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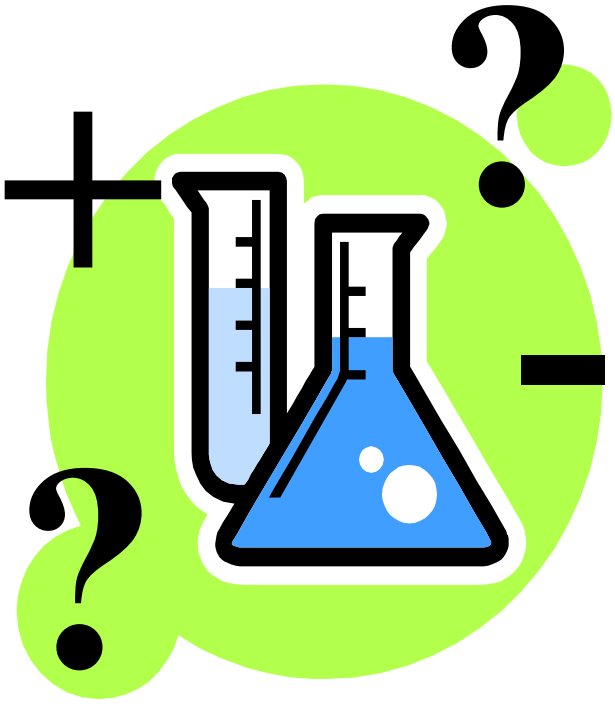
Got Meth?
Or is that a False Positive in the Field Test?



- **What Went Wrong? (Part III): Eyewitness Memory and Misidentification**
- **Defending Your First Sexual Abuse Case**
- **2006 Statewide Poll Shows Kentuckians Overwhelmingly Reject Death Penalty**
- **Kentuckian's Attitudes toward the Death Penalty: a 17-Year Comparison**

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Table of Contents

Justice cannot be for one side alone, but must be for both.

— Eleanor Roosevelt

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

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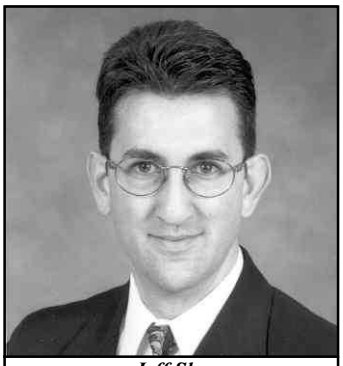
FROM THE EDITOR...



Jeff Sherr

Scott West, Murray Office Directing Attorney, is back with more information on defending meth cases. In **Got Meth? Or is that a False Positive in the Field Test**, Mr. West explains how a 2000 National Highway Transportation Safety Administration funded study reveals the high risk for false positives in on-site field tests for amphetamines (including Methamphetamine).

Melanie Lowe and Gordon Rahn of the DPA Kentucky Innocence Project offer Part III of their series on causes of wrongful convictions in **What Went Wrong: Eyewitness Memory and Misidentification**. This article uses the Kentucky wrongful conviction of Herman May as the context to explore the science, law, and the need for reform in the procedures used for eyewitness identification. Jurisdictions across the country are following the recommendations for more reliable procedures made by the National Institute of Justice in **"Eyewitness Evidence: A Guide for Law Enforcement,"** and in 2003, **"Eyewitness Evidence: A Trainer's Manual for Law Enforcement."**

Sexual Abuse cases are among the most difficult challenges facing the criminal defense attorney. In **Defending Your First Sexual Abuse Case**, Elizabeth Bradley Barber and Susan M.J. Martin, from DPA's Owensboro office, provide tips tailored for attorneys new to these cases that will benefit the experienced as well.

A survey conducted this summer by the University of Kentucky Survey Research Center shows Kentuckians overwhelmingly reject the use of the death penalty. In this edition, we reprint the **Kentucky Coalition to Abolish the Death Penalty** article based on the poll, along side an article by University of Louisville professor Dr. Gennaro Vito comparing the results of this survey to those conducted since 1989. ■

GOT METH?
OR IS THAT A FALSE POSITIVE IN THE FIELD TEST?

B. Scott West, Directing Attorney, Murray

You had the highest hopes that your client Able would make it. Probated only a few months ago, he seemed sincere about his desire to get a handle on his addiction, and his substance abuse counselor had written glowing reports about his success so far. Able had consistently attended AA and NA meetings, and the first few drug screens taken by their probation officer had been negative.

Then, last Monday, you were hit with the notice of preliminary hearing to revoke his probation. The allegation? A positive field test for methamphetamine.

When you talk to him, Able refuses to admit that he used, and he will not stipulate to anything. Unlike so many other clients who have acknowledged the usage of controlled substances and just want you to "try to get rehab," Able remains defiant throughout. He is angry! At you, at the judge, at the probation officer, at the world. Why? Because there is NO WAY that he tested positive for methamphetamine! Someone must have doctored the results, or mixed up his urine with somebody else's, or they're lying, or someone slipped him a mickey, or something, because he knows FOR A FACT that he has not any methamphetamine for the 214 days since he was first arrested on this possession charge. He's not admitting to anything, and if he gets revoked, he wants an appeal. Furthermore, if you don't believe him he wants a new lawyer. Challenge the field test, he commands, and so you do. We want a lab to test this, you say to the judge, we do not believe the results are accurate. When asked why you believe that, you are left with nothing other than "because the client insists he had no meth." So the judge orders the sample to be sent to lab, although the client will remain incarcerated pending the results.

This ever happen to you? If so, join the club, we've got jackets. Just be glad that you insisted on having the sample sent to the lab, because chances are, there actually has been a false positive.

I. The 2000 NHTSA Study: False Positives Do Occur

In 1997, the National Highway Transportation Safety Administration funded a study to see if a sample of commercially available on-site detection devices were of any value to police officers who used them to test for drivers during DUI stops. The study was done for cocaine, methamphetamine, marijuana and other controlled substances, and according to the NHTSA, was the first of its kind to so comprehensively study on-site devices and evaluate their accuracy. The results were recited in an October 2000 publication entitled "Field Test of On-Site Drug Detection Services," available on-line at www.nhtsa.dot.gov/people/injury/research/pub/onsitedetection/Drugs_Ch1.htm.

B. Scott West

A. Methodology

The NHTSA contracted with ISA Associates, Inc. and the University of Utah's Center for Human Toxicology to conduct a field test of five on-site testing devices. The five models which were selected for testing were:

- The AccuSign®, manufactured by Princeton Biomedical Corporation, Princeton, New Jersey;
- The OnTrak TesTcup-5® and
- The OnTrak TesTstik®, both manufactured by Roche Diagnostic Systems, Inc., of Somerville, New Jersey;
- The Rapid Drug Screen®, manufactured by American Bio Medica Corp, of Ancramdale, New York; and
- The Triage®, manufactured by Biosite Diagnostics, of San Diego, California.

The 2000 report goes into great detail – far too much detail to be restated in this article – as to why these five brands, out of a total of sixteen candidates, were selected. Suffice it to say that the selection process was thorough.

Then, five drugs or classes of drugs were selected for study:

- THC-COOH (marijuana)
- Cocaine
- Amphetamines (including methamphetamine)
- Opiates
- PCP

Finally, the field test sites selected were Nassau County, New York and Houston, Texas. These cities were selected

from several candidate venues after consideration of eight factors, such as legal barriers to obtaining consent to obtain urine samples in DUI arrests, the law enforcement agency's programs and procedures, and the willingness of the department to participate and conform to the study's parameters.

Specific directions for specimen handling and data collection were developed and followed. In New York, data collection began in November 1998 and ended in November 1999. In Houston, data collection took place between October 1998 and July 1999. In all, 800 participants were chosen for the study. The demographics of 783 of the 800 individuals are contained within the report and are irrelevant to our purposes here. The result of each field test was recorded, and then later confirmed with Gas Chromatography / Mass Spectrometry (MS) technology.

In determining whether the field test was accurate when compared to MS testing, the following definitions were adopted:

A "false positive" was indicated when the device indicated a positive result, but no drugs or metabolites were detected in the MS confirmation test.

A "false negative" was indicated when the device tested negative in the field, but the sample contained drug concentrations as confirmed by MS testing which were greater than or equal to the device screening cutoff.

Finally, an "unconfirmed positive" was indicated whenever the device result was positive in the field, but the concentration of the drug or metabolites, when measured by MS was below the confirmation cutoff level.

B. Amphetamine and Methamphetamine Test Results

Overall, the field tests were fairly accurate over the five classes of drugs which were screened, especially with regard to cocaine and marijuana. In fact, there was only one false positive for cocaine and two false positives for THC. When it came to the amphetamines class, however, the results were astonishing: As for false positives, "[o]f the 39 samples that tested positive using the on-site devices, only 6 had MS measurable concentrations of amphetamine, methamphetamine or phentermine (the target analytes)." Thus, 33 samples were false positive for methamphetamine, using the study's definition of "false positive." That is an error rate of 85%.

Interestingly, though, 16 of the field tests indicated a presence of methylenedioxymethamphetamine (MDMA), or "ecstasy." Apparently, ecstasy can be a cause of a false positive. Still, that leaves 17 out of 39 field tests which were false positives without any MS confirmation of the target drugs. That is a 43% error rate, according to this study. (The error rates listed in the study are different than these due to the methodology of calculating error rates employed by the study. The machines' error rates were figured after taking into account *all* samples and *all* drugs, and including the statistical analyses for false positives, false negatives *and* unconfirmed positives. This resulted in a much lower error rate in general. Nevertheless, this article is interested solely in determining the accuracy or inaccuracy of testing for methamphetamine or amphetamines, and no other results. Thus, taking the 39 positive field tests for which there was a subsequent failure of MS to find amphetamines or methamphetamines in 17 of those samples, the error rate remains at 85% overall, and 43% where there is no illicit drug whatsoever as determined by MS testing.)

There were no false negatives when it came to testing for amphetamines.

II. Corroborating Resources

The NHTSA study, while billed as the "first" comprehensive study, is not the only study. According to the Fall, 2000 issue of Drug Testing Quarterly, available on-line at www.norchemlab.com, 53% of on-site testing devices, which tested for amphetamine/methamphetamines, opiates, cocaine, THC and PCP, produced false negatives. The article does not break down which machines produced the false positives, or which drugs were falsely found to have been included in the specimens. However, the reference for this statistic was given as "Accuracy of Five On-Site Immunoassay Drugs-Of-Abuse Testing Devices," E. Howard Taylor, Ernest H. Oertli and Jana Wolfgang, *Journal of Analytical Toxicology*, Vol. 23, March/April 1999.

To read what this author considers to be an indictment of the Enzyme Multiple Immunoassay Test, or EMIT®, one of the common methodologies on which field tests are based, see "Problems of Urine Screening," John Morgan, *Journal of Psychoactive Drugs*, 1984, pp. 305-317, available on-line at the Drug Policy Alliance page at www.lindesmith.org. Simply (perhaps *too* simply) described, the presence of a sought-after drug molecule or metabolite causes the body to produce a specific immune chemical, or antibody, which will bind to the drug. EMIT® screening harvests this drug-enzyme complex, and produces a positive result for that drug. However, Morgan states that positive reactions to a drug using the EMIT® method may occur for several reasons, including a carryover following a preceding sample that was strongly positive, operator error (such as contamination or failure to clean glassware), or because of the reactive presence of other chemicals that bind to a particular antibody, or finally due to endogenous human urinary enzymes that mimic the effects of the detector enzymes.

Continued on page 6

Continued from page 5

"Perhaps the technology that binds a large enzyme to a small drug molecule is not error free," Morgan states.

An internet search will yield many more sources – some more credible than others – which will demonstrate the fact that false positives for methamphetamine can and do happen. Which leads to the question…

III. What Can Cause a False Positive for Methamphetamine?

Not a week goes by that I am not asked this question by someone, whether a fellow lawyer, a client, or a client's family member. The answer I give is "virtually anything that contains some presence of ephedrine, pseudoephedrine or diet pills." The answer I could give, according to the website "The Vaults of Erowid," by Erowid, is "Nyquil, Contact, Sudafed, Allerest, Tavist-D, Dimetapp, Pheregan-D, Robitussin Cold and Flu, Dexatrim, Accutrim, Bronkaid tablets, Marax, Primatene Tablets, Afrin, Vicks inhaler, and other prescription medications including Amfepramone, Cathne, Etafediabe, morazone, phendimetrazine, phenmetrazine, benzphetamine, fenfluramine, dexfenfluramine, dexdenfluramine, Redux, mephentermine, Mesocarb, methoxphenamine, phenetermine, amineptine, Pholedrine, hydroymethamphetamine, Dexedrine, amifepramone, clobenzorex, fenproyorex, mefenorex, fenelylline, Didrex, dextroamphetamine, methpenidate, Ritalin, permoline, Cylert, selegiline, Deprenyl, Eldepryl, or Famprofazone.

And, according to "The Vaults of Erowid," kidney disease, liver disease or diabetes can cause a false positive also. See www.erowid.org.

Assuming that your prosecutor and / or judge are not Erowid disciples (after all, it's not like citing Robert G. Lawson for an evidence issue), and you want a more citable resource, consider the disclaimer made by a company whose business is selling home methamphetamine drug test kits, based on EMIT® technology, found at www.ipassedmydrugtest.com. Among the substances which can cause false positives, each and every substance described by Erowid is listed in the disclaimer, as well as a few additional drugs, Allerest, Tavist-D and Triaminic.

"[o]f the 39 samples that tested positive using the on-site devices, only 6 had MS measurable concentrations of amphetamine, methamphetamine or phentermine (the target analytes)."

The specifications sheet for the AccuSign® brand of on-site testing, marketed by Princeton BioMeditech Corporation, even lists ephedrine as one of the substances, if found in concentrations of 200,000 ng/mL. Also, the AccuSign® literature acknowledges that "there is a possibility that factors such as technical or procedural errors, as well as other substances in the urine sample [not listed in a table of compounds for which the device will display positive results] may interfere with the test and cause erroneous results."

IV. The Hundred (100%) Solution: MS Spectrometry

Yes, Virginia, there is a possibility of a false positive in an on-site field test device. And yes, it can be caused by some of the over-the-counter household medications that are in many of your clients' medicine cabinets. Fortunately, or unfortunately, depending on your client's situation, there is a virtually fool-proof method of determining whether it is a false positive.

The Mass Spectrometry test, available at the KSP lab. Unless there is human error (sample mix-up, or cross-contamination, etc.), the mass spectrometer will tell you what the substance is, actually. (Folks, if I am wrong about this, or over-stating the accuracy of "the lab," please write the editor and let us know. I am more than willing to be educated. It's advice from folks like you readers that got me to questioning the accuracy of these infernal field test devices in the first place!) If your client is absolutely positive that his drug test is a false positive, request that the Court order the Commonwealth to forward the sample on for lab testing, and appeal the Court if he will not do so.

But remember, a mass spectrometry test, of course, can be exculpatory or inculpatory for your client. Our fictional client Able would be well-advised to "fess up," if in fact he knows that he has ingested methamphetamine over the weekend. Better that Able's counsel spend whatever precious time he has for the revocation hearing arguing mitigation and asking for rehab and leniency, rather than waste it trying to persuade the court that Nyquil® is the culprit in all this.

V. Conclusion

The on-site field testing device tests positive for methamphetamine. Your client is positive that he has had none. One of these positives is a false one. The only way to be certain which positive is false is to insist that the sample be tested at the lab, using mass spectrometry.

I'm positive. ■

What Went Wrong? (Part III) Wrong Place, Wrong Time: Eyewitness Memory and Misidentification

By Melanie Lowe and Gordon Rahn, Kentucky Innocence Project

In the early morning hours of May 22, 1988, Herman May's life changed forever. At approximately 3:00 a.m. in the backyard of a house in Frankfort, an unknown assailant raped and sodomized a female University of Kentucky student. The initial description of the attacker was that he was thin, in his 20's, had long, stringy, greasy dark brown hair and was wearing a blue cap. Two police officers testified at trial about the description given within minutes of the attack. The investigating officer advised that the victim gave the same physical description at the hospital but added that the attacker's hair was "chocolate brown." Herman May was 17 years old in May 1988, and had bright red hair.

Once May was identified as a suspect, the investigating detective flew to California where the victim was vacationing. He showed the victim a photo lineup that included May's picture. The victim first picked out three pictures and began a process of elimination that led to her identifying May as her attacker. In October of 1989, May was convicted of rape and sodomy and sentenced to concurrent 20 year sentences.

DNA testing changed Herman May's life again on September 18, 2002. Franklin Circuit Court Judge Roger L. Crittenden received the lab report, granted a new trial, and entered the order releasing Herman May from prison. That same day, Herman May walked out of the Kentucky State Penitentiary and into the arms of his mother who had professed her son's innocence during the 13 years he sat in prison.

Is there a problem?

In every criminal case, the prosecution must prove the defendant to be the perpetrator or participant in the crime. Often, this evidence is presented in the form of the "in-court identification." In some cases, identification is inferred through other evidence or testimony.[1] Evidence of identification by eyewitnesses is second only to confession in persuading jurors. Nonetheless, eyewitness "misidentification" remains the leading causes of wrongful conviction. In fact, of the first 130 DNA exonerations, 101 of the cases are suspected to be the result of mistaken I.D.[2] Certainly, some of the blame can be placed upon misconduct; police knowingly disregarding proper techniques in order to secure identification of a particular suspect. However, the real culprit is expectation. We expect our brains to function as cameras, recording what is experienced. Psychological research demonstrates danger lies where fallible sensory perception and human memory intersect with procedurally suggestive influences.

Defense lawyers must understand the circumstances of misidentification (mistaken identity) in an attempt to protect their clients from becoming victims of eyewitnesses' propensity to "misrepresent, misrecollect, and misinterpret." Defenders must be prepared to utilize motion practice, discovery, and investigation in order to present jurors with an accurate look at the identification circumstances. Effective cross-examination of the eyewitness is crucial but effective use of an expert along with an understanding of the behavioral research can make the difference with a jury. [3]

Even those trained in critical observation, like police officers, erroneously identify in exigent circumstances. Courts often underestimate the dangers inherent in eyewitness identification testimony and place responsibility for intelligently weighing such testimony with the jury. Unfortunately, the average individual called to serve as a juror has no understanding of the risks of misidentification and the effects of suggestion. Defenders must not only obtain understanding of suggestive investigative procedures but the pitfalls inherent in the human memory. Then, criminal defense practitioners must successfully impart this knowledge to jurors.

Empirical Examples

In 1902, a criminologist at Berlin University, von Liszt, conducted one of the first experimental studies into human memory and eyewitness identification. Unbeknownst to his students, von Liszt staged an altercation between two students. The staged exchange culminated in a gunshot. When the Professor restored order, he asked students to describe what they had observed. Thus began a long series of studies designed to understand memory and recall of human experience.

On the evening of December 19, 1974, viewers of a local NBC newscast were shown a twelve-second documentary film. In it a man wearing a hat, leather jacket, and sneakers lurks in a door while a young woman makes her way down a hallway.

