The Advocate

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Kentucky Department of Public Advocacy

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THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES

A Justice Policy Institute Report

THE IMPACT OF *LOPEZ V. GONZALES*: CRIMINAL DEFENSE OF IMMIGRANTS IN STATE DRUG CASES

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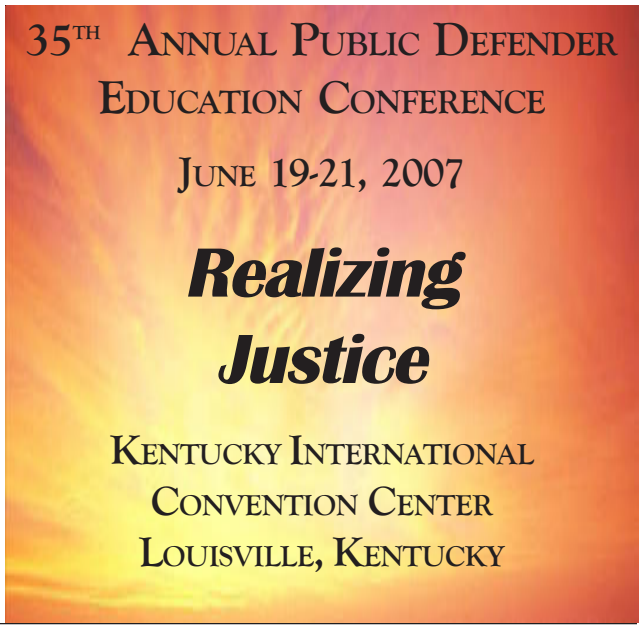

The Advocate: Ky DPA's Journal of Criminal Justice Education and Research

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FROM THE EDITOR...

Jeff Sherr

The Department of Public Advocacy decided to publish one fewer publication of The Advocate this year. This occurred as a result of our receiving insufficient funds for FY07 to continue operating at the same level while at the same time lowering caseloads by the hiring of 53 additional staff. We hope that we will be able to resume our full level of publication during FY08, and we apologize for any inconvenience.

Inappropriately incarcerating youth in secure detention centers across the country can contribute to their future delinquent behavior and harm their education, employment and health, according to a new report by the Justice Policy Institute, a Washington, D.C.-based group that studies adult and juvenile justice policies.

The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities shows that rather than promoting public safety, detention — the pretrial "jailing" of youth not yet found delinquent — may contribute to future offenses. Studies from around the country show that **incarcerated youth have higher recidivism rates than youth supervised in other kinds of settings**.

This report is published in full in this edition along with an overview of the use of detention in Kentucky by Rebecca Ballard DiLoreto, DPA Post Trial Division Director.

The recent Supreme Court decision *Lopez v. Gonzales* provides an answer to an important question for criminal defense attorneys representing immigrants: What state drug offenses are "aggravated felonies" and thereby trigger mandatory deportation without the possibility of a waiver? A **Practice Advisory** by the New York State Defenders Association Immigration Defense Project provides detailed on how this decision impacts our strategy in drug cases.

Robert E. Hubbard, DPA LaGrange Post Conviction Office, offers an explanation and analysis of the latest data on **Parole Eligibility** in Kentucky.

The next edition of *The Advocate* will be available in July 2007. ■

JUVENILE DETENTION: A KENTUCKY OVERVIEW

By Rebecca Ballard DiLoreto, Director, Post Trial Division

In the next article, the *Justice Policy Institute Report* analyzes national trends impacting youth in detention facilities across the country. Each state's juvenile justice system is unique. In many of the states discussed in this report, "detention" refers equally to what we in Kentucky refer to as our detention facilities as well as what we refer to as DJJ "youth development centers." The adverse impact of detention described in the article has applicability in both settings.

Kentucky is unique in two respects when it comes to pretrial detention. First, since the Juvenile Code was established in 1986, Kentucky has had a court designated worker program developed by Honorable Susan Clary through the Administrative Office of the Courts. These workers are dedicated to developing pre-court diversionary programs for youth facing status and public offense charges. They work to identify community-based services for youth, create diversionary contracts for youth and track the progress of their clients. The goal of the CDW program is to divert as many youth as possible, to give youth a chance to avoid going to court and thereby reduce the number of formal court cases. Any youth who violates the diversionary agreement can be sent to court. The county attorney and the judge also have the option of directing a case to go to court rather than to diversion.

Secondly, Kentucky has used federal grant money over the past six years to establish detention alternative coordinators in regionally based detention facilities. These DACs are charged with finding alternatives to detention for those youth whom the courts have initially ordered detained. To be effective in their jobs, the DACs work to identify community-based treatment programs and reasonable and safe alternatives to detention. Our DACS and our CDWs bring significant savings to the juvenile justice system and help the Commonwealth build community-based resources. DAC workers continue the work of the Court Designated Worker to find and promote community alternatives to pre-trial detention in the short term and alert the court, prosecutor, and defense counsel to detention alternatives for long term disposition.

The Department of Public Advocacy is itself responsible for a third unique initiative, the DPA Social Work Pilot, that should help build community-based services and create dispositional alternatives with a greater likelihood of long-term success. A growing number of our DPA offices have access to DPA social workers or social work interns dedicated to helping our attorneys find community-based dispositional alternatives designed to meet our client's needs.

This *Justice Policy Institute Report* can support legal advocates in persuading the court and other key stakeholders to choose dispositions for youth that have a more reasonable chance of meeting the child's needs and helping that child to grow to be a productive member of their communities. The alternative, as the *Report* notes, is that by incarcerating the child, we simply lead that child further down the road of delinquent and later criminal behavior. As the saying goes, 'If we do what we have always done, we can expect to get what we have always got.'

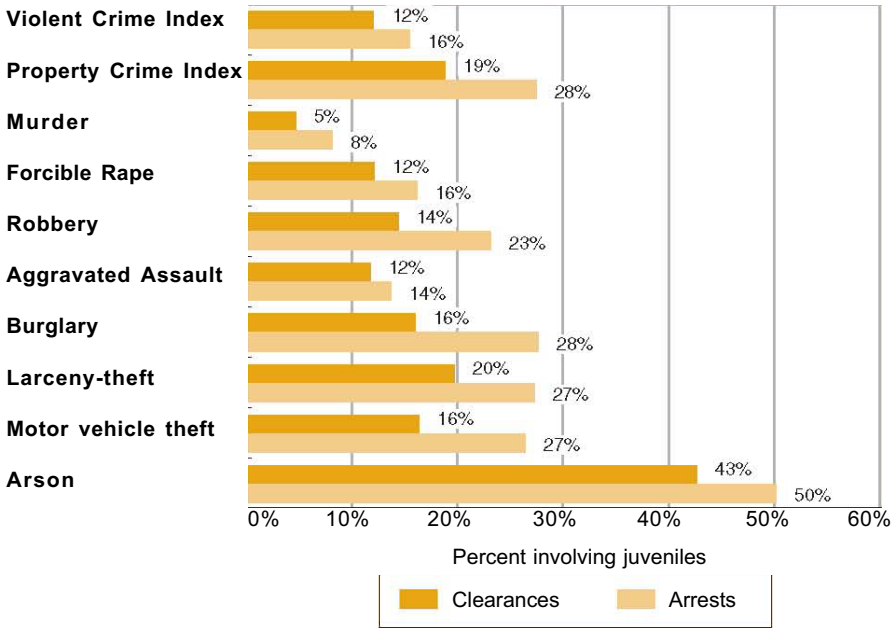
Rebecca DiLoreto

Juvenile arrest data published by the Office of Justice Programs reveals that youth usually commit offenses with other youth and that youth are arrested more often than adults when comparing arrest rates on the same offense types. The Office of Juvenile Justice Delinquency and Prevention OJP chart confirms the experience of many public defenders. I recall my first murder case twenty years ago. Eight youths were running wild in Estill County, Kentucky. They were charged with killing the local bootlegger. The killing was not planned, it was the unexpected consequence of a robbery of the bootlegger; that was planned by one member of this group of kids, running around on a slow Saturday night looking for some excitement. My client was a thirteen-year-old girl. Her involvement in the offense itself was tangential — in the wrong place, with the wrong people, at the wrong time. How well would she have been served by short or long term detention in confinement with other youth with lengthier histories of violent offenses in the system? What would be the rehabilitative impact of long term confinement that placed this child with likely more delinquent and more sophisticated youth? The community needed to build its own solution even though the offense was a serious one.

It is important to remember what the data in Kentucky tells us. As the charges chart reveals, Kentucky youth appear in court most often for contempt of court. Reasonable dispositional plans for both status and public offenders can help our court system reduce the number of contempt cases. The data also reveals that the next largest level of offenses are disorderly conduct, then theft under 300 dollars, possession of marijuana, and then criminal mischief third degree. In our litigious society, we have to expect that the court system will continue to be called upon to fulfill the role of parent or guardian. Until that situation changes, it is important that the family and juvenile

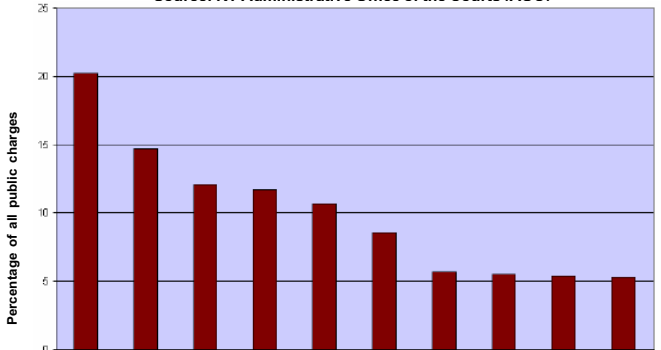
court systems of the state be good parents, measuring out the appropriate response for misbehaviors, many of which all of us as children engaged in at one time or another. We apparently grew out of our delinquent behavior, just as the *Justice Policy Institute Report* indicates our children will do. Better to not blow the situation out of proportion, utilize our DACs, our CDWs, and our DPA social workers, and create real, reasonable, and likely to succeed programs for our youth rather having only the option of the constant, harsh slam of the jail cell door. ■

The juvenile proportion of arrests exceeded the juvenile proportion of crimes cleared by arrest or exceptional means in each offense category, reflecting the fact that juveniles are more likely to commit crimes in groups and are more likely to be arrested than are adults.



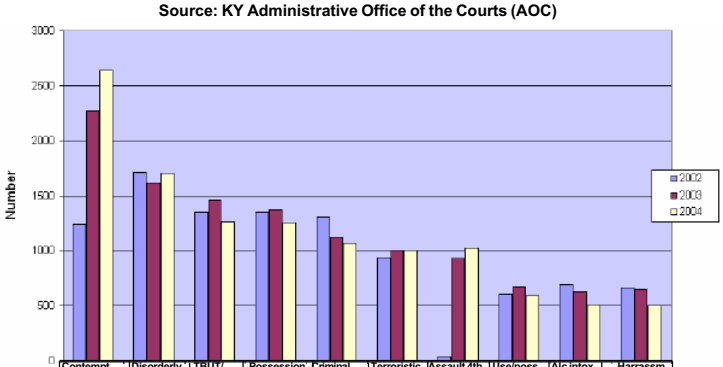
Data source: *Crime in the United States 2004* (Washington, DC: U.S. Government Printing Office, 2005), tables 28 and 38 (updated 2/17/2006).
Reprinted from: Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, Juvenile Arrest Data 2004, published in December 2006.

