in a reduced term of incarceration from what he was facing. The Court summed up the testimony of the prosecutor at the post-conviction evidentiary hearing:

> Ross Miller (Miller), the prosecutor at Petitioner's trial,…testified that he did not promise Davenport anything in exchange for Davenport's testimony at Petitioner's trial. Miller testified that while he wrote a letter to the parole board on Davenport's behalf, he did not promise Davenport that he would do so. Miller admitted that Davenport first approached the prosecution about testifying against Petitioner, and that "[e]verybody wants something, and I'm sure Davenport wanted something." (J.A. at 476.) Notes taken by Miller at the first meeting between Miller and Davenport indicated that Davenport wanted a transfer of facilities or a work release program.
>
> During closing arguments, Miller argued to the jury that he did not have any "say-so" with the parole board in Davenport's case. At the evidentiary hearing, Miller admitted that he did in fact write a letter to Davenport's parole board; in that letter Miller wrote that the prosecution did not have a strong case without Davenport's testimony. Davenport's testimony was important in that it provided Petitioner's motive for the shooting and established what had actually happened at the shooting. Miller admitted that Davenport was the prosecution's final witness in its case. Miller reiterated that he made no promises to Davenport.

At trial, Bell's attorney had been aware of Davenport's upcoming parole hearing and impeached him with it. Bell's attorney was unaware of the notes taken by the prosecutor, and he was unaware that Davenport had benefited from a favorable plea bargain on his pending charges.

Judge Clay delivered the Opinion of the Court. The Court found that the district court had erred in not granting Bell a writ of habeas corpus based on the rule of *Brady v. Maryland*, 373 U.S 83 (1963).

First, the Court found that Bell could bring his claim despite not having brought it the state courts of Tennessee. The Court stated that Bell could not have brought a claim of which he was unaware:

> In the instant case, Petitioner's counsel requested any exculpatory or impeachment evidence that the prosecution had in its possession, and the prosecution provided nothing. The prosecution did not inform Petitioner that Davenport had approached the prosecution to testify in exchange for a building transfer or a work release program; the prosecution did not reveal that shortly after a meeting with Davenport, the government dropped four criminal counts against Davenport and Davenport received concurrent sentences for two

Continued on page 34

Continued from page 33

> additional criminal counts; and the prosecution made no mention of any intention to aid Davenport in his upcoming parole hearing. Petitioner thus could not have made his *Brady* claim in state court because he had no way of knowing that the prosecution failed to disclose such evidence. Moreover, once the prosecution responded to Petitioner's request for exculpatory evidence with an empty hand, Petitioner was under no duty to engage in further investigation to determine whether the prosecution in fact withheld evidence. *See Banks*, 540 U.S. at 695, 124 S.Ct. 1256 ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.").

The Court then analyzed whether tacit understandings between the prosecution and witnesses could qualify as *Brady* violations. The Court held that "[n]o principled reason exists for differentiating between spoken and unspoken agreements between the prosecution and a witness." The Court stated that a tacit agreement carried with it the same potential partiality that an expressed agreement carried. The Court then stated:

> Moreover, a tacit agreement in this context is based on the transparent incentives for both the witness and the prosecution. The fact is that a jailhouse informant is one of the least likely candidates for altruistic behavior; his offer to testify is almost always coupled with an expectation of some benefit in return. The prosecution is not naive as to this expectation, and the prosecution also knows that when the value of the informant's testimony reaches a sufficient level, it is in the prosecution's interest to fulfill this expectation. At the most fundamental level, the arrangement is a *quid pro quo;* the informant knows he is giving something of value and expects something in return; the prosecution knows it is receiving something of value, and gives something in return. No written or spoken word is required to understand the nature of this tacit agreement. This is not to say that "a nebulous expectation of help from the state" is sufficient evidence for such an agreement. *Goodwin v. Johnson*, 132 F.3d 162, 187 (5th Cir.1997). But if a petitioner proves that a witness approached the prosecution to testify with the expectation of some benefit, and that the prosecution understood this expectation and fulfilled the expectation by actually bestowing some benefit, the petitioner has sufficiently demonstrated a tacit agreement that must be disclosed under *Brady.*

The Court found that *Brady* was violated in this case. Though no one ever testified that an agreement was in place, the Court wrote that it was "difficult to believe as mere coincidence" that Davenport got a reduced sentence and a letter of recommendation to the parole board in the absence of at least a tacit deal. The Court found that there was a reasonable probability of a different verdict if the defense had been fully able to impeach Davenport. The Court also stated that it was immaterial that the information of Davenport's plea deal was an available public record:

> [A]ssuming…that the basis of Petitioner's *Brady* claim could indeed have been found in these records, Petitioner was under no obligation to second guess the prosecution's representation that no impeaching evidence existed as to Davenport…[O]nce the prosecution responded to Petitioner's request for impeaching evidence, Petitioner was under no duty to engage in further investigation to determine whether the prosecution's response was truthful. *See Banks* [*v. Dretke*], 540 U.S. [668] at 695, 124 S.Ct. 1256 [2004] ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.").

Judge Gibbons dissented from the grant of the writ. She found fault with the majority's legal reasoning. She believed that the cases cited by the majority from sister circuits, while supporting that tacit agreements are *Brady* material, did not militate that under these facts there was a provable *Brady* violation. She did, though, find that the prosecutor's notes should have been turned over to the defense. However, she did not think they satisfied *Brady*'s prejudice prong.

***United States v. Kelley*,**
461 F.3d 817 (C.A.6 (Mich.)),
before Boggs, Chief Judge, and Keith and Sutton, Circuit Judges.

A jury considering in deliberations that the defendants did not testify couldn't form the basis for a new trial based on juror misconduct.

Wilbourne Kelley, III, and Barbara Kelley, married, were found guilty by a federal jury of receiving kickbacks from a contractor in return for awarding the contractor lucrative airport construction contracts. The case was high profile. The press interviewed the jury after the verdict. One juror stated, "I was also struck by the fact that neither of the Kelleys testified. If they were innocent, they would have testified."

Judge Keith delivered the Opinion of the Court.

Despite the jury's impermissible consideration of the Kelleys not testifying, the Court found the information from the juror inadmissible. The Court cited FRE 606(b). Under this rule, "any evidence regarding a juror's thoughts about the trial, if offered to impeach the jury's verdict, is incompetent and cannot be admitted." The rule is designed to encourage open discussion in jury rooms, to help juries make unpopular decisions, and to maintain the public's trust in the jury system. Only two exceptions to the rule exist: (a) "when extraneous prejudicial information is improperly brought to the jury's attention," and (b) "when outside influence [is] improperly brought to bear upon any juror."

The Kelleys argued that they met the exception of an outside influence. However, the Court did not agree, citing a long list of cases from sister circuits that supported that conclusion.

Note: In Kentucky, our juror testimony rule, RCr 10.04, has been interpreted with the same proscriptions and exceptions. *Bowling v. Commonwealth*, 168 S.W.3d 2, 9-10 (Ky. 2004).

***Dando v. Yukins*,**
461 F.3d 791 (C.A.6 (Mich.)),
before Martin, Clay and Guy, Circuit Judges.

Writ of *habeas corpus* granted to woman whose attorney failed to develop evidence of a battered woman defense.

On the advice of counsel, Debra Dando pled no contest to several counts of robbery. She committed the robberies with her boyfriend, Brian Doyle. Prior to the plea, Dando requested that her attorney have her mental health evaluated. Her attorney stated that this would cost too much money. Dando told her attorney that she had a long history of "violent sexual and physical abuse." She told him that immediately prior to the robberies that Doyle beat her and threatened to kill her if she did not participate. At her sentencing, the Judge sentenced her to the low end of the guidelines (10-30 years) because Doyle had "misused" her. The Judge noted that she had plenty of opportunity during the robbery spree to cease participation at times when Doyle was not directly with her.

On appeal, Dando, through new counsel, motioned the trial court for funds to hire an expert in battered woman syndrome to assess whether she should withdraw her guilty plea. Her appellate attorney believed that Dando had a duress defense to the crime spree. The trial court treated the motion as a claim of ineffectiveness against the trial attorney and ruled that Dando had received effective assistance. The trial court ruled that Dando's attorney had made a strategic decision to take a lenient sentence rather than go to trial and risk a longer sentence. Dando appealed unsuccessfully to the appellate courts of Michigan. She then filed a petition for *habeas corpus*.

Judge Martin delivered the Opinion of the Court.

The Court found that Dando's trial attorney's refusal to seek an expert because it would be too costly was a misapprehension of the controlling law. The Court explained that Dando was entitled under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) to a state funded expert. Thus, the Court reasoned, Dando's trial attorney could not have made a reasoned strategic decision to recommend a plea. The Court stated that the Michigan courts misapplied "clearly established Supreme Court precedent that required counsel to adequately investigate potential defenses." The Court ruled that the fact that Dando got a lenient sentence is immaterial to the inquiry. The Court analyzed the case under *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (When "a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.").