Continued on page 8

Continued from page 7

Suddenly, the man bursts from the doorway, grabs the woman's purse, and runs directly toward the camera. Viewers were shown a "lineup" of six "suspects," asked to call a number, and either pick one of the suspects or advise that the perpetrator was not present in the "lineup." Professor Robert Buckhout of Brooklyn College, who had arranged the experiment, decided to unplug the phone after receiving an overwhelming 2,145 calls. The "thief," placed at position number two, received 302 votes or 14.1 percent. "The results were the same as if the witnesses were merely guessing," wrote Professor Buckhout in an article analyzing the experiment called "Nearly 2000 Witnesses Can Be Wrong."[4]

The most significant lesson of all of these studies is that innocent individuals can be wrongfully convicted based upon eyewitness identification evidence. A study was not necessary to convince Herman May of this fact. The legal field can learn much from psychological research on the subject of memory and witnesses.

Lessons from Psychology

Researchers have identified four factors personal to witnesses which affect the accuracy of eyewitness identification: (1) Perception; (2) Memory; (3) Communication; and (4) Candor.

Perception

The first element of memory is perception. The mind can only recall that which is perceived by the senses. Of course, the actual limitations of the physical senses restrict the perception and the resulting memory. For instance, the blind man can neither perceive nor remember what can be seen. Aside from the effects of physical limitations, expectation also molds perception. In this way, the witness tends to perceive what he anticipates and he believes is expected. Witnesses understand the judicial system's fact-finding process depends upon "perception, memory and recollection" of sworn testimony. If the witness does not locate the face she saw during the crime, she will likely succumb to the psychological tendency to look for a similar face in the identification procedure *(See discussion of Relative Judgment Theory)*.

"Biases, prejudices, interests and motives" influence eyewitness perception. Psychologists believe perception to be a process of decision making affected by every facet of the individual, his environment, and circumstances of the perceived event. Where all of this influences the perception, it must also affect memory. The gaps in perception compel witnesses to rely upon experience and expectation in order to create complete memory for identification and testimony. Relevant research in this area has focused upon how the situational fear, anxiety, and terror impact the perceptions of the identification witness. The individual is less able to perceive and retain detail during a stressful incident than during ordinary circumstances. Of course, this flies in the face of conventional courtroom wisdom regarding victim memory of a crime. How often do witnesses bolster an identification or detail by saying "I'll never forget it" and how often does the prosecutor argue that the experience is "burned" upon the memory of the victim by the extremely emotional nature of the event? The body's physical answer to stress, the rush of energy associated with the autonomic nervous system's "fight or flight" response, prepares the victim to survive the experience while actually impairing the ability to remember the experience. In short, emotions disorganize the thought process. "The more pronounced the stress or excitement the more likely the event will make an impression on the person and the more likely that his perception and recall will be unreliable."[5]

In the Herman May case, the criminal incident must have been overwhelmingly emotional for the victim. She was attacked by a man she presumably had never seen and in a violent and vicious manner. She was whisked off to a hospital, subjected to medical testing, and questioned by police about the most personal of matters. Within a few short hours, the young woman had experienced one of the most traumatic of experiences. Psychological research indicates that what she perceived would have been jumbled by the emotional experience.

Memory

Researchers have discovered that memory is not a static entity and is subject to a variety of external influences. In addition to a number of organic problems, memory may be otherwise lost. Psychological manipulation often aides in recovery of memories, however, if not performed properly, such processes can take advantage of the witness' suggestibility. In the realm of eyewitness identification, suggestion can be created intentionally and unintentionally. The unwitting suspect is particularly vulnerable when the opportunity to observe by the witness was insufficient.[6]

A witness who wants to be a good citizen or a victim who wants to believe his attacker has been apprehended are particularly susceptible to suggestion by untrained or over-zealous law enforcement. Under these circumstances, eyewitnesses experience extreme pressure to choose someone from a lineup that may not include their attacker. Consider the Herman May case, where the officer flew thousands of miles to show the victim a photo array. Without a word from the detective, the victim likely assumed that *her attacker* must have been present in the lineup. Otherwise, why would the detective have come such a long way?

Most people would agree that memory distorts and dims over time. It is also true that our brains discard information when it remains unused for a period. For example, can you recall all of the phone numbers you have ever known or the names of all your childhood friends? In the same manner, the period of time between the crime and the lineup or the identification and the testimony may weaken the eyewitness' memory. Psychologists use the terms "sharpen" and "level" to describe the effects of time on elements of memory. The mind tends to exaggerate critical aspects of the perceived event in proportion to the significance within the original event. This is called "sharpening." Likewise, less critical aspects of the original perception tend to diminish in proportion to the original perception. Psychologists call this "leveling." In regard to recollection of the human face, psychological research indicates that the memory highlights (sharpens) distinct features while minimizing (leveling) that which is ordinary. Both of these phenomena continue to occur from the time of perception until the retrieval of the memory. Of course, to a great degree what a particular witness perceives as critical and in turn sharpens may vary from person to person. In this way, perception can be as unique as the individual. This explains how two people witnessing the same crime can provide accurate yet sharply different physical descriptions. One witness may notice a tattoo while the other a torn red sweatshirt. Ask either witness about the color of the perpetrators hair or if he had beard and each would be unable to recall.

Psychologists in the area of memory research have documented the "recency effect." This theory indicates that items most recently presented to a subject will be remembered best. In the timeline of criminal procedure, identifications (like lineups, showups, photo arrays) take place after the crime and therefore may result in stronger memories than the crime itself. In addition, the mind is capable of fusing memories. Behavioral scientists call this "unconscious transfer." When an eyewitness to a crime later sees a person who looks familiar, the mind may associate this familiarity with the emotional memory of the crime. The result can be a confused memory and an erroneous identification.[7]

Researchers have shown that when the actual culprit of a staged crime *is* in the photo lineup that more than half of the field of witnesses will actually pick that culprit. What is alarming, however, is that if the culprit is removed from the photo array with no replacement photo inserted into the array, a high percentage of witnesses will pick someone else rather than saying they have no choice.[8] This is known as the theory of "relative judgment."

The theory is relatively simple: Eyewitnesses tend to identify the person from the lineup who, in the opinion of the eyewitness, looks most like the culprit *relative to the other members of the lineup*.[9] Just as in Herman's case, eyewitnesses, when presented with a photo lineup or even a live lineup, have a tendency to compare the photos with each other rather than to simply rely upon their memory.

Gary Wells a leading researcher in the field of eyewitness memory conducted studies confirming the relativity bias in lineups. Notice in the table below that when the true culprit of the staged crime was in the photo array (#3) that 25% of the eyewitnesses still picked the wrong person. Remove the culprit from the lineup and an astounding 68% chose the wrong person. Relative judgment may be a simple theory but it is certainly not benign. Innocent people do get identified and convicted because of it.

Communication

Communication is the ability to convert the memory of an experience into a verbal description of what was perceived. The most common problem in this area involves the witness' inability to articulate the descriptive facts required to reach adequate investigative conclusions. Defense counsel must be alert to communication disabilities such as language barriers, insufficient vocabulary, deficient intellectual functioning, and communication disorders. Such eyewitness problems create a fertile area for cross-examination.

Table 2. Rate of Choosing Lineup Members when a Target Is Present versus Removed-without-Replacement Condition

	Percent of identification of lineups members 1-6						
	1	2	3	4	5	6	No choice
Target (lineup member 3) Present	3%	13%	54%	3%	3%	3%	21%
Target (lineup member 3) Removed Without Replacement	6%	38%	—	12%	7%	5%	32%

Source: Wells (1993)

Continued on page 10

Continued from page 9

Candor

The effective identification witness is candid. Typically, the problems inherent in the identification process are not the result of deliberate plan by the witness but arise of honest mistake. Simple sincerity becomes the greatest danger of misidentification evidence. Counsel's best defense lies in demonstrating limited perception or improperly conditioned recollection. Absent such hot-button problems with the identification or process, defenders risk bolstering the honestly mistaken I.D. through cross-examination.

Use of Experts

In many cases, the eyewitness testimony may be unshakable. The defender realizes that there is nothing to be gained in an attack on the witness' perception, recollection, and communication. The witness ends up appearing truthful, unbiased and without motive to lie. Then what? Eyewitness identification experts can provide juries with an understanding of the forensic problems inherent in the identification method and physiological/psychological process of the particular I.D. There is a significant list of experts whose research and testimony is available to criminal defense attorneys: Gary Wells, Professor of Psychology at Iowa State University; Professor Elizabeth Loftus; Professor Roy S. Malpass of the Eyewitness Identification Resources Laboratory at the University of Texas, El Paso; Professor Jonathan Schooler of the University of Pittsburg; Professor Steven Penrod of the John Jay College of Criminal Justice in New York; and a number of other up and coming labs and researchers. These types of experts provide testimony explaining how the brain processes, stores and retrieves information; analysis of the power of suggestion; insight into faulty recollection. Of course, defenders should expect the prosecution to secure the services of experts like Dr. Ebbe B. Ebbesen, Professor of Psychology at the University of California, San Diego. Defenders should be prepared to conduct Daubert[10] hearings in order to secure use of such experts. When locating a false memory expert, defenders should begin in the academic realm. Several of the leading centers of research and professors have established websites.

Essential Caselaw

Identification procedures must meet Constitutional standards before Courts can allow identification testimony. For example, the prosecution cannot utilize testimony to reinforce its case-in-chief if the identification is made in violation of the Defendant's Sixth Amendment rights. (*See Moore v. Illinois)*[11] Counsel must assert the client's rights by filing a motion to suppress the identification evidence.

The Wade-Gilbert Rule[12] held that a post-indictment lineup in which the defendant is a participant is a "critical stage" of the proceedings triggering the Sixth and Fourteenth Amendments right to counsel. The remedy is per se exclusion where the procedure is conducted without counsel and without a valid waiver. Additionally, in-court identification testimony from the witness who participates in such a identification proceeding will only be allowed if the prosecutor can demonstrate, based upon a totality of the circumstances, that the in-court identification is based upon a source independent the illegal lineup. The Supreme Court set forth the following factors to establish the sufficiency of the "independence": the witness' prior opportunity to view the accused; degree of certainty of the witness' identification at the line-up; presence or absence of inconsistencies between the original description of the perpetrator by the witness and the actual appearance of the accused; the length of time between the first opportunity to view the perpetrator and the un-counseled identification; and the use of suggestive methods at the identification.[13]

The Supreme Court limited the Wade-Gilbert Rule by saying that the right to counsel did not attach after arrest but before adversary criminal process commenced (whether by formal complaint, preliminary hearing, indictment, information, or arraignment).[14] The practical effect of this limitation is to render the Wade-Gilbert Rule null as authorities simply skirt the rule by conducting line-ups before charges are formalized. It is also important to note that Wade-Gilbert does not apply when the accused is in custody on a formally-charged crime and is placed in a line-up for a crime which is at the informal, investigative stage.

Kentucky Courts utilizes a two-step procedure for determining whether identification testimony violates a defendant's due process rights.[15] First, the Court must analyze whether the pre-identification procedures were "unduly suggestive." If not, then the testimony is allowed. If the procedures were "unduly suggestive," the testimony may still be admissible based upon a "totality of the circumstances" look at whether the identification was reliable despite the suggestive procedure.[16] This analysis is subject to the same five-factor test set forth in *Neil v. Biggers*.[17]

Reform

So, how can the justice system minimize mistaken eyewitness identification? As early as 1998, four simple rules were recommended.[18] These rules were recommended after the authors studied the first 40 exonerations by DNA testing and found that 36 involved mistaken eyewitness identification. The recommended rules were:

1) The person who conducts the lineup or photo spread should not be aware of which member of the lineup or photo spread is the suspect (also known as the double-blind procedure).
2) Eyewitnesses should be told explicitly that the person in question might not be in the lineup or photo spread and therefore should not feel that they must make an identification.
3) The suspect should not stand out in the lineup or photo spread as being different from the distracters based on the eyewitness' previous description of the culprit or based on other factors that would draw extra attention to the suspect.
4) A clear statement should be taken from the eyewitness at the time of the identification and prior to any feedback as to his or her confidence that the identified person is the actual culprit.

The reform movement today also recommends the sequential lineup. Dr. Gary Wells, professor of psychiatry at Iowa State University and one of the authors of the aforementioned article, is one of the leading proponents of the double-blind sequential lineup procedure. In the sequential lineup, the eyewitness views photos one at a time, making a decision on each photo based upon the witness' memory, thus eliminating the comparisons found in the relative judgment theory.

Dr. Wells has spoken with law enforcement agencies, prosecutor associations, and other organizations across the country and through his efforts as well as others such as Barry Scheck, The Innocence Network and Innocence Projects across the nation, the movement for reforming eyewitness identification procedures has gained momentum. New Jersey was the first state to adopt the blind sequential lineup procedure statewide. The New Jersey Supreme Court recently ruled that in addition to the lineup procedures that all procedures must be documented and highly recommended the videotaping of the procedures. The Court ruled that unless a written record is kept, the fact that an eyewitness picked the defendant out of a line-up or a series of photographs will not be admissible at trial.[19]

Several other jurisdictions and law enforcement agencies across the country have also adopted blind sequential lineup procedures. One pilot program in Hennepin County, Minnesota, had its data analyzed by an eyewitness scientist at Augsburg College in Minneapolis, who co-wrote an academic article with Hennepin County Attorney Amy Klobuchar and Hilary Lindell Caligiuri, an Assistant Hennepin County Attorney.

"The article, "Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project," reports that the scientific evaluation of the year-long pilot project resulted in fewer witnesses identifying "fillers" (or lineup subjects who are not the actual suspect), which shows that blind sequential lineups reduce the number of witnesses who guess when identifying a suspect—and reduce the number of innocent people identified in lineups."[20]

In another pilot project, the Chicago Police Department published a report suggesting that the Chicago pilot program casts doubt on recent reform of eyewitness identification procedures.[21] However, the report is looked upon with skepticism by many in the field.

The Attorney General of the State of Wisconsin, in partnership with the Frank J. Remington Center at the University of Wisconsin Law School, developed and published a Model Policy and Procedure for Eyewitness Identification, which sets out guidelines for eyewitness identification procedures.[22] The Wisconsin Model Policy addresses many issues of eyewitness identification but expressly adopts the double-blind sequential lineup procedure with other requirements to minimize the identification of innocent persons. Following the release of *The Chicago Report*, the Wisconsin Attorney General's office issued a response that basically said *The Chicago Report* did not address four of Wisconsin's Model Policy requirements and that its findings regarding the double-blind sequential procedure actually reinforced the position for the procedure.[23]

"Even though the Chicago Report does not challenge any of these principles, the report relies on the higher rate of suspect identifications in non-blind lineups to support a claim that non-blind procedures are superior. However, this result—more identifications of suspects in non-blind lineups—is exactly what the research on suggestion predicts, and exactly the problem double-blind administration was designed to prevent."[24]

Will Kentucky join the reform movement? Two men in Kentucky have been exonerated through DNA testing. In BOTH cases, mistaken eyewitness identification was key to their convictions. Some would say that only two cases in a state is not a bad error rate. But to those two men, it was a 100% error rate and cost them, collectively, 20+ years of their lives. And the issue is not limited to just DNA cases. Innocent men and women in Kentucky and across the nation are being sent to prison based upon mistaken eyewitness identification and any reform that can minimize the chances of an innocent person spending a single night in jail is worth considering.

Endnotes:

1. Ray Moses, "Misidentification: The Caprices of Eyewitness Testimony in Criminal Cases" http://www.criminaldefense.homestead.com/eyewitnessmisidentification.html. (2001)
2. http://www.innocence project.org/causes/

Continued on page 12

Continued from page 11

3. Ray Moses, "Misidentification: The Caprices of Eyewitness Testimony in Criminal Cases" http://www.criminaldefense.homestead.com/eyewitnessmisidentification.html. (2001)
4. Jim Dwyer, Peter Neufeld, Barry Scheck, *Actual Innocence*, Doubleday (2000) p. 43-45
5. Ray Moses, "Misidentification: The Caprices of Eyewitness Testimony in Criminal Cases" http://www.criminaldefense.homestead.com/eyewitnessmisidentification.html. (2001)
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8. Wells, G.L. (1993). What do we know about eyewitness identification? *American Psychologist*, 48, 553-571.
9. Wells, G.L. (1984). The psychology of lineup identifications. *Journal of Applied Social Psychology*, 14, 89-103.
10. *Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)*.
11. 434 U.S. 200 (1977); *Gilbert v. California*, 388 U.S. 263 (1967).
12. Derived from *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967).
13. *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401, 411 (1972).
14. *Kirby v. Illinois*, 406 U.S. 682 (1972), affirmed by *Moore v. Illinois*, 434 U.S. 220 (1977).
15. *Dillingham v. Comonwealth*, Ky., 995 S.W.2d 377, 383 (1999) *quoting Thigpen v. Cory,* 804 F.2d 893, 895 (6th Cir.1986) and *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1274 (1968).
16. *Id. quoting Stewart v. Duckworth,* 93 F.3d 262, 265 (7th Cir.1996) and *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401, 411 (1972).
17. Adopted by Kentucky in *Savage v. Commonwealth*, Ky., 920 S.W.2d 512 (1995).
18. Wells, G.L., Small, M., Penrod, S., Malpass, R.S., Fulero, S.M., & Brimacombe, C.A.E. (1998). Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, *Law and Human Behavior*, Vol. 22, No. 6.
19. Justices: Witness IDs Must Be Written Down. *Star-Ledger*, August 1, 2006.
20. Study of Year-long Pilot Project Shows that Key Eyewitness Identification Reforms are Effective. *The Advocate*, pg. 23, Volume 28, No. 5, September, 2006.
21. Mecklenberg, S.H. *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures*. March 17, 2006.
22. Office of the Attorney General, Wisconsin Department of Justice Bureau of Training and Standards for Criminal Justice. Model Policy and Procedure for Eyewitness Identification. *Comprehensive review & Analysis of Best Practices*. September 12, 2005.
23. Office of the Attorney General, Wisconsin Department of Justice Bureau of Training and Standards for Criminal Justice. Response to Chicago Report on Eyewitness Identification Procedures. July 21, 2006.
24. *Id*. at 3. ■

The National Legal Aide and Defender Association's Forensics Library has a wealth of information for use in eyewitness identification cases at
http://www.nlada.org/Defender/forensics/for_lib/Index/Eyewitness%20ID#Eyewitness%20ID

Including:

Eyewitness ID Pleadings
Eyewitness ID Websites
Eyewitness ID Court Opinions
Eyewitness ID Research Articles
Eyewitness ID Wrongful Convictions
Eyewitness ID Government Expert Materials
Eyewitness ID Training Materials
Eyewitness ID Legislative Reforms
Eyewitness ID Defense Expert Materials
Eyewitness ID Illinois Study

Defending Your First Sexual Abuse Case

By Elizabeth Bradley Barber and Susan M. J. Martin, Owensboro

You've just been assigned to represent a person charged with Sexual Abuse, First Degree. You go to the county detention center to discuss the case with your new client at which time he tells you that he will no way, no how, plead guilty to this charge. With a sex abuse case, you normally know early on whether you will be preparing for trial. After all, the discovery usually consists of the child reciting a scenario of sex abuse, such as an inappropriate touching, and the client denying the allegation. Normally, no new discovery arises which would cause a client to decide to plead guilty. No eyewitness testimony exists, except that of the alleged victim, and there is no physical evidence, such as DNA.

So you know from the onset that you must prepare for trial, but you are not sure where to start. You begin to feel a little overwhelmed. I understand completely. In this article I will share some tips that have proved very beneficial to me in preparing and trying child sex abuse cases.

Is The Child Competent To Testify?