Top Ten Public (Delinquent) Charges (2002-2004)
Source: KY Administrative Office of the Courts (AOC)



	Contempt (slander/libel)	Disorderly conduct $300 of 28	TBUT dispshplft	Possession of marijuana	Criminal mschf 3rd degree	Terroristic threat, 3rd injury	Assault 4th degree mnr paraphern	Use/poss. drug	Alcintox 1st/2nd	Harrassm. no physical contact
Charge	20.2	14.7	12.1	11.7	10.7	8.5	5.7	5.5	5.4	5.3

Top Ten Juvenile Charges by year
Source: KY Administrative Office of the Courts (AOC)



	Contempt (slander/libel)	Disorderly conduct $300 of 28	TBUT/ Dispshplft	Possession of marijuana	Criminal mschf 3rd degree	Terroristic threat, 3rd	Assault 4th degree mnr injury	Use/poss. drug paraphern	Alc intox 1st/2nd	Harrassm. no physical contact
2002	1242	1712	1350	1352	1302	939	34	601	693	860
2003	2270	1814	1458	1370	1122	1002	932	674	625	846
2004	2638	1706	1258	1254	1070	1002	1027	588	512	503

Kentucky Juvenile Crime Analysis 2002-2004: Prepared for the Kentucky Juvenile Justice Advisory Board with data from DJJ, AOC, KSP, TWIST, MH/MR, Substance Abuse Database, CDW Database

The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities

A Justice Policy Institute Report
by Barry Holman and Jason Ziedenberg

The Dangers of Detention[1]

Introduction: The Growing Impact of Youth Detention

Despite the lowest youth crime rates in 20 years, hundreds of thousands of young people are locked away every year in the nation's 591 secure detention centers. Detention centers are intended to temporarily house youth who pose a high risk of re-offending before their trial, or who are deemed likely to not appear for their trial. But the nation's use of detention is steadily rising, and facilities are packed with young people who do not meet those high-risk criteria—about 70 percent are detained for nonviolent offenses.[2]

The increased and unnecessary use of secure detention exposes troubled young people to an environment that more closely resembles adult prisons and jails than the kinds of community and family-based interventions proven to be most effective. Detention centers, said a former Deputy Mayor of New York of that city's infamous Spofford facility, are "indistinguishable from a prison."[4] Commenting on New York's detention centers, one Supreme Court Justice said that, "fairly viewed, pretrial detention of a juvenile gives rise to injuries comparable to those associated with the imprisonment of an adult."[5]

Detained youth, who are frequently pre-adjudication and awaiting their court date, or sometimes waiting for their placement in another facility or community-based program, can spend anywhere from a few days to a few months in locked custody. At best, detained youth are physically and emotionally separated from the families and communities who are the most invested in their recovery and success. Often, detained youth are housed in overcrowded, understaffed facilities—an environment that conspires to breed neglect and violence.

"Detention: A form of locked custody of youth pre-trial who are arrested—juvenile detention centers are the juvenile justice system's version of "jail," in which most young people are being held before the court has judged them delinquent. Some youth in detention are there because they fail the conditions of their probation or parole, or they may be waiting in detention before their final disposition (*i.e.*, sentence to a community program, or juvenile correctional facility)."[3]

A recent literature review[i] of youth corrections shows that detention has a profoundly negative impact on young people's mental and physical well-being, their education, and their employment. One psychologist found that for one-third of incarcerated youth diagnosed with depression, the onset of the depression occurred after they began their incarceration,[6] and another suggests that poor mental health, and the conditions of confinement together conspire to make it more likely that incarcerated teens will engage in suicide and self-harm.[7] Economists have shown that the process of incarcerating youth will reduce their future earnings and their ability to remain in the workforce, and could change formerly detained youth into less stable employees. Educational researchers have found that upwards of 40 percent of incarcerated youth have a learning disability, and they will face significant challenges returning to school after they leave detention. Most importantly, for a variety of reasons to be explored, there is credible and significant research that suggests that the experience of detention may make it more likely that youth will continue to engage in delinquent behavior, and that the detention experience may increase the odds that youth will recidivate, further compromising public safety.

Detention centers do serve a role by temporarily supervising the most at-risk youth. However, with 70 percent being held for nonviolent offenses, it is not clear whether the mass detention of youth is necessary—or being borne equally. While youth of color represent about a third of the youth population, the latest figures show that they represent 61 percent of detained youth.[9] Youth of color are disproportionately detained at higher rates than whites, even when they engage in delinquent behavior at similar rates as white youth.

This policy brief looks at the consequences of detention on young people, their families, and communities. This policy brief shows that, given the new findings that detaining youth may not make communities safer, the costs of needlessly detaining young people who do not need to be there are

simply too high. Policymakers, instead, should look to detention reform as a means to reduce the number of young people needlessly detained, and reinvest the savings in juvenile interventions proven to reduce recidivism and crime, and that can help build healthy and safe communities.

Each year it is estimated that approximately 500,000 youth are brought to juvenile detention centers. On any given day more than 26,000 youth are detained.[8]

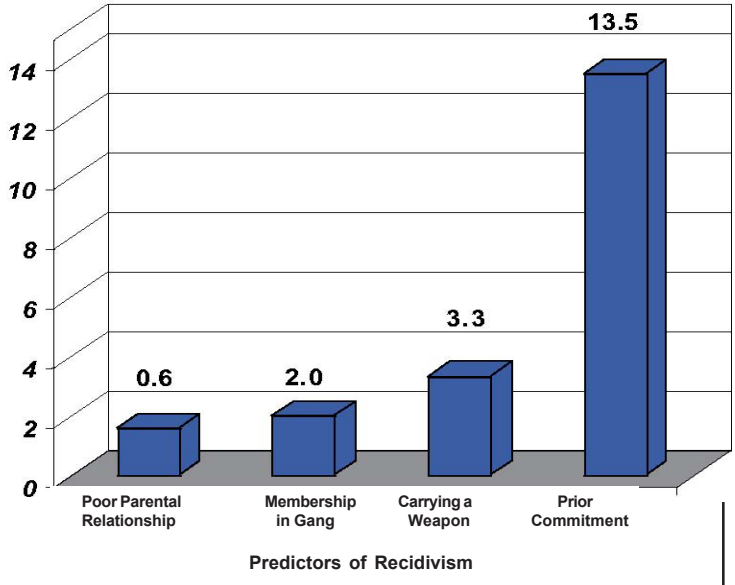
The Impact of Detention on Crime, Rehabilitation, and Public Safety

Detention can increase recidivism

Instead of reducing crime, the act of incarcerating high numbers of youth may in fact facilitate increased crime by aggravating the recidivism of youth who are detained.

A recent evaluation of secure detention in Wisconsin, conducted by the state's Joint Legislative Audit Committee reported that, in the four counties studied, 70 percent of youth held in secure detention were arrested or returned to secure detention within one year of release.[10] The researchers found that "placement in secure detention may deter a small proportion of juveniles from future criminal activity, although they do not deter most juveniles."

Prior Incarceration was a Greater Predictor of Recidivism than Carrying a Weapon, Gang Membership, or Poor Parental Relationship



Source: Benda, B.B. and Tollet, C.L. (1999), "A Study of Recidivism of Serious and Persistent Offenders Among Adolescents." Journal of Criminal Justice, Vol. 27, No. 2 111-126.

Studies on Arkansas' incarcerated youth[11] found not only a high recidivism rate for incarcerated young people, but that the experience of incarceration is the most significant factor in increasing the odds of recidivism. Sixty percent of the youth studied were returned to the Department of Youth Services (DYS) within three years. The most significant predictor of recidivism was prior commitment; the odds of returning to DYS increased 13.5 times for youth with a prior commitment. Among the youth incarcerated in Arkansas, two-thirds were confined for nonviolent offenses. Similarly, the crimes that landed the serious offenders under the supervision of adult corrections were overwhelmingly nonviolent—less than 20 percent were crimes against persons.

Congregating delinquent youth together negatively affects their behavior and increases their chance of re-offending

Behavioral scientists are finding that bringing youth together for treatment or services may make it more likely that they will become engaged in delinquent behavior. Nowhere are deviant youth brought together in greater numbers and density than in detention centers, training schools, and other confined congregate "care" institutions.

Researchers at the Oregon Social Learning Center found that congregating youth together for treatment in a group setting causes them to have a higher recidivism rate and poorer outcomes than youth who are not grouped together for treatment. The researchers call this process "peer deviancy training," and reported statistically significant higher levels of substance abuse, school difficulties, delinquency, violence, and adjustment difficulties in adulthood for those youth treated in a peer group setting. The researchers found that "unintended consequences of grouping children at-risk for externalizing disorders may include negative changes in attitudes toward antisocial behavior, affiliation with antisocial peers, and identification with deviancy."[12]

Detention pulls youth deeper into the juvenile and criminal justice system.

Similar to the comment by the San Jose police chief, studies have shown that once young people are detained, even when controlling for their prior offenses, they are more likely than non-detained youth to end up going "deeper" into the system; these studies show that detained youth are more likely to be referred to court, see their case progress through the system to adjudication and disposition, have a formal disposition filed against them, and receive a more serious disposition.

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"Locking up kids is the easiest way. But once they get in the juvenile justice system, it's very hard to get them out."

—San Jose Police Chief Bill Landsdowne[13]

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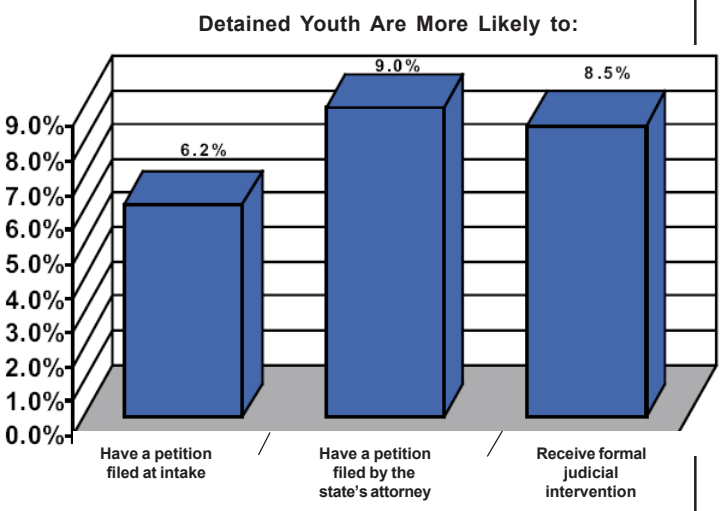


Source: Frazier, C.E. and Cochran, J.K. (1986) Detention of Juveniles: Its Effects on Subsequent Juvenile Court Processing and Decisions. Youth and Society, Vol. 17, No. 3, March 1986, p. 286-305 (N=9,317;p=05)

A study done in Florida in the late 1980s found that, when controlling for other key variables such as age, race, gender, and offense severity, detained youth faced a greater probability of having a petition filed at intake (6.2 percent), a greater probability for having a petition filed by the State Attorney (9 percent), and a greater probability of receiving formal judicial interventions (8.5 percent) than youth not detained. Another study in Florida by the Office of State Court Administrators found that when controlling for other factors—including severity of offense—youth who are detained are three times more likely to end up being committed to a juvenile facility than similar youth who are not detained.[14]

Alternatives to detention can curb crime and recidivism better than detention.

Several studies have shown that youth who are incarcerated are more likely to recidivate than youth who are supervised in a community-based setting, or not detained at all. Young people in San Francisco's Detention Diversion Advocacy Program, for example, have about half the recidivism rate of young people who remained in detention or in the juvenile justice system.[15]

Research from Texas suggests that young people in community-based placements are 14 percent less likely to commit future crimes than youth that have been incarcerated.[16]

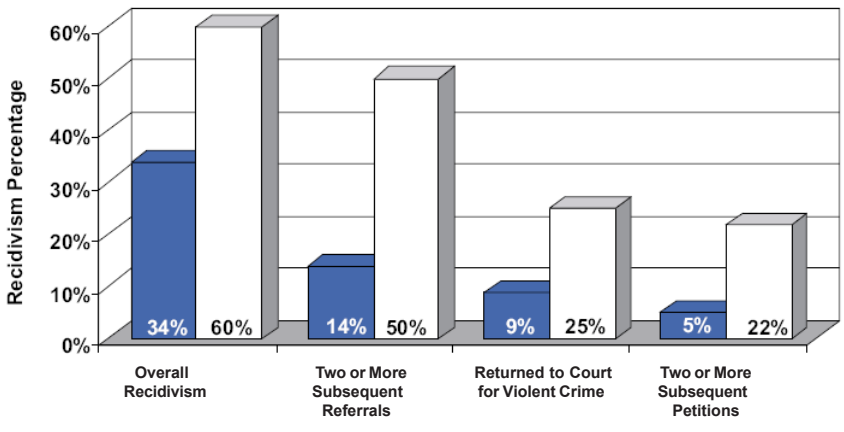
Detention can slow or interrupt the natural process of "aging out of delinquency."