The Court then assessed whether Dando was prejudiced by not having an expert. Interestingly, the Opinion makes no mention of an expert's actual diagnosis of Dando. Rather, the Opinion mentions three affidavits filed with the trial court that documented Dando's history – one signed by Dando, one by a friend, and one by Dando's Aunt. The Court wrote:

> Dando's experience of abuse is itself shocking, and would present a potentially compelling duress defense based on Battered Woman's Syndrome. Dando's mother was a drug addict, who would "lend out" Dando to drug dealers for months at a time to pay off her drug debts, from the time Dando was six years old until she was twelve. Dando was forced to perform sex acts upon the dealers. Her parents abused her both physically and sexually, and her father took photographs of her which the state court described as shocking and appalling. Dando's first husband seems to have abused her to the point where she was "scared to death of him." Doyle also violently abused Dando, and one of the affidavits submitted by an acquaintance claimed that Doyle said he was "selling" Dando. Doyle threatened and hit Dando on the morning of the offenses, possibly giving her a concussion and requiring her to seek medical attention. Doyle's reckless and violent behavior is also exemplified by his brandishing of a shotgun, repeated robbery attempts, and eventual armed confrontation with the police that resulted in his death.
>
> With help from an expert on Battered Woman's Syndrome, Dando could have introduced evidence of all of the elements of a duress defense. Just prior

Continued on page 36

Continued from page 35

> to embarking on the crime spree, Doyle had threatened her life if she did not cooperate. Given Doyle's propensity for violence, with which Dando had sadly become too familiar, a reasonable person in her situation would likely have feared death or serious bodily harm. Dando's testimony could also support conclusions that the threats in fact caused her to fear death or serious bodily harm, that this fear was operating upon her mind at the time of her cooperation with Doyle, and that she cooperated with Doyle to avoid the threatened harm. Evidence of Battered Woman's Syndrome would also have been relevant to explain why Dando may have felt unable to escape the situation.
>
> For purposes of evaluating prejudice under *Hill*, we need not determine to an absolute certainty that a jury would have acquitted Dando based on a defense of duress. Rather, we need only find a likelihood of a favorable outcome at trial such that Dando's counsel would not have given the same recommendation and she likely would have rejected the guilty plea. We find there to be a sufficient likelihood here to establish ineffective assistance of counsel under *Hill*. Because the state courts failed to apply this well established Supreme Court precedent, the writ of habeas corpus should be granted by the district court.

Judge Guy dissented. He stated that because the assessment of prejudice under *Hill* depends largely on whether the missed defense would have succeeded at trial that prejudice could not be met in this case. He also did not think that Dando's trial attorney's decision to pursue a lenient plea was objectively unreasonable performance. Lastly, he noted that Dando had not indicated what an expert on battered woman syndrome might have contributed to Dando's defense.

***Dyer v. Bowlen*,**
— F.3d ——, 2006 WL 2482819 (C.A.6 (Tenn.)),
before Suhrheinrich, Gilman, and Rogers, Circuit Judges.

Parole standards are subject to the Ex Post Facto Clause of the Constitution.

Joseph Dyer challenged the fact that a change in Tennessee's parole standards was applied to him. He argued that the parole standards at the time of his conviction were more lenient. A long discussion of the specifics of those standards will not be included here, because they have little application to the parole standards in effect in Kentucky.

Judge Gilman delivered the Opinion of the Court.

The Court wrote:

> The Constitution prohibits states from imposing ex post facto laws. U.S. CONST. art. I, § 10, cl. 1. An ex post facto law possesses two elements: (1) "it must apply to events occurring before its enactment," and (2) "it must disadvantage the offender affected by it." *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997) (citation and quotation marks omitted) (holding that a Florida statute canceling provisional release credits violated the Ex Post Facto Clause). Retroactive application of parole provisions falls within the ex post facto prohibition if such an application creates a "sufficient risk of increasing the measure of punishment attached to the covered crimes." *Garner v. Jones*, 529 U.S. 244, 250, 120 S.Ct. 1362, 146 L.Ed.2d 236 (2000) (citation and quotation marks omitted).

The Court went on to say that there is not a test for determining what is a "sufficient risk." However, speculation and conjecture of increased punishment is not enough to establish a constitutional violation. In this case, Dyer met his pleading burden in that the Court remanded the case back to the district court to conduct a hearing on similarly situated inmates' parole treatment.

Judge Suhrheinrich concurred in the Opinion, agreeing that a remand was the proper procedural remedy. He stated, however, that he thought Dyer unlikely to ever get parole due to the severity of his crimes. He believed that the remand was therefore a fruitless exercise.

Judge Rogers dissented. He believed that this was one of those cases where there was a "substantive" change in the parole standards. In such a case, a remand would not be necessary. He would grant the writ, ordering the Tennessee parole board to consider Dyer's parole under the old standards. ■

The Battered Women's Legal Advocacy Network, a Minnesota based, statewide, non-profit organization provides legal information, consultation, training, litigation and legal resource support, and policy development assistance to battered women and to criminal justice, legal and social service systems. Resources can be found at http://www.bwlap.org/

KENTUCKY CASE REVIEW

By Roy Durham, Appeals Branch

Rodney T. Bixler v. Commonwealth
Rendered 08/24/06, To Be Published
2006 WL 2454712
Affirming
Opinion by J. Roach, Dissent by C.J. Lambert

Daisy Whitaker was murdered in the early morning hours of October 22, 2000. A jury convicted Bixler of murder and theft by unlawful taking over $300.00.

A party-spouse must assert or invoke the spousal testimony privilege on the record before he or she can claim the protections of the rule. A party-spouse who wishes to claim the benefits of the privilege simply needs to invoke it on the record and may do so at any time. The Commonwealth's Attorney discussed the failure of Bixler's wife to testify. Bixler's attorney objected to the questioning and mentioned the existence of the spousal testimony privilege. The judge made it clear that he was aware of the prohibition in KRE 511(a), on commenting on the claim of a privilege. But as the judge noted repeatedly, neither Bixler nor his wife ever expressly invoked the spousal testimony privilege. The issue the judge addressed was the prosecutor's comment on the fact that Bixler's wife was a missing witness. In making these comments, the judge was inviting Bixler's attorney to indicate whether he had chosen to exercise his privilege. Bixler's attorney did not accept the invitation, thus there is no evidence in the record that Bixler asserted his privilege to prevent his wife from testifying. Bixler's failure to assert his own privilege preclude review of the issue.

Demetrius Maurice Wilson v. Commonwealth
Rendered 08/24/06, To Be Published
2006 WL 2454542
Affirming
Opinion by J. Roach

Demetrius Wilson went to the Paducah Police Department for an interview. After Mr. Wilson told his record of the events, the officers told him that his story was not consistent with the evidence from the crime scene. The police then suggested that Mr. Wilson go to lunch to think things over and return in the afternoon. Upon returning, the Detective was informed that the family had consulted with an attorney who advised Mr. Wilson not to speak with police. Wilson was immediately arrested and taken into an interview room. The officers read him his *Miranda* rights. Mr. Wilson began to give a statement that was inconsistent with those made in his first interview. A jury found Wilson guilty of intentional murder and sentenced him to 21 years in prison.

The Fifth Amendment rights protected by *Miranda* attach only after a defendant is taken into custody and subjected to interrogation. Wilson's rights to silence and counsel had not yet attached when he attempted to invoke them upon returning to the police station, because he was not in custody. The Fifth Amendment rights protected by *Miranda* attach only after a defendant is taken into custody and subjected to interrogation. Any attempt to invoke those rights prior to custodial interrogation is premature and ineffective.

To determine whether a suspect is in custody for the purposes of *Miranda*, a court must consider the totality of the circumstances. But "the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." The inquiry into whether Wilson was in custody turns on whether a reasonable person in a similar situation would have believed that he or she was free to leave. Wilson invoked his rights to silence when he voluntarily returned to the police station after having been allowed to go to lunch with his family. Under these circumstances, a reasonable person would have felt free to leave. Wilson was not in custody when he attempted to invoke his *Miranda* rights to silence and counsel therefore his *Miranda* rights had not yet attached, and he could not at that time make a valid assertion of those rights.

The evidence presented during trial of Wilson's statement to the detective was to the effect that the victim robbed him of money and weed fell into the exception to the rule against character evidence listed in KRE 404(b)(1). In determining the admissibility of other crimes evidence under KRE 404(b), a court must engage in an analysis of the relevance of the evidence, the probative value of the evidence, and prejudice to the defendant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The marijuana evidence was relevant because it tended to make the prosecution's theory that the shooting incident stemmed from a "drug deal gone bad" more probable. The inquiry into the probative value of the evidence turns on whether evidence of a prior bad act or uncharged crime is "sufficiently probative of its commission by the accused to warrant its introduction into evidence." Because the challenged evidence was Wilson's own admission that he committed the prior bad act, it is clearly probative of the fact that Wilson did in fact possess marijuana on the night of the shooting.

Continued on page 38

Continued from page 37

The statement is sufficiently probative to warrant its introduction into evidence. While possession of marijuana is a serous crime, evidence of such a crime is not so prejudicial as to preclude its introduction for the purpose of establishing a motive for a murder. The burden is on the Commonwealth to show both that the evidence fits within an exception to the rule against character evidence, and to demonstrate that the probative nature of the evidence substantially outweighs its prejudicial effect. The Commonwealth met this burden by showing that the evidence of Wilson's possession of marijuana on the night of the shooting, marijuana that he claims Mr. Knox stole from him, was offered to establish his motive for shooting Mr. Knox.

Ricky Barbour v. Commonwealth
Rendered 08/24/06, To Be Published
2006 WL 2454484
Affirming
Opinion by J. Roach

Barbour was convicted of first-degree attempted rape, kidnapping, fourth-degree assault and PFO II in November 1994. His sentence was enhanced to twenty years for the attempted rape and 200 years for the kidnapping. Barbour appealed his conviction contending that the trial court erred in admitting evidence of two out-of-state felony convictions, which were used to prove his status as a PFO II. In May 1996, the Supreme Court reversed the PFO II conviction and sentence enhancement and remanded the matter to the Hart County Circuit Court for retrial of the PFO II charge.