In March 2004, I tried my first sex abuse case. At the time, I was the first attorney in Department of Public Advocacy's Owensboro Trial Office to try this type of case. Where did I turn for guidance? The Department of Public Advocacy's Circuit Court Manual. I found it to be a major resource and would recommend it to any defense attorney in the same situation. The Manual gave me the idea of filing a Motion for a Competency Hearing of Child Witnesses. The results of my first competency hearing proved so helpful that I have filed such motions in practically every case I've had with a child witness since then.

Thus far, I have never had a judge find a child incompetent to testify, but from the competency hearings, I have gained priceless insights on how to question particular child witnesses at trial. For example, during the competency hearing, I ask the child about prior events in his life, such as the schools he has attended, the names of his former teachers and details about important birthdays he has had. If the prosecutor objects, you can respond to the court that you are merely asking these questions to aid the court in determining if the child is competent to testify under Kentucky Rule of Evidence 601, "Competency." In fact, KRE 601 requires that the child be able to perceive matters "accurately," "recollect facts," "express himself so as to be understood, either directly or through an interpreter," and have the "capacity to understand the obligation" of telling the truth.[1] According to Professor Robert G. Lawson, the competency issue requires a "thoughtful analysis of whether the child is intellectually capable of perceiving and remembering the specific facts that comprise [his] testimony."[2] The child's answers to questions about his former teachers, schools and birthdays can only assist the court in analyzing the child's intellect, perceptions and memory. While preparing for the hearing, keep in mind that there may be more than one issue at stake. The issue may be the child's capacity to testify in the here and now (at trial), or at the time of the alleged crime, or both.[3]

As a defense attorney, you may find the child's answers to everyday questions about schools and birthdays to be invaluable. For example, if the child's trial testimony concerning his allegations of sexual abuse is vague, you may ask him leading questions about the schools, teachers and birthdays you discussed with him during the competency hearing. Consider the following types of questions:

1. Where do you go to school this year?
2. Who's your teacher this year?
3. Have you ever gone to any other schools? Which ones?
4. Who was your teacher last year? The year before? How about when you were in kindergarten?
5. What's your favorite holiday?
6. What did you get for Christmas last year? What about the year before?
7. What did you dress up as for Halloween last year? What about the year before?
8. How old are you now? What did you do on your last birthday? How did you celebrate it? Who came to your birthday party? What kind of gifts did you get?
9. Last summer when school was out, did you and your family do anything special? Did you go anywhere? What did you do while you were there? How long did you stay?

If the child gives specific, detailed testimony about things such as holidays or birthdays, you can point out in your closing argument that in contrast, the child is vague about the alleged abuse because his allegations just aren't true.

Continued on page 14

Continued from page 13

On the other hand, what if the child's direct testimony is specific and detailed about the sexual abuse? You may still work it to your advantage in cross examination. Ask the child how many times he has gone over these events with his parents, social workers, counselors, police officers, and commonwealth attorneys. In closing argument, you can argue that the child gave specific details about the sexual abuse because he had gone over those details so many times with so many different adults.

A competency hearing also gives you the opportunity to let the child witness become comfortable in your presence. While questioning the child, you can tell him that you have a son, daughter, niece or nephew about the same age. Or, when asking the child about a certain birthday, interest or vacation, you can add a comment about your own children's experiences when they were the same age. If you don't have children, comment about your own childhood experiences (favorite birthday, vacation, etc.) when you were the same age. Your goal is to let the child witness know that you are not his enemy. He does not need to be scared of you or your questions. If the child is comfortable with you at the competency hearing, your cross-examination at trial will go much more smoothly because the child will be more at ease. Consequently, the jury will view you, the defense attorney, more favorably.

Critical Investigation Above And Beyond The Discovery

No matter how many documents you receive in discovery from the Commonwealth Attorney, in a child sex abuse case, a great deal of documentation about the child's allegations exists elsewhere. When a child alleges that he has been sexually abused, many agencies other than the police and prosecutor get involved, and they tend to create a lot of records. For example, the Cabinet for Health and Family Services in Frankfort, Kentucky, will have records of social workers and others who investigated the child's allegations. The Cabinet's records may show inconsistencies in the child's statements (including retractions) and reasons why the child may be fabricating his allegations. The easiest way to obtain such records is to contact the Cabinet in Frankfort, obtain a release form called "Authorization for Disclosure of Protected Health Information," have your client sign the form and send it back to the Cabinet4 with an Open Records request letter.[5] It may take several weeks or even months to receive Cabinet records, so make your request early. Anticipate that you may be asked to provide other documentation such as the child's birth certificate or a court order.

What should you do if the Cabinet or other entity (the child's school, counselor or another private organization) tells you its records can only be released by court order? In such cases, file a motion asking the trial court to do an *in camera* review of the records, after which the court would disclose any records containing favorable or impeachment material to defense counsel.6 The Commonwealth's obligation to disclose such material includes records that are actually in the hands of other state agencies involved in the investigation and prosecution of your client.7 If the trial court denies your motion or only allows you to view a limited number of documents, be sure to request that any undisclosed documents be sealed into the court record, to preserve the (non-disclosure) issue for appellate review.

Requests for the *in camera* review of records are important because school and counseling records often show inconsistencies in the child's allegations. They may show that the child has a tendency to make up stories or seek attention. Or, he may dislike his mother's boyfriend or stepparent. He may simply want to live not with your client, but with a grandparent who gives him expensive toys. In addition, these records often answer questions such as, has one of the child's parents or other care givers ever been charged with abuse and neglect? Has the child alleged that people other than your client have sexually abused him? Cabinet records generally contain such information, which allows you to poke significant holes in the Commonwealth's case. Cabinet records involving allegations against parties other than your client may also be informative, but you will need a court order to obtain them.

***Voir Dire*: Tips on Choosing Jurors**

Prior to trial, you might want to consider having a formal or informal trial "team." Enlist co-counsel, preferably someone who has tried this type of case, to sit beside you at counsel table. Get copies of motions your co-counsel has filed in sexual abuse cases and let that attorney explain the importance of such motions to your particular case. Ask your co-counsel to help you draft a set of voir dire questions. Chances are that your co-counsel can give you the voir dire questions that he or she has used in the past. Voir dire is your opportunity to persuade the jurors to think in a certain direction. Do not underestimate the value of effective voir dire.

In drafting your voir dire questions, decide what kind of people would be the perfect jurors for your case. Then, ask your investigator, co-counsel, and a secretary to review the juror qualification forms and earmark the people you will want to strike. For example, you might consider striking social workers, school teachers or others who work with children. Or, people who work with crime victims of any kind. You might consider striking people who have children the same age as the child witness. In any event, during voir dire, concentrate on asking your questions and making a meaningful connection with the jurors. Have your investigator and co-counsel take notes on the potential jurors' comments and body language.

As you begin drafting your voir dire questions, you might consider the following suggestions:

1. Have any of you ever been a victim of sexual abuse or sexual assault?

2. Do any of you currently work with victims of sexual offenses? Have any of you ever worked with victims of sexual offenses in the past?

3. Are any of you related by blood or marriage to a victim of a sexual offense?

4. Do any of you know anyone, either a friend or acquaintance, who was the victim of a sexual offense?

5. Does anyone disagree with this statement: Children can distort reality and fantasy. That is, a child can believe that something happened, when in reality, it didn't happen.

6. Does anyone disagree with this statement: Children will sometimes lie about being abused.

7. Would any of you find the testimony of the child who will testify today to be more truthful just because he's a child?

8. Does anyone disagree with this statement: A person will sometimes lie about another individual in order to get that person in trouble — or to keep from getting themselves in trouble?

9. Does anyone disagree with this statement: A child may sometimes lie about being sexually abused in order to try to get attention?

10. Does anyone disagree with this statement: A child may sometimes lie about being sexually abused in order to try to please someone else, such as a parent?

11. Does anyone disagree with this statement: A child may sometimes get ideas about being sexually abused from watching television shows?

12. Is there anyone who doesn't believe that a child could be talked to and questioned so much about sexual abuse that the child could end up believing that he was abused when in fact, he wasn't?

13. The case before you today consists of _____ counts of Sexual Abuse in the First Degree. Each count carries a potential penalty of _____ years in prison. The minimum Mr. Client could receive if found guilty would be _____ years. Is there anyone right now, before hearing the testimony, that could not give the minimum? The maximum Mr. Client could receive would be years. Is there anyone right now, before hearing the testimony, that would automatically give the maximum penalty?

Will The Child Testify Face-to-Face Or By Video?

Prior to trial, depending on the circuit judge and prosecutor in your case, you many find it necessary to file a motion *in limine* to ensure that the child witness testifies face-to-face with your client and the jury.[8] I have had jury trials where the courtroom bailiff has stood to the side of the witness box, squarely between my client and the child witness, or the child's parent has sat right next to the witness box while the child testified. In both instances, I made a contemporaneous objection pursuant to *Coy v. Iowa*,[9] but I find it preferable to file a motion *in limine* prior to trial to try to avoid such situations altogether. In such motions, I argue that under *Coy v. Iowa*, the Sixth Amendment of the United States Constitution and the Fourteenth Amendment Due Process clause, putting any object or person between the child witness and my client is prejudicial. It gives the appearance that the child is afraid of my client, must be protected from my client and that my client is guilty, just as if he were wearing an orange jumpsuit.[10]

In any event, if the Commonwealth Attorney wants a child witness to testify by video, for example, he or she must (a) make a motion requesting a hearing, and (b) demonstrate during the hearing that a "compelling need" exists for the child to testify by video.[11]

A "compelling need" exists only where the child witness will experience trauma, and the source of the child's trauma is the defendant's very presence. Significantly, the child's trauma must be so substantial that the child's ability to communicate will be impaired.[12]

Pinpointing and Emphasizing Reasonable Doubt

The best opportunity you have to emphasize all the points of reasonable doubt in your case is in closing argument. While drafting your closing, review the discovery and the other records you've obtained, looking for details such as whether the child procrastinated in reporting the alleged sexual abuse. If so, you can argue in closing argument that the delay in reporting is because the child's allegations are not true. If the child's statement to law enforcement officers is not tape recorded in some way, consider bringing that up in cross-examining the officers. For example, did you document the specific questions you asked the child? Did you write down the child's answers verbatim? Or, did you only make notes that summarized the child's statements? How much time elapsed between the time you interviewed the child and wrote your report? Who was present when you questioned the child? A parent or care giver having an axe to grind against your client? Posing such questions in cross-examination allows you to argue in closing that the absence of a taped statement from the child gives rise to reasonable doubt about the accuracy of the child's statements.

Continued on page 16

Continued from page 15

Before trial, brainstorm your case with as many people as possible. Your jurors will not be defense attorneys, so go over the facts of the case with your support staff as well as other attorneys. I am always amazed at the ideas my colleagues give me, including ones I mention or emphasize in closing arguments. As the primary attorney on a case, it can sometimes be easy to overlook the obvious. Have your co-counsel take notes during the trial which you can review during recesses. Through these notes, you will think of additional questions to ask witnesses and even more points of reasonable doubt to argue in closing.

When cross-examining the child witness, do not take an argumentative, overly aggressive approach. Ask questions, elicit answers and bring out any inconsistencies during your closing argument instead of arguing with the child that he hasn't been consistent in describing events of sexual abuse. Arguing with the child will get you nowhere, except on the bad side of the jurors.

Your closing argument gives you the opportunity to tell your client's story one last time. I suggest that you approach it just that way. Tell the facts of your client's case in a story to the jurors, stopping along the way to point out facts that give rise to reasonable doubt. Although you may be tempted to, never attack the child witness, law enforcement officers, or the prosecuting attorney. Such attacks can offend the jurors, making your argument less effective.

Endnotes:

1. *See* KRE 601. *See also City of Covington v. O'Meara*, 133 Ky. 762, 119 S.W. 187 (1909), *Hendricks v. Commonwealth*, 550 S.W.2d 551, 554 (Ky. 1977) *and Gaines v. Commonwealth*, 728 S.W.2d 525 (Ky. 1987).
2. *See* Robert G. Lawson, The Kentucky Evidence Law Handbook, § 3.05 at 149 n22 (3d ed. 1993).
3. *Id.* at 149.
4. The Cabinet's address and phone number are Cabinet for Health and Family Services, Department of Community Based Services, Records Management Section, 275 East Main Street, Section 3E-G, Frankfort, KY, 40602, (502) 564-3834.
5. *See* KRS 61.870 *et seq.*
6. Information regarding the credibility of a prosecution witness is "the sort of exculpatory evidence which is subject to disclosure" to defense counsel. *See, e.g.,Eldred v. Commonwealth*, 906 S.W.2d 694, 701-02 (Ky.,1994) (citing *Davis v. Alaska*, 415 U.S. 308, 320-21 (1974)), *partially overruled on other grounds by Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003).
7. *Id.* at 702 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 55-56, 107 S.Ct. 989, 1000 (1987) *and Ballard v. Commonwealth*, 743 S.W.2d 21, 22-23 (Ky. 1988)).
8. *See, e.g., Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798 (1988), *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691 (1976), *Price v. Commonwealth*, 31 S.W. 3d 885 (Ky. 2000) *and Commonwealth v. M.G.*, 75 S.W.3d 714 (Ky. App. 2002).
9. *See Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. (1988).
10. *See, e.g., George v. Commonwealth*, 885 S.W.2d 938, 942 (Ky. 1994) (Stephens, J., concurring).
11. *See* KRS 421.350(5).
12. *See Maryland v. Craig*, 497 U.S. 836, 856-57 (1990). ■

2006 Statewide Poll Shows Kentuckians Overwhelmingly Reject Death Penalty

Kentucky Coalition to Abolish the Death Penalty

Kentuckians have overwhelmingly rejected the death penalty as the most appropriate punishment for those convicted of aggravated murder in response to a polling question asked in the Summer 2006 Kentucky Survey conducted by the University of Kentucky Survey Research Center.

Interviews were completed with 836 Kentuckians over 18 years old between August 14 and September 6, 2006. The survey question gave respondents a choice of the penalties now available to jury members who sit for death penalty trials.

Two-thirds of the respondents, 67.6%, rejected the death penalty as the MOST appropriate penalty for aggravated murder. Less than one-third think the death penalty is the MOST appropriate penalty. Only 2% selected none of the available penalties.

The center column in the chart presents a breakdown of the respondents answers, with a plurality of Kentuckians, though not a majority, preferring life without the possibility of parole forever. Just over ten percent believe life without parole for 25 years is MOST appropriate; 5.6% felt a life sentence with parole possible in 20 years is MOST appropriate; and 15.5% selected a term of 20—50 years with no parole possible until 85% of the sentence is served as the MOST appropriate penalty.

KCADP asked Dr. Gennaro Vito, a professor at the University of Louisville, to take this new polling data and compare its results to the results of polls conducted in Kentucky since 1989. His article appears inside on pages two and three.

The Kentucky Coalition to Abolish the Death Penalty will continue to press lawmakers to reflect the clear desire of Kentuckians by repealing the law that allows the use of the death penalty. Kentuckians overwhelmingly support the other sentences already available to juries in aggravated murder cases. These severe penalties hold the guilty accountable and protect society.

Abolishing the death penalty will also insure that Kentucky does not execute any innocent persons, as it almost did in the case of Larry Osborne. Kentucky's Supreme Court unanimously ordered a new trial for Osborne after rejecting his death sentence and the guilty verdict imposed by a jury that used hearsay evidence to convict him. The jury in the second trial found him not guilty and Osborne regained his freedom.

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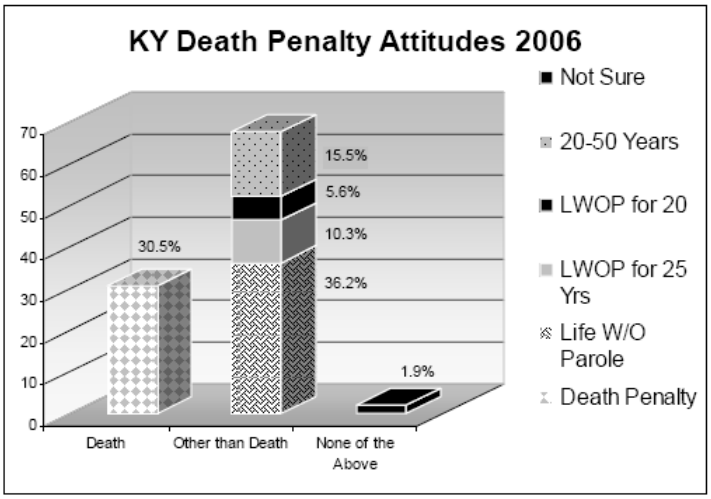


Questions Asked by University of Kentucky Research Center

If a person is convicted in Kentucky of aggravated murder, which of the following punishments do you personally think is MOST appropriate: The death penalty; Life in Prison without Parole forever; Life in Prison with the Possibility of Parole for 25 years; Life in Prison Without the Possibility of Parole for 20 years; 20 to 50 years in prison with no parole possible until 85% of sentence is served.

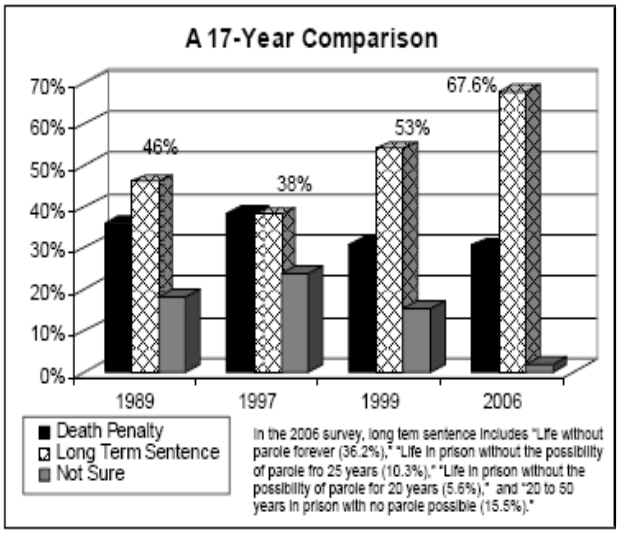
KENTUCKIAN'S ATTITUDES TOWARD THE DEATH PENALTY: A 17-YEAR COMPARISON[1]

Nearly 7 out of 10 Kentuckians favor a long term sentence (*e.g.*, Life without Parole) over capital punishment for convicted murderers.

By Gennaro F. Vito

Support for Death Penalty Wanes to 30.5%

Support for the death penalty in Kentucky declined from 35.9% to 30.8% over 10 years from 1989 to 1999 and remained consistent at about 30 percent for the seven years since 1999. This decrease may be due to the publicity given to cases, like Illinois, where innocent individuals were incarcerated on death row. This level of support for the death penalty is also substantially lower than the lowest figure ever registered in a national poll on capital punishment, 38 percent support in 1966.



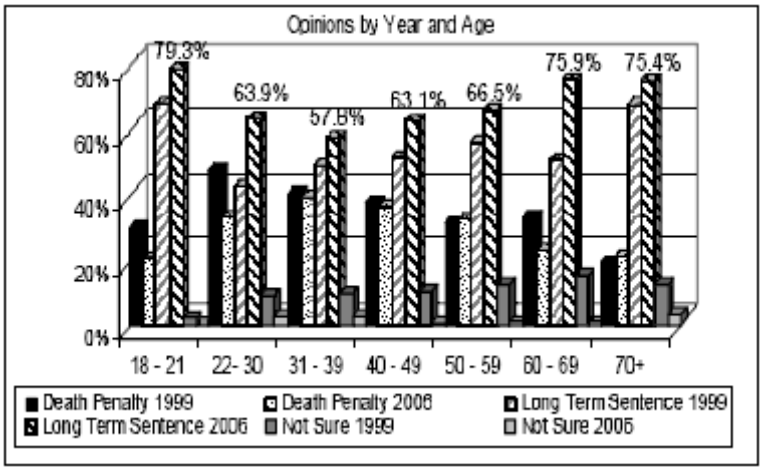
Support for Long Term Sentences Sharply Increases to 67.6%

Over the same time period, Kentuckians have revealed a distinct preference for long term sentences like life without parole for convicted murders, rising from 46 percent in 1989 to a peak of almost 68 percent in 2006. Again, the popularity of a long term sentence may be due to the fact that, if an error is discovered, it is not irrevocable. Executions cannot be reversed.