Many young people in fact engage in "delinquent" behavior, but despite high incarceration rates, not all youth are detained for delinquency. Dr. Delbert Elliott, former President of the American Society of Criminology and head of the Center for the Study of the Prevention of Violence has shown that as many as a third of young people will engage in delinquent behavior[17] before they grow up but will naturally "age out" of the delinquent behavior of their younger years. While this rate of delinquency among young males may seem high, the rate at which they end their criminal behavior, (called the "desistance rate") is equally high.[18] Most youth will desist from delinquency on their own. For those who have more trouble, Elliott has shown that establishing a relationship with a significant other (a partner or mentor) as well as employment correlates with youthful offenders of all races "aging out" of delinquent behavior as they reach young adulthood.

Research from Florida shows that when controlling for other factors, youth who are detained are three times more likely to end up being committed to a juvenile facility than similar youth who are not detained.

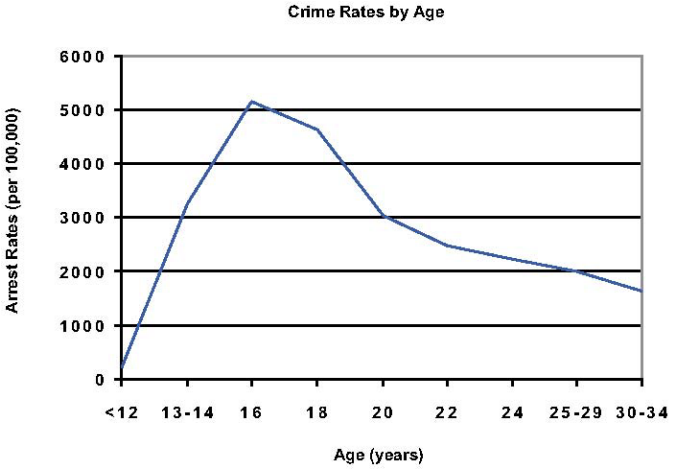
Whether a youth is detained or not for minor delinquency has lasting ramifications for that youth's future behavior and opportunities. Carnegie Mellon researchers have shown that incarcerating juveniles may actually interrupt and delay the normal pattern of "aging out" since detention disrupts their natural engagement with families, school, and work.[19]

Various Measures of Recidivism between Detention and Diversion



Source: Sheldon, R.G. (1999), "Detention Diversion Advocacy: An Evaluation." Juvenile Justice Bulletin Washington, DC: Department of Justice, Office of Juvenile Justice and Delinquency Prevention (DDAP n=271; Comparison n=271)

Most Young People Age Out of Crime on Their Own



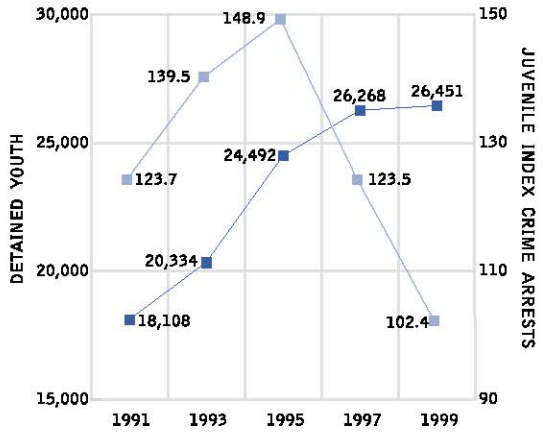
Source: FBI Crime in the United States (1993).

There is little relationship between detention and overall crime in the community.

While there may be an individual need to incarcerate some high-risk youth, the mass detention of a half-million youth each year is not necessarily reducing crime.

During the first part of the 1990s, as juvenile arrests rose, the use of detention rose far faster (See table, "Different Directions"). By the middle of the 1990s, as juvenile arrests began to plummet (and the number of youth aged 10-17 leveled off), the use of detention continued to rise. In other words, while there may be some youth who need to be detained to protect themselves, or the public, there is little observed relationship between the increased use of detention, and crime.

Detention Populations vs.
Arrest Rates for U.S. Juveniles in the 1990's



Sources: Detention data adapted from Sickmund, M. (forthcoming).Juveniles in Corrections. Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention; arrest data from FBI Uniform Crime Reports.

Different Directions:
Detention Populations vs.
Arrest Rates for U.S. Juveniles in the 1990s

To the contrary, several communities ranging from the Western United States (Santa Cruz, California and Portland, Oregon) to one of the nation's biggest urban centers (Chicago, Illinois) have found ways to both reduce detention and reduce crime, better serving the interests of youth development and public safety. Between 1996 and 2002, violent juvenile arrests in the country fell by 37 percent; Santa Cruz matched that decline (38 percent), and Portland and Chicago exceeded it (45 percent and 54 percent, respectively).[20] And during roughly the same time, juvenile detention populations fell between 27 and 65 percent in those jurisdictions.

Researchers believe that the combination of mental health disorders youth bring into detention coupled with the negative effects of institutionalization places incarcerated youth at a higher risk of suicide than other youth.[21]

The Impact of Detention on Young People's Mental Health, and Propensity to Self-Harm.

Of all the various health needs that detention administrators identify among the youth they see, unmet mental and behavioral health needs rise to the top. While researchers estimate that upwards of two-thirds of young people in detention centers could meet the criteria for having a mental disorder, a little more than a third need ongoing clinical care—a figure twice the rate of the general adolescent population.[22]

Why is the prevalence of mental illness among detained youth so high? First, detention has become a new "dumping ground" for young people with mental health issues. One Harvard academic theorizes that the trauma associated with the rising violence in the late 1980s and early 1990s in some urban centers had a deep and sustained impact on young people. At the same time, new laws were enacted that reduced judicial discretion to decide if youth would be detained, decreasing the system's ability to screen out and divert youth with disorders. All the while, public community youth mental health systems deteriorated during this decade, leaving detention as the "dumping ground" for mentally ill youth.

Detention makes mentally ill youth worse.

Another reason for the rise in the prevalence of mental illness in detention is that the kind of environment generated in the nation's detention centers, and the conditions of that confinement, conspire to create an unhealthy environment. Researchers have found that at least a third of detention centers are overcrowded,[23] breeding an environment of

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violence and chaos for young people. Far from receiving effective treatment, young people with behavioral health problems simply get worse in detention, not better. Research published in Psychiatry Resources showed that for one-third of incarcerated youth diagnosed with depression, the onset of the depression occurred after they began their incarceration.[24] "The transition into incarceration itself," wrote one researcher in the medical journal, Pediatrics, "may be responsible for some of the observed [increased mental illness in detention] effect."[25]

An analysis published in the Journal of Juvenile Justice and Detention Services suggests that poor mental health and the conditions of detention conspire together to generate higher rates of depression and suicide idealization:[26] 24 percent of detained Oregon youth were found to have had suicidal ideations over a seven-day period, with 34 percent of the youth suffering from "a current significant clinical level of depression."

An indicator of the shift was spelled out by a 2004 Special Investigations Division Report of the U.S. House of Representatives, which found that two-thirds of juvenile detention facilities were holding youth who were waiting for community mental health treatment, and that on any given night, 7 percent of all the youth held in detention were waiting for community mental health services. As one detention administrator told Congress, "we are receiving juveniles that 5 years ago would have been in an inpatient mental health facility. . . [W]e have had a number of juveniles who should no more be in our institution than I should be able to fly."[27]

Detention puts youth at greater risk of self-harm.

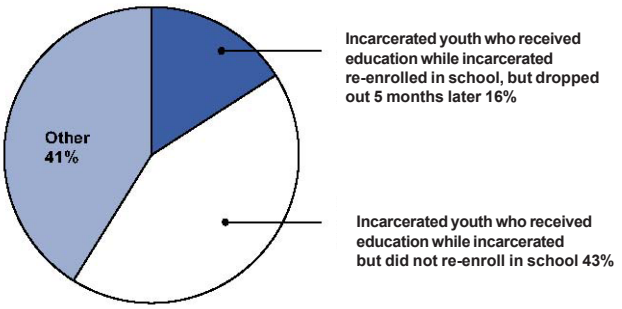
While some researchers have found that the rate of suicide in juvenile institutions is about the same as the community at large,[28] others have found that incarcerated youth experience from double to four times the suicide rate of youth in community.[29] The Office of Juvenile Justice and Delinquency Prevention reports that 11,000 youth engage in more than 17,000 acts of suicidal behavior in the juvenile justice system annually.[30] Another monograph published by OJJDP found that juvenile correctional facilities often incorporate responses to suicidal threats and behavior in ways that endanger the youth further, such as placing the youth in isolation.[31]

The Impact of Detention on the Education of Detained Youth

Detained youth with special needs fail to return to school.

Juvenile detention interrupts young people's education, and once incarcerated, some youth have a hard time returning to school. A Department of Education study showed that 43 percent of incarcerated youth receiving remedial education services in detention did not return to school after release, and another 16 percent enrolled in school but dropped out after only five months.[32] Another researcher found that most incarcerated 9th graders return to school after incarceration but within a year of re-enrolling two-thirds to three-fourths withdraw or drop out of school: After four years, less than 15 percent of these incarcerated 9th graders had completed their secondary education.[33]

Detention May Affect Youth's Ability to Re-enroll in School



Source: LeBlanc, (1991), "Unlocking Learning" in Correctional Facilities. Washington, D.C. Department of Education.

Young people who leave detention and who do not reattach to schools face collateral risks: High school dropouts face higher unemployment, poorer health (and a shorter life), and earn substantially less than youth who do successfully return and complete school.[34] The failure of detained youth to return to school also affects public safety. The U.S. Department of Education reports that dropouts are 3.5 times more likely than high school graduates to be arrested.[35] The National Longitudinal Transition Study reveals that approximately 20 percent of all adolescents with disabilities had been arrested after being out of school for two years.[36]

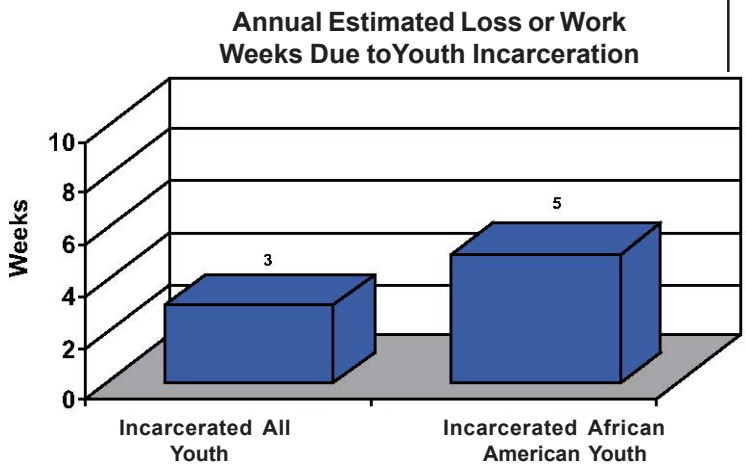
In one study, 43 percent of incarcerated youth receiving remedial education services did not return to school after release. Another 16 percent enrolled in school but dropped out after only 5 months.

The Impact of Detention on Employment

Formerly detained youth have reduced success in the labor market.

If detention disrupts educational attainment, it logically follows that detention will also impact the employment opportunities for youth as they spiral down a different direction from their non-detained peers. A growing number of studies show that incarcerating young people has significant immediate and long-term negative employment and economic outcomes.

A study done by academics with the National Bureau of Economic Research found that jailing youth (age 16-25) reduced work time over the next decade by 25-30 percent.[37] Looking at youth age 14 to 24, Princeton University researchers found that youth who spent some time incarcerated in a youth facility experienced three weeks less work a year (for African-American youth, five weeks less work a year) as compared to youth who had no history of incarceration.[38]



Source: Western, Bruce and Beckett, Katherine (1999), "How Unregulated Is the U.S. Labor Market?: The Penal System as a Labor Market Institution," The American Journal of Sociology, 104: 1030-1060.