Barbour filed a pretrial motion to pursuant to KRS 532.055(2)(b), the truth-in-sentencing statute, to allow him to introduce mitigation evidence at the retrial of the PFO II charge. Barbour sought to introduce evidence of his post-conviction conduct, including proof of his completion of the Sexual Offender Treatment Program and other programs in prison, and evidence of his remorse. The trial court granted the motion on November 12, 2002. On July 30, 2004, Barbour filed a motion *in limine* to limit the retrial "to the PFO phase and not a full truth-in-sentencing proceeding." On August 9, 2004, the trial court issued an order that granted the motion *in limine* but that also overruled the previous order allowing the introduction of mitigation evidence at the retrial.

During an in-chambers meeting on August 11, 2004, Barbour objected to wearing leg shackles during the PFO proceeding. The judge ruled that Barbour would remain in shackles, but offered to give the jury an admonition which was declined for fear that such an admonition would draw more attention to the shackles. The jury found Barbour guilty of PFO II and enhanced his sentences accordingly. The sentence for the first-degree attempted rape conviction was enhanced from 10 years to 20 years and the sentence for kidnapping was enhanced from 20 years to 50 years. The sentences were set to run consecutively for a total of 70 years imprisonment.

The trial court's granting Barbour's motion *in limine* requesting that the retrial be limited to the PFO phase overruled its previous order granting the motion to allow introduction of mitigation evidence. While Barbour had at one time moved the trial court to allow the introduction of mitigation evidence under the truth-in-sentencing statute, that request was effectively withdrawn when he subsequently filed a motion *in limine* requesting that the retrial be limited to the PFO phase and not a full truth-in-sentencing proceeding. Barbour's current challenge that his motion to introduce mitigation evidence during the remanded PFO proceeding was denied improperly cannot be justified, given that it was the direct result of his own motion. The effect of this ruling was that all other evidence, including mitigation evidence, could not be introduced. The court could not consider Barbour's alleged objection to the exclusion of mitigation evidence as grounds for reversing Barbour's conviction when the exclusion was prompted by his own motion and was not properly preserved by subsequent objection.

It was an abuse of discretion for the trial court to conclude that it was justified for Barbour to appear at the PFO hearing in shackles. RCr 8.28(5) bars the routine shackling of a defendant, absent a showing of good cause, whenever he will be seen by the jury. There have been a few exception cases in which the court has upheld the practice of shackling, and in each case the trial court based its decision on specific findings of extraordinary circumstances. In this case, the shackling was not based on any specific finding that he was violent or a flight risk. In fact, the prosecutor supported his shackling request only with nonspecific concerns about escape risk and safety. Under the Commonwealth's reasoning, a trial court would be free to predict a defendant's behavior solely from his status as a convicted felon, without making any specific findings that he posed a risk of violence in or escape from the courtroom.

The nature of the charges against a particular defendant cannot themselves provide the entire justification for shackling; rather, all the relevant factors must be considered, including alternative means of providing a safe and fair trial. It was unfair in this case for the trial court to impose shackles merely because Barbour has already been give a lengthy sentence.

A trial court's decision to keep a criminal defendant shackled before the jury is usually accorded great deference. However, in light of RCr 8.28(5)'s requirement of a showing of "good cause" for allowing the practice and the lack of any substantive evidence or finding by the trial court that Barbour was either violent or a flight risk, it was clear that the decision to require Barbour to appear at the PFO hearing in shackles was not justified. However, this error is subject to the harmless error rule. Given the circumstances of the remanded PFO proceeding and the overwhelming evidence of guilt, the error was harmless.

Jeremy Deshannon Rice v. Commonwealth
Rendered 08/24/06, To Be Published
2006 WL 2454431
Affirming
Opinion by C.J. Lambert

On March 8, 2004, a Fayette County Grand Jury indicted Rice on one count of robbery in the first degree, one count of burglary in the first degree, and one count of being a persistent felony offender in the second degree. The indictment included several co-conspirators as well. In addition, Rice was charged with assault in the first degree for shooting Chris Manly. Rice was acquitted of assault in the first degree, but the jury was hung on the remaining charges of robbery in the first degree, burglary in the first degree, and being a persistent felony offender in the second degree.

A second trial was scheduled in which Barbour was to be tried along with another co-defendant. However, the other co-defendant accepted a plea agreement with the Commonwealth prior to the commencement of trial. Rice was therefore tried on the charges by himself. The jury found Rice guilty of robbery in the second degree and burglary in the second degree. In addition, the jury found Rice to be a persistent felony offender and recommended that the 10 year sentence on each charge be enhanced to 20 years for a total sentence to be served of 40 years.

There was no error when the Commonwealth introduced evidence that implied Rice shot one of the victims, even though Rice had been acquitted of such charge in a prior trial. Upon Rice's initial motion *in limine*, the trial court agreed to exclude certain other crimes evidence and directed the prosecution to refrain from mentioning that Rice had been previously tried and acquitted of assault. Nevertheless, on direct examination a witness for the Commonwealth testified without objection that Rice had participated in the robbery/burglary while armed with a nine millimeter handgun; that he ran down the hallway of the house; and that a shot was fired. Other evidence established that the male victim was shot with a nine millimeter handgun. Therefore, a logical inference was that Rice had fired the shot and hit the victim.

There was no error by the trial court in allowing this testimony to be heard. The general rule on the admissibility of evidence of other crimes is that such evidence is not admissible to prove the character of a person in order to show action in conformity therewith, however, there are notable other uses of such evidence. KRE 404(b)(2) allows such testimony if it is "so inextricably intertwined with other evidence it is essential to the case that separation…could not be accomplished without a serious adverse effect." The testimony that Rice was present, armed, and proceeded down the hallway where a shot was fired recounted a seamless series of circumstances and events that were impossible to separate. Thus, there was no error committed by the trial court in its ruling to allow the entire testimony of the witness.

There was no error when the trial court failed to admonish the jury that Rice was not on trial for assault. During each of the pretrial hearings, the trial judge expressly stated that she would admonish the jury that Rice was not on trial for assault when the Commonwealth's witness testified. However, an admonition was not given at trial. Even if Rice had a reasonable expectation that an admonition would be given, he had a duty to speak. At a minimum, Rice had a duty to remind the court of the Judge's pretrial ruling.

An objection of an attorney for one codefendant will not be deemed to be an objection for other codefendants unless counsel has made it clear that in making an objection it is made for both defendants. Rice argues that the trial court erred by failing to prohibit the introduction of testimony that one of the victims was pregnant when she sustained injuries during the incident. Rice concedes that he made no objection to the evidence of the victim's pregnancy, however, he argues that even though he made no objection at trial, the issue is still preserved because it was raised by codefendant's counsel during a pretrial hearing.

Where two or more defendants are being tried together, it is incumbent upon each party to timely make the court aware of his objection to any of the proceedings. This may be done on behalf of one of the parties or jointly on behalf of others, but the court must be informed of the position taken by a party or he cannot later complain. Since Rice's counsel did not object either at the pretrial hearing or during the trial, nor did co-defendant's counsel state that he was objecting on Rice's behalf, the testimony regarding the victim's pregnancy and injuries sustained during the incident were not improperly admitted.

Steve Bryant v. Commonwealth
Rendered 08/24/06, To Be Published
2006 WL 2454351
Affirming
Opinion by J. Roach

Steve Bryant was indicted for a robbery and assault. Sometime later, Bryant was incarcerated in the Illinois River Correctional Center (IRCC). On July 1, 2002, the Commonwealth's attorney lodged a detainer against Bryant at IRCC based on the Kentucky indictment. On or about July 16, 2002, IRCC's warden informed Bryant of the charges that were pending against him in Kentucky. Bryant signed and returned to the warden Agreement on Detainers Forms I and II. IRCC staff sent two separate copies along with other required forms via certified mail. The first was sent to the County Attorney and the second to the Clerk of the Court which was signed for by a staff member in the office of the County Judge Executive.

Continued on page 40

Continued from page 39

On April 30, 2003, Bryant was brought from IRCC to Caldwell County. Trial was scheduled for August 26, 2003 which would have been 118 days from the date Bryant was transferred. On June 10, 2003, Bryant filed a motion to dismiss the charges pending against him because he had not been brought to trial within 180 days of his request. The trial court issued an order denying the motion to dismiss.

Bryant entered a conditional guilty plea. He was sentenced to 10 years in prison for the robbery and 11 years for the assault to run consecutively for a total of 21 years. Bryant reserved the right to appeal the trial court's denial of his motion to dismiss in accordance with the Interstate Agreement of Detainers (IAD), KRS 440.450.

The 180 day time limit imposed by an IAD does not commence until the prisoner's request for final disposition of the charges against him has actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer against him. The trial court noted that there was no evidence that proper notice was given to the Commonwealth Attorney who is the appropriate prosecuting officer for this the appropriate Court of felony jurisdiction in Kentucky. Additionally, the office of the Caldwell County Judge Executive was not the appropriate office with which to file IAD paperwork because it did not perform any judicial function or possess any judicial authority.

The IAD states that a defendant "shall be brought to trial within one hundred eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint…" KRS 440.450 (Art. III)(1). There is no dispute that Bryant requested disposition of the charges pending against him in July 2002. Likewise, there is no dispute that IRCC staff failed to give notice to the appropriate officials as required by the IAD. By informing the IRCC warden of his request for a final disposition of the Kentucky indictment, Bryant did all that was required of him under the IAD. At the same time, it is unquestioned that IRCC's staff failed to transmit Bryant's request to the appropriate parties, a function they are required to perform under the IAD.

It was held in *Fex v. Michigan*, 507 U.S. 43, 113 S.Ct. 1085, 122 L.Ed.2d 406 (1993), that the 180 day time period of the IAD did not commence until the prisoner's request for final disposition of the charges against him had actually been delivered to the court or prosecuting officer of the jurisdiction that had lodged the detainer against him. In the present case, the trial court conducted a hearing on Bryant's motion to dismiss prior to trial and specifically found that his disposition request was never delivered to either the Caldwell County Commonwealth's Attorney or to the Caldwell Circuit Court. As such, the 180 day time limit imposed by the IAD never began to run because neither the prosecutor nor the court was ever informed of Bryant's request for disposition of the charges. ■

PLAIN VIEW . . .