A comparison of death penalty attitudes of Kentuckians over the past two surveys (seven years) by demographic groups was also completed. Here, the differences between age groups for the past two surveys are presented.
In general, death penalty support was lowest in both surveys for the youngest age group in both years (18-21). Support for a long term sentence was highest for this group. Support for capital punishment generally increased with age with the exception of the oldest group whose levels of opposition paralleled that of the youngest age group. Traditionally, youths and elders have expressed little support for capital punishment.

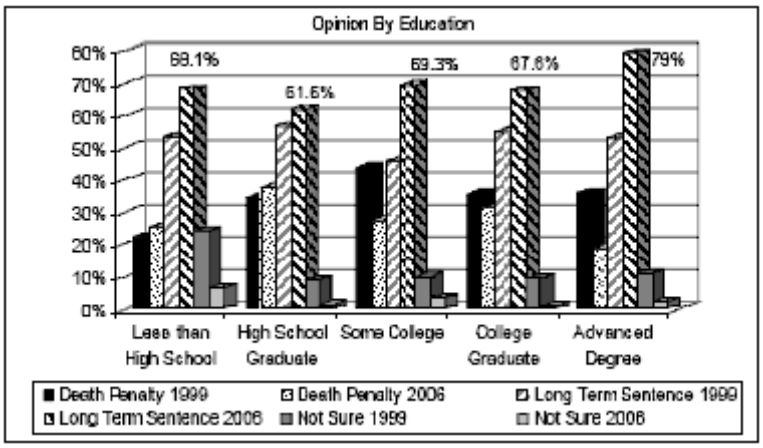
It is notable that death penalty support never rose to a majority position for any age group for either survey.

On the other hand, a long term sentence was the preferred penalty for every age group across both surveys.



Although it never rose to a majority status for any educational level in either year, death penalty support appeared to increase with the level of education for both years.

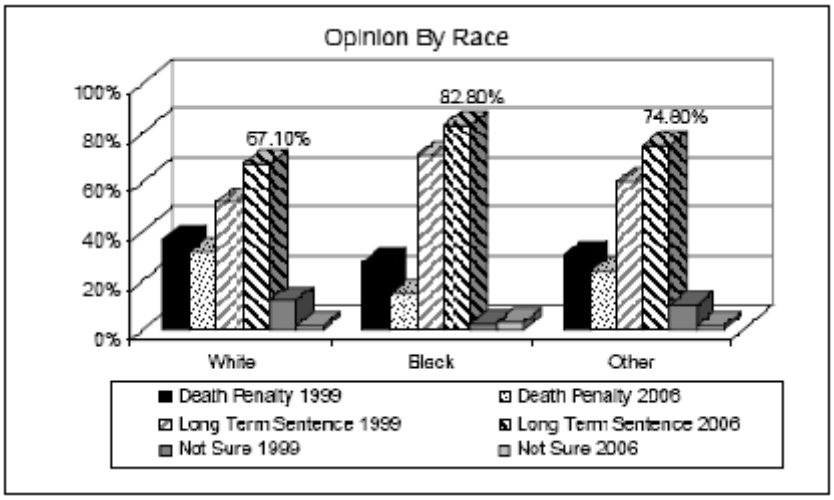
However, in the 2006 survey, Kentuckians with an advanced degree had the lowest level of support for capital punishment (about 19 percent) and the highest level of support for a long term sentence (79 percent) as a punishment for convicted murderers. This finding has also been consistently true in national polls on capital punishment.



Death Penalty Rejected Regardless of Age, Education, Race

Traditionally, whites have registered higher levels of support for capital punishment than minority groups. This pattern held for both survey years. Once again, support for capital punishment failed to assume a majority position in either year.

Blacks had the lowest level of support for the death penalty, especially in the 2006 survey and the highest level of support for a long term sentence for convicted murderers. Racial bias has been a consistent research finding in studies of capital sentencing, including in Kentucky where the research results contributed to the passage of the Racial Justice Act.



Conclusion

These four survey results over 17 years clearly reveal that the majority of Kentuckians favor a long term sentence over the death penalty for convicted murderers. This support has intensified over the past two waves of surveys between 1999 and 2006, increasing 21.6% from 1989 to 2006. Policy and decision makers at all levels of government, especially legislators and criminal justice operatives, should take note of the consistency of these findings as the people of Kentucky are expressing their opinions clearly.

Endnote:

1. The Survey Research Institute of the Urban Studies Institute at the University of Louisville conducted the 1989, 1997 and 1999 surveys. In October of 1989, data were collected from a probability sample of 811 Kentucky households (margin of error = + 2.5%). The 1997 survey was conducted in July and had an N of 709 (margin of error = + 2.5%). The 1999 survey was conducted in December and had an N of 909 (margin of error = + 4.8%). The 2006 survey was conducted in August and September by the University of Kentucky and had an N of 836 (margin of error = + 3.3%).

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Capital punishment, like the rest of the criminal justice system, is a government program, so skepticism is in order.

—George Will

Capital Case Review

By David M. Barron, Post Conviction Branch

Supreme Court of the United States

***Ayers v. Belmontes*,**
127 S.Ct. 469 (2006)

(Kennedy, J., for the Court, joined by, Roberts, C.J., Scalia, Thomas, and Alito, JJ.; Scalia, J., filed separate concurring opinion, joined by Thomas, J.; Stevens, J., dissenting, joined by, Souter, Ginsburg, and Breyer, JJ.)

Belmontes argued that California's special sentencing factor (k), "which requires the jury to consider any other circumstances which extenuates the gravity of the crime even though it is not a legal excuse for the crime," prevented the jury from considering predictions of continued good acts if given a life sentence, and that his case was distinguishable from prior cases upholding factor (k) because his case was not restricted by the Anti-Terrorism and Effective Death Penalty Act. The Court held that there was no reasonable likelihood that jurors interpreted the instruction to preclude consideration of forward-looking mitigation evidence concerning Belmontes's ability to positively contribute to society if given a life sentence.

Scalia, J., concurring, joined by Thomas, J.: They reiterated their belief that the Eighth Amendment does not prohibit limitations on the sentencer's discretion to consider all mitigating evidence. Aside from that, Scalia also reiterated that a jury need not be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant.

Supreme Court Grants of *Certiorari*

***Brewer v. Quarterman*,**
No. 05-11287, cert. granted October 13, 2006,
decision below, 442 F.3d 273 (5th Cir.)

1. Do the former Texas "special issue" capital sentencing jury instructions – which permit jurors to register only a "yes" or "no" answer to two questions, inquiring whether the defendant killed "deliberately" and probably would constitute a "continuing threat to society" - - permit constitutionally adequate consideration of mitigating evidence about a defendant's mental impairment and childhood mistreatment and deprivation, in light of this Court's emphatic statement in *Smith v. Texas*, 543 U.S. 37, 48 (2004), that those same two questions "had little, if anything to do with" Smith's evidence of mental impairment and childhood mistreatment?

2. Do this Court's recent opinions in *Penry v. Johnson*, 532 U.S. 782 (2001) ("Penry II") and *Smith*, both of which require instructions that permit jurors to give "full consideration and full effect" to a defendant's mitigating evidence in choosing the appropriate sentence, preclude the Fifth Circuit from adhering to its prior decisions - - antedating *Penry II* and *Smith* - - that reject *Penry* error whenever the former special issues might have afforded some indirect consideration of the defendant's mitigating evidence?

David M. Barron

3. Has the Fifth Circuit, in insisting that a defendant show a predicate to relief under *Penry* that he suffers from a mental disorder that is severe, permanent or untreatable, simply resurrected the threshold test for "constitutional relevance" that this Court emphatically rejected in *Tennard v. Dretke*, 542 U.S. 274 (2004)?

4. Where the prosecution, as it did here, repeatedly implores jurors to "follow the law" and "do their duty" by answering the former Texas special issues on their own terms and abjuring any attempt to use their answers to effect an appropriate sentence, is it reasonably likely that jurors applied their instructions in a way that prevented them from fully considering and giving effect to the defendant's mitigating evidence?

***Abdul-Kabir v. Quarterman*,**
No. 05-11284, granted October 13, 2006,
decision below, 418 F.3d 494 (5th Cir.)

Presents the exact same questions presented as *Brewer*.

***Smith v. Texas*,**
No. 05-11304, cert. granted October 6, 2006,
decision below, 185 S.W.3d 455 (Tex.Crim.App.)

1. In *Smith v. Texas,* 543 U.S. 37 (2004), this Court summarily reversed the Texas Court of Criminal Appeals and found constitutional error under *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Penry I), and *Penry v. Johnson*, 532 U.S. 782 (2001) (Penry II). Is it consistent with this Court's remand in this case for the Texas Court of Criminal Appeals to deem the error in petitioner's case harmless based on its view that jurors were in fact able to give adequate consideration and effect to petitioner's mitigating evidence notwithstanding this Court's conclusion to the contrary?

2. Can the Texas Court of Criminal Appeals, based on a procedural determination that it declined to adopt in its original decision that this Court then summarily reversed, impose on remand a daunting standard of harm ("egregious harm") to the constitutional violation found by this Court?

***Schriro v. Landrigan*,**
No. 05-1575, cert. granted September 26, 2006,
decision below, 441 F.3d 638 (9th Cir.)

Respondent Jeffrey Landrigan actively thwarted his attorney's efforts to develop and present mitigating evidence in his capital sentencing proceeding. Landrigan told the trial judge that he did not want his attorney to present any mitigation evidence, including proposed testimony from witnesses whom his attorney had subpoenaed to testify. On post-conviction review, the state court rejected as frivolous an ineffective assistance of counsel claim in which Landrigan asserted that if counsel had raised the issue of Landrigan's alleged genetic predisposition to violence, he would have cooperated in presenting that type of mitigating evidence.

1. In light of the highly deferential standard of review required in this case pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), did the Ninth Circuit err by holding that the state court unreasonably determined the facts when it found that Landrigan "instructed his attorney not to present any mitigating evidence at the sentencing hearing"?

2. Did the Ninth Circuit err by finding that the state court's analysis of Landrigan's ineffective assistance of counsel claim was objectively unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984), notwithstanding the absence of any contrary authority from this Court in cases in which (a) the defendant waives presentation of mitigation and impedes counsels attempts to do so, or (b) the evidence the defendant subsequently claims should have been presented is not mitigating?

Stays of Executions

***Cooey v. Taft*,**
No. 06-4527 (6th Cir. Dec. 1, 2006)
(Henderson stay)

(Norris and Clay, JJ., Batchelder, J., dissenting)

The federal district court had allowed him to intervene in the underlying action, which has been stayed for more than a year while the state pursues an interlocutory appeal in the Sixth Circuit. Without any explanation, the court granted Jerome Henderson's emergency motion for a stay of execution so he could pursue a challenge to the chemicals and procedures used in lethal injections. The state of Ohio has sought rehearing *en banc*. Henderson is scheduled to be executed at 10:00 a.m. on December 5, 2006. When this article went to press, no final word on the status of Henderson's execution date has been issued.

Batchelder, J., dissenting: Batchelder could not find any basis under the law to grant the motion and cannot reconcile the majority's decision to grant the stay with the court's prior decision to vacate the district court's grant of a stay to Jeffrey Lundgren less than six weeks ago. The district court denied Henderson a stay because it believed it was bound to do so by the Sixth Circuit's order vacating Lundgren's stay of execution. According to Batchelder, Henderson presented the identical situation as Lundgren and thus the law of the case doctrine bars the court from granting Henderson's motion for a stay of execution.

Note: *Lundgren moved to intervene in the Cooey lethal injection litigation after his execution was scheduled while Henderson moved to intervene prior to his execution being scheduled. It is unknown whether this explains the apparent inconsistency between Henderson and Lundgren.*

Guy LeGrand: North Carolina state court judge granted a 60 day stay of execution so LeGrand's competency to be executed could be determined after mental health evaluations are conducted. LeGrand also raises the issues of whether it is constitutional to execute a severely mentally ill person.

***Charles Anthony Nealy*:** Execution stayed by the Texas Court of Criminal Appeals based on claims of innocence and prosecutorial misconduct and remanded to the trial level court to determine if a witness' recantation is credible. A witness who testified at trial came forward and said that the prosecutor had intimidated and threatened him prior to trial, including that he would be charged with capital murder if he did not testify against Nealy.

***Johnson v. Bell*,**
No. 05-6925 (6th Cir., Oct. 19, 2006)

(Boggs, C.J., Norris and Clay, JJ.)

In an unpublished order with no explanation, the court granted Donnie Johnson's motion for a stay of execution pending disposition of the appeal of the denial of his Federal Rules of Civil Procedure, Rule 60(b) motion, which alleged violations of the state's obligation to disclose material, exculpatory information under *Brady v. Maryland*.

United States Court of Appeals for the Sixth Circuit

Grants of rehearing en banc: The court granted rehearing *en banc* in *Getsy v. Mitchell*, 456 F.3d 575 (6th Cir. 2006) [discussed in the November 2006 edition of *The Advocate*], vacating the panel decision in its entirety. The Court also recently held *en banc* oral argument in *Van Hook v. Anderson*, another capital case where the panel decision was vacated by the grant of rehearing *en banc*.

***Slaughter v. Parker*,**
467 F.3d 511 (6th Cir. 2006)

Continued on page 22

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In an order without any explanation, rehearing *en banc* was denied by a 7-7 vote. Judge Cole wrote a dissenting opinion that was joined by Martin, Daughtrey, Moore, and Clay, JJ.

Cole, J., dissenting: "We are uneasy about executing anyone sentenced to die by a jury who knows nearly nothing about that person. But we have allowed it. We are also uneasy about executing those who commit their crimes at a young age. But we have allowed that as well. We are particularly troubled about executing someone who likely suffers from brain damage. We rarely, if ever, allow that - - especially when the jury is not afforded the opportunity to even consider that evidence. Jeffrey Leonard, known to the jury only as 'James Slaughter,' approaches the execution chamber with all of these characteristics. Reaching this new chapter in our death-penalty history, the majority decision cannot be reconciled with established precedent. It certainly fails the Constitution. This Court's seven to seven stalemate regarding the *en banc* petition, however, leaves this precarious decision intact."

Judge Cole continued by saying, "[d]isagreements about whether counsel's ineffectiveness prejudiced a capital defendant are commonplace; the majority's holding on this point, however, creates two particular conflicts that should have been resolved by the *en banc* Court. First, it conflicts with cases concluding prejudice occurred where, although some mitigating evidence was presented, evidence of severe childhood abuse and diminished mental capacity was not. This conflict is particularly stark where the absent evidence includes, as here, possible brain damage to the defendant. Slaughter will be executed in violation of this clear law. Second, the holding presumes a defendant's self-serving testimony - - even when he testifies to spare his own life - - has the same impact regardless of whether other witnesses corroborate it. That conflicts with the Supreme Court's recognition in *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986), that a defendant's testimony is inherently suspect and a jury will naturally discount it. The image presented to the jury was a man so loathed that nobody - - not even his family - - would corroborate his testimony or plead for his life. In reality, his family - - including the younger siblings he protected as a child - - would have testified in this way, but they never knew he was on trial. This Court nonetheless approves his execution."

Finally, Cole argued that "[w]thout *en banc* review, we are left with authority that stands for an absurdity: "A petitioner fails to present a federal claim for relief when citing to the precise *constitutional text* that is the genesis of the claim itself." (emphasis in original). According to Cole, [t]he majority's decision effectively overrules Sixth Circuit law without even discussion of the cases it overrules.

***Cooey v. Taft*, No. 06- (Oct. 23, 2006):** An Ohio federal district court judge granted Jeffrey Lundgren's motion to intervene in the *Cooey* lethal injection litigation and issued an injunction barring Lundgren's execution so he could pursue the litigation. Despite the underlying action being stayed for more than a year while Ohio pursues an interlocutory appeal in the Sixth Circuit Court of Appeals, the three-judge panel of Suhrheinrich, Siler, and Gilman vacated the injunction. No written opinion was rendered and there was no dissent. Lundgren was executed.

***Keith v. Mitchell*,**
466 F.3d 540 (6th Cir. 2006)

(Clay, J., dissenting from the denial of rehearing en banc, joined by, Martin, Moore, and Cole, JJ.; Martin, J., also dissenting by separate opinion)

"Despite a long and well-recognized line of Supreme Court case law requiring counsel in death penalty cases to conduct at least a cursory investigation into mitigation evidence, it is uncontested in this case that defense counsel failed to conduct *any* investigation. Instead, defense counsel submitted reports containing information that any reasonable counsel would recognize could only prejudice a defendant, including: (1) victim impact information; (2) an extensive list of evidence implicating Petitioner; (3) a record of Petitioner's prior convictions; (4) erroneous positive statements about Petitioner's family and childhood; and (5) a psychiatrist's report stating that Petitioner was not mentally impaired and that no mitigating factors existed. It cannot be reasonably argued that submitting such information was a legitimate strategy simply because the report also mentioned that Petitioner was a good football player and considered himself to be a 'nice guy.' I would therefore grant the petition for rehearing and hold that Petitioner received ineffective assistance of counsel during the mitigation phase of his trial, requiring this Court to vacate his death sentence."

What trial counsel did and did not do: The court found that trial counsel did not do the following: 1) discuss the concept of mitigation with Petitioner; 2) question Petitioner about his life or childhood; 3) interview Petitioner's family or friends, despite their expressed willingness to speak with him; 4) present an opening statement, witnesses, or a closing statement at the sentencing phase; 5) argue innocence, residual doubt, or even ask the jury to spare Petitioner's life. Instead, he allowed the submission of two highly prejudicial reports.

The first report, the result of a one-hour examination by a psychologist, noted that Petitioner did not appear to have any mental illnesses, was of average intelligence, and was not depressed. It also stated that Petitioner considered himself a nice guy who had no anger problems and did not have a significant substance abuse problem. Further, it stated that Petitioner's family had no history of alcoholism, and that Petitioner was never physically or sexually abused. Finally, the report said it was the examiner's opinion that there were no mitigating factors in the case.

The second report was a pre-sentence report that contained: 1) three pages recounting the crime and evidence against Petitioner; 2) a page long victim impact statement including information regarding the psychological state and monetary troubles of the surviving victims and their relatives; 3) a one sentence section labeled "Defendant's version" that included Petitioner's claim of innocence; 4) a one page history of Petitioner's prior record; 5) a two page summary of Petitioner's parole and supervised release history; and, 6) a one page social history of Petitioner, which stated that Petitioner was an illegitimate child who was raised by his grandparents and had a happy and normal childhood, and that Petitioner maintained employment and had a daughter for whom he paid $25 a week in child support.