"Having been in jail is the single most important deterrent to employment...the effect of incarceration on employment years later [is] substantial and significant," according to the National Bureau of Economic Research.

Due to the disruptions in their education, and the natural life processes that allow young people to "age-out" of crime, one researcher posits, "the process of incarceration could actually change an individual into a less stable employee."[39]

A monograph published by the National Bureau of Economic Research has shown that incarcerating large numbers of young people seems to have a negative effect on the economic well-being of their communities. Places that rely most heavily on incarceration reduce the employment opportunities in their communities compared to places that deal with crime by means other than incarceration. "Areas with the most rapidly rising rates of incarceration are areas in which youths, particularly African-American youths, have had the worst earnings and employment experience."[40]

The loss of potentially stable employees and workers—and of course, county, state, and federal taxpayers—is one of numerous invisible costs that the overuse of detention imposes on the country and on individual communities.

The Larger Economic Impact of Detention on Communities

Detention is expensive — more expensive than alternatives to detention.

The fiscal costs of incarcerating youth are a cause for concern in these budget-strained times. According to Earl Dunlap, head of the National Juvenile Detention Association, the annual average cost per year of a detention bed—depending on geography and cost of living—could range from $32,000 ($87 per day) to as high as $65,000 a year ($178 per day), with some big cities paying far more. Dunlap says that the cost of building, financing, and operating a single detention bed costs the public between $1.25 and $1.5 million over a twenty-year period of time.[41]

By contrast, a number of communities that have invested in alternatives to detention have documented the fiscal savings they achieve on a daily basis, in contrast to what they would spend per day on detaining a youth. In New York City (2001), one day in detention ($385) costs 15 times what it does to send a youth to a detention alternative ($25).[42] In Tarrant County, Texas (2004), it costs a community 3.5 times as much to detain a youth per day ($121) versus a detention alternative ($35), and even less for electronic monitoring ($3.75).[43]

Detention is not cost effective.

Whether compared to alternatives in the here and now, or put to rigorous economic efficiency models that account for the long-term costs of crime and incarceration overtime, juvenile detention is not a cost-effective way of promoting public safety, or meeting detained young people's needs.

The Washington State Institute for Public Policy (WSIPP), a non-partisan research institution that—at legislative direction—studies issues of importance to Washington State, was directed to study the cost effectiveness of the state's juvenile justice system. WSIPP found that there had been a 43 percent increase in juvenile justice spending during the 1990s, and that the main factor driving those expenditures was the confinement of juvenile offenders. While this increase in spending and juvenile incarceration was associated with a decrease in juvenile crime, WSIPP found, "the effect of detention on lower crime rates has decreased in recent years as the system expanded. The lesson: confinement works, but it is an expensive way to lower crime

Continued on page 12

"It is quite reasonable to suggest that a single detention bed costs the public between $1.25 and $1.5 million over a twenty-year period of time."

— Earl Dunlap, CEO,
National Juvenile Detention Association

Continued from page 11

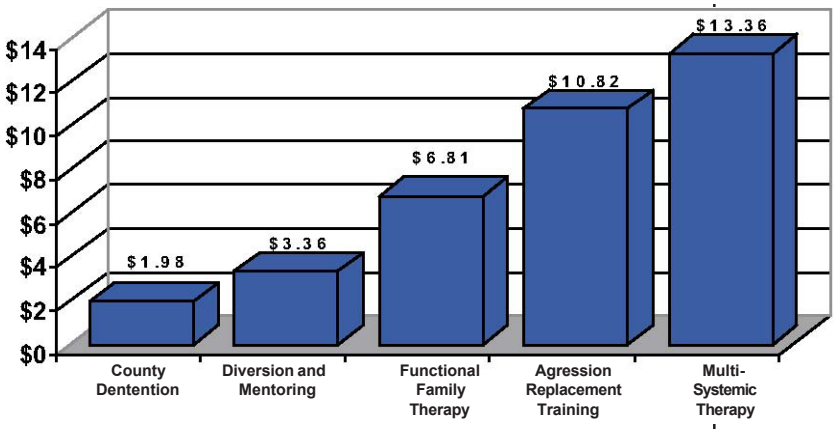
rates."[44] The legislature directed them to take the next step, and answer the question, "Are there less expensive ways to reduce juvenile crime?"

"The effect of detention on lower crime rates has decreased in recent years as the system expanded... it is an expensive way to lower crime rates."

—Washington State Institute for Public Policy

WSIPP found that, for every dollar spent on county juvenile detention systems, $1.98 of "benefits" in terms of reduced crime and costs of crime to taxpayers was achieved. By sharp contrast, diversion and mentoring programs produced $3.36 of benefits for every dollar spent, aggression replacement training produced $10 of benefits for every dollar spent, and multi-systemic therapy produced $13 of benefits for every dollar spent. Any inefficiencies in a juvenile justice system that concentrates juvenile justice spending on detention or confinement drains available funds away from interventions that may be more effective at reducing recidivism and promoting public safety.

Cost Effectiveness of Interventions per Dollar Spent



Source: Aos, S. (2002), The Juvenile Justice System in Washington State: Recommendations to Improve Cost-Effectiveness. Olympia, Washington: Washington State Institute for Public Policy.

Given the finding by the Journal of Qualitative Criminology that the cost of a youth offender's crimes and incarceration over their lifetime (including adult) can cost as much as $1.7 million,[45] a front-end investment in interventions proven to help young people would seem to be more effective public safety spending.

The rise of youth detention: policy or politics?

With falling youth crime rates, and a growing body of research that shows that alternatives are less expensive and more effective than detention, why do we continue to spend valuable resources building more locked facilities to detain low-risk youth?

Similar to the fate of the adult criminal justice system, the traditional mission of the juvenile justice system has been altered by the politicization of crime policy in this country.

At the turn of the century, when reformers developed the nation's first juvenile court in Chicago, Illinois, they set up a separate system for youth to meet the needs of adolescents, acknowledging that youth have different levels of culpability and capacity than adults. They also believed that youth deserved a second chance at rehabilitation. Within 30 years, every state in the nation had a juvenile court system based on the premise that young people were developmentally different than adults.

But the "tough-on-crime" concerns of the 1990s changed the priorities and orientation of the juvenile justice system. Rising warnings of youth "superpredators," "school shootings," and the amplification of serious episodes of juvenile crime in the biggest cities fueled political momentum to make the system "tougher" on kids. By the end of the 1990s, every state in the nation had changed their laws in some way to make it easier to incarcerate youth in the adult system. As many states made their juvenile justice systems more punitive, the courts made more zealous use of detention.

The rise of youth detention borne by youth of color.

The rapid expansion of the use of juvenile detention has hit some communities harder than others. From 1985 to 1995, the number of youth held in secure detention nationwide increased by 72 percent. But during this time, the proportion of white youth in detention actually dropped, while youth of color came to represent a majority of the young people detained. The detained white youth population increased by 21 percent, while the detained minority youth population grew by 76 percent. By 1997, in 30 out of 50 states (which contain 83 percent of the U.S. population) minority youth represented the majority of youth in detention.[46] Even in states with tiny ethnic and racial minority populations, (like Minnesota, where the general population is 90 percent white, and Pennsylvania, where the general population is 85 percent white) more than half of the detention population are youth of color. In 1997, OJJDP found that in every state in the country (with the exception of Vermont), the minority population of detained youth exceeded their proportion in the general population.[47]

The latest figures show that the shift in the demographics of detention that occurred during the 1980s and 1990s continues today: In 2003 African-American youth were detained at a rate 4.5 higher than whites; and Latino youth were detained at twice the rate of whites. Minority youth represented 61 percent of all youth detained in 2003.[48]

By the end of the 1990s, the system became more punitive, and every state in the nation had changed their laws in some way to make it easier to incarcerate youth in the adult system. An adult charge often means a young person must be held pre-trial in either a detention center or an adult jail.

The greatest levels of racial disparity in the use of detention are found in the least serious offense categories. For example, surveys from the late 1990s found that whites used and sold drugs at rates similar to other races and ethnicities, but that African Americans were detained for drug offenses at more than twice rate of whites.[49] White youth self-reported using heroin and cocaine at 6 times the rate of African-American youth, but African-American youth are almost three times as likely to be arrested for a drug crime.[50] On any given day, African Americans comprise nearly half of all youth in the United States detained for a drug offense.[51]

The causes of the disproportionate detention of youth of color are rooted in some of the nation's deepest social problems, many of which may play out in key decision-making points in the juvenile justice system.

While white youth and minority youth commit several categories of crime at the same rate, minority youth are more likely to be arrested. Once arrested, white youth tend to have access to better legal representation and programs and services than minority youth.

People involved in the decision to detain a youth may bring stereotypes to their decision. One study shows that people charged with the decision of holding youth prior to adjudication are more likely to say a white youth's crimes are

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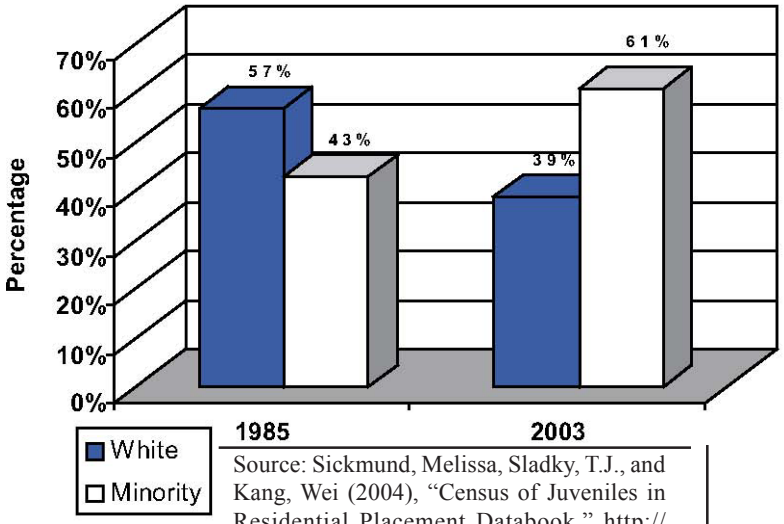
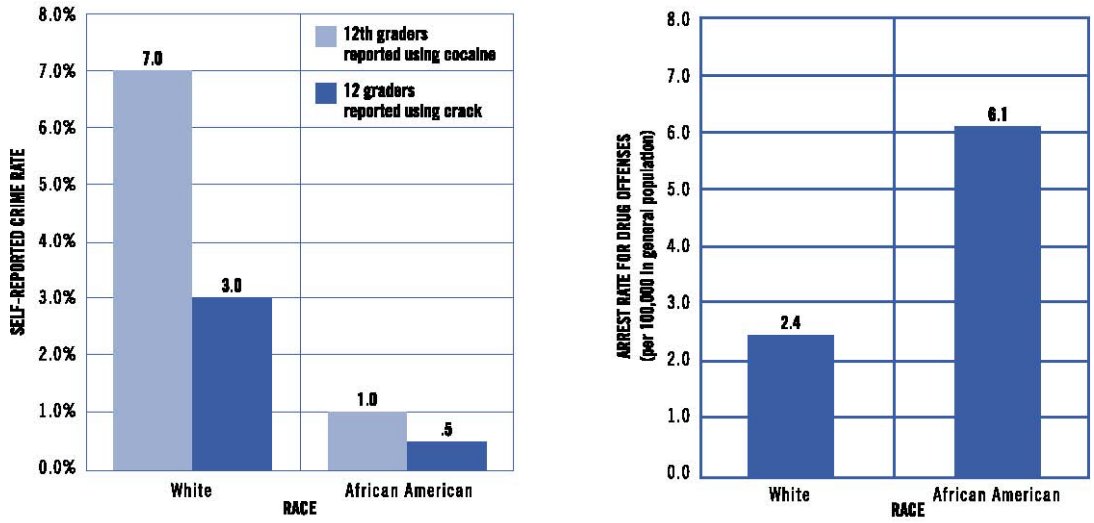
Disproportionate Minority Confinement Racial and Ethnic Proportions of the Juvenile Detention Population



Source: Sickmund, Melissa, Sladky, T.J., and Kang, Wei (2004), "Census of Juveniles in Residential Placement Databook," http://www.ojjdp.ncjrs.org/ojstatbb/cjrp/.