Ernie Lewis, Public Advocate

***Rainey v. Commonwealth*, 197 S.W.3d 89 (Ky. 2006)**

Two Louisville police officers were walking in a housing project when they saw Rainey driving at a high rate of speed over several speed bumps, get out of his car, and yell at nearby residents. When they approached him 50 feet away from the car, he admitted he had been drinking and had been kicked out of a bar. Rainey was arrested on DUI, and in the search incident to the arrest he was found to have a handgun. He was charged with DUI, being a felon in possession of a handgun, and PFO 1st. His motion to suppress the handgun was granted by the trial court. The Court of Appeals affirmed the trial court opinion, and the Commonwealth sought discretionary review. The Supreme Court remanded the case to the Court of Appeals for them to reconsider their opinion in light of *Thornton v. United States*, 541 U.S. 615 (2004). The Court of Appeals reversed their previous opinion and overruled the decision by the trial court to suppress the handgun. The Supreme Court granted discretionary review.

In an opinion by Justice Scott, the Court affirmed the decision of the Court of Appeals. Justice Scott begins by stating that Section Ten of the Kentucky Constitution is no broader than the Fourth Amendment. The opinion features a summary of the history of the search incident to a lawful arrest exception, from *Chimel* through *Belton* to *Thornton*. The Court states that while the distance from the car and the time elapsed are both relevant to the question of whether a search incident to an arrest is lawful or not, those factors are not dispositive. "Appellant was a 'recent occupant' and was sufficiently close to the vehicle, in both time and space, for the concerns of Belton and Thornton to be applicable. We see no reason to distinguish Thornton on the facts of this case. Accordingly, we affirm the Court of Appeals in finding that the suppression of the evidence was erroneous."

Justice Cooper wrote a concurring opinion joined by Justice Johnstone. In their view, *Thornton* is on all fours with this case and thus must be followed. They wrote to say that *Thornton* is "seriously flawed."

Justice Roach also wrote a concurring opinion joined by Justice Lambert. Most interestingly, his opinion differs from Justice Scott's opinion regarding Section Ten of the Kentucky Constitution. The case, *LaFollette v. Commonwealth*, 915 S.W. 2d 747 (Ky. 1996), cited by Justice Scott for this proposition, does not support it, according to Justice Roach. In Justice Roach's opinion, Section 10 might be interpreted more broadly than the Fourth Amendment, given the right circumstances. "However, if we were to determine that Section 10 of the Kentucky Constitution, as applied to a specific case, contained more protections than the United States Supreme Court had declared is provided by the Fourth Amendment, I believe that we should honor our own constitution. The issue could arise in a situation where the United States Supreme Court has interpreted the Fourth Amendment in such a way as to formulate a legal rule that is inconsistent with the original understanding of Section 10 of the Kentucky Constitution. In such a case, we should decline to defer to the United States Supreme Court's interpretation of the Fourth Amendment when interpreting our own constitutional provision, which is an independent legal protection with a different, albeit related, history and origin. To do otherwise would violate our oath of office by which we are bound to 'support the Constitution of the United States and the Constitution of this Commonwealth . . . .' Ky. Const. § 228 (emphasis added). Our obligation to engage in independent analysis under our own constitution is even more apparent where the relevant federal precedent is weak."

Justice Roach, as Justice Cooper in his concurring opinion, also believed that *Thornton* was poorly decided. He declined to review the case under Section Ten because it had not been briefed with that section in mind.

***Barger v. Commonwealth*, 2006 WL 2191346, 2006 Ky. App. LEXIS 253 (Ky. Ct. App 2006)**

On October 18, 2003, the Louisville Police Department was giving extra attention to a Speedway where there had been several "snatch and grab" incidents. They did not know the description of suspects nor of a vehicle. However, they saw a car "full of people." Later they saw the same car in the same place. When the car left, they began to follow it. While the car did not commit any traffic violations, the police considered their driving "erratic." Eventually, the police stopped the car, and the driver appeared to be drunk, and eventually he was charged with DUI. The issue was whether the stopping by the police violated the Fourth Amendment and Section Ten. The trial court held that it did not. The Court of Appeals, in an opinion by Judge Johnson, affirmed the trial court.

Continued on page 42

Continued from page 41

The Court held that there need not be probable cause to stop someone when investigating for a past crime. While *Terry* has usually been confined to a suspicion of an ongoing crime, the Court said that it did not have to be. The Court went on to note that there was a reasonable suspicion under the facts of this case. The facts alleged by the Commonwealth to be supportive of a reasonable suspicion were that there had been "snatch and grabs" at the particular Speedway station, the occupants of the car did not appear to be doing anything, the car was registered to someone from outside the neighborhood of the Speedway, and the car drove erratically. The Court did not detail those facts that it found persuasive, but rather indicated that under the totality of the circumstances *Terry* had not been violated.

Judge Buckingham wrote a dissenting opinion. He believed the case was a "close call." He also acknowledged that the case law on this issue was all over the place. However, in his opinion, there simply were insufficient facts to justify the stopping. He also noted that the officer had testified that he was not stopping to investigate an existing crime but rather to obtain identification to turn over to the officers investigating the snatch and grabs.

I find this case to be disturbing. Barger and his friends went to a convenient store 3 times on a particular afternoon. They drove within the speed limit. They were stopped as a result of there having been crimes in that store in the past, not because they fit any particular description or because they were engaged in any particular crime or even because they were involved in any articulably suspicious behavior. If this stop is justified, it can be said that virtually anyone can be stopped at any time at the discretion of the police officer.

Black v. Commonwealth,
2006 WL 2846423, 2006 Ky. App. LEXIS 307 (Ky. Ct. App. 2006)

The Lexington Police Department in October of 2002 received an anonymous tip saying that a black male riding a purple bicycle wearing a blue jeans jacket and blue jeans was selling cocaine at a particular corner and that he had the cocaine in a newspaper. When the police went to the area, they found a person matching this description. They left, and when they came back the person on the bike was gone. They soon found Black, and stopped him. Black had a newspaper with him, which he put down. He had his hand in his pocket, and the police ordered him to take his hand out of his pocket. Black declined to follow the instructions, and in the process of putting handcuffs on Black cocaine fell out of the newspaper. Black was arrested and indicted on possession of crack cocaine and PFO 1st. After losing his suppression motion, he entered a conditional plea of guilty. Although he won in the Court of Appeals, subsequently the Supreme Court reversed and remanded back to the Court of Appeals for the Court to reconsider in light of *Commonwealth v. Kelly*, 180 S.W. 3d 474 (Ky. 2005), and *Commonwealth v. Priddy*, 184 S.W. 3d 501 (Ky. 2005).

The Court of Appeals, in an opinion by Judge Taylor and joined by Judge Johnson, reversed. The Court held that the anonymous tip did not create reasonable suspicion sufficient to stop Black. The Court evaluated the issue of when an anonymous tip can be used alone for the creation of reasonable suspicion, relying upon this standard from *Alabama v. White*, 496 U.S. 325 (1990): "[A] range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted. . . . What was important was the caller's ability to predict respondent's *future behavior*, because it demonstrated inside information-– a special familiarity with respondent's affairs." Using this standard, the Court also relied extensively upon *Florida v. J.L.*, 529 U.S. 266 (2000). The anonymous tip gave a particular description, as in *J.L.* but the tip was not corroborated by anything indicative of illegality. "An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." The Court concluded, "[s]imply stated, the tip provided no information upon which police could corroborate its reliability and provided no basis for its allegation of criminal activity. *See Id*.; *Alabama v. White*, 496 U.S. 325. Upon the totality of the circumstances, we are of the opinion the anonymous tip was insufficient to create reasonable suspicion that appellant was engaged in criminal activity; thus, the investigatory stop was violative of the Fourth Amendment of the United States Constitution and of Section 10 of the Kentucky Constitution. Accordingly, we hold the circuit court erred by failing to grant appellant's motion to suppress."

Judge VanMeter dissented. In his view, *Florida v. J.L.* was distinguishable. As opposed to J.L., in this case the tip involved a high crime area, the police officer recognized Black from previous encounters, and Black "took evasive action," presumably riding his bicycle away from the corner. Most importantly, when stopped, Black refused to pull his right hand out of his pocket. (The majority had emphasized that reasonable suspicion must be present prior to the stopping).

United States v. Long,
2006 WL 2795053, 2006 Fed.App. 0367P 2006 U.S. App. LEXIS 24584 (6th Cir. 2006)

In November of 2000, in the afternoon, a person called 911 in Knoxville, Tennessee, and said that a woman in a nearby house was addicted to drugs, and that drug dealers were

removing items from her house in order to pay for a drug debt. The caller said that two black males and one white male were putting items into two pickup trucks, one of which was a red S-10 and one a black and gray Ford Ranger, and that the trucks had left the house. The Knoxville Police saw a black Ford Ranger with large pictures and mirrors in the bed of the truck, stopped the truck, and found Richard Long as the driver. When Long admitted to being at the address, the officer ordered Long out of the truck and handcuffed him, found a pistol on him, and also found a variety of controlled substances. Long was arrested, lost his motion to suppress, and entered a conditional plea of guilty.