AEDPA's limitation on relief: Under AEDPA, relief can only be granted if the state court holding was "contrary to or an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States; or 2) resulted in a decision that was 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 a clearly established Federal law 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 is an unreasonable application of clearly established Federal law if "the state court identifies the correct governing legal principle but unreasonably applies that principle to the facts of the prisoner's case.

The state court's decision that counsel made a strategic decision not to present mitigating evidence despite failing to investigate mitigating evidence is contrary to *Strickland v. Washington*, 466 U.S. 668, 691 (1984): Under *Strickland*, counsel has a duty to make reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary. Thus, any decision to forgo the presentation of mitigating evidence is unreasonable unless made after a reasonable decision not to investigate further. As a result, trial counsel's complete failure to investigate before deciding not to present mitigating evidence at the sentencing phase is deficient performance as a matter of law under Supreme Court case law. Because trial counsel conducted no investigation before deciding not to present mitigating evidence, Judge Clay concluded that the state court's ruling that counsel made a strategic decision because presenting mitigating evidence was incompatible with a claim of innocence is contrary to *Strickland*. In addition, the proposition that mitigation and innocence are inconsistent is untenable.

The state court's decision that counsel's decision to submit the presentence report and the doctor's evaluation was reasonable trial strategy is an unreasonable application of *Strickland*: Judge Clay relied heavily on the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Case. Under Guideline 10.12(A)(1), counsel in death penalty cases have an obligation to consider the strategic implications of requesting a pre-sentence report where such reports are optional. The commentary to Guideline 10.12 expressly notes that requesting such a report may amount to ineffective assistance of counsel when it allows the prosecution to present a defendant's prior record and victim impact evidence, where such information would otherwise be inadmissible. The Guidelines also say that counsel should provide the preparer of the presentence report with information favorable to the client and seek to ensure that improper, incorrect, or misleading information that may harm the client is deleted from the report.

Because there is no evidence in the record that trial counsel considered the implications of submitting the presentence report before deciding to do so, Judge Clay concluded that Ohio courts' ruling that counsel made a strategic decision to submit the report is nothing more than a post-hoc rationalization, which *Strickland* prohibits courts from crediting.

To the extent that counsel made a strategic decision to submit the reports, Judge Clay believed that the decision was objectively unreasonable. The reports contained pages documenting Petitioner's prior record, the impact of the crime on the victims and their families, evidence implicating Petitioner, erroneous statements about Petitioner's background and childhood, and a psychologist's outrageous conclusion that no mitigating factors existed. No reasonable defense attorney could conclude that the mitigating value of the report outweighed the introduction of the prejudicial evidence simply because the report also contained a handful of positive sentences about Petitioner.

The standard for determining prejudice: Prejudice, under *Strickland*, requires a showing that but for counsel's errors there is a reasonable probability that the outcome of the proceedings would have been different. Because the decision to impose death under Ohio law must be unanimous, petitioner only needs to establish a reasonable probability that one juror would have voted differently.

Petitioner was prejudiced by counsel's deficient performance: Under Ohio law, if trial counsel did not submit the presentence report, the jury would not have had access to Petitioner's prior criminal record or the trauma the crime instilled on the victim's family - - factors that were definitely considered by the jury. During deliberations, the jury asked the court to verify the dates of Petitioner's imprisonment for a prior robbery. This shows that Petitioner's prior record affected the jury's deliberations and thus a reasonable probability exists that but for counsel's submission of the reports, one juror would have voted to recommend sentencing Petitioner to life instead of death.

Continued on page 24

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In addition, if counsel had conducted an investigation, the jury would have also known: 1) that Petitioner's mother was an alcoholic who drank during her pregnancies; 2) that Social Services determined that Petitioner's mother neglected him, causing him to be placed with his grandparents; 3) that Petitioner's grandfather abused at least one of Petitioner's half-siblings and probably abused Petitioner; and, 4) that Petitioner's custodial grandmother was a convicted murderer. This evidence contradicts much of the evidence presented through the presentence report and the doctor's report that was submitted during the sentencing phase. Cumulatively, a reasonable probability exists that at least one juror would have voted against death if presented with this evidence.

Martin, J., dissenting: Martin wrote a separate dissenting opinion to "express [his] dismay and frustration with the shortcomings of [the court's] approach to reviewing death sentences through *habeas corpus* appeals. Needless to say, if each of the states where the death penalty is a punishment were to provide adequate counsel and adequate resources at the initial trial and sentencing stages, most of these cases would be disposed of in a fashion that would allow the process to move more swiftly and fairly." Martin continued by saying, "[n]or do I believe that we as a nation, or as a federal judiciary, have had the courage to recognize the failings of our present system of capital representation and the conviction to do what is necessary to improve it. . . . The majority's willingness to take the opposite approach here, and to make light of the prejudice imposed upon Keith at sentencing, show nothing less than indifference toward a criminal defendant's right to effective assistance of counsel in a capital sentencing proceeding. Indeed, members of this Court have gone on the record to second-guess the jurisprudence of the Supreme Court, and this Court, that requires counsel to conduct an adequate investigation of potential mitigating circumstances for purposes of capital sentencing, and mandates the reversal of convictions where this does not occur. This reasoning strikes me as demonstrating callousness and possible animosity toward the Sixth Amendment right to counsel.

Martin also used this case as an opportunity to address Judge Boggs prior statements that the current state of the law of ineffective assistance of counsel encourages trial counsel to not present mitigating evidence in hopes of reversal. Martin said, "it is simply incorrect, and contravenes commons sense, to suggest that the protection of the Sixth Amendment right to counsel by the federal judiciary has somehow created incentive for defense counsel to intentionally fail to provide adequate representation during capital sentencing proceedings. The proposition that a trial lawyer would ever intentionally lose at trial or sentencing in the hopes that his client will have the resulting conviction reversed on appeal would seem incredible to an attorney with any experience at the trial level, and is indicative of the tendency of appellate judges to be oblivious to the real world of litigation strategy. It would be particularly poor judgment for defense counsel in a state criminal trial to leave the protection of her client's Sixth Amendment rights in the hands of a federal judiciary that has become increasingly willing to play fast and loose with the individual protections guaranteed by the Constitution merely to avoid temporarily delaying a state's rush toward death. . . . It seems to me that the better explanation for the frequent findings of ineffectiveness of counsel in capital cases that Judge Boggs documents has nothing to do with intentionally deficient representation, and much more to do with the fact that there is insufficient support, financial and otherwise, for attorneys representing capital defendants. For this reason, I share Justice Blackmun's concern that without question, the principle failings of the capital punishment review process today are the inadequacy and inadequate compensation of counsel at trial. Until our society is willing to provide rigorous support for appointed defense counsel - - or to abolish the death penalty - - the shortcomings in representation in capital cases will likely continue. In the meantime, the insufficient resources provided to indigent defense counsel combined with the reluctance of the federal courts to provide meaningful review of state court death sentences will continue to do a great disservice to the Sixth Amendment right to counsel in capital cases. So long as the attempt to constitutionally impose capital punishment is continued, we must have the courage to recognize the current failings of our present system of capital representation and the conviction to do what is necessary to improve it. In light of this warning, I believe that instead of following the majority's overly-deferential approach, the Sixth Amendment requires us to maintain adequate scrutiny of death sentences in cases such as this, where any confidence we might have in the reliability of the outcome is entirely undermined by the possibility that mitigating evidence was never brought to light."

Kentucky Supreme Court

***Commonwealth v. Paisley*,**
201 S.W.3d 34 (Ky. 2006)

(Graves, J., for the Court; Minton, J., dissenting without opinion)

Karu Gene White, a Kentucky death-sentenced inmate was pursuing federal *habeas corpus* relief when the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), which prohibits the execution of the mentally retarded. White, who was convicted and sentenced to death prior to Kentucky's 1990 statute prohibiting the execution of the mentally retarded, immediately filed a CR 60.02 motion in the circuit court to vacate his death sentence on the grounds that he is mentally retarded and got the federal district court to stay *habeas* proceedings pending the outcome of White's state court mental retardation litigation. Although White's I.Q. had never been tested, White's deficits in adaptive behavior described in his 60.02 motion convinced the circuit court that there was sufficient doubt as to whether White is mentally retarded to warrant an evidentiary hearing.

Subsequently, Judge Paisley ordered the Finance and Administration Cabinet to pay up to $5,000 for mental health testing by an expert of White's choosing. The state sought a writ of prohibition in the Kentucky Supreme Court, which held that the case met the requirements to be entertained as a writ and that Judge Paisley abused his discretion by granting funds for an independent expert without first making a finding that use of state facilities is impractical.

It was appropriate for the court to order mental health testing to determine if White is mentally retarded: The Court noted that it has long held that a defendant is entitled to receive expert assistance necessary to prove a mitigating circumstance, which is of the greatest importance when a defendant is facing the death penalty. Because White has never had the opportunity to assert and prove his entitlement to the mitigator of being mentally retarded, which the Court ruled is not a defense to the crime but a circumstance that mitigates the punishment, the Court held that "it was no doubt proper for Judge Paisley to order mental health testing for White."

Note: Paisley appears to recognize that as long as the movant agrees to testing at a state facility, a circuit court always has the authority to order testing at the state facility whenever the defendant has not had the opportunity to assert and prove his entitlement to a mitigating circumstance. Arguably, this includes situations where the movant was denied the opportunity to assert and prove his entitlement to a mitigating circumstance as a result of ineffective assistance of counsel.

State funds are only available upon a showing that the use of state facilities is impractical: According to the Kentucky Supreme Court, under K.R.S. 31.185, state funds for the purpose of hiring an expert of his choosing is only available if the use of the state facilities is impractical. Because the state was ordered to pay for a private psychologist without the requisite showing that the use of state facilities was somehow impractical in this case, which cannot be established solely on the perception of bias, the Court held that Judge Paisley abused his discretion.

Note: *By recognizing that state funds are available under K.R.S. 31.185 in post conviction proceedings when the use of state facilities is impractical, the Kentucky Supreme Court held that K.R.S. 31.185 applies to at least some post conviction claims. In so ruling, the Court either created an exception to its ruling in Stopher v. Conliffe, 170 S.W.3d 307 (Ky. 2005), that 31.185 does not apply to post conviction or created an exception to it.*

The requirements for entertaining a writ of prohibition are satisfied when the issue involves state funds that cannot be recovered later: A writ of prohibition is an extraordinary remedy that courts have always been cautious and conservative both in entertaining petitions for it and in granting relief. The merits of a writ will not be considered unless the party seeking the writ can first demonstrate a minimum threshold showing of harm and lack of redressability on appeal. When conducting this analysis, the Kentucky Supreme Court usually distinguishes between cases in which the lower court is allegedly acting beyond its jurisdiction and cases where the lower court is allegedly acting erroneously within its jurisdiction. Within this second class of writs, the writ will be considered upon a showing that there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted. Because the state would be unable to recoup the funds since White is indigent and the facts of this case are capable of frequent repetition and would cause the Commonwealth to suffer irreparable injury in the form of massive payouts of funds to indigent defendants seeking private expert opinions, the Kentucky Supreme Court held that this case satisfies the requirements for being considered as a writ of prohibition.

Note: By upholding the grant of an evidentiary hearing on mental retardation despite no I.Q. scores, the Kentucky Supreme Court recognized that it is appropriate to hold an evidentiary hearing on mental retardation when the allegations in the post conviction pleading supports any one of the prongs of mental retardation and no evidence refutes one of the prongs. In other words, a death-sentenced inmate does not need to present evidence in support of each prong of the definition of mental retardation to obtain a mental retardation hearing, and the lack of evidence on a prong does not create a presumption that the inmate is not mentally retarded.

Note: *Bowling v. Commonwealth, 163 S.W.3d 361 (Ky. 2005), held that an Atkins claim is procedurally defaulted if the condemned inmate was tried after the effective date of the statute prohibiting the execution of the mentally retarded (1990), but failed to raise at trial mental retardation as a bar to execution. Paisley recognizes that default does not apply to inmates who were tried prior to the 1990 statute, even though they arguably could have raised the claim sometime after 1990 and before Atkins was decided by the United States Supreme Court in 2002.*

Non-final Kentucky Supreme Court decisions: The Kentucky Supreme Court affirmed the denial of a challenge to the chemicals and procedures used in Kentucky lethal injection in *Baze and Bowling v. Rees*, *et al.*, affirmed the denial of post conviction relief in *Stopher v. Commonwealth*, and upheld the grant of sentencing phase relief based on ineffective assistance of counsel for failing to investigate and present mitigating evidence and the denial of guilt phase relief in *Marlowe v. Commonwealth*. These cases and other death penalty cases still pending on rehearing petitions in the Kentucky Supreme Court will be discussed when they become final.

Unpublished Kentucky Supreme Court decisions: Beginning January 1, 2007, unpublished decisions from the Kentucky Supreme Court rendered after January 1, 2003, can be cited as persuasive authority. ■

Sixth Circuit Case Review

By Dennis J. Burke, Post-Conviction Branch

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

An important *Brady* case. In a familiar scenario, the prosecution denied promising a benefit to a jailhouse snitch in return for his testimony that the defendant confessed to committing the crimes. After trial it was learned that the snitch did receive lenient treatment from the prosecution. The question addressed by the court was whether a tacit agreement between the prosecution and the snitch is favorable evidence which must be turned over under *Brady*.

Petitioner was convicted in TN of two counts of murder and sentenced to life plus twenty years in prison. At trial, a prosecution witness, William Davenport, testified that while he and the petitioner were both in custody, the defendant confessed to him that he shot the victims. (Prejudicial, because it vitiated defendant's mistaken identity defense.) Davenport also claimed the defendant confessed that he killed the second victim because she was a witness to the first killing (thus establishing premeditation).

Defense counsel requested any potentially exculpatory or impeachment evidence but was provided with none. However, shortly after Davenport contacted prosecutors regarding his supposed conversation with the petitioner, the government withdrew multiple felony charges against Davenport. In addition, Davenport received a concurrent sentence for two other felony charges. Finally the prosecutor wrote a letter to the parole board on Davenport's behalf.

The Government argued that there was not a *Brady* violation because at the federal district court post conviction evidentiary hearing the prosecutor testified that while he did write a letter to the parole board on Davenport's behalf, he did not promise Davenport that he would do so. The prosecutor also admitted that Davenport approached the prosecution about testifying and opined that "everybody wants something and I'm sure Davenport wanted something."

In evaluating the claim, the court succinctly laid out the legal framework as follows: In *Brady v. Maryland*, the Supreme Court held that the prosecution has a constitutional obligation under the Due Process Clause of the Fourteenth Amendment to disclose exculpatory evidence that is material to either guilt or punishment. 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The Court emphasized that the purpose of such a rule was "avoidance of an unfair trial to the accused." *Id.* The Supreme Court has held that the *Brady* rule extends to witness impeachment evidence. *See, e.g., Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the *Brady*] rule." (internal quotations and citation omitted).

In order to make a *Brady* claim, Petitioner must prove three elements: (1) "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching"; (2) "that evidence must have been suppressed by the State, either willfully or inadvertently"; and (3) "prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

The Supreme Court has not spoken directly on the tacit agreement issue; it has only found that evidence of an *explicit agreement* between the witness and the government is favorable evidence under *Brady*. *See Giglio v. United States*, 405 U.S. 150, 154 (1972). Until now, the Sixth Circuit has also not addressed it.

However, several other circuits have ruled on this very issue and therefore, the Court looked to those circuits for guidance. The 7th Circuit, *Wisehart v. Davis*, 408 F.3d 321, 323-24 (7th Cir. 2005) and the 9th Circuit, *United States v. Shaffer*, 789 F.2d 682, 685 (9th Cir. 1986), found that evidence of a tacit agreement between the government and the witness is favorable evidence required to be provided to the defense under *Brady*. The 8th Circuit, in *Reutter v. Solem*, 888 F.2d 578, 581 (8th Cir. 1989), has gone even further holding that there is no need to establish an agreement between the government and the witness as long as the evidence can impeach the witness.

However, the 2nd Circuit has effectively endorsed tacit agreements between the government and their jailhouse snitches in holding that proof of favorable treatment for a prosecution witness is not enough to establish a *Brady* violation as long as the government does not promise the witness anything prior to the witness testimony. *Shabazz v. Artuz*, 336 F.3d 154, 157 (2nd Cir. 2003). Left unsaid is that it is virtually impossible for a defendant to prove the existence of a tacit agreement between the government and a witness, which by definition is unspoken.

In granting the *habeas corpus* petition, the court adopted the reasoning of the Second and Seventh Circuits. "No

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…The fact that an agreement is unspoken does not lead to a diminishment of the witness' interest under the agreement."

Hopefully this ruling will (eventually) end the shameful practice of secret agreements between prosecutors and jail house snitches.

***Dando v. Yuk*ins,**
461 F.3d 791 (6th Cir. 2006)

Guilty plea - ineffective assistance of counsel (IAC); Failure to seek mental health expert and explore a potential defense based upon duress and Battered Woman's Syndrome is not considered reasonable professional judgment, even if defendant received a relatively lenient sentence.

Dando and her boyfriend were involved in a number of armed robberies in Michigan, using a sawed off shotgun. On the day she was apprehended Dando tried to run away. (Her boyfriend, still in possession of the shotgun, confronted the police, who shot him dead.)

After her arrest, Dando confessed to her role in the robberies. She was appointed counsel. She informed her counsel that she had a long history of physical and sexual abuse and that her boyfriend beat her and had threatened to kill her immediately before she took part in the robberies. Counsel advised Dando to plead No Contest to the charges. Dando claims that she requested her counsel consult a mental health expert before she made her decision, but that he allegedly refused because "an expert would cost too much money." *Dando* at 794. She entered the no contest plea in return for a sentence at the low end of the state sentencing guidelines which ended up as a sentence of ten to thirty years in prison.

Dando's ineffective assistance of counsel claim is considered under the well known standard established in *Hill v. Lockhart*. 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (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.") "[t]he two-part test to establish ineffective assistance of counsel, established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), 'applies to challenges to guilty pleas' based on ineffective assistance of counsel. 474 U.S. at 58, 106 S.Ct. 366.'" Under the Strickland test, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the defendant was prejudiced by the attorney's error. *Id.* at 57-59, 106 S.Ct. 366. In the context of a challenge to a guilty plea, the defendant must show that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59, 106 S.Ct. 366. "An assessment of prejudice must include a prediction of the likely outcome at trial. *Id.* "In the case of an unexplored affirmative defense or undiscovered evidence, this prediction of the likely outcome at trial is relevant to determine whether or not the potential defense or evidence would have caused counsel to change the recommendation as to the plea." *Dando,* at 798, citing to *Hill v. Lockhart.*

The court concluded that trial counsel's performance was deficient. He failed to adequately investigate the possibility of a duress defense and the possibility that Dando suffered from Battered Women's syndrome. His advice that hiring an expert would be too expensive is "flatly incorrect" because under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), she would have been entitled to have the state pay for a mental health expert. "Investigation of this potential defense was a minimal requirement to providing adequate representation at the plea stage particularly where Dando herself told her attorney about the history of abuse and even suggested the need for a mental health expert" *Dando* at 798-99. Under *Strickland*, reviewing courts are required to show deference to trial counsel's strategic decisions, supported by professional judgment. However, the majority found that counsel's misunderstanding of the law regarding the availability of funds with which to hire a mental health expert does not reflect sound professional judgment. Significantly, even Dando's "relatively lenient sentence" does not render counsel's failure to investigate a sound professional judgment because Dando may have been acquitted of the charges altogether or convicted of some but acquitted of others.