White Youth Report Using Drugs At 6 to 7 Times the Rate of African Americans, but African American Youth Are Arrested at Higher Rates Than Whites For Drug Crimes



Sources for both graphs: Yamagata, Eileen Poe and Michael A. Jones. *And Justice for Some: Differential Treatment of Minority Youth in the Justice System.* Washington, DC: Building Blocks for youth, April 2000; *U.S. Population Estimates by Age, Sex, Race, and Hispanic Origin: 1980-1999.* Population Estimates Program, Population Divisions, U.S. Census Bureau, 2000; *Monitoring the Future Report, 1975-1999*, Volume I. Washington, DC: National Institute on Drug Abuse, 2000.

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a product of their environment (*i.e.*, a broken home), while an African-American youth's delinquency is caused by personal failings—even when youth of different races are arrested for similar offenses and have similar offense histories.[52]

A Better Way: Juvenile Detention Reforms Taking Hold Across the Nation

The way to reduce the impact of detention on young people is to reduce the number of youth needlessly or inappropriately detained. The Juvenile Detention Alternatives Initiative (JDAI) is a response to the inappropriate and unnecessary detention of youth in the nation's juvenile justice systems. JDAI is a public-private partnership being implemented nationwide; pioneering jurisdictions include Santa Cruz County, California Multnomah County (Portland), Oregon; Bernalillo County (Albuquerque), New Mexico; and Cook County (Chicago), Illinois.

JDAI is a process, not a conventional program, whose goal is to make sure that locked detention is used only when necessary. In pursuing that goal, JDAI restructures the surrounding systems to create improvements that reach far beyond detention alone.

To achieve reductions in detention populations, the JDAI model developed a series of core strategies, which include:

- Inter-governmental collaboration: bringing together the key actors in the juvenile justice system—especially courts, probation, and the police—as well as actors outside the justice system such as schools and mental health.
- Reliance on data: beginning with data collection and leading to continuous analysis of data as well as the cultural expectation that decisions will be based on information and results.
- Objective admissions screening: developing risk assessment instruments and changing procedures so they are always used to guide detention decisions.
- Alternatives to secure confinement: creating programs and services in the community to ensure appearance and good behavior pending disposition, and to be available as an option at sentencing.

The way to reduce the impact of detention is to reduce the number of youth needlessly or inappropriately detained.

While white youth and minority youth commit several categories of crime at the same rate, minority youth are more likely to be arrested.

- Expedited case processing: to move cases along so youth don't languish in detention for unnecessarily long time periods.
- Improved handling of "special cases": Youth who are detained for technical probation violations, outstanding warrants, and youth pending services or placement create special management problems and need special approaches.
- Express strategies to reduce racial disparities: "good government" reforms alone do not eliminate disparities; specific attention is needed to achieve this goal.
- Improving conditions of confinement: to ensure that the smaller number of youth who still require secure detention are treated safely, legally, and humanely.

The fundamental measure of JDAI's success is straightforward: a reduction in the number of youth confined on any day and admitted to detention over the course of a year, and a reduction in the number of young people exposed to the dangers inherent in a detention stay.

Decreasing the use of detention has not jeopardized public safety. In the counties implementing JDAI, juvenile crime rates fell as much as, or more than, national decreases in juvenile crime. These communities have also experienced an improvement in the number of young people who appear in court after they have been released from detention, further reducing the need for detention.

Like the impact of detention—which can extend beyond the walls of the locked facility—reducing detention populations influences the entire juvenile justice system. In Cook County, the number of youth sent from local detention to state prison beds declined from 902 in 1997 to 498 in 2003, at average annual savings of $23,000 per bed.[53] In addition, more kids who rotated through the juvenile justice system re-enrolled in school and obtained scholarships for college.

Cities and counties engaged in detention reform also note their progress by their acceptance in the community. Cook County engaged system kids and their parents for advice about how to improve the system, and persevered (and supported the staff) through some daunting complaints. In the aftermath, the probation department adjusted its office hours and locations, changed the way it communicated with clients and their families, and institutionalized feedback mechanisms. Now community members are genuinely engaged in decisions including policy formulation, program development, and even hiring. It is not a formal measure, but it leads to improved services and priceless levels of respect and engagement in the community.

Detention Reform Decreases Detention Populations: Admissions Impact of JDAI on Select Sites.				
County	Average Daily Population		Annual Admissions	
	Pre-JDAI	2003	Pre-JDAI	2003
Cook	623	454 (-27.1%)	7,438	6,396(-14.0%)
Multnomah	96	33 (-65.6%)	2,915	348 (-88.1%)
Santa Cruz	47	27 (-42.6%)	1,591	972 (-38.9%)
Source: Cook County, Multnomah, and Santa Cruz Probation Departments.				

A better future: invest juvenile justice funds in programs proven to work.

If detention reform is successful, communities should be able to reinvest the funds once spent on detention beds and new detention centers in other youth-serving systems, or other interventions proven to reduce recidivism.

Detention Reform Coincides with Crime Declines,and Failure to Appear Rates Fall.			
County	Violent Juvenile Arrest Rate	Failure to Appear	
	(1996-2002)	Pre-JDAI	2003
Cook	-54%	39%	13%(-66.7%)
Multnomah	-45%	7%	7%
Santa Cruz	-38%	N/A	3%
United States Average	-37%		
Source: Uniform Crime Report, Crime in the United States Survey (1996; 2002); Cook County, Multnomah and Santa Cruz Probation Departments			

The Center for the Study and Prevention of Violence, the Office of Juvenile Justice and Delinquency Prevention, the Washington State Institute for Public Policy, and a plethora of other research institutes have shown that several programs and initiatives are proven to reduce recidivism and crime in a cost-effective matter. Some common elements in proven programs include:

- Treatment occurs with their family, or in a family-like setting
- Treatment occurs at home, or close to home
- Services are delivered in a culturally respectful and competent manner
- Treatment is built around the youth and family strengths
- A wide range of services and resources are delivered to the youth, as well as their families.

Most of these successful programs are designed to serve the needs of youth in family-like settings, situated as close to home as possible with services delivered in a culturally sensitive and competent manner. These proven programs identify the various aspects of a youth—their strengths and weaknesses as well as the strengths and resources of their families and communities. Progress is based on realistic outcomes and carefully matches the particular needs of the youth and family to the appropriate intervention strategy.

For online information and assistance on detention reform, visit: www.jdaihelpdesk.org

To learn more about the work and research of the Justice Policy Institute, visit: www.justicepolicy.org.

Authors

Barry Holman is a criminal justice researcher and author. He is the Senior Associate of Research and Quality Assurance for the Department of Youth Rehabilitation Services of Washington, D.C. and the former Director of Research and Public Policy for the National Center on Institutions and Alternatives. He authored forthcoming Annie E. Casey Foundation, Doing Deadtime: An Assessment of Detained Youth Awaiting Placement, the Process that Keeps Them Waiting and Findings from an Alternative Placement Project.

Jason Ziedenberg is the Executive Director of the Justice Policy Institute, a Washington, D.C. based public policy organization dedicated to ending society's reliance on incarceration by promoting effective and just solutions to social problems. He is author of the Annie E. Casey foundation publication Pathway's 8: Reducing Racial Disparity in Detention.

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Endnotes

i This policy brief brings together the best existing literature on the efficacy and impact of detention, and also examines the reported outcomes of incarcerating juveniles in secure, congregate detention facilities in order to provide practitioners and policymakers with a deeper understanding of "the dangers" of overusing detention. Some of the findings reported here are the result of research conducted on youth and young adults in facilities or programs outside of juvenile detention facilities. The implications and conclusion drawn from research outside of detention centers proper is worthy of consideration: detention is usually the first form of congregate institutional confinement that youth falling under the authority of juvenile justice agencies will experience, and like residential or adult correctional or pretrial institutions, it is reasonable to infer that the impact of other kinds of incarceration and secure, congregate facilities do apply to the detention experiences. Every attempt has been made to accurately portray the population that the cited authors were studying, and the environment in which the study was conducted—generally, we referred to "detention" when the youth were detained, and "incarceration" when they were somewhere else.

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8. Sickmund, M., Sladky, T.J., and Kang, W. (2004), "Census of Juveniles in Residential Placement Databook" http://www.ojjdp.ncjrs.org/ojstatbb/cjrp/. In regards to the estimate of the number of youth moving through detention each year, the most recent data available from surveys administered by the National Council on Juvenile Justice (NCJJ) estimate that 350,000 youth were detained in 1999 (OJJDP, 2001b). This gure, however, does not include youth detained while they are awaiting a court-ordered out-of-home placement. Further, according to Dr. Barry Krisberg, "The NCJJ data covers court hearings for detention—many youths come into detention via law enforcement agencies, schools, parents, social service agencies etc, and are released before a court hearing is held—this might also include probation and parole violators in some jurisdictions." Personal correspondence (2003).

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23. Using research from the mid-1980s, the Coalition for Juvenile Justice, two-thirds of the detention centers in the country were crowded. Using research from this data—and after a massive expansion of the detention system—the Ofce of Juvenile Justice and Delinquency Prevention reports that 32 percent of detention centers are crowded, measured by being at or over standard bed capacity. Unlocking the Future: Detention Reform in the Juvenile Justice System. (2003) Washington, DC: Coalition for Juvenile Justice. Synder, Howard N., and Sickmund, Melissa. (2006), Juvenile Offenders and Victims 2006 National Report. Washington, DC: U.S. Department of Justice, Ofce of Justice Programs, Ofce of Juvenile Justice and Delinquency Prevention.
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28. There is a debate within the juvenile justice research community surrounding the true suicide rate in juvenile institutions, and how that compares to youth in the community at large. One researcher posits that the suicide rate is no higher in juvenile institutions than what is the rate in the community at large, while another has recently found that it is at least double what is about the same as the rate in the community at large. The reason for the difference reects a debate among researchers as to how you calculate rates in a correctional population that "turns over" frequently. Others question whether the number of suicides being accounted in more recent studies accurately reects the true number of suicides in juvenile institutions (Hayes, Personal Communications; 2006). It beyond the scope of this paper to answer which method yields a more accurate reection of true youth risk of "successful" suicidal behavior—something resulting in a young person's death, rather than the kind of self-harm behaviors young people engage in when in custody. As the researcher who nds no difference in "free-world" and juvenile custody suicide rates notes, "any suicide in custody is unacceptable. Its circumstances should be investigated and practice adjusted when possible." Synder, Howard (2005), "Is Suicide More Common Inside Or Outside of Juvenile Facilities," Corrections Today; Gallagher, Catherine A. and Dobrin, Adam. "The Comparative Risk of Suicide in Juvenile Facilities and the General Population: The Problem of Rate Calculations in High Turnover Institutions." (forthcoming). Criminal Justice and Behavior.
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The report can be found online at:
http://www.justicepolicy.org/reports_jl/11-28-06_dangers/dangers_of_detention_report.pdf ■

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Practice Advisory: Criminal Defense of Immigrants in State Drug Cases — The Impact of *Lopez v. Gonzales*

By Manuel D. Vargas and Marianne C. Yang
New York State Defenders Association Immigrant Defense Project

This advisory is IDP's third in a series of practice advisories on the impact of the Supreme Court's decision in *Lopez v. Gonzales* (No. 05-547) (Dec. 5, 2006). The Court's decision answers an important question for criminal lawyers representing immigrants: What state drug offenses are "aggravated felonies" and thereby trigger mandatory deportation without the possibility of a waiver?

What the Supreme Court Decided in *Lopez*

The Supreme Court held that the federal government may not apply the aggravated felony label to state felony drug possession offenses that would be misdemeanors under federal law. This means that **state first-time drug simple possession offenses**—except for possession of more than five grams of crack cocaine and possession of flunitrazepam—are **NOT aggravated felonies**, even if classified as a felony by the state. Thus, while noncitizen clients convicted of such offenses will generally still face regular drug offense deportability or inadmissibility, some may be eligible to seek discretionary relief from removal in later immigration proceedings, *e.g.*, cancellation of removal, asylum or naturalization.