The Sixth Circuit affirmed in a decision written by Judge Martin and joined by Judges Gilman and Sargus. The Court found the initial stopping of the truck to have been a legal *Terry* stop, finding the 911 call to have been "relatively reliable" and the identity of the caller, while not known, to have been similar to a citizen caller rather than an anonymous tip, which is accorded less deference (the police had been outside the caller's home at the time of the call). The Court further found that once Long admitted to having been at the house, reasonable suspicion ripened into probable cause which allowed for the search of Long's person.

United States v. Shaw,
2006 WL 2728761, 2006 Fed.App. 0364P, 2006 U.S. App. LEXIS 24257 (6th Cir. 2006)

Brendan Shaw was 18 years of age in June of 2004, living with his cousin, his cousin's wife, and their three young children. He was a live-in babysitter. On June 21, Shaw's cousin's wife, Angie, took their 3 year-old to the emergency room at an Army Hospital and told the staff that the 3 year-old had stated that Brendan had "touched his pee-pee" and that "his pee-pee had touched his butt." A doctor examined the child and found no physical evidence. The military police were called and an MP investigator and a special agent of the FBI eventually joined together to investigate. Without speaking with the child, they picked up Brendan Shaw after midnight. They told Brendan Shaw that "they needed to talk to him down at CID." Shaw was frisked and handcuffed and without allowing him to go inside the house to put on his shoes put him into the backseat of the police car. Shaw was put into an interrogation room where he waited for 30-50 minutes for Special Agent Wolfington. Wolfington moved Shaw into another room and gave him his *Miranda* rights. A waiver form was signed. Wolfington then interrogated Shaw for the next 4-5 hours, from approximately 3:00 a.m. until 7:45 a.m., when he reversed his previous statement and "admitted touching the three-year-old incidentally in the course of bathing and dressing him on one occasion, when the three-year-old was having difficulty getting dressed." Later that afternoon, a blood sample was taken from Shaw. Sometime during this process, Shaw's Uncle came to pick him up, but his request to do so was denied. At 3:15 in the afternoon Special Agent Joubert, a polygrapher, came to interrogate Shaw further. At this point, no one had interviewed the either the three-year-old child or the five-year-old child. Joubert knew that the five-year-old child had denied being touched by Shaw. Joubert had Shaw again sign a waiver of rights form. At 7:45 p.m., after more than four more hours of interrogation, Shaw "confessed, in detail, to five instances of sexual molestation of the three-year-old, including touching, attempted anal penetration, and one brief instance of actual penetration." Wolfington then joined Joubert and began to interrogate Shaw about the five-year-old. At 9:30 p.m. Shaw agreed that he had molested the five-year-old, although his hand-written statement contained no details. "This statement was signed at 9:30 p.m., by which time Shaw had been held in custody for nearly twenty hours and had been questioned for approximately eleven of those hours." Shaw was charged with multiple counts of child sexual abuse. His motion to suppress was denied, the district court finding that the MP had probable cause to arrest him. Shaw entered a conditional plea of guilty.

In an opinion by the Sixth Circuit, written by Judge Wiseman and joined by Judge Gilman, the Court reversed the trial court. The Court found that Shaw had been under arrest for Fourth Amendment purposes as soon as he was seized by the MP, rejecting the government's contention that Shaw had gone voluntarily without his shoes with the MP in the middle of the night. The Court held that this seizure was done without probable cause. The Court acknowledged that while an eyewitness's statement that he saw a crime committed is enough to establish probable cause, "[w]e are not aware, however, of any situation in which the uncorroborated hearsay statement of a child as young as three, standing alone, has been considered sufficient to establish probable cause." "[T]he police neither interviewed the child nor made any effort whatsoever to corroborate the mother's allegations before taking Shaw into custody. In fact, the sum total of information in the possession of the police at the time of Shaw's arrest was that (1) Angie Shaw reported that her three-year-old son had told her that Shaw had touched his penis and that Shaw's penis had 'touched his butt'; and (2) the doctor who had examined the three-year-old boy had not found any physical evidence of sexual trauma (or any other trauma)." "It appears that the district court's finding that probable cause existed was likely based more upon the type of crime allegedly committed and the difficulty of detecting such crimes, rather than upon the objective evidence available."

The Court further found that Shaw's statements were not "sufficiently voluntary to overcome the taint of illegality such that suppression of the statements is not required" under the standard established in *Brown v. Illinois*, 422 U.S. 590 (1975). The Court found that Shaw's statements had been voluntarily given. The Court went on to find that the fact that the statements had been given some hours after the initial illegality was not dispositive of the suppression

Continued on page 44

Continued from page 43

question. "[T]he length of the detention, and particularly the fact that Shaw was interrogated for approximately eleven of the twenty hours he was held, does not weigh in favor of the Government's argument." The Court found no intervening circumstances sufficient to purge the taint. "Instead, the police simply interviewed the parents of the children—in other words, they began to conduct the type of investigation they should have done before arresting Shaw." Finally, under the *Brown* factors, the Court found the misconduct by the police to have been purposeful and flagrant. "Despite not having probable cause, the police proceeded to conduct a series of custodial interrogations in what can only be described as flagrant disregard for Shaw's Fourth Amendment rights."

Judge Sutton wrote a dissenting opinion. In his opinion, there was clearly probable cause to arrest Shaw based upon the statements of the Mother relating the statements of the child. "In murder and rape cases, one does not need corroborating evidence at the probable-cause stage to support the testimony of someone who witnessed (or experienced) the crime. Eyewitness testimony alone will suffice, unless there is a reason for 'the officer to believe that the eyewitness was lying, did not accurately describe what he had seen, or was in some fashion mistaken regarding his recollection.'…But in this case the eyewitness testimony does not suffice, the court holds, absent corroborating evidence, and that is true even though there is nothing about the child's accusation suggesting he was mistaken. To say that child-sexual-abuse cases require corroborating evidence thus not only *increases* the Fourth Amendment protections for this one crime but does so for the one type of crime most likely *not to* yield such evidence."

United States v.Ellison,
462 F.3d 557, 2006 Fed.App. 0339P (6th Cir. 2006)

Officer Mark Keeley of the Farmington Hills, Michigan, Police Department pulled into a service road near a shopping center where a van was parked near the stores. There were "no parking" and "fire lane" signs nearby. Keeley checked his "Law Enforcement Information Network" (LEIN) computer and found that there were outstanding felony warrants out on Ellis, the owner of the van. After the van drove off, Keeley stopped it. He told the driver that he was being stopped for illegal parking. The driver was Edward Coleman, and the passenger was the owner of the van, Curtis Ellison. Keeley told Ellison he was being arrested on the outstanding warrant, and upon a search incident to arrest, a weapon was found. Ellison was charged with being a felon in possession of a firearm. The trial court granted Ellison's motion to suppress.

In an opinion written by Judge Gibbons, joined by Judge Griffin, the Sixth Circuit reversed. Interestingly, the Court's opinion is based upon an issue not raised by the government previously. They do so, contrary to the "long-standing rule that this court generally will not consider an argument not raised in the district court" because this is an "exceptional case" and because "failing to consider the issue would result in a plain miscarriage of justice." The Court found that Ellison did not have a reasonable expectation of privacy in his license plate under the Fourth Amendment, nor did he have an interest in the information about the license plate entered into the database of the LEIN. "In this case, Officer Keeley had a right to be in the parking lot observing the van—he was in a public place conducting a routine patrol….Once Officer Keeley conducted the check and discovered the outstanding warrant, he then had probable cause to pull over the vehicle and arrest the man identified as Ellison. The arrest and resulting search, during which the handguns were found, in no way violated the Fourth Amendment, and the district court's order granting the motion to suppress was in error."

Judge Moore dissented. She criticized the majority for reaching an issue not raised by the government below. "The majority's decision is a textbook example of a court reaching to resolve an issue that is not properly before it. The majority opinion highlights how a court can undermine just results by choosing to address an argument—that an officer can run a license plate number through a computer database search without any heightened suspicion—despite its being raised for the first time on appeal without the legal or factual development necessary to resolve the issue…The majority's reaching out to decide this Fourth Amendment question on a basis that the government failed to raise below contradicts legal authority, the interests of justice, and the principle of judicial restraint."

Judge Moore also criticized the majority on its Fourth Amendment analysis. The issue as she sees it is "even if there is no privacy interest in the license-plate number per se, can the police, without any measure of heightened suspicion or other constraint on their discretion, conduct a search using the license-plate number to access information about the vehicle and its operator that may not otherwise be public or accessible by the police without heightened suspicion?" "The use of a computer database to acquire information about drivers through their license-plate numbers without any heightened suspicion is in tension with many of the Fourth Amendment concerns expressed in *Delaware v. Prouse*, 440 U.S. 648, 655-63 (1979)…In *Prouse*, the Supreme Court held that an officer may not stop a vehicle to check the operator's license and registration without 'at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law.'" "In addition, the possibility and the reality of errors

in the computer databases accessed by MDT systems lead to great concern regarding the potential for license-plate searches to result in unwarranted intrusions into privacy in the form of stops made purely on the basis of incorrect information."

Judge Moore was also concerned that racial profiling was behind the LEIN search in this case. "[T]he district court found that Ellison's vehicle *was not* parked illegally, and the government does not appeal this finding. Because this asserted reason for the LEIN search was discredited and indeed rejected by the district court, the government's race-neutral reason drops away, and Ellison's circumstantial evidence supports the inference that race motivated Officer Keeley's decision to conduct a LEIN search on the vehicle…Ellison has presented sufficient evidence in support of his racial profiling claim to warrant a remand to the district court to conduct an evidentiary hearing on this matter."