Having determined that counsel's performance was deficient, the court determined that Dando's "shocking" history of abuse "would present a potentially compelling duress defense based upon Battered Women's Syndrome." Ultimately the majority decided that had counsel properly investigated and consulted a domestic violence expert, there is a reasonable probability that his recommendation to plead No Contest would have been different and that Dando likely would have insisted on proceeding to trial. *Dando* at 802. The *habeas* petition was granted.

Stewart v. Wolfenbarger,
—-F.3d -—, 2006 WL 3230286 (6h Cir. 2006)

Ineffective assistance of counsel; defense attorney failed to investigate alibi witness and failure to file state law required notice of alibi location.

Defendant was convicted of murder in a shooting which occurred in Detroit. The key evidence against him was an eyewitness who testified that he saw Stewart shoot the *victim.*

Continued on page 28

Continued from page 27

A second prosecution witness, a close friend of the victim, testified that while at the home of a friend named Marvin on the day of the shooting, he overheard Stewart threaten to kill the victim.

In his defense, Stewart planned to call three men to testify that he and the men drove to Atlanta, GA, earlier in the week and did not return to Detroit until after the shooting. However, because Stewart's counsel had not provided written notice of the location of the alibi as required by Michigan law, the judge (exercising his discretion) only permitted one of the three men to testify.

At the post trial evidentiary hearing, Stewart presented Marvin, who had not testified at trial, even though Stewart asked his counsel to subpoena him. Marvin testified that Stewart's counsel had never contacted him or subpoenaed him. He further testified that contrary to the prosecution witness, Stewart was not at his home on the day of the shooting.

As noted above, to prevail on a claim of ineffective assistance of counsel the petitioner must ordinarily prove two components: (1) counsel's performance was deficient; and (2) prejudice, which means that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The court found that counsel's failure to provide the location of the alibi fell below an objectively acceptable level of performance under *Strickland.* It also found that counsel inadequately investigated Melvin and "clearly constituted objectively deficient performance." Further, because the errors by counsel went to the heart of Stewart's defense, the court found he was prejudiced under the second prong of *Strickland*. In weighing prejudice, the court made special note of the prosecution's emphasis of the lack of alibi witnesses during the cross-examination of the one alibi witness who did testify. "Amazingly, the prosecution made this comment after the state trial judge had already ruled, outside of the jury's presence, that [the other alibi witnesses] could not testify, so they were prevented from corroborating the [alibi] testimony….The jury had good reason to find [Stewart's] alibi dubious."

***Higgins v. Renico*,**
—-F.3d—-, 2006 WL 3345289 (6th Cir. 2006)

IAC - cross examination

In another Detroit murder case, Alvin Ramsey was shot to death as he sat in the driver's seat of a car parked in a residential neighborhood. Higgins, who was convicted of the murder, alleged ineffective assistance of counsel.

The case is remarkable for two reasons: (1) at trial, defense counsel refused to cross-examine the only eyewitness against Higgins. Counsel refused because he hadn't anticipated that the witness would testify at trial and so he was not prepared. The trial court refused to grant him an extended recess in which to prepare, and defense counsel thought that if he proceeded as is, he would be committing legal malpractice.

(2) On direct appeal, the state court determined that the defendant was not prejudiced by his counsel's inaction, even though this sole eyewitness also gave inconsistent stories to police before trial; he tested positive for gunpowder residue on his hands, yet denied both that he was in the car when shots were fired and that he himself had fired a gun on the day of the murder; on direct examination he initially responded to the prosecutor's question about the murder weapon with 'I pulled' then changed his response to 'he pulled' out the gun; and finally based on all of the above factors, the witness may himself have been the actual killer.

Applying the now familiar two pronged *Strickland* analysis outlined in the case summaries above, the federal district court granted Higgins' *habeas* petition and the Court of Appeals unanimously affirmed.

***Rittenberry v. Morgan*,**
—F.3d—2006 WL 3230278 (6th Cir. 2006)

Statutory interpretation of Antiterrorism and Effective Death Penalty Act (AEDPA)

Rittenberry pled guilty to murder and robbery in Tennessee and was sentenced to life imprisonment. After being denied post-conviction relief in state court, he filed a federal *habeas* petition which he also lost. After the *habeas* petition was denied, Rittenberry gained access to the prosecutor's file through the state public records act. In the file, he discovered that the codefendant had admitted tying up the victim in the robbery which led to the victim's death. This non-disclosed information was important because the codefendant was the primary witness against Rittenberry, pursuant to the codefendant's guilty plea. Further, the strength of the codefendant's statement convinced Rittenberry to plead guilty.

The AEDPA as interpreted presents serious procedural hurdles to a petitioner seeking to file a successive petition after having filed a previous petition. Thus to quote the court on page three of the opinion:

Rittenberry's appeal turns on the question of whether a *habeas* petitioner can avoid the procedural hurdles of the Antiterrorism and Effective Death Penalty Act, the pertinent portions of which are codified in 28 U.S.C. §§ 2244 and 2254, by filing his petition under 28 U.S.C. § 2241, rather than section 2254. Section 2241 provides a general grant of *habeas* jurisdiction and would, on its own, be more friendly to a

habeas petitioner-particularly one who has previously filed a federal *habeas* petition. By contrast, section 2254 limits the grounds for *habeas* relief to people in custody pursuant to a state court judgment. Rittenberry freely admits that he is filing under section 2241, which he describes as a separate "gate" to *habeas* relief from section 2254, "because [§ 2241's] hurdle for successive petitions is more flexible than § 2254's." Most significantly, because this is not Rittenberry's first habeas petition, if he were filing under section 2254 he would have to satisfy the requirement of section 2244(b)(2)(B) that he obtain initial authorization from this Court to file his claim by making a showing of actual innocence (in addition to showing that the facts underlying his claim could not have been discovered initially). Rittenberry contends that he does not have to meet this prerequisite because he "filed under section 2241."(Emphasis added).

Ultimately, although the court found Rittenberry presented a persuasive argument it concluded that his "comparative analysis reveals nothing more than poor draftsmanship. The numerous federal decisions on this issue support the view that all petitions filed on behalf of persons in custody pursuant to State court judgments are filed under section 2254 and subject to AEDPA's restrictions, even if language in section 2244(b) seems to indicate otherwise."

Thus the court rejected the backdoor attempt at a successive *habeas* petition and continues to require that before filing a successive *habeas*, petitioners must seek permission from the court under section 2244(b) and must satisfy the onerous burden of making a showing of actual innocence (in addition to showing that the facts underlying the claim could not have been discovered initially). ■

I am the Lawyer

by James J. Doherty

I am the lawyer.
I displaced brute force with mercy, justice, and equity.
I taught mankind to respect the rights of others to their property, to their personal liberty, to freedom of conscience, to free speech and free assembly.
I am the spokesman of righteous causes.
I plead for the poor, the persecuted, the widow and the orphan.
I maintain honor in the market place.
I am the champion of unpopular causes.
I am the foe of tyranny, oppression and bureaucracy.
I prepared the way for the Ten Commandments.
I pleaded for the freedom of the slave in Greece and for the captive in Rome.
I fought the Stamp Act.
I wrote the Declaration of Independence and the rights of man.
I defended the slave.
I was an Abolitionist.
I signed the Emancipation Proclamation.
I punish the wicked, protect the innocent, raise up the lowly, oppose brutality and injustice, in every land and clime.
I fought in every war for liberty.
I stand in the way of public clamor and the tyranny of the majority.
I plead for the rich man when prejudice prevents him from getting justice and I insist that the poor man be accorded all his rights and privileges.
I seek the equality of mankind, regardless of color, caste, sex or religion. I hate fraud, deceit or trickery.
I am forbidden to serve two masters or to compromise with justice.
I am the conservative of the past, the liberal of the present and the radical of the future.
I believe in convention, but I cut the Gordian knot of formalism and red tape to do justice and equity.
I am the leader of mankind in every crisis.
I am the scapegoat of the world.
I hold the rights of mankind in the hollow of my hand, but am unable to obtain recognition of my own.
I am the pioneer.
I am the last to renounce the past and to overturn the present.
I am the just judge and the righteous ruler.
I hear before I condemn.
I seek the best in everything.

KENTUCKY CASE REVIEW

By Sam Potter, Appeals Branch

Alejandro Gonzalez De Alba v. Commonwealth
Final 10/12/06, To Be Published
202 S.W.3d 592 (Ky. 2006)
Affirming
Unanimous Opinion by J. Roach

De Alba was convicted of murder and fourth degree assault and received a sentence of 50 years in prison. De Alba was married to Pauline Gonzalez, who had an adult son Patrick Carter. Patrick came over to his mother's house to celebrate Thanksgiving with Pauline and De Alba. De Alba stayed in his room throughout the visit and refused to eat dinner with the rest of the family. Late in the day, he emerged from his room, said the party was over, and instructed everyone to leave. He unplugged the television, broke a glass coffee table, and threw the leftovers of the Thanksgiving meal into the backyard. Pauline urged her husband to stop, and De Alba began hitting her on the head and in the mouth. Patrick intervened to try to help his mother. De Alba claimed Patrick threatened to cut him with a knife. The fight between De Alba and Patrick carried out to the street. After being knocked down, De Alba ran inside the house, got a gun, and chased Patrick down the street. One bullet struck Patrick in his hand and forearm and another in his chest, killing him.

The marital privilege of KRE 504 did not apply because the murder occurred in the course of wrongful conduct against the testifying spouse. The marital privilege allows a party spouse to prevent a witness spouse from testifying about events that occurred during their marriage. Several exceptions to this rule exist. The privilege does not apply if the party spouse is charged with wrongful conduct against the person or property of the witness spouse or a third person if the wrongful conduct against a third person is committed in the course of the wrongful conduct against the witness spouse. KRE 504 (C)(2)(A, D).

De Alba's act of murdering Patrick was committed in the course of his assault against Pauline. He admitted to the police that he instigated the argument with his wife and her son. This argument led to the assault of Pauline and the murder of Patrick. The uninterrupted and logical progression of events in this case compels the conclusion that the murder was committed in the course of the assault on Pauline. To hold otherwise would be an unjustifiable expansion of the privilege.

Wiley Gibbs v. Commonwealth
Final 10/12/06, To Be Published
2006 WL 2706957
Affirming in Part, Reversing in Part, and Remanding
Opinion by J. Lambert, Dissent by J. Roach


Sam Potter

Gibbs is 65 years old and has an IQ of 66. He was married to Linda for 26 years, and they raised three children. In 2002 his daughter, referred to as Jane Doe, accused him of abusing her between the ages of seven to 15. The abuse included touching, intercourse, and oral sex. A friend of Jane's, referred to as Sarah Smith, accused Gibbs of abusing her when she was between 13 and 15 years old. Gibbs admitted to some instances of misconduct. Gibbs was convicted of various counts of incest, sodomy, rape, and sexual abuse of both Jane and Sarah. He received a 105 year sentence.

The trial court has a mandatory and affirmative duty to hold a competency hearing following a competency evaluation. Gibbs' trial lawyer requested a competency evaluation. He had an IQ of 66, was mentally retarded, and suffered from a depressive disorder. Despite this, the report concluded he was competent to stand trial because he did not suffer from a mental condition that impaired his ability to understand the requirements of the law or prevented him from conforming his behavior to those requirements.

However, no competency hearing was ever held in his case. KRS 504.100 places an affirmative duty on the trial court to hold an evidentiary hearing following a competency evaluation. The language of that statute appears to be mandatory. The Supreme Court reversed the case for a retrospective competency hearing that allows the Commonwealth and defendant an opportunity to present evidence on the issue of competency and to cross examine the person who prepared the report.

While not the best practice, reversible error did not occur when the trial court did not read each and every instruction to the jury. The trial court read the instructions for a particular offense, but some offenses contained multiple counts. The trial court decided not to reread some instructions that were the same except for the location of the offense. The trial court must instruct the jury in writing on the law of the case

and read those instructions to the jury before closing arguments. These requirements cannot be waived unless both the Commonwealth and the defendant agree. RCr 9.54(1). However, Gibbs did not object to the omission as required by RCr 9.54(2), which rendered the issue unpreserved. While the trial court did not read each and every specific jury instruction, it did provide a full set of instructions to the jury. The Supreme Court recognized that practical considerations must be taken into account for such technical errors during the course of a trial. No error was committed.

The prosecution of misdemeanor offenses must be commenced within one year after it is committed. Gibbs was convicted of several counts of second-degree sexual abuse, which is a misdemeanor offense. The prosecution for an offense other than a felony must be commenced within one year after it is committed. KRS 500.050(2). The police received the complaint on February 11, 2002. Gibbs was indicted on felony and misdemeanor charges on April 2, 2003. The misdemeanor offenses occurred more than one year before the proceedings commenced and were barred by the statute of limitations. These convictions were reversed for dismissal.

A person guilty of only class C and class D felonies cannot be sentenced to more than 20 years in prison. The trial court instructed the jury on 19 offenses. The jury found Gibbs guilty of five misdemeanors, 10 class C felonies, and one class D felony. The jury recommended a total sentence of 105 years, and the judge followed the recommendation. For a person who is convicted of only class C and class D felonies, the law sets a maximum punishment at no more than 20 years in prison. KRS 532.110(1)(c); KRS 532.080(6)(b). The Supreme Court remanded the case with instructions for the trial court to sentence Gibbs for a period not to exceed 20 years.

Forcible compulsion requires the threat or use of physical force and does not require resistance or duress. One of the crimes Gibbs was charged with was first degree sexual abuse, which required him to subject another person to sexual contact by forcible compulsion. KRS 510.110(1). Forcible compulsion only requires the use of physical force or the threat of physical force. KRS 510.010(2). Resistance and duress are not required to prove forcible compulsion. Sarah Smith testified that Gibbs placed her hand on his pants where his penis was. This testimony satisfied the forcible compulsion element of first degree sexual abuse.

For both rape and incest, the specific location of the offense is not a statutory element of the offense. Gibbs argued that error occurred when the judge instructed the jury on four counts of rape and incest that occurred in the bathroom of Gibbs' home because the victim did not testify that any act of intercourse occurred in the bathroom. The location was only used to identify each offense. Because Gibbs admitted having sexual intercourse with his underage daughter on three occasions at his home, it was not improper for the trial court to instruct the jury on at least the three incidents of rape and incest at the home. Further, this issue was not preserved because Gibbs made only a general directed verdict motion.

Instructions that require a jury to find that certain offenses occurred within a stated time frame and that the victims were younger than 14 or 16 years old are permissible even if the victims would have passed the maximum age during part of time frame the offenses were alleged to have occurred. Gibbs argued that the instructions included a time frame of years in which the offenses had to be committed against the victim, but that the time frame included some years in which the victims were older than the maximum age requirement for the offense. The Commonwealth had to prove that the offenses occurred when the victims were under fourteen or sixteen years of age, depending on the offense. Gibbs argued the instructions allowed the jury to find that the offense occurred within the time frame given in the instructions, but after the victims had attained an age that exceeded the maximum age element for the offense.

However, the instructions required the jury to find not only that the offenses occurred within the stated time frame, but also that the alleged victims were less than 14 or 16 at the time of sexual contact or intercourse. The instructions only allowed the jury to find Gibbs guilty if the act fell within the stated period and in which the child was less than 14 or 16. The instructions did not relieve the jury from finding that the act occurred before the victims attained the maximum age requirement because the second paragraph of each of the instructions required that finding.

Walter Durrell Gray v. Commonwealth
Final 11/9/06, To Be Published
203 S.W.3d 679 (Ky. 2006)
Affirming
Opinion by J. Scott, Dissent by J. McAnulty

Gray received a 45-year prison sentence for shooting to death Andrea Tiller. Gray and two companions approached Tiller in her car in a housing project in Lexington to sell Tiller drugs. Gray leaned in the window to make the sale, but Tiller insisted on buying from one of his companions. This upset Gray, and he shot her six times.

Failure to ask questions about statement waived objection to its exclusion. Gray's counsel and an investigator recorded a statement from Rose Crutcher, a resident in the neighborhood where Tiller was killed. Crutcher's statement indicated the she thought someone other than Gray had held the murder weapon in her apartment immediately after Tiller was killed. During her testimony, Gray attempted to impeach Crutcher with the statement. The Commonwealth

Continued on page 32

Continued from page 31

objected because it had not been provided pursuant to the reciprocal discovery agreement between the parties. The trial court ruled that Gray could ask Crutcher whether she remembered making these statements, but that he could not impeach her with the statement if she did not remember. However, Gray asked no further questions on this matter. The Supreme Court found that this waived the issue for appellate review, even though valid strategic reasons appeared to exist for not asking the question (*i.e.,* because the implication could not be substantiated under the court's ruling).

The trial court abused its discretion by denying Gray the opportunity to use Crutcher's statement to impeach her, though the error was harmless because Gray waived the issue. The trial court excluded Crutcher's taped statements on the basis of the reciprocal discovery agreement. That agreement was based on RCr 7.24(3)(A)(i), which allowed the Commonwealth to inspect, copy, or photograph the results or reports of scientific tests. A taped statement used for impeachment purposes clearly did not fall underneath this rule. The exclusion of Crutcher's taped statements was an abuse of discretion and erroneous. However, since Gray waived this issue by failing to ask the question suggested by the trial court, the Supreme Court found the exclusion of the statement to be harmless error.

A trial court's ruling will be affirmed if the result is correct even though it was made for the wrong reason. The trial court also excluded the written statements of another witness based on the reciprocal discovery agreement. Again, this was an abuse of discretion. The written statements of Eggerson, one of Gray's companions, were consistent with his trial testimony, so the prior inconsistent statements rule of KRE 801A(a)(1) did not apply. The statements were not offered to rebut allegations of recent fabrication or improper influence, so the prior consistent statements rule of KRE 801A(a)(2) did not apply either. Because no rule would have allowed Gray to use the statements, the trial court's decision to exclude them, even for the wrong reason, was proper.

The trial court properly denied Gray's motion to postpone the penalty phase. The jury returned its guilty verdict on the fourth day of trial at 6 p.m. Gray requested a continuance so he could secure character witnesses for the penalty phase. The trial court denied this motion because it had told the jury the case would end that day, and the trial court had motion day the next day which could not be rescheduled. RCr 9.04 requires that a motion for continuance must be accompanied by an affidavit showing the materiality of the evidence that would have been obtained and that diligence had been used to obtain it. Gray did not offer such an affidavit. The trial court did not abuse its discretion in denying Gray's motion.

The Commonwealth's question to potential jurors about whether the victim deserved a fair trial did not constitute error. In voir dire, the Commonwealth stated that the defendant deserved a fair trial. It then asked whether the potential jurors believed that the victim also deserved a fair trial and a day in court. At a bench conference, the trial court suggested the Commonwealth move on, but did not admonish the jury to disregard the statement. The Commonwealth represents the people and their interests, including victims. The Supreme Court was not persuaded that the question during voir dire was fundamentally unfair.

Living in a high crime area is a race neutral reason for striking a juror, at least for now. The trial court required the Commonwealth to offer race neutral reasons for exercising a peremptory strike on an African-American juror. The Commonwealth struck the juror because she lived in a high crime area and her participation would put the Commonwealth in a "tight spot." Five Supreme Court Justices found this to be a race neutral reason.