What *Lopez* means for state criminal defense practice

1. Conviction of, or mere guilty plea to, **virtually *any* drug offense still generally triggers deportability and/or inadmissibility.** In fact, for some noncitizen clients, a drug possession conviction or plea may result in removal without any possibility of a waiver.
2. *Lopez*, however, makes clear that **most first-time drug *possession* offenses will not trigger the more certain mandatory deportation consequences** attached to the "aggravated felony" label.
3. **Whether a second possession offense may be deemed an aggravated felony remains uncertain** and may depend on the law of the federal circuit in which your client's removal case later arises.
4. Conviction of any drug sale, possession with intent to sell, or other offense akin to a federal felony "*trafficking*" offense continues to trigger aggravated felony mandatory deportation consequences.

Background; More on *Lopez*

Pre-*Lopez* case law conflict. Before *Lopez*, the Board of Immigration Appeals (BIA) had reversed position and federal courts had been split on what state drug offenses constitute a "drug trafficking" aggravated felony for immigration purposes.

The immigration statute defines "aggravated felony" to include "illicit trafficking in a controlled substance . . ., including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." *See* INA 101(a)(43)(B). The BIA had initially interpreted INA 101(a)(43)(B) and 18 U.S.C. 924(c) to hold that a state drug offense qualifies as an aggravated felony only if either (1) it is a felony under state law and has a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered "illicit trafficking" as commonly defined or (2) regardless of state classification as a felony or misdemeanor, it is analogous to a felony under the federal Controlled Substances Act (the so-called **federal felony approach**). *Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995), *reaffirmed by Matter of K-V-D-*, 22 I&N Dec. 1163 (BIA 1999).

In general, the federal Controlled Substances Act punishes, as felonies, drug manufacture or distribution offenses (including possession with intent to distribute), but simple possession drug offenses are generally misdemeanors. *See* 21 U.S.C. 801 et seq. and 21 U.S.C. 844 (penalizing possession offenses as misdemeanors unless the prosecution has charged and proven a prior final drug conviction, or possession of more than five grams of cocaine base or any amount of flunitrazepam).

Before and after *Matter of L-G-*, however, several federal circuit courts concluded, in the context of the prior aggravated felony sentence enhancement for the federal crime of illegal reentry after removal, that a state simple possession drug offense is an aggravated felony if it is classified as a felony under state law, even if it is not punishable as a felony under federal law (the so-called **state felony approach**). *See U.S. v. Restrepo-Aguilar*, 74 F.3d 361 (1st Cir. 1996); *U.S. v. Polanco*, 29 F.3d 35 (2d Cir. 1994); *U.S. v. Wilson*, 316 F.3d 506 (4th Cir. 2003); *U.S. v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 2001); *U.S. v. Briones-Mata*, 116 F.3d 308 (8th Cir. 1997); *U.S.*

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v. Ibarra-Galindo, 206 F.3d 1337 (9th Cir. 2000); *U.S. v. Cabrera-Sosa*, 81 F.3d 998 (10th Cir. 1996); *U.S. v. Simon*, 168 F.3d 1271 (11th Cir. 1999).

In 2002, in response to the trend in sentencing cases, the BIA, in *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002), reversed course and adopted the reasoning of the federal courts in the sentencing context and found that a state simple possession drug offense is an aggravated felony for immigration purposes if it is classified as a felony under state law, unless the case arises in a federal circuit with a contrary rule.

After *Matter of Yanez-Garcia*, conflict in the case law only increased. Some federal circuit courts applied the state felony approach in both the immigration and sentencing contexts, *see, e.g.,* the lower court decision in the case before the Supreme Court—*Lopez v. Gonzales*, 413 F.3d 934 (8th Cir. 2005). At the same time, several other\courts lined up in support of the federal felony approach, at least in the immigration context. *See, e.g., Gerbier v. Holmes,* 280 F.3d 297 (3d Cir. 2002)(immigration context), *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004)(immigration context), *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005)(sentencing context, but applicable also in the immigration context), and *Gonzales-Gomez v. Achim*, 441 F.3d 532 (7th Cir. 2006)(immigration context). Two Circuits – the Second and Ninth — adopted different rules for sentencing and immigration cases. *Compare U.S. v. Pornes-Garcia*, 171 F.3d 142 (2d Cir. 1999) and *U.S. v. Ibarra-Galindo, supra* (sentencing cases following state felony approach), *with Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996) and *Cazarez-Gutierrez v. Ashcroft, supra* (immigration cases following federal felony approach). Yet other courts went so far as to find or suggest that a state drug offense is an aggravated felony if it is a felony under either state or federal law (the so-called "**either or" approach**). *See, e.g., Amaral v. INS*, 977 F.2d 33 (1st Cir. 1992)(immigration context); *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002)(sentencing context); *U.S. v. Sanchez-Villalobos*, 413 F.3d 575 (5th Cir. 2005)(sentencing context, but Fifth Circuit followed same rule in immigration and sentencing contexts).

***Lopez* resolves case law conflict**. With *Lopez*, the Supreme Court resolved this conflict, ruling in favor of the federal felony approach to interpreting the meaning of the 18 U.S.C. 924(c) "drug trafficking crime" term referenced in the aggravated felony definition. Thus, the government may no longer deem a state felony possession offense to be an aggravated felony unless it would be a felony under federal law.

The Court relied in part on the ordinary meaning of "trafficking," noting that "[t]he everyday understanding of 'trafficking' should count for a lot here, for the statutes in play do not define the term . . . ." *Lopez*, slip op. at 5. Noting that "ordinarily 'trafficking' means some sort of commercial dealing," it stated that reading 924(c) the government's way would nevertheless turn simple possession into trafficking, "just what the English language tells us not to expect." *Lopez* at 3. Although there are exceptions, the Court found that typically federal law treats non-trafficking offenses as misdemeanors, and therefore such offenses generally should not be deemed "drug trafficking crimes" in the absence of express Congressional command. The "inclusion of a few possession offenses in the definition of 'illicit trafficking' does not call for reading the statute to cover others for which there is no clear statutory command to override ordinary meaning." *Lopez* at n.6. Moreover, the Court made clear that it did not matter what quantity of the controlled substance was possessed, since federal law punishes virtually all simple possession offenses as misdemeanors without, in general, designating such offenses as felonies based on the quantity involved. *See Lopez* at 11-12.

The only exceptions to the general rule that simple possession offenses are misdemeanors under federal law, the Court noted, are offenses involving possession of two specific controlled substances—crack cocaine and flunitrazepam—as well as "recidivist possession," citing 21 U.S.C. 844(a) (providing sentence enhancements for possession of more than five grams of cocaine base, known as "crack cocaine," possession of any amount of flunitrazepam, and possession of a controlled substance after a prior drug conviction has become final). *See Lopez* at n.4 & n.6. The Court indicated that state counterparts may be deemed aggravated felonies if the state offense "corresponds" to the analogous federal offense. *See Lopez* at n. 6.

What *Lopez* Means For State Criminal Defense Practice

We distill the import of *Lopez* for state criminal defenders into the following four general principles:

1. Conviction of, or mere guilty plea to, virtually *any* drug offense still generally triggers deportability and/or inadmissibility, even if later vacated or expunged based on rehabilitation or participation in drug treatment. In fact, for some noncitizen clients, a drug possession conviction or plea may result in removal without any possibility of a waiver. If your noncitizen client is convicted of virtually any drug offense relating to a controlled substance, he or she will become removable despite the Supreme Court decision in *Lopez*. Your client's conviction will trigger regular controlled substance offense deportability for lawfully admitted immigrants,[1] or inadmissibility for others who now or in the future may be seeking lawful admission.[2] The only exception is for deportability purposes and applies only to lawfully admitted immigrants convicted of a single offense involving possession for one's own use of thirty grams or less of marijuana.[3]

Even a drug conviction later expunged via a rehabilitative statute—or even a mere guilty plea to a drug offense later vacated, *e.g.*, due to successful completion of a drug treatment program—may be sufficient for your client to be deemed convicted for immigration purposes and rendered removable (unless the disposition involves a first-time possession offense and the removal case later arises in the Ninth Circuit).[4]

Moreover, if your client is a lawful permanent resident immigrant ("green card" holder) who was admitted to the United States less than seven years before the alleged commission of the drug offense, conviction or plea to a drug offense may trigger *mandatory deportation*.[5] And, if your client is a noncitizen who does not have lawful permanent resident status, conviction or plea to virtually any drug offense will trigger *inadmissibility without a waiver* if the client is now applying, or in the future plans to apply, for permanent resident status.[6]

2. *Lopez*, however, dictates that most first-time drug *possession* convictions will no longer trigger the more certain mandatory deportation consequences attached to the "aggravated felony" label. Your client convicted of a first-time possession offense – even if deemed a felony under state law – will no longer be deemed convicted of an aggravated felony. The only exceptions would be if your client was convicted of possession of more than five grams of crack cocaine or any amount of flunitrazepam since such offenses would be felonies under federal law.[7]

This is important: If your client is convicted of a first-time drug possession offense, he or she may avoid the statutory aggravated felony bars for eligibility for removal relief such as cancellation of removal for certain lawful permanent residents,[8] asylum,[9] withholding of removal,[10] and termination of removal proceedings in order to pursue naturalization.[11] Whether your client may be able to obtain such relief will depend on whether he or she is otherwise eligible and the strength of the claim.

For example, if your client is a lawful permanent resident and is convicted of a drug offense that triggers removability but is not an aggravated felony, your client may later be eligible for the relief of cancellation of removal as long as s/he has resided continuously in the United States for at least seven years prior to commission of the offense.[12] To be granted such relief, your client will have to show favorable factors such as family ties within the United States, residency of long duration in the country, evidence of hardship to the individual and family if deportation were to occur, service in the armed forces, history of employment, existence of property or business ties, existence of value and service to the community, proof of genuine rehabilitation, and evidence attesting to good moral character.[13] It is estimated that about one-half of applicants whose applications for the similar "212(c) waiver" cancellation predecessor form of relief were decided between 1989 and 1995 were granted such relief.[14]

Finally, it should be noted that avoiding the aggravated felony label also avoids other negative immigration consequences under the immigration laws, such as the stiff sentence enhancements that exist for the federal crime of illegal reentry after deportation subsequent to an aggravated felony conviction.[15]

3. Whether a conviction of a second possession offense may be deemed an aggravated felony remains uncertain, and may depend on the law of the federal court circuit in which your client's removal case later arises. The only drug offense plea that is currently safe from aggravated felony consequences is a first-time possession offense. If preceded by a prior drug conviction, even a misdemeanor possession offense might be deemed an aggravated felony. This is because the government may continue to argue, as it has in the past, that under the federal felony approach adopted by the Supreme Court in *Lopez*, a misdemeanor possession offense preceded by a prior drug conviction must be deemed an aggravated felony because of the authority under federal law to penalize a second or subsequent possession conviction as a felony.[16] Some federal circuits have adopted this position.[17] However, other circuits have applied the federal felony approach to find that the later conviction does not correspond to a federal "recidivism possession" 21 U.S.C. 844(a) felony offense if the state conviction did not involve notice and proof of the prior conviction as required for a federal possession recidivism conviction under 21 U.S.C. 851.[18] In addition, even if a circuit has stated that a second or subsequent possession offense may be deemed an aggravated felony, it may not so find if the prior conviction was not yet final at the time of commission of the later offense. This is because a second or subsequent state drug possession conviction is subject to an 844(a) recidivism sentence enhancement only if the prior conviction was final at the time of commission of the later offense.[19] It should be noted that the Ninth Circuit Court of Appeals has ruled that a second or subsequent state drug possession conviction should not be treated as punishable by more than one year's imprisonment and therefore a "felony" punishable under the Controlled Substances Act by virtue of a recidivist sentence enhancement;[20] however, be aware that the *Lopez* decision contains language characterizing federal convictions of misdemeanor possession offenses with a recidivist enhancement to a potential sentence in excess of one year as "felonies" falling within the 18 U.S.C. 924(c)(2) "drug trafficking crime" definition. *See Lopez* at n.6.