United States v. Romero,
452 F.3d 610, 2006 Fed.App. 0219P (6th Cir. 2006)

Romero called an undercover police officer in Dearborn, Michigan, and offered to sell him meth. When the officer agreed, Romero said that he would travel from New York to Detroit to make the sale. Local police then put together a team to conduct a buy-bust once Romero got to Detroit. Romero contacted the local person and agreed to sell meth from his room at a local Howard Johnson's hotel. One officer went into the hotel room and got spooked when he saw a second person, Romero, in the room. A signal was given and other officers converged on the room. Romero was arrested by police who thereafter searched a nightstand that revealed a significant quantity of meth. Both men were arrested and charged with conspiracy to distribute meth. Romero's motion to suppress was granted based upon the fact that the search of the nightstand had occurred after Romero had been handcuffed. The government appealed.

The Sixth Circuit reversed in a decision by Judge Moore and joined by Judges Griffin and Cudahy. The Court found that there was probable cause to arrest both men at the hotel. The Court also found that Romero had consented to the entry by the 3 police. They relied upon a notion called "consent once removed" to justify the entry of the room by the backup police. Consent once removed required "that an 'undercover agent or informant 1) entered at the express invitation of someone with authority to consent; 2) at that point established the existence of probable cause to effectuate an arrest or search; 3) immediately summoned help from other officers.'"

The harder question for the Court was whether the search of the nightstand incident to the arrest was lawful. The Court said that it was. "[T]he law does not require that an area be accessible to the defendant at the time of a search incident to arrest for the search to be valid. 'So long as the defendant had the item within his immediate control near the time of his arrest, the item remains subject to a search incident to arrest.'"

United States v. Harness,
453 F.3d 752, 2006 Fed.App. 0249P (6th Cir. 2006)

Terry Harness's ex-wife called the police and said that he was sexually abusing their 10-year-old-boy. The police interviewed both her 10-year-old and 14-year-old boys, who partially corroborated the claim. The police also found out that Harness had a previous sexual battery. The police went to Harness's house, patted him down and handcuffed him. He was told he was being arrested for failing to register as a sex offender. Harness answered the question of whether he needed anything by saying that he needed his wallet, which was inside his house. The police followed him into his house where they founded four guns. After the arrest, the police found out that he had indeed registered as a sex offender. His state charge of sexual battery was dismissed. He was indicted in federal court with being a felon in possession of a firearm. His motion to suppress was denied, and he entered a conditional plea of guilty.

The Sixth Circuit, in an opinion written by Judge Sutton joined by Judges McKeague and Caldwell affirmed. The Court found that there was probable cause to arrest Harness for sexual battery based upon the wife's statements, and that it did not matter that the officer told Harness he was being arrested on failure to register as a sex offender. The Court further found that the police were within their rights to follow Harness from the porch inside the house once he had been arrested. "[T]he deputies had placed Harness under arrest and thus had every right 'to remain literally at [his] elbow at all times,' *Chrisman*, 455 U.S. at 6, no matter whether he presented a specifically identifiable risk or not."

United States v. Brown,
449 F.3d 741, 2006 Fed.App. 0184P (6th Cir. 2006)

Brown's home security alarm went off in Pikeville, Kentucky, and the police responded. They entered into his home through an open window basement door without a warrant and found that Brown had a marijuana growing operation in his basement. They obtained a search warrant after their discovery, after which Brown was charged with the unlawful manufacture of 100 or more marijuana plants. Brown moved to suppress the evidence, with the motion being denied. Brown then entered a conditional plea of guilty and appealed to the sixth Circuit.

The Sixth Circuit affirmed in a decision written by Judge Guy joined by Judges Daughtrey and Clay. The Court held that the search here was justifiable under the exigent circumstances exception to the warrant requirement. "When

Continued on page 46

Continued from page 45

probable cause exists to believe a burglary is in progress, officers are presented with exigent circumstances justifying their warrantless entry into the residence 'because "it would defy reason to suppose that [the officers] had to secure a warrant before investigating, leaving the putative burglars free to complete their crime unmolested."'" The Court further found the police in this case had the specific exigent circumstances to justify their warrantless entry. "The sounding alarm, the lack of response from the house, and the absence of a car in the driveway made it less likely that this was an accidental activation. Investigating, Edmonds found the front door secured but the basement door in the back standing ajar. While Edmonds did not find a broken window or pry marks on the open door, it was objectively reasonable for him to believe that this was not a false alarm, but, rather, that the system had recently been triggered by unauthorized entry through the open basement door. These circumstances, including the recently activated basement door alarm and evidence of a possible home invasion through the same door, establish probable cause to believe a burglary was in progress and justified the warrantless entry into the basement.

United States v. Huffman,
461 F.3d 777, 2006 Fed.App. 0328P (6th Cir. 2006)

Detroit police officers responded to a 911 call that stated that shots had been fired at a particular residence. When they got to the house they found bullet holes and broken glass. They knocked on the door but no one answered so they went through an open window, finding Huffman asleep with an assault rifle nearby. Huffman was arrested and charged with possession of a firearm by a felon, by an illegal drug user, and possession of ammunition. Huffman's motion to suppress was denied and he entered a conditional plea of guilty.

The Sixth Circuit affirmed in an opinion written by Judge Gilman and joined by Judges Sutton and Wiseman. The Court found that the entry into the house without a warrant was justified under the exigent circumstances exception. "In the present case, the 'risk of danger' exigency is the one implicated." In addition, once the officers were legally inside the house, they were entitled to seize the weapon and the ammunition that they saw in plain view.

United States v. Lawson,
461 F.3d 697, 2006 Fed.App. 0315P (6th. Cir. 2006)

In February of 2005, Oluyemisi Lawson was flying from Paris to Cincinnati. A customs officer identified her as a potential drug courier based upon having paid for her ticket in cash, by the fact that her passport had been issued overseas, and previous flights. When she passed through the checkpoint with her 16-month-old son, she was asked to move into a secondary inspection area. The officers then examined her three bags. They emptied the contents of one and saw that it had been tampered with. An x-ray revealed that there was something in the hollowed out part of the bag, so they drilled a hole into the bag revealing heroin. Heroin was also found in the other two bags. Lawson was charged with conspiring to import one kilogram or more of heroin. When her motion to suppress was denied she entered a conditional plea of guilty.

The Sixth Circuit affirmed in an opinion by Judge Sutton joined by Judges Moore and Katz. Lawson agreed that the examination of the contents of her bag was lawful in that searches at the border are viewed as reasonable; she also agreed that the dismantling of her handle on her bag was reasonable. She challenged, however, the government's right to x-ray her bag and to drill a hole into it. The Court disagreed that any level of suspicion was needed in order to x-ray the bag. "[W]e accept the commonsense (and commonly observed) conclusion that customs officers may x-ray an airline passenger's luggage at the border without reasonable suspicion."

The Court also held that drilling the hole into Lawson's bag did not violate the Fourth Amendment. The Court found that there was at least a reasonable suspicion that the bags held contraband, without acceding to the notion that such a level of suspicion was required.

United States v. Conley
453 F. 3d 674, 2006 Fed.App. 0231P (6th Cir. 2006)

Bobbie Conley is a bank teller. Or was one, anyway, when she began to defraud her employer. As a result, she was convicted in federal court and placed on supervised release. As a result of that, she was required to submit a DNA sample to the Bureau of Prisons. Bobbie challenged this under 42 U.S.C. #14135a. The federal district court overruled her petition.

The Sixth Circuit affirmed the district judge in a decision written by Judge McKeague joined by Judges Siler and Clay. The Court rejected Conley's position that in order to be reasonable, a search of one on probation must be based upon a reasonable suspicion. The Court also rejected Conley's assertion that a seizure of her blood constituted an unwarranted invasion of privacy not based upon a special need, but rather simply for a law enforcement purposes, citing *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). "We agree [with the government] that the 'special needs' of law enforcement in obtaining Conley's DNA outweighs her greatly reduced expectation of privacy as a convicted felon." Finally, under the totality of the circumstances, the Court found that the seizure of blood for the DNA database was not an unreasonable search and seizure." In view of Conley's sharply reduced expectation of privacy, and the minimal

intrusion required in taking a blood sample for DNA analysis for identification purposes only, the government's interest in the proper identification of convicted felons outweighs her privacy interest. Under a totality of the circumstances analysis, the search is reasonable, and does not violate the Fourth Amendment."

***United States v. Pruitt*,**
458 F.3d 477, 2006 Fed.App. 0293P (6th Cir. 2006)

Demetrius Pruitt was on parole in Ohio when the U.S. Marshal's service began conducting "Operation LASSO." In August, a woman called Pruitt's parole officer and told him that Pruitt was no longer at his known address and instead was at 2652 Meister Road and that he possessed drugs and a firearm. The police went to the area and saw a man leave the home. The police followed and stopped the man who gave them false identification and told them that Pruitt was indeed at the house and had refused to sell him crack cocaine on credit. The police went to court and obtained a form for an affidavit from a prosecutor. But rather than fill out the affidavit, the police simply related to the Court the facts they believed were supportive of probable cause. The Court signed the search warrant and the police went back to the Meister address where they found Pruitt, crack cocaine, and a handgun. Pruitt was indicted on being a felon in possession of a firearm and possession with intent to distribute crack cocaine. His motion to suppress was granted by the district court initially but was later reversed.

In an opinion by the Sixth Circuit, written by Judge McKeague and joined by Judges Siler and Clay, the lower court decision was affirmed. The Court first agreed that the search warrant (not an arrest warrant) based upon an affidavit without any facts listed was an invalid search warrant. Further, the Court rejected the government's assertion that the warrant was relied upon in good faith. "Here, the district court properly ruled that the officers could not have had a good faith belief that the warrant was valid because the warrant was obtained with a 'bare bones' affidavit, and no transcript of Earl's sworn statement was recorded by the Court…Under *Leon*, such a bare bones affidavit cannot support a reasonable belief on the part of law enforcement officials that a warrant is valid."