Justice McAnulty and Chief Justice Lambert dissented and would have reversed on the *Batson* issue. They "believe courts need to pay substantially greater attention to whether the mere claim that a person lives in a high crime area is being used as a pretext for discrimination against blacks in jury selection." Because three of the five justices in the majority will no longer be on the bench in January 2007, the dissent provides solid support to continue to raise challenges in this area. The incoming justices may join the dissenters when this issue is revisited.

Damien A. Sublett v. Commonwealth
Final 11/9/06, To Be Published
203 S.W.3d 701 (Ky. 2006)
Affirming
Unanimous Memorandum Opinion

Sublett was paroled in May 2003. His parole involved the usual conditions of agreeing to be searched by his parole officer, allowing his officer to visit his home and workplace at any time, and agreeing not violate any laws. Within a few weeks of his release from prison, Sublett became the primary suspect in a number of robberies. He eventually entered a conditional guilty plea to 22 counts of first degree robbery and received a 25 year sentence.

Parole officers have statutory authority to arrest parole violators. KRS 439.430 authorizes parole officers to arrest parolees the officer believes has violated the conditions of their parole or the officer may deputize any other peace officer to do so by providing that peace officer with a written statement that parolees have violated their parole conditions. Sublett's parole officer believed he had violated his parole conditions, and she arrested him with the assistance of another parole officer. His arrest conformed to the statutory procedure and was proper.

The Commonwealth must prove by a preponderance of the evidence that suspects voluntarily waive their *Miranda* rights. Sublett was arrested and taken to the Robbery Unit Office for questioning. He wrote "refused" on a *Miranda* rights waver form and initialed it. Later the same day and in the same office, he signed a *Miranda* rights waver form. Sublett argued that after he refused to waive his rights, several officers encouraged him to sign the waiver repeatedly over four hours, and he finally gave in since the police would not leave him alone until he waived his rights. The Supreme Court found his version incredible because it would have required finding that all of the officers who testified lied. Additionally, Sublett admitted lying about having multiple personalities. The totality of the circumstances shows his confession to 20 of the robberies was voluntarily given.

James O. Olden v. Commonwealth
Final 11/9/06, To Be Published
203 S.W.3d 672 (Ky. 2006)
Affirming in Part, Reversing in Part
Unanimous Opinion by J. Scott

Officer McDowell observed a car in front of Olden's house. After leaving, McDowell pulled it over for speeding. The driver, who had some crack, said she got it from Olden. McDowell obtained and executed a search warrant on Olden's house, finding 11.6 grams of crack and $1,610. Olden was arrested and made bail. A month later, McDowell saw another car leave Olden's house. He stopped it after it ran a stop sign. He discovered the passenger had crack, and the passenger said she got it from Olden. McDowell secured and executed another warrant and found 4.3 grams of crack and $1,542. Olden was convicted of two counts of first degree trafficking in crack cocaine and received a 40 year sentence.

Voicing a pretrial intention to object but failing to actually object during trial does not preserve an issue for appellate review. RCr 9.22 requires a party to render a timely and appropriate objection in order to preserve an issue for review. This action allows the complaining party to make known to the trial court the relief he desires the court to grant. The purpose of the rule is to give the trial court the opportunity to remedy any errors in the proceedings.

Before the trial began, the Commonwealth notified Olden that the marijuana he had when arrested would likely be covered during the officers' direct examination. Olden told the court that he would object. At the suggestion of the trial court, he requested a jury admonition. However, at no point during the testimony of any of the three officers did Olden object or request an admonition. The Court found the error to be unpreserved.

A statement against interest that contradicts a previous statement cannot be introduced unless the declarant testifies, circumstances indicate its trustworthiness, or the declarant had been previously cross examined on the statement. The first driver stopped**,** Gordon, made a written statement that she lied to McDowell about where she received the crack and was coerced into giving her statement incriminating Olden. She could not be located on the trial date. Olden moved to have her statement admitted under KRE 804(b)(3), which is the statement against interest exception. The Supreme Court upheld the trial court's exclusion of the statement because no corroborating circumstances indicated its trustworthiness, and the Commonwealth had no opportunity to cross examine Gordon about the statement.

People are entitled to the constitutional protections of due process before forfeiture of their property. At trial, the Commonwealth introduced evidence that Olden bought a scooter for his daughter even though he had no means of income, other than from the sale of crack. Olden's daughter testified that she, her mother, and an uncle purchased the scooter. The Commonwealth never provided notice that it intended to seek forfeiture of the scooter during Olden's trial or afterwards. This deprived Olden's daughter of notice of the proceeding and of an opportunity to be heard at it. The Supreme Court reversed the forfeiture order of the scooter for another hearing that complied with due process. ■

My 3 best lessons learned over time:

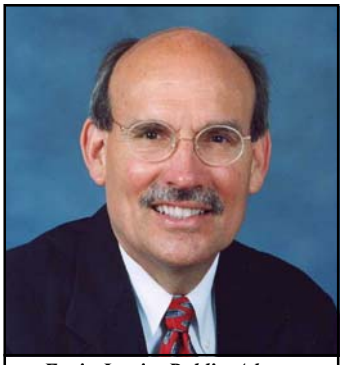
1) **There is no substitute for time spent with your client;**

2) **A less-than-perfect motion you actually file is better than a perfect motion in your head;**

3) **Your judges WILL let you do it.**

—George Sornberger

Plain View . . .



Ernie Lewis, Public Advocate

***Sublett v. Commonwealth*, 203 S.W.3d 70 (Ky. 2006)**

Damien Sublett was released on parole after having agreed that he could be "subject to search and seizure if my officer has reason to believe that I may have illegal drugs, alcohol, volatile substances, or other contraband on my person or property…I shall permit my Probation and Parole Officer to visit my residence and place of employment at any time." When he became a suspect in a series of robberies in Louisville, his parole officer went to his mother's home and obtained a consent to search from her. Nothing was found at that time. The next day the police went back to the mother's home to arrest Sublett. The mother called Sublett and had him come to her house, at which point he was arrested. The police found out that he had been staying at Sublett's sister's house. They contacted her and received consent to search her house. That search produced significant evidence of guilt. Eventually Sublett's motion to suppress was denied, and he entered a conditional plea of guilty.

The Kentucky Supreme Court affirmed. Most of the opinion deals with Sublett's arguments that the parole officer in this case failed to follow the requirements of KRS 439.430. Sublett's assertion that KRS 439.430(1) does not specify whether a parole officer may enter a house to arrest a parolee was not preserved. The Court acknowledged that *Payton v. New* York, 445 U.S. 573 (1980) does not authorize the warrantless entry into a house to make an arrest. The Court relied instead on Sublett's mother's consent to search her house. "So regardless of whether KRS 439.430(1) grants parole officers the authority to enter a home without a warrant to make an arrest, the authority to enter this home was granted by the consent of Ms. Sublett."

The Court also rejected Sublett's argument that parole officers are not "peace officers" under KRS 439.430 and that the arrest was unlawful because of the officer's failure to follow KRS 439.430, which contains certain requirements of a parole officer when making an arrest. "Subsection 1 [of KRS 439.430] presents two options to parole officers having reasonable suspicion of parole violation: arrest the parolee or deputize a peace officer to do so. Since Officer Johnson arrested Sublett with Officer Hamilton's assistance, there was no need to deputize another to arrest him." Further, "the parolee may be arrested without a warrant by the parole officer or may be arrested by another peace officer with a parole officer's written statement (which serves as a sufficient warrant) setting forth the parole violation. But we do not read this subsection as requiring a written statement of parole violation to be delivered to the detention facility with the parolee if the parolee is arrested by a parole officer." Nor did the parole officer need to submit a report to the Commissioner of the Department of Corrections. "[T]his requirement obviously relates to parole revocation hearings…Sublett's parole was not revoked; rather, he was charged with the new robbery offenses, constituting a parole violation."

The Court further found that the search of Sublett's backpack and jeans, found at his sister's house, did not violate the Fourth Amendment. While the sister had consented to a search of the house, the Court held that the consent did not extend to the search of Sublett's blue jeans, found beside a couch in the living room, and the backpack, found in a laundry bag in the kitchen, "not in areas where Sublett might reasonably have had heightened expectations of privacy." These searches were justified by the specific terms of Sublett's parole. "Sublett consented to the search by agreeing as a condition of release on parole that he was subject to search upon a parole officer's reasonable suspicion of parole violation."

***Olden v.* Commonwealth, 203 S.W.3d 672 (Ky. 2006)**

An officer of the Princeton Police Department pulled over Christy Gordon for speeding. During the process, a tin box with crack cocaine was found in her pants. She told the officers that she had been smoking crack with Olden in his home. Based upon this statement, the officer obtained a search warrant for Olden, his house, and his car. During the execution of the warrant, 11.6 grams of crack cocaine, marijuana seeds, and $1,610 in cash were found. He was arrested and apparently released on bond. A month later, a similar scenario occurred, with more cocaine and cash found, followed again by Olden's arrest. Olden was indicted and following the denial of his motion to suppress and a jury trial, he was convicted and sentenced to two twenty-year prison terms.

The Kentucky Supreme Court affirmed the trial court in an opinion written by Justice Scott. The Court rejected the defendant's claim that the officer improperly relied upon the three informants who had been arrested following a traffic stop. "[A]n 'explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles [the informant's] tip to greater

weight than might otherwise be the case…Such occurred in this case as Officer McDowell testified to the statements taken from the informants, whom he had just seen at Appellant's house."

***Krause v. Commonwealth*,**
2006 WL 2986470, 2006 Ky. LEXIS 259 (Ky. 2006)

A Kentucky State Police Officer arrested someone for possession of cocaine. He told the trooper that he obtained the cocaine from a house where Krause and Joe Yamada lived. Trooper Manar decided that he did not have probable cause to obtain a search warrant, and rather than conduct a "knock and talk," he decided to create "'a false story that he believed would more likely result in the residents' consent to search.'" Manar went with one or two other officers to the house at 4:00 a.m. and said that a young girl had reportedly just been raped, naming Yamada as the rapist. Trooper Manar asked if he could enter "to determine whether her description of the residence and its furnishings was accurate." His ruse worked, and during the "search" for evidence of a sexual assault, drugs were found. Krause was arrested and charged with possession of cocaine, possession of drug paraphernailia, second offense, and possession of marijuana. He entered a conditional plea of guilty after the trial court held that Krause had consented to the search and that the drugs were found in plain view. The Court of Appeals affirmed. Discretionary review was granted by the Supreme Court.

The Kentucky Supreme Court, in an opinion by Justice Graves, reversed. The Court examined whether the search could be justified as a plain view search whereby the police were where they had a right to be based upon Krause's consent. The Court was concerned that the consent was only obtained through the use of a ruse. The Court both used *Adcock v. Commonwealth*, 967 S.W. 2d 6 (Ky. 1998), and distinguished it. In *Adcock*, the Court "held that '[t]he guiding factor in determining whether a ruse entry, to execute a search warrant, constitutes a "breaking" under the Fourth Amendment should be whether the tactic frustrates the purposes of the "knock and announce" rule.'" Based upon this, the Court found that the consent could not be relied upon. "First, given the time and nature of the trooper's ruse, we believe that Appellant and his roommate were in a particularly vulnerable state. A knock on the door at 4:00 a.m. by uniformed police officers is a frightening event in and of itself. Couple this knock with a heinous and shameful accusation, such as the rape of a young girl, and nearly any person would be overwhelmed and stunned. Second, Tooper Manar's tactics were unnecessary in this instance and not based on any pressing or imminent tactical consideration…Finally, we believe that if the type of ruse utilized by Trooper Manar was sanctioned by this Court, citizens would be discouraged from 'aiding to the utmost of their ability in the apprehension of criminals' since they would have no way of knowing whether their assistance was being called upon for the public good or for the purpose of incriminating them…Moreover, widespread use of this type of tactic could quickly undermine 'the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness.'"

The Court was careful to say that they were not condemning all subterfuge. "What distinguishes this case most, perhaps, from the bulk of other ruse cases is the fact that Trooper Manar exploited a citizen's civic desire to assist police in their official duties for the express purpose of incriminating that citizen. The use of this particular ruse simply crossed the line of civilized notions of justice and cannot be sanctioned without vitiating the long established trust and accord our society has placed with law enforcement."

Justice Wintersheimer dissented, joined by Justice Roach. Justice Wintersheimer believed that the consent of the defendant and his roommate was sufficient. The dissenters did not believe that the ruse was sufficient to render the consent involuntary.

Williams v. Commonwealth,
2006 WL 3386328, 2006 Ky. LEXIS 305 (Ky. 2006)

The Lewis County Sheriff's Office began to receive complaints about too much traffic at Dr. Fortune Williams' medical clinic. Their investigation revealed that many of the cars going in and out of his office came from out-of-state. Officers began to arrest people coming from the clinic for driving under the influence of intoxicants. Both the Attorney General's Office and the Cabinet for Health and Family Services became involved in investigating the activity at Dr. Williams' office. Bob Kelly, of the Office of Drug Control with the Cabinet obtained a KASPER report that revealed that Dr. Williams was "prescribing large quantities of multiple controlled substances to several patients." Officers sent three informants to Dr. Williams posing as new patients. Dr. Williams spoke with the "patients" for 3-15 minutes but did not perform a physical exam. Thereafter, he prescribed controlled substances for them. In subsequent visits, Dr. Williams asked whether anything had changed since their last visit. The Attorney General obtained the involvement of the Kentucky Board of Medical Licensure. Their investigator obtained the names of 35 patients from the Attorney General and the Cabinet and went to Dr. Williams' office where they seized the patients' files. Based upon this seizure, Dr. Williams was charged with four counts of unlawfully prescribing a controlled substance. After his motion to suppress, he was tried and convicted by a jury and given 20 years in prison.

In an opinion written by Justice Graves, the Kentucky Supreme Court reversed. Dr. Williams asserted that the search was illegal as a search of a business conducted without a

Continued on page 36

Continued from page 35

warrant. The Commonwealth relied upon *New York v. Burger*, 482 U.S. 691 (1987), which held that "a warrant was not required for 'administrative inspections' of 'commercial property employed in "closely regulated" industries.'" The Court rejected reliance upon *Burger* because "the Commonwealth has failed to make any credible showing that the search in this case was conducted for an administrative rather than law enforcement purpose."

The Court relied extensively upon *Ferguson v. City of Charleston*, 532 U.S. 67(2001). There, the Court examined a state hospital's testing the urine of pregnant women and turning over the results to the police when there was a positive test. The Court "stated that in order for the hospital's warrantless search program to qualify as being 'administrative' or 'special needs' in nature, its immediate purpose must be 'divorced from the State's general interest in law enforcement." Because the hospital was obtaining the urine for the "specific purpose of incriminating those patients," the *Ferguson* Court held that the search was not a special needs search but rather an illegal search.

Similarly, the Court rejected the Commonwealth's assertion that the search here was an administrative search conducted pursuant to KRS 311.605(2). "[T]wo factors ultimately undermine the Commonwealth's position: (1) the raid in this case was conducted for the immediate and sole purpose of collecting incriminating evidence against Appellant; and (2) there was excessive entanglement with law enforcement in both the Board's investigation of Appellant and in the resulting warrantless raid at his office."

The Court also considered the fact that a warrant should have been obtained under the circumstances in this case. "With the evidence available before the raid, we perceive absolutely no reason whatsoever (and the Commonwealth identifies none) why the miniscule delay in obtaining a warrant would have frustrated the governmental purpose of any of the authorities in this case." "In plain words, neither Section 10 of Kentucky's Constitution nor the Fourth Amendment permits administrative statutes or agencies to be utilized or exploited as a means to conduct searches and seizures for law enforcement purposes without first obtaining (1) consent; or (2) a valid warrant. Accordingly, the evidence seized during the raid must be excluded as being obtained in violation of Appellant's Fourth Amendment rights."

The Court rejected Williams' claim that his statements made after the seizures should be suppressed as fruit of the poisonous tree, relying upon *Brown v. Illinois*, 422 U.S. 590 (1975). "When the totality of the circumstances are weighed and considered, we believe that Appellant's statements are sufficiently attenuated to purge them from the taint of the illegal search, and thus, are admissible." Those circumstances included the voluntariness of the statements, there was no intimidation or coercion, Dr. Williams asked one of the agents to leave the room during questioning, Dr. Williams was not under arrest or detention at the time of the questioning, and the conduct of the officers was not flagrant.

The Court also rejected Williams' claim that the KASPER statute, KRS 218A.202(6)(a)&(b) was unconstitutional. In doing so, the Court overruled *Thacker v. Commonwealth*, 80 S.W. 3d 451 (Ky. App. 2002), which had previously held pursuant to *Burger* that KASPER was constitutional as an administrative search. Instead, the statute was upheld under the reasonable expectation of privacy criteria. "[W]e find that examination of KASPER reports by authorized personnel pursuant to KRS 218A.202(^)(a)&(b) does not constitute a 'search' under the Fourth Amendment or Section 10 of Kentucky's constitution, since citizens have no reasonable expectation of privacy in this limited examination of and access to their prescription records." Relying upon *Smith v. Maryland*, 442 U.S. 735 (1979), the Court held that a "KASPER report conveys only limited data to a restricted number of persons. First, it does not report the dispensation of all substances by practitioners or pharmacists but only those substances classified as 'Schedules II, III, IV, and V controlled substances.' Second, nothing in a KASPER report discloses a patient's condition, treatment, or communications with his or her physician, as the report merely conveys the patient's name, the drug dispensed, the date of dispensing, the quantity dispensed, the prescriber, and the dispenser. KRS 218A.202(4). Finally, KASPER data is not available to the general public, but rather only to specified personnel who certify that they are conducting 'a bona fide specific investigation involving a designated person.'"

Bottom v. Commonwealth,
2006 WL 2846439,
2006 Ky. App. LEXIS 340 (Ky. Ct. App. 2006)

Melissa Bottom went into a farm supply store and asked to buy dog collars. When told that they were not available, she bought two 16 ounce bottles of iodine. This made the store manager suspicious, so he called the police and gave them the license number of Melissa's car. The police went to her house and saw her car there and decided to talk with her rather than seek a search warrant. Melissa and Brian Bottom came out on the porch to talk with the police. They noticed iodine stains on Melissa's hands, and smelled the odor of methamphetamine, so they asked for permission to search the house. Brian refused. The police then left to obtain a search warrant, leaving behind other officers to ensure that the Bottoms would not go back into their house. While the officers were gone, Brian offered the police $1000 each to allow them to go back into the house for 15 minutes. When the police returned with a warrant they searched the house and found marijuana and components of the manufacture of meth as well as $2,000 in cash. After being indicted, the Bottoms moved to suppress. The court overruled the motion,

ruling that there was a reasonable and articulable suspicion existing to conduct a "knock and talk" at the Bottoms' house. The Bottoms entered conditional pleas of guilty.

In an opinion by Judge Huddleston joined by Judges Combs and Knopf, the Court of Appeals affirmed. They held that in order to conduct a knock and talk, that is to go to a person's house, the police have to have no level of suspicion. They rejected the Bottoms' assertion that a reasonable and articulable suspicion was required in order to go to a suspects' home and ask for consent to search.

United States v. Paulette
457 F. 3d 601 (6th Cir. 2006)

On November 1, 2002, the Memphis Police Department observed a drug transaction between Paulette and another person. They went to him, patted him down, and found marijuana. Upon hearing that he was residing with his aunt, the officers went to the aunt's house and received permission to search. They found drugs, an assault rifle, and ammunition in the area where Paulette slept. He was charged with drug possession and being a felon in possession of a firearm. He pled guilty to the drug counts and went to trial on the firearm counts. His motion to suppress was denied. After being convicted he appealed to the Sixth Circuit.