4. Conviction of any drug sale, possession with intent to sell, or other offense akin to a federal "trafficking" offense continues to trigger aggravated felony mandatory deportation consequences. Any state drug offense that corresponds to a federal felony drug offense listed at 18 U.S.C. 841 *et seq*. — generally true trafficking-type offenses such as drug distribution or intent to distribute offenses —

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is an aggravated felony. However, conviction of a state offense that covers conduct that may not be a federal felony (*e.g.*, possession, transfer of marijuana without remuneration, or maybe offer to sell – see practice tips below), as well as conduct that would be a federal felony, may not necessarily be deemed an aggravated felony unless the federal government is able to establish, through the state record of conviction, that your client was convicted of that portion of the statute relating to the covered conduct that would be a federal felony.

Practice Tips

In light of *Lopez*, state criminal defense practitioners representing noncitizen clients facing state drug charges may wish to consider the following tips:

♦ **Avoid drug conviction or plea, if possible.** As explained above, virtually any drug offense – other than a single offense involving possession for one's own use of thirty grams or less of marijuana — triggers controlled substance deportability for a lawfully admitted noncitizen client. Moreover, any drug offense triggers inadmissibility for a noncitizen client who is not yet lawfully admitted. Therefore, if possible, you should avoid conviction of a drug offense for a noncitizen client. This includes a guilty plea to a drug offense combined with some penalty or restraint ordered by a court (*e.g.*, court-ordered commitment to a drug treatment program) since such a disposition may be deemed a conviction for immigration purposes even if the plea is later vacated. *See, supra,* note 4. If possible, when there is a possibility of placement in a drug treatment or other alternative-to-incarceration program, try to negotiate a disposition that does not involve an up-front guilty plea to a drug offense.

♦ **If this is your client's first drug offense charge, plead to possession rather than sale.** As discussed above, *Lopez* makes clear that any first-time drug possession offense – although it will still trigger removability — may not be deemed an aggravated felony triggering mandatory removal of a lawful permanent resident immigrant. Thus, if your permanent resident client will plead guilty, you should negotiate a plea to a simple possession offense rather than a sale or possession with intent-to-sell or other trafficking-type offense in order to preserve the possibility of relief from removal. Moreover, since the Court made clear that it did not matter what quantity of the controlled substance was possessed as long as the possession offense does not contain a distribution, intent to distribute, or other federal "trafficking" element, your client may in some states be able to offer a plea to a simple possession offense that is of a comparable or even higher level than the "trafficking" offense charged. Even if your client is not a permanent resident, avoiding the aggravated felony label may enable your client to apply for asylum if otherwise eligible or, if your client is deported, may avoid the stiff federal prior aggravated felony sentence enhancement if your client is charged and convicted in the future of the crime of illegal reentry after deportation.

♦ **If your client has a prior drug conviction(s), file an appeal of the prior conviction(s), or seek leave to appeal the prior conviction(s), if possible.** *Lopez* leaves open the question of whether a second state drug possession conviction may be deemed an aggravated felony. However, a second state possession offense should not be deemed to correspond to a federal 21 U.S.C. 844(a) recidivism possession offense if the prior conviction was not final at the time of commission of the later offense. Thus, if your client is still within the time to file an appeal of the prior conviction as of right, you might advise your client that he or she may avoid aggravated felony consequences for the current case if he or she appeals the prior conviction. If the time for an appeal of right has passed but there is still time to seek discretionary leave to appeal the prior conviction, you might advise your client to seek such leave. *See Smith v. Gonzales*, 468 F.3d 272 (5th Cir. 2006)(later offense committed while individual still within the time to seek leave to appeal the prior conviction).

♦ **If your client has a prior drug conviction(s), avoid plea to offense that involves charge and proof of the prior conviction(s).** As discussed above, a second state drug possession conviction might be deemed not to correspond to a federal 21 U.S.C. 844(a) recidivism possession offense if the conviction does not include charging and proof of the prior drug conviction. Thus, if your state has separate offenses for those convicted of possession depending on whether the prosecution chooses to charge and prove a prior conviction of a drug offense, you should seek to avoid the offense involving proof of the prior conviction. This strategy should work in particular if your client's later removal case is likely to fall within the jurisdiction of the U.S. Courts of Appeals for the First Circuit (Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island) or the Third Circuit (Delaware, New Jersey, Pennsylvania, Virgin Islands). *See Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006); *Steele v. Blackman,* 236 F.3d 130 (3d Cir. 2001). Be aware, however, that this strategy may not work if your client's later removal case falls within the jurisdiction of the Second Circuit (Connecticut, New York, Vermont) or the Fifth Circuit (Canal Zone, Louisiana, Mississippi, Texas). *See U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002); *U.S. v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005).

♦ **If possible, plead to a preparatory or accessory-after-the-fact offense.** For removal cases arising in the Ninth Circuit, a state conviction of a free-standing preparatory or accessory offense such as solicitation, even if the underlying offense is a drug offense, should not be deemed an aggravated felony. *See Levya-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999). Therefore, if your noncitizen client is charged with a drug

offense, you might offer an alternate plea to such a preparatory or accessory offense. At present, this strategy may work only if your client's later removal case falls within the jurisdiction of the Ninth Circuit (Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington); however, even for clients whose cases will probably not fall within Ninth Circuit jurisdiction, such a disposition may offer your client an argument to avoid removal or mandatory removal.

♦ **If your client will plead guilty to a state drug offense that covers conduct that would be an aggravated felony but also conduct that would not, keep out of the record of conviction any information that would help establish that the conduct is an aggravated felony.** Under immigration case law, an offense that covers some conduct that is an aggravated felony and some that is not may not categorically be determined to be an aggravated felony. For example, the Third Circuit has found that a state marijuana "sale" offense that might cover transfer of a small amount of marijuana for no compensation should not categorically be considered a "drug trafficking crime" or an "illicit trafficking" aggravated felony since such a transfer would be treated as a misdemeanor under federal law. *See* 21 U.S.C. 841(b)(4) ("distributing a small amount of marijuana for no remuneration" treated as simple possession misdemeanor under 21 U.S.C. 844); *Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2004); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001). Similarly, the Ninth Circuit has found that a state drug offense that includes "offers" to transport, import, sell, furnish, administer, or give away marijuana thus includes solicitation conduct and, therefore, could not categorically be determined to be an aggravated felony. *See U.S. v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001). However, be aware that the immigration authorities may look to the record of conviction to determine whether your client was convicted of that portion of the statute relating to conduct that would be an aggravated felony. Therefore you may help your noncitizen client avoid removal if you either make sure the record of conviction establishes conduct that would not be considered an aggravated felony, or keep out of the record of conviction any information that would help the federal government establish conduct that would be an aggravated felony.

♦ **If your client will plead guilty to a state drug offense whose elements do not establish the controlled substance involved, keep out of the record of conviction any information that would help establish that the substance involved is one listed in the federal controlled substance schedules.** The aggravated felony definition at INA 101(a)(43)(B) covers only drug offenses that relate to a substance included in the federal definition of "controlled substance" in section 102 of the Controlled Substances Act (referencing federal controlled substance schedules published at 21 U.S.C. 812). However, many states define "controlled substance" to include some substances that do not appear in the federal controlled substance schedules. Therefore, if you are able to avoid the record of conviction in your client's state criminal case establishing the particular controlled substance involved, this may offer your client an argument in later immigration proceedings that his or her particular offense is not necessarily an aggravated felony.

♦ **If your client will plead guilty based on an understanding that the plea will not trigger removal, or at least mandatory removal, advise your client to allocute to his or her understanding.** You might advise your client to include such a statement of his or her understanding in the plea allocution in order to provide some basis for a later withdrawal of the plea should this understanding be upset by later legal developments.

Contact Us

For the latest legal developments or litigation support on any of the issues discussed in this advisory, contact IDP's Benita Jain at (718) 858-9658 ext. 231 or Manny Vargas at (718) 858-9658 ext. 208, or for support on issues involving drug possible alternative-to-incarceration (ATI) disposition cases, contact IDP's Alina Das at (718) 858-9658 ext. 203. They may also be contacted by email at bjain@nysda.org, mvargas@nysda.org and adas@nysda.org.

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Endnotes:

1. *See* INA 237(a)(2)(B)(i), 8 U.S.C. 1227(a)(2)(B)(i).
2. *See* INA 212(a)(2)(A)(i)(II), 8 U.S.C. 1182(a)(2)(A)(i)(II).
3. *See* INA 237(a)(2)(B)(i), 8 U.S.C. 1227(a)(2)(B)(i).
4. *See* INA 101(a)(48)(A), 8 U.S.C. 1101(a)(48)(A)(guilty plea combined with some penalty or restraint ordered by a court sufficient to be deemed conviction for immigration purposes); *see also Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999) (giving no effect to vacatur of drug guilty plea under Idaho withholding of adjudication statute); *but see Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that first-time drug possession offense expunged under state law is not a conviction by analogy to the Federal First Offender Act).
5. The relief of cancellation of removal for lawful permanent resident immigrants is barred not only if the individual is convicted of an aggravated felony, but also if the individual commits any drug offense before the person has continuously resided in the United States for seven years. *See* INA 240A(a) & (d), 8 U.S.C. 1229b(a) & (d).
6. The waiver of inadmissibility available for persons seeking lawful permanent resident status who have been convicted of, or who have admitted, crimes is not available for any drug offense other than a single offense of simple possession

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of 30 grams or less of marijuana. *See* INA 212(h), 8 U.S.C. 1182(h).
7. *See* 21 U.S.C. 844(a).
8. Barred by aggravated felony—*see* INA 240A(a)(3)).
9. 2Barred by aggravated felony—*see* INA 208(b)(2)(B)(i)).
10. Barred by aggravated felony or felonies for which the person has been sentenced to an aggregate term of imprisonment of at least 5 years—*see* INA 241(b)(3)(B)).
11. Barred by post-November 29, 1990 aggravated felony—*see* INA 101(f).
12. *See* INA 240A(a) & (d), 8 U.S.C. 1229b(a) & (d).
13. *See Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998).
14. *See INS v. St. Cyr,* 533 U.S. 289 at 296, n.5 (2001).
15. *See* INA 276(b)(2), 8 U.S.C. 1326(b)(2).
16. *See* 21 U.S.C. 844(a) (subjecting individuals convicted of possession of a controlled substance after a prior drug conviction has become final to a maximum sentence in excess of one year).
17. *See U.S. v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005)(finding second misdemeanor possession offense constituted an aggravated felony); *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002)(finding second misdemeanor possession offense to be an aggravated felony in illegal reentry sentencing context but declining to comment on whether such offense would be an aggravated felony in the immigration context).
18. *See Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006) ("Because Berhe's 1996 conviction is not a part of the record of the 2003 conviction, the government did not establish that Berhe was convicted of a hypothetical federal felony"); *Steele v. Blackman,* 236 F.3d 130 (3d Cir. 2001).
19. *See* 21 U.S.C. 844(a)(providing for sentence enhancement based on a prior conviction only if the offense at issue is committed after such prior conviction "has become final"); *see also U.S. v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005)(later offense committed while prior drug case still pending in criminal court); *Smith v. Gonzales*, 468 F.3d 272 (5th Cir. 2006)(later offense committed while individual still within time to seek leave to appeal prior conviction).
20. *See Oliveira-Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004).