However, the Court did not grant relief to Pruitt because they ruled that Pruitt did not have a privacy interest in his girlfriend's home and thus his Fourth Amendment rights were not violated. It was the girlfriend's privacy interests that were violated by the issuance and execution of an invalid search warrant. The Court further ruled that the officers had a reasonable belief that Pruitt was at his girlfriend's house which is sufficient to enter a third party's residence to enforce an arrest warrant. "We therefore conclude that reasonable belief is a lesser standard than probable cause, and that reasonable belief that a suspect is within the residence, based on common sense factors and the totality of the circumstances, is required to enter a residence to enforce an arrest warrant."

Judge Clay wrote a concurring opinion "because I believe that the facts and posture of this case deserve careful distinction from those circumstances in which an arrestee or a third-party homeowner may assert valid Fourth Amendments interests against warrantless searches. In addition, I believe that the 'reason to believe' standard under *Payton v. New York*, 445 U.S. 573 (1980), is the functional equivalent of 'probable cause' and not some lesser standard." Judge Clay noted the defendant was in error in this case in his assertion that *Payton* had been overruled by *Olson v. United States*, 459 U.S. 91 (1990). "*Olson* is entirely compatible with *Payton* and *Steagald.* ..After *Olson*, the overnight guest has Fourth Amendment standing to challenge the validity of a premises search warrant, something a guest simply could not do before the *Olson* ruling. It does not follow, however, that the *Olson* decision grants greater Fourth Amendment protections to overnight guests than those granted to homeowners' themselves. Under *Payton*, a valid arrest warrant is sufficient to protect the Fourth Amendment rights of the person named in the arrest warrant, even if that arrest takes place in his or her home. It would be incongruous to say that the overnight guest has greater Fourth Amendment protections in the home of another than he or she would have in his or her own home."

***United States v. Caruthers*,**
458 F.3d 459, 2006 Fed.App. 0292P (6th Cir. 2006)

In June of 2003, an anonymous person called 911 at 1:15 a.m. in Nashville, Tennessee, saying that a black male had fired a gun in the air and was arguing with a woman. The caller said that the gun was in the man's pocket, and that the man had on a red shirt and shorts. Two police officers went to the address and saw Caruthers walking dressed in a red shirt. The officers pulled up to Caruthers and asked him to talk, at which point Caruthers left quickly. When they saw him next, Caruthers was bent over. The officers handcuffed Caruthers and took him to a police car. A backup officer arrived and found a handgun where Caruthers had been bent over. Bullets were found in the back of the police car. Caruthers was charged with being a felon in possession of a firearm. His motion to suppress was overruled and he entered a conditional plea of guilty.

The Sixth Circuit affirmed the lower court in a decision written by Judge Moore and joined by Judges Polster and McKeague. The Court first found that there was a reasonable suspicion to stop Caruthers under *Terry v. Ohio*, 392 U.S. 1 (1968). The Court acknowledged that there was not a reasonable suspicion based solely upon the anonymous call under *Florida v. J.L.*, 529 U.S. 266 (2000). "[T]he tip here

Continued on page 48

Continued from page 47

was even vaguer than the one in *J.L.*, as it included a less precise location and lacked any indication of the individual's age. Thus, there is no doubt that the stop of Caruthers would have been impermissible if it had been justified solely by the anonymous call."

The Court, however, extended its analysis and found a reasonable suspicion in Caruthers' actions after the police car pulled up to him. The Court analyzed his behavior in light of *Illinois v. Wardlow*, 528 U.S. 119 (2000), which states that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." "Soon after Officer Stockes began to give chase, Caruthers was seen 'hunched down' near a wall, 'kind of leaning toward the ground.' Bending or leaning tends to be more suspicious when accompanied by some other indication of an attempt to conceal contraband or to reach for a weapon, such as arm movements or the sound of an item being moved…Viewed together, these two reactions could reasonably suggest that Caruthers fled from Officer Stocks so that he could discard a weapon or other contraband." The Court also considered the fact that Caruthers was out late at night "in a high-crime area." The Court acknowledged the potential problems with relying upon such "contextual considerations." "[L]abeling an area 'high-crime' raises special concerns of racial, ethnic, and socioeconomic profiling." However, the Court noted that Caruthers had conceded that the area where Caruthers was was a high crime area. "Thus, we are satisfied that we have not too easily permitted the consideration of this factor."

Finally, the Court looked if whether the degree of intrusion in this case was reasonable under *Terry*. The Court found that because the anonymous call told of a fired gun, it was reasonable to conduct a search, and further to "secure Caruthers for safety reasons while he searched the ground for the weapon, as at the very least it prevented Caruthers from lunging back for the weapon."

United States v. Coleman,
458 F.3d 453, 2006 Fed.App. 0291P (6th Cir. 2006)

The Cincinnati police were watching a park for drug activity in 2003 when they saw Coleman get out of a car, take a CD case and put it in the weeds at the rear of a vacant building near the park, and put a small plastic bag in a jungle gym. A man came up to Coleman and began to speak with him. Coleman took the bag from the jungle gym, and then they walked toward Coleman's car. Coleman returned to the jungle gym where he put the bag again. About 10 minutes later, Coleman got the CD case back, went to his car and drove away. The police followed him. When Coleman parked at a curb, the police drove up to him and identified themselves. Coleman took off at a high rate of speed. When Coleman approached a police roadblock, he stopped his car. Coleman was asked whether he had any drugs, and he gave them marijuana from his pocket, after which he consented to a search of the car. The car search resulted in the finding of a loaded gun in the CD case. Coleman was indicted on possessing a firearm by a convicted felon. His motion to suppress was denied. He was convicted by a jury and thereafter appealed to the Sixth Circuit.

Judge Boggs wrote the opinion for the Court joined by Judges Rosen and Cole. Coleman did not challenge the stop, but instead alleged that his car had been searched unlawfully. The Court held that under the facts, the search was legal under several exceptions to the warrant requirement. The exceptions included the search incident to a lawful arrest (based upon Coleman's giving his marijuana to the officers upon request), probable cause to search an automobile, and finally consent. Coleman asserted that the search incident to arrest applied only to searches conducted after a completed arrest. "[T]his exception actually applies once the police are in possession of probable cause to make a lawful arrest. It is immaterial that Coleman was not formally taken into custody until after his car was searched."

SHORT VIEW . . .

1. *United States v. Mosley*, 454 F.3d 249 (3rd Cir. 2006). A bulletin went out describing a crime, and the police pulled over the car in which the defendant was a passenger. He was convicted of being a felon in possession of a firearm after the car was stopped and a firearm was seen on the floorboard of the car. The Third Circuit rejected the government's arguments that Fourth Amendment protections should not apply to Mosley as a passenger. Citing *Hudson v. Michigan*, 126 S.Ct. 2159, 165 L.Ed.2d 56 (U.S. 2006), the most recent case on knock-and-announce, the Court said that the Supreme Court had stressed "that in determining whether a particular Fourth Amendment violation is causally related to a particular challenged piece of evidence in such a way as to trigger the exclusionary rule, we must look not only to the logical relationship between the violation and the discovery of the evidence, but also to the nature of the personal and social interests the Constitution protects, the prevalence of the illegal police practice at issue, the deterrent value of the suppression remedy, and the likely practical effects of a particular rule…Passengers, no less than drivers, have a constitutional interest in protection from unreasonable seizures…While the Supreme Court may be right about the increased professionalism of police and the robustness of the #1983 plaintiffs' bar, we cannot say that either racial profiling or reliance on anonymous tips has declined in frequency in recent years, or that civil lawsuits will adequately deter such practices. Nor can we say that the various other categories of cases that give rise to passenger suppression motions are rare, decreasing, sufficiently internally disciplined, or

otherwise deterred….[Thus], when a vehicle is illegally stopped by the police, no evidence found during the stop may be used by the government against any occupant of the vehicle unless the government can show that the taint of the illegal stop was purged."

2. *United States v. Ziegler*, 456 F.3d 1138 (9th Cir. 2006). An employee has no expectation of privacy in their work computer, according to the 9th Circuit. In this case, the FBI was contacted by the company's ISP, and the company made a copy of the hard drive and turned it over to the FBI. The 9th Circuit held that the employee had no expectation of privacy that society would find to be reasonable. Essential to the holding was that the company had a policy that was widely distributed. "Employer monitoring is largely an assumed practice, and thus we think a disseminated computer-use policy is entirely sufficient to defeat any expectation that an employee might nonetheless harbor."
3. *MacWade v. Kelly*, 460 F.3d 260 (2nd Cir. 2006). In a clear indication of the growing diminution of the Fourth Amendment in response to the post-9/11 world, the Second Circuit has approved of suspicionless searches of the persons and belongings of subway riders in New York City under the special needs doctrine. This holding was made despite no showing of a specific terrorist threat and no showing that these random searches deter terrorism. The justification for the search regime is that it is needed to protect the subway system from a terrorist attack rather than serving the general purposes of law enforcement. "Where, as here, a search program is designed and implemented to seek out concealed explosives in order to safeguard a means of mass transportation from terrorist attack, it serves a special need... In sum, we hold that the Program is reasonable, and therefore constitutional, because (1) preventing a terrorist attack on the subway is a special need; (2) that need is weighty; (3) the Program is a reasonably effective deterrent; and (4) even though the searches intrude on a full privacy interest, they do so to a minimal degree."
4. *United States v. Olivares-Rangel*, 458 F.3d 1104 (10th Cir. 2006). The defendant was a person who had been deported. He was thereafter recognized by a border patrol agent during an admittedly illegal stop. He admitted to being in the country illegally, which resulted in the obtaining of evidence of the previous deportation and the fact that he was a convicted felon. The 10th Circuit affirmed the district court's decision that evidence of identity was a fruit of the poisonous tree that should have been suppressed.
5. *United States v. Arellano-Ochoa*, 461 F.3d 1142 (9th Cir. 2006). The police may not open a screen door and enter into a dwelling when the screen door is the only door. The Court held that the police violated the Fourth Amendment when they entered into a trailer through only a screen door after seeing the defendant try to close the solid door. "Where the screen door is the only barrier between the inside of the house and the outside, the police cannot open the screen door without consent or some exception." However, in this case the Court went on to allow the entry under the exigent circumstances exception, finding the background information the police had going in combined with the defendant's furtive movements and the fact that women and children were present to justify the warrantless entry.
6. *United States v. Hudspeth*, 459 F.3d 922 (8th Cir. 2006). The Eighth Circuit has extended the Supreme Court's most recent holding in *Georgia v. Randolph*, 78 Cr. L. 711 (U.S. 2006) by finding that even where a resident is not present, their refusal to consent to search will trump the present resident's consent. Here the defendant had refused to consent to a search of his computer at home, so the police obtained consent by calling his wife who was at home and who did consent. "We believe that the Supreme Court has made it clear that the police must get a warrant when one co-occupant denies consent to search."
7. *United States v. Guerrero-Espinoza*, 462 F.3d 1302 (10th Cir. 2006). When an officer stopped a van, and was talking with the driver, but failed to communicate with a passenger that the stop was over, the passenger's consent to search the vehicle was not voluntary. ■