The Court affirmed the lower court in a decision written by Judge Schwarzer joined by Judges Gibbons and Cook. The Court held that there was a reasonable suspicion sufficient to detain and pat down Paulette. "Viewing the totality of the circumstances, the officers had a reasonable suspicion that Paulette was engaged in criminal activity based upon his hand movements consistent with drug-dealing activity, efforts to evade the police upon noticing them, and presence in a high crime area. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L. Ed. 2d 570 (2000). The officers were also justified in searching Paulette for their own protection, given the frequency with which drug dealers arm themselves, Paulette's insistent movements towards his right pocket, and his presence in a high crime neighborhood."

United States v. McPhearson,
2006 WL 3392616, 2006 Fed.App. 0435P,
2006 U.S. App. LEXIS 29129 (6th Cir. 2006)

Officers Mathis and Wiser had a warrant for the arrest of Martedis McPhearson in Jackson, Tennessee in December of 2003. They arrested him on his front porch and in the pat-down discovered crack cocaine in his pocket. Their request to search his house was refused, so they obtained a search warrant. During the execution of the search warrant they found additional crack cocaine and firearms. McPhearson was charged with possession of crack cocaine, with intent to distribute, and being a felon in possession of a firearm as well as possession of a firearm during and in relation to a drug-trafficking crime." His motion to suppress was granted, with the trial court saying that "[t]here are cases that have held that when the defendant is arrested at his residence with a large quantity of drugs, then that is an indication that there may have been drug paraphernalia in the house. There are cases that hold that a person who is arrested at his home and gives deceptive answers to the policemen at the time of the arrest about where he had gotten the drugs or where he had been—deceptive answers along with an arrest with drugs in his pocket might be enough for probable cause. The problem in this case, though, is that there's none of that in the affidavit." The government appealed.

In a decision by the Sixth Circuit written by Judge Gibbons joined by Judge Holschuh, the lower court was affirmed. The government had failed to raise the protective sweep issue in the court below, and thus that was not preserved for appeal. The Court held that the affidavit was not sufficient to support probable cause. "The affidavit in this case did no more than state that McPhearson, who resided at 228 Shelby Street, was arrested for a non-drug offense with a quantity of crack cocaine on his person. These averments were insufficient to establish probable cause because they do not establish the requisite nexus between the place to be searched and the evidence to be sought." The Court rejected the government's assertion that being arrested at a home in possession of drugs is sufficient to believe that drugs will be found inside the house.

The Court also rejected the government's position that the evidence should be admitted based upon the officers' good faith reliance upon the warrant. The good faith exception was rejected based upon exception number three: "when the affidavit is so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable…" *United States v. Leon*, 468 U.S. 897 (1984). A bare bones affidavit "is one that merely 'states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge.'" "The affidavit in this case was so bare bones as to preclude any reasonable belief in the search warrant that the affidavit supported. As noted above, the affidavit failed to establish a nexus between McPhearson's residence and evidence of wrongdoing that would support a finding of probable cause."

Judge Rogers wrote a dissenting opinion. "When officials read an affidavit describing how a man emerged from his single-family residence with over six grams of crack cocaine and how agents on the scene believed that there were more drugs inside the dwelling, the officials could reasonably believe that the search-warrant affidavit adequately described probable cause to justify a search of the dwelling…If there was, in hindsight, no probable cause for the search, the officials executing a warrant based on that affidavit are still entitled to the good-faith exception in *United States v. Leon*…."

Continued on page 38

Continued from page 37

United States v. Garrido,
467 F.3d 971, 2006 Fed.App. 0416P (6th Cir. 2006)

In May of 2003, Kentucky Vehicle Enforcement Officers saw two trucks, one of which was a "bobtail tractor" driven by Victor Garrido. Garrido's truck was following the first truck too closely. The officers decided to stop both trucks. During the inspection of Garrido's truck, the officers became suspicious. Further contact with the DEA revealed that Garrido had been involved in a "drug-related incident" in 1997, although that was never proven. After over an hour-long inspection, the officer then began to ask Garrido several questions followed by a request to search the tractor. Garrido gave verbal consent but declined to sign a waiver. Another officer arrived to conduct a canine search, during which the dog alerted to the presence of narcotics. After five minutes or so, Garrido asked the officers to stop their search. The officer told Garrido that because the dog had alerted they no longer needed his consent to search the tractor. Eventually the officers found 161 grams of heroin in a plastic bag in the headliner compartment. Garrido was arrested and charged initially in state court, with the federal government soon picking it up. Garrido was charged with possessing 100 grams or more of heroin with the intent to distribute. A suppression hearing was held and the motion denied. Garrido was tried and convicted, and he appealed.

In a decision written by Judge Gilman joined by Judges Guy and Rogers, the Sixth Circuit affirmed. The Court first held that there was probable cause to believe that Garrido had committed a traffic offense. "What Garrido is really getting at is that the traffic congestion further demonstrates that the officers could not have been in a traffic-enforcement mode when they selected his truck for a roadside stop. That may very well be true. Again, however, the officers' subjective motivation for detaining Garrido is irrelevant so 'long as [they] had probable cause to initially stop the vehicle.'… Because the district court assessed the credibility of the testifying officers and determined that Garrido in fact violated the traffic laws, we find no error in its determination that the initial traffic stop was lawful."

The Court also held that the officers could legitimately hold Garrido's tractor and conduct a thorough inspection for over an hour. While Kentucky law does not require a reasonable suspicion prior to conducting a thorough inspection, the Court did not consider whether the Kentucky law is constitutional or not. Rather, the Court found that the officers had a reasonable belief that a safety violation was occurring, particularly in the "fifth wheel" area of the truck, which appeared to be dry and rusty and thus not suitable for attaching to a trailer.

Next the Court held that detaining Garrido after the safety inspection was complete was reasonable. The question here is whether the officers had a reasonable suspicion sufficient to detain Garrido further under the totality of the circumstances. The Court attributed eight factors found by the district court to constitute reasonable suspicion to be sufficient. "The district court's emphasis on the eighth factor…the fact that the officers' attempts to corroborate Garrido's relationship with E-Freight indicated that no such relationship existed—is particularly persuasive…these events, when combined with the fact that Garrido's logbook showed that the tractor was leased to the 3W company rather than to E-Freight, could reasonably have caused the officers to believe that Garrido was lying in an attempt to conceal unlawful activity…Because their initial attempts to corroborate the veracity of Garrido's story had done nothing to dispel their suspicions, the officers acted reasonably in continuing to question Garrido on the same subjects, even if that questioning stretched slightly beyond the completion of the safety inspection."

SHORT VIEW . . .

1. *United States v. Delfin-Colina*, 464 F.3d 392 (3rd Cir. 2006). Whether a police officer is correct in her interpretation of the legal basis for a stop is irrelevant under *Whren v. United States*, 517 U.S. 806 (1996). Thus, where the police officer believed he could stop someone for having a necklace hanging from a rear view mirror and made the stop on that basis, it did not violate the Fourth Amendment when the law correctly allowed for a stop where something was hanging from the rear view mirror that could materially obstruct the driver's vision. "In situations where an objective review of the record evidence establishes reasonable grounds to conclude that the stopped individual has in fact violated the traffic-code provision cited by the officer, the stop is constitutional even if the officer is mistaken about the scope of activities actually proscribed by the cited traffic-code provision."
2. *State v. Gant*, 143 P.3d 379 (Ariz. Ct. App. 2006). Once a person is secured in a police car, the police may not then search the person's car incident to the arrest. Under *New York v. Belton*, 453 U.S. 454 (1981), the search incident to arrest exception to the warrant requirement does not apply unless the police have reason to believe that there is a threat to them posed by the defendant or that there is evidence located in the car. It should be noted that while *Thornton v. United States*, 541 U.S. 615 (2004), recently discussed this exception for "recent occupants," 5 U.S. Supreme Court justices expressed dissatisfaction with the expansion of the *Belton* exception to persons arrested far from the car. "In short, neither the Arizona Supreme Court nor the United States Supreme Court has characterized *Belton* as relieving the state of its duty to demonstrate the appropriate

constitutional basis for a search conducted incident to an arrest…But, here, the state has presented no concrete evidence whatsoever that, when the officers searched Gant's car, there was any risk of the arrestees acquiring a weapon in Gant's car or destroying any evidence therein."

3. *United States v. Novak*, 453 F.Supp.2d 249 (D. Mass. 2006). It violates the Fourth Amendment to monitor a phone call from an inmate at a jail to his attorney. "[B]alancing the institution's need to maintain order and safety against the reduced right to privacy of inmates, the monitoring of prisoners' phone calls generally is not unreasonable…In the case of attorney-client communications, the balancing of the institution's need for security against the inmate's privacy interest tilts heavily in favor of the inmate's privacy interest."
4. *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006). A soldier has a reasonable expectation of privacy in the e-mails he sends over a Department of Defense network. This was so despite the fact that there was a logon message warning users that their e-mails could be monitored.
5. *United States v. Mendez*, 467 F.3d 1162 (9th Cir. 2006). Mendez was stopped for a traffic violation. During the stop, the officers found out that Mendez had been a member of the "Latin Kings" and that he had served time in prison for a weapons violation. The police continued to question Mendez and eventually he agreed that he had a weapon in the car, which led to his conviction in federal court for being a felon in possession of a firearm. The 9th Circuit held that the police violated Mendez' Fourth Amendment rights when they continued to question him regarding matters outside the scope of the traffic violation. The fact that Mendez had been a gang member, the fact that Mendez had been in prison, and those two facts together did not constitute a reasonable suspicion. "To hold that the fact that an individual was previously convicted of a crime, and was or is a gang member, is sufficient cause to interrogate him about general criminal activity whenever he may be subjected to a *Terry* stop would infringe upon the fundamental constitutional rights of many currently law-abiding citizens…Although persons who have committed crimes may be afforded lesser Fourth Amendment rights while on probation or parole, once that process is completed and their debt to society has been fully paid, they are entitled to the same protection against unreasonable searches and seizures as all other individuals." The Court noted the racial profiling aspect of the case. "Reasonable suspicion may not be 'based on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped.'"
6. *State v. Hisey*, 723 N.W.2d 99 (Neb. Ct. App. 2006). The Nebraska Department of Motor Vehicles is part of the law enforcement team and can be expected to be deterred by the application of the exclusionary rule. Thus, the good faith exception does not apply to mistakes made by them in the collection and retention of motor vehicle licensing records. "The purpose of the exclusionary rule is to deter police and adjuncts of law enforcement from conduct that will result in a denial of rights to people…We find that the threat of exclusion of evidence will likely encourage DMV employees charged with recording and transmitting information on license impoundments to exercise greater caution. The purpose of the exclusionary rule will therefore be served if the evidence from the arrest in this case is suppressed."
7. *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App. 2006). It violates the Fourth Amendment to require the giving of a DNA sample to a person charged with, rather than convicted of, a crime. Obtaining a DNA sample from one simply charged with a crime requires the obtaining of a search warrant.
8. *State v. Lawson*, 144 P.3d 377 (Wash. Ct. App. 2006). The police may not enter without a warrant into a shed upon the smelling of a chemical associated with the manufacture of methamphetamine. "Generally, we have endorsed an emergency aid exception only where the officers reasonable believed that a specific person or persons needed immediate help for health or safety reasons….We are unwilling to authorize warrantless entries where the officers express only a generalized fear that methamphetamine labs and their ingredients are dangerous to people who might live in the neighborhood."
9. *Joseph v. State*, 145 P.3d 595 (Alaska Ct. App. 2006). The Alaska Court of Appeals has decided that *California v. Hodari D.*, 499 U.S. 621 (1991) is too restrictive and does not sufficiently protect the rights to privacy of persons in Alaska. *Hodari D.* had held that a person is not "seized" for purposes of the Fourth Amendment until he submits to a show of authority by the police, or is physically restrained by them. ■

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 own home and there be free from unreasonable governmental intrusion.

— Potter Stewart

Despite Fewer Lockups, NYC Has Seen Big Drop in Crime

By Michael Powell
***Washington Post* Staff Writer**

The correction commissioner walks down a long row of cells painted blue, his footsteps echoing inside the massive Rikers Island jail block.

Every cell is empty, and he couldn't be happier.

"What we've seen in New York is the fastest drop in crime in the nation, and we did it while locking up a lot less people," says Commissioner Martin F. Horn, who oversees the city lockups, including barbed-wire-ringed Rikers Island. "The only people using these cells now are the directors and actors from 'Law and Order.' "

It is one of the least-told stories in American crime-fighting. New York, the safest big city in the nation, achieved its now-legendary 70-percent drop in homicides even as it locked up fewer and fewer of its citizens during the past decade. The number of prisoners in the city has dropped from 21,449 in 1993 to 14,129 this past week. That runs counter to the national trend, in which prison admissions have jumped 72 percent during that time.

Nearly 2.2 million Americans now live behind bars, about eight times as many as in 1975 and the most per capita in the Western world. For three decades, Congress and dozens of legislatures have worked to write tougher anti-crime measures. Often the only controversy has centered on how to finance the construction of prison cells.

New York City officials, by contrast, are debating whether to turn some old cells in downtown Brooklyn into luxury shops.

"If you want to drive down crime, the experience of New York shows that it's ridiculous to spend your first dollar building more prison cells," said Michael Jacobson, who served as New York's correction commissioner for former mayor Rudolph W. Giuliani (R) and now is president of the Vera Institute of Justice, which studies crime-fighting trends worldwide.

"I can't tell you exactly why violent crime in New York declined by twice the national rate," he said. "But I can tell you this: It wasn't because we locked up more people."

Perhaps as intriguing is the experience in states where officials spent billions of dollars to build prisons. From 1992 to 2002, Idaho's prison population grew by 174 percent. the largest percentage increase in the nation. Yet violent crime in that state rose by 14 percent. In West Virginia, the prison population increased by 171 percent, and violent crime rose 10 percent. In Texas, the prison population jumped by 168 percent, and crime dropped by 11 percent.

The debate about the degree to which the United States' record rate of imprisonment has driven down crime is more than a dance on the head of a statistical pin. FBI data released in September showed that violent crime — rape, homicide and robbery — edged up by 2.2 percent last year. That is far from the violent heights of the early 1990s, but Jacobson and other criminologists are concerned that a resurgence in crime could cast a shadow on an intriguing cultural moment.

In the past few years, legislators in such conservative states as Louisiana and Mississippi have passed sentencing reforms. Kansas and Nebraska are reconsidering prison expansion in favor of far less expensive drug treatment. The United States annually spends about $60 billion on prisons.

"Crime is down and people realize, sure, we can lock up more people, but that's why your kid's pre-K class has 35 kids — all the money is going to prisons," Jacobson says. "There's a sense of urgency that for the first time in two decades, we can talk about whether it makes sense to lock up even more people."

It's important for me to know that [defendants] know that I'm going to be there for them — standing in front of them, standing beside them, standing behind them. Before the commonwealth, with all of its power, gets to them, they gotta go through me.

— Stephanie Page

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PRACTICE CORNER
LITIGATION TIPS & COMMENTS

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An Evidentiary Hearing is Required on a Motion To Suppress

In some trial courts, suppression motions are often ruled upon after only motion hour attorney arguments based upon a police report or some basic stipulated version of the facts. This procedure raises difficulty on appeal and is inconsistent with the Kentucky criminal rules.

Kentucky Rule of Criminal Procedure 9.78 says:

> If at any time before trial a defendant moves to suppress …, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling.

In *Commonwealth v. Charles Jones*, 2006 WL 3386490 (Ky. 2006), the Kentucky Supreme Court was faced with a "dearth of evidence" about a questionable search because no evidentiary hearing had been conducted. In the trial court, the parties had stipulated that an officer would testify to the contents of his written report. Although the trial court upheld the search, the Court of Appeals reversed. After granting discretionary review, the Supreme Court cited RCr 9.78 to say that an evidentiary hearing was required. The Court used Black's Law Dictionary to define evidentiary hearing as "[a] hearing at which evidence is presented, as opposed to a hearing at which only legal argument is presented."

Plain Feel Really Means *Plain* Feel

In the *Jones* case mentioned above, the limited issue on appeal was whether evidence found during a protective pat-down of the defendant had to be suppressed. While serving a DVO on Mr. Jones, an officer noticed a bulge in his pocket. The officer recognized that it was a pill bottle and "asked" Jones to remove it. Jones pulled it out, opened it up, and flung the contents (oxycontin pills) into a nearby ditch.

The Supreme Court ruled that the evidence had to be suppressed because, under the circumstances, the illegal nature of the contents of the pill bottle was not readily apparent. Under the plain feel doctrine, evidence may be seized if, during a lawful patdown of the outer clothing of a suspect, an officer "feels an object whose contour or mass makes its identity immediately apparent." *Commonwealth v. Whitmore,* 92 S.W.3d 76, 80 (Ky. 2002). That was not the case in *Jones* because, as said by the Court, "[t]here is nothing inherently incriminating about carrying a pill bottle in one's pocket."

For future practice, *Jones* is a very helpful case, but it has limitations. The case's strong emphasis on the illegal nature being immediately apparent will provide support for many challenges to questionable searches where law enforcement officers reach into suspects' pockets and then later claim that their actions were supported by the plain feel doctrine. The limitations may come from the procedural shortcomings in *Jones*, described above. The Supreme Court specifically mentioned elements that could have been in a more fully developed record to support the search (*i.e.*, officer's training, high crime area, drug-related observations, etc.). Still, the Supreme Court ordered that the case be published and it unquestionably sets a high standard for when warrantless "plain feel" searches will be acceptable.

Object to "Send A Message" Closing Arguments

If you regularly practice in a courtroom where the prosecutor likes to tell a jury to "send a message" to the community, please object. Such statements have long been held to be improper, but rarely result in relief in part because they are almost never objected to.

In *Lee Roy Brewer v. Commonwealth*, 2006 WL 3386645 (Ky. 2006), the Commonwealth Attorney said the following:

> Whenever I am trying to do this job, I am trying my best to send that signal out there to people about what's going to happen to them, if they commit these types of crimes. I want the person who's involved to understand the way the community feels about this type of conduct. So, your sentence here tonight is going to send a message.
>
> * * *
>
> It's also going to send a message to other people that want to be involved in this, and you heard the

> list and we've got one. And, they're going to hear about the way an Owen County jury views all of this, and so that's important. The community's going to know about it. They're going to know whether or not we have the backbone to stand up to it. And, so there is a message with your sentence and you've got to consider that.

The Supreme Court found this portion of the closing argument "troubling," but said that, because it was not objected to, it did not merit reversal. It ended its analysis, however, with a strong warning.

> Lest this opinion be misconstrued, we do find that the Commonwealth's exhortation to this jury to "send a message" to the community was improper. We strongly urge the prosecutors throughout the Commonwealth to use extreme caution in making similar arguments. Indeed, had a timely objection been made, we may have found the Commonwealth's comments to constitute reversible error.
>
> *Brewer*, *supra*

Assuming the Court's warning does not magically eliminate "send a message" arguments from Kentucky courthouses, we must be prepared to object at the trial level. Only then can we, if necessary, gain relief by raising the preserved issue on appeal before a court that appears to be looking for an opportunity to show it's serious about stopping such closing statements.

Practice Corner is always looking for good tips. If you have a practice tip to share, please send it to Damon Preston, Appeals Branch Manager, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601. ■

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