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The Defending Immigrants Partnership

Mission

For a noncitizen facing criminal charges today, the right to defense counsel who understands the immigration consequences of criminal dispositions may be all that stands between continued permanent, temporary or potential residence as a member of our community and the other side of the border. The Defending Immigrants Partnership, a joint initiative comprised of the National Legal Aid and Defender Association (NLADA), the New York State Defenders Association's Immigrant Defense Project, the Immigrant Legal Resource Center (ILRC), and the National Immigration Project, represents an unprecedented collaboration among the foremost immigration advocacy and defense organizations with expertise in the immigration consequences of crime and the one national legal organization devoted exclusively to ensuring high-quality legal representation for indigent clients in criminal and civil matters. Since its inception in October 2002, the Partnership has coordinated on a national level the necessary collaboration between public defense counsel and immigration law experts to ensure that indigent noncitizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions. To that end, the Partnership offers defender programs and individual defense counsel critical resources and training about the immigration consequences of crimes, actively encourages and supports development of in-house immigration specialists in defender programs, forges connections between local criminal defenders and immigration advocates, and provides defenders technical assistance in criminal cases

http://www.nlada.org/Defender/Defender_Immigrants

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Practice Tips & Alerts ~ Current "best practices" suggestions & law change alerts
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PAROLE ELIGIBILITY: 2003-2006 UPDATE

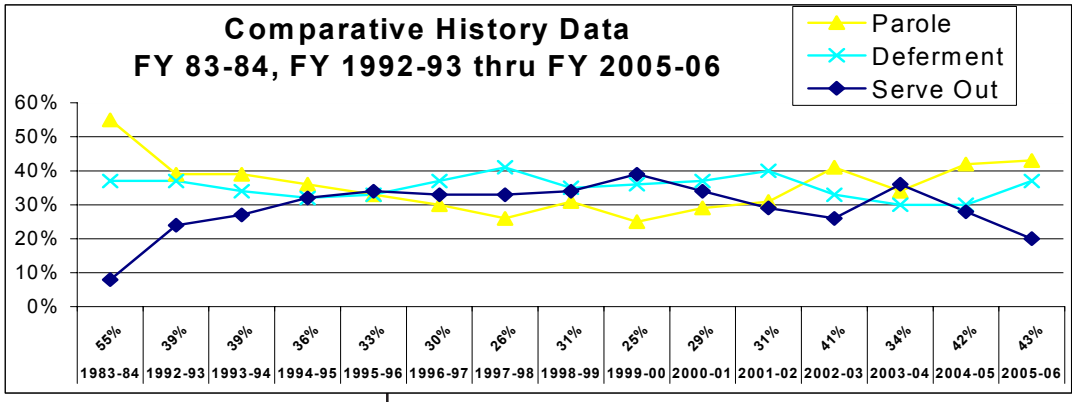
By Robert E. Hubbard, CCDI, LaGrange Post Conviction

Parole is a real and direct consequence of a conviction, and with it come ramifications and other considerations that must be discussed with your client to insure that they are properly advised. As such, the importance of the practicing attorney's knowledge and understanding of parole cannot be overstated. Indeed, the prospect of parole is often one the most important and initial considerations of the client weighing the advantages of entering a guilty plea or following their conviction. While there is no guarantee of what the outcome will be for any client when their opportunity to meet the Board finally arrives, providing the client proper information in this area can often mean the difference between a satisfied client and one who wants to claim ineffective assistance of counsel. Lets take a look at how fiscal years 2003-2006 compare to the past.

Comparison Data for All Type Interviews Conducted FY 83-84, FY 92-93 thru FY 05-06

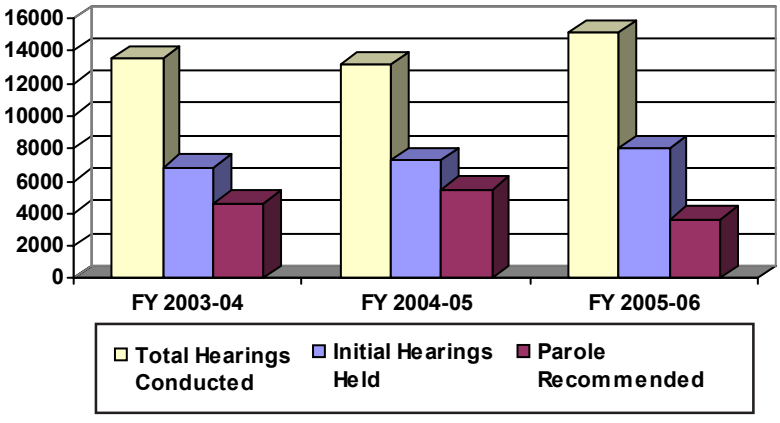
Fiscal Year	1983 1984	1992 1993	1993 1994	1994 1995	1995 1996	1996 1997	1997 1998
Parole	55%	39%	39%	36%	33%	30%	26%
Deferment	38%	37%	34%	32%	33%	37%	41%
Serve Out	8%	24%	27%	32%	34%	33%	33%

Fiscal Year	1998 1999	1999 2000	2000 2001	2001 2002	2002 2003	2003 2004	2004 2005	2005 2006
Parole	31%	25%	29%	31%	41%	34%	42%	43%
Deferment	35%	35%	36%	40%	33%	30%	30%	37%
Serve Out	34%	39%	34%	29%	26%	36%	28%	20%



Parole Board Conducted Interviews: According to *Kentucky Parole Board* statistics, compiled by the Department of Corrections in fiscal year 2003-2004, 13,540 individuals were interviewed/reviewed by the Board during an initial appearance, a parole revocation review, a deferred review, or other special hearing compared to FY 2002-2003 when the Board reviewed 12,680 offenders, or 860 less individuals than in FY 2003-04. In 2004-2005, 13,160 individuals were seen by the Board and in FY 2005-2006, 15,135 individuals met the Board.. Thus, the figures for FY 2004-2005 reflect an increase of 480 individuals over the previous year while, figures for 2005-2006 reveal an increase of 1,975 individuals over FY 2004-2005. This available data also reflects that the number of individuals receiving parole in FYs 2004-2006 continues to increase; with parole in fiscal years 2004-2005 and 2005-2006 averaging 42% and 43% respectively. The figures also represents a 10% increase in the number of individuals paroled during fiscal year 2003. Additionally, deferments continue to remain below 40% and serve-outs are now at their lowest level (20%) in over 14 years.

For fiscal year 2003-2004, of the 13,540 individuals interviewed by the board 6,825 of those cases were for initial parole hearings. Of that number, 4,591 (67%) individuals were recommended for parole. For FY 2004-05 out of the 13,160 hearings held there were 7278 initial hearings with 76% or 5511 individuals recommended for parole. While in FY 2005-06 8005 initial hearings were held out of a total 15,135 hearings with only 45% or 3624 individuals being recommended for parole.



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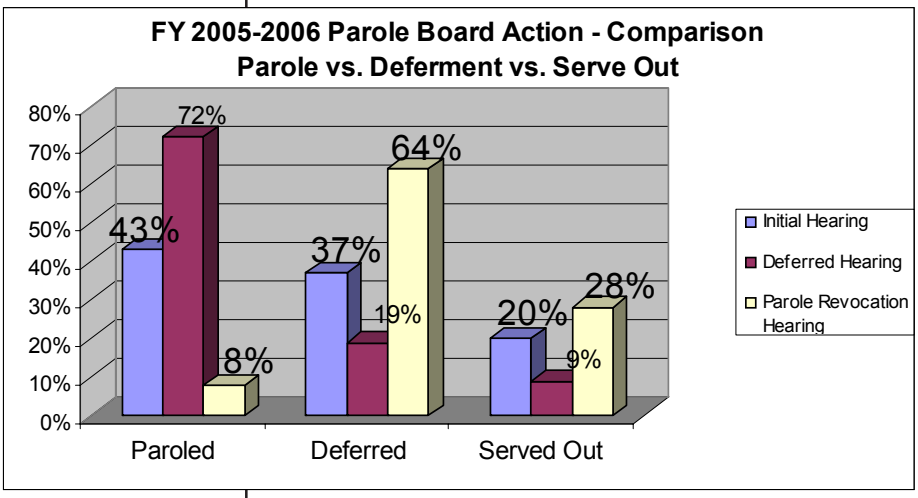
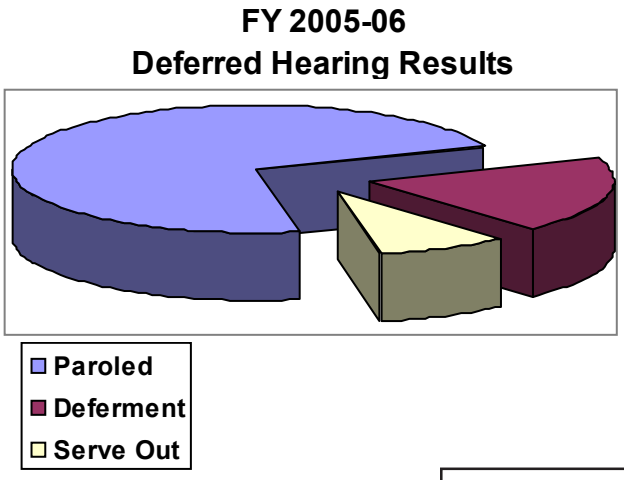
In FY 2005-06, of the remaining 55%, 2,708 individuals (34%) were deferred and 1,673 individuals (21%) were ordered to serve out their sentences.

Deferrals have a better chance of parole. A deferral is when the offender is told he will have to serve an additional number of months before the Parole Board will again review his case for possible parole. This is also known as a "flop" in the prisons. The Board's statistics show that if an offender was given a deferral(s), the offender will have a better chance of being paroled, at their next appearance before the Board, following the deferment. However, an offender may receive more than one deferral before being paroled.

In FY 2003-2004 the Parole Board interviewed 3,938 deferred cases. In FY 2004-05, the Board saw 3523 deferred cases and, in FY 2005-06, 3585 deferred cases were heard by the Board. Of the deferred cases, reviewed in FY 2005-06 2,574 (72%) were recommended for parole, 674 (19%) received an additional deferment and 337 (9%) were ordered to serve out. These statistics do not indicate how many deferrals an individual may have received before being granted parole and, unfortunately, there is no information reflecting the average length of a deferral(s) given before parole is granted.





Parole violators are the least likely to be paroled. In FY 2003-2004 the board interviewed 2,657 individuals who had been returned as parole violators. In FY 2004-05 the Board saw 1991 returned parole violators and in 2005-06, 2860 individuals who were returned PVs. Representative statistics from FY 2005-06 reflects that of that number (2860), 234 (8%) were recommended for parole, 1824 (64%) received additional deferments and 802 (28%) received serve-outs. These latest figures compare more favorably to FY 2001-02 numbers, when the Board reviewed 1,789 parole revocation cases. Of those 1,789 cases only 17 individuals (1%) were recommended for parole, with 1,138 (64%) receiving a deferment or an additional deferment and 634 (35%) being ordered to serve out their sentences.

Other Parole Board Conducted Hearing Results: Each year the Board conducts additional miscellaneous hearings which address cases falling into one of the following areas: (1) Back to Board Hearings; (2) Medical Hearings; (3) Reconsideration; (4) Youthful Offender (YO) Hearings; and (5) Courtesy Hearings. Statistics for FY 2003-2004 reveal that 120 "other" cases were considered by the Board with action being taken in all but 20 of those cases. There was a tremendous jump in FY 2004-2005 with 368 cases being considered and action being taken in all but 56. More definitive figures for FY 2005-2006 reflect that consideration was provided in a total of 350 cases; of that number the Board choose to take no action in 71 of the cases. As for instances where specific action was taken by the Board the breakdown for each category is as follows.

Other Information Worthy of Note: During FY 2005-2006 in addition to and/or conjunction with the foregoing the Board conducted or was involved in 214 Victim Hearings, 1006 Preliminary Revocation Hearings, accepted 2180 Waivers of Preliminary Parole Revocation Hearings, reviewed 574 Reconsideration Requests and 12464 Risk Assessments.

	NO ACTION	PAROLE	DEFERMENT	SERVE OUT	TOTAL
BACK TO BOARD	30	64	123	41	**258**
MEDICAL	24	13	1	0	**38**
RECONSIDERATION	17	16	7	0	**40**
YO HEARING	0	2	8	1	**11**
COURTESY	0	0	2	1	**3**

Many Thanks go to Melissa Clark, **Supervisor of Risk Assessment, Grants, and Statistics** with the Kentucky Parole Board, whose prior work and continued assistance with the statistics provided was invaluable. ■

Capital Case Review

By David M. Barron, Capital Trial Branch

Supreme Court of the United States

***Jones v. Bock*,**
2007 WL 135890 (Jan. 23, 2007) (non-capital)
(Roberts, C.J., for a unanimous Court)

In this non-capital case originating out of the United States Court of Appeals for the Sixth Circuit, the court made four rulings concerning 42 U.S.C. §1983 suits that are relevant to capital cases: 1) that exhaustion of administrative remedies through the prison grievance process is mandatory under the Prison Litigation Reform