The 4th Amendment and the personal rights it secures have a long history. At the very core stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion.

- Justice Potter Stewart

JUVENILE COLUMN

HAYWOOD BURN INSTITUTE DMA TRAINING

Rebecca Diloreto and Suzanne Hopf attended the Haywood Burn Institute DMC Training, September 20-22, in San Francisco. The Institute emphasized reducing racial disparity for youth in the juvenile justice system and the focus of the Institute was moving from "abstract discussion to strategic action."

The Institute featured breakout groups which presented innovative local programs which have been effective in reducing disproportionate minority confinement. The event provided invaluable networking opportunities for our two DPA members that went, and also for the DJJ staff and local key stakeholders that attended. This Institute was the first of its kind to be held in the U.S., and was funded by federal grants. Suzanne and Rebecca were both impressed by the quality of the presentations and the high level of organization for a first time event.

NEW ASSESSMENT OF QUALITY OF JUVENILE DEFENSE IN FLORIDA

The National Juvenile Defender Center published, *An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Florida,* this past October. DPA Post Trial Division Director, Rebecca DiLoreto, assisted as one of the evaluators of the Florida system. The study was encouraged by then Chief Justice Barbara Pariente, as well as the elected public defenders of Florida. Overall, the evaluation found that children and youth routinely give up their right to legal representation and that when they are assigned lawyers, those attorneys are inexperienced and overworked. The study's authors highlight the routine use of shackles in the courtroom. They note the prejudicial impact of the shackles when combined with the public courtrooms and an inexperienced judiciary.

In its preface, the study asserts that "[t]he delinquency system, like a braided cord, depends on the strength of each of its strands." Notably, probation officers express the strongest concern about the lack of counsel or the lack of competent counsel for youth who appear in juvenile court. "Kids often plead guilty to charges without knowing if it's a good case or not," asserted one probation officer. While another expressed his belief that "every kid should be represented because really no parent, no kid truly understands the system. They need someone who can walk them through and represent their interests." To conduct the assessment, juvenile defense experts from around the country came to Florida. Their task was to observe cases in court, interview youth and children in the courtroom setting, interview family members, public defenders, public defender supervisors, prosecutors, probation officers, law enforcement, judges, court clerks, and detention superintendents and staff. The evaluators also collected and reviewed data, legal motions, court files and client files. The entire report can be found at http://www.njdc.info .

100 YEARS OF JUVENILE JUSTICE IN KENTUCKY

Two hundred attorneys, child service workers, and judges from around the Commonwealth attended a conference to celebrate 100 years of juvenile justice in Kentucky. The symposium, "Re-envisioning the Role of the Juvenile Court in the 21st Century," held on Friday, September 29, at the Northern Kentucky Convention Center in Covington was sponsored by Northern Kentucky University Chase College of Law, The Children's Law Center, the Kentucky Juvenile Justice Advisory Board, AOC, DPA, and the National Partnership for Juvenile Services.

Speakers included James Bell, Executive Director of the W. Haywood Burns Institute; Howard Davidson, Director of the ABA Center on Children and the Law; Professor Steven Drizin of Northwestern University School of Law; Professor Barry Feld of the University of Minnesota Law School, and Professor Randy Otto of the University of South Florida. Professor Emily Buss of the University of Chicago Law School served as discussion moderator. Kim Brooks Tandy, Executive Director of the Children's Law Center, Inc., moderated a panel discussion on "The Juvenile Court in Kentucky," featuring panelists Rebecca Ballard DiLoreto, DPA, Patrick Yewell, AOC, and Honorable Susan Clary, Clerk of the Kentucky Supreme Court and founder of Kentucky's unique Court Designated Worker's program.

"It was a successful event," said Chase student Katherine Siereveld, who helped organize the symposium. "I think those who work in the field were excited to see so many prominent people in juvenile justice in the room, and several presenters also remarked on how pleased they were to be a part of it."

An opening program and reception was held the evening before the symposium at Northern Kentucky University's University Center, featuring a re-enactment and discussion of *in re Gault* and artwork and poetry from children currently involved in the juvenile court system. ■

Practice Corner
Litigation Tips & Comments

It is the duty of counsel who wishes to claim error to keep current on the law, and to object with specificity … The underlying purpose of such a rule is to obtain the best possible trial at the trial level.

Wiley Gibbs v. Commonwealth,
2006 WL 2706957 (Ky.)
(To Be Published, but not final at the time of writing)

Objections and Directed Verdict Motions Must Be Specific

In *Gibbs*, the Kentucky Supreme Court took the opportunity to again make clear that, in most circumstances, general objections and directed verdict motions will not preserve issues for appeal. The language above was in response to an appellate argument that the trial judge erroneously failed to read all the instructions in their entirety. Even though Criminal Rule 9.54 requires that the instructions be read and states that the requirement cannot be waived without agreement of the parties, the Supreme Court did not accept that the issue was preserved in the absence of an objection.

> No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

Later in *Gibbs*, the Court turned to the question of whether there was sufficient evidence to support an instruction (or warrant a conviction) for certain offenses. Again, the Court held that the issue was not preserved because defense counsel had not made a specific objection.

> Appellant claims that this issue is preserved by his motion for directed verdict, but it is not. RCr 9.22 states in pertinent part, that a party must "ma[k]e known to the court the action which that party desires the court to take or any objection to the action of the court, and on request of the court, the grounds therefor."
>
> **Appellant made only a general motion for a directed verdict, which is insufficient to preserve this issue for appeal.** This Court has recently reaffirmed that failure to state specific grounds for a motion for directed verdict will foreclose appellate review of the trial court's denial of that motion. In the motion, no specific mention was made of a lack of evidence as to any particular element of the charges; Appellant merely asserted that there was insufficient evidence as to each and every charge pending against him. Without a specific objection, "[t]he trial court was never given an opportunity to address the question of whether there was lack of evidence on this particular element of the offense."

Recently, attorneys from the Appeals Branch have been traveling around the state conducting Appeals Roadshows. We have been stressing the need for specific motions for directed verdicts. At a recent event, one attorney said that they had previously been trained by DPA to make only a general objection because if a specific objection was made, but on the wrong grounds, the right grounds could not be raised on appeal. **If you believe you were taught this, please *unlearn it*!**

Thanks to Emily Rhorer in Appeals Section A, I have been able to isolate the source of this misunderstanding. In this space, in the July 2003 Advocate, a Practice Tip appeared under the headline, *Be Wary of Using Only Specific Directed Verdict Motions*. The content of the tip below this headline was technically correct, but should have emphasized that the danger is in making only a narrow specific motion. If you have grounds for a specific motion (failure to prove venue, value of property, intent to commit crime, etc.), you must state those grounds in order to preserve the record on appeal. The previous article recommended that the specific motion be followed by a general motion so that challenges on other grounds could also be preserved. While this is not bad advice, recent decisions have consistently held, like *Gibbs*, that a general directed verdict motion is insufficient to preserve any grounds for appeal.

The best practice is to:

1) Make a motion for directed verdict immediately after the Commonwealth rests.
2) The motion should be specific to each count and specific to each element. If the evidence would not support any lesser included offenses, make it clear in your motion that you are requesting a complete directed verdict and not merely a dismissal of the greater charge. [You will note that this is a lot of ground to cover. If the judge in your court expects you to make a brief motion at the bench while the jury is still in the box, you should probably ask that the jury be given a recess while you make your argument.]
3) Renew the motion at the end of all the evidence. If you were specific in your prior motion, you can refer back to that motion and not restate everything. If the defense presents no evidence, you do not have to renew your motion to preserve it for appeal (but it is not a bad idea to get in the habit of making a motion at both the end of the Commonwealth's case and the end of all the evidence, even if the two occasions are only seconds apart).
4) If the evidence would support the giving of a lesser included offense, you must object to the giving of an instruction on the greater. Even a specific directed verdict motion will not preserve the sufficiency issue if the evidence supports a lesser included offense and counsel does not object to the greater instruction. ■

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**** KBA ****

Annual Seminar
Louisville, KY
June 2007

**** NCDC ****

Theories and Themes
Atlanta, Georgia
March 9 - 11, 2007

**** NLADA ****

Appellate Defender Training
January 18-21, 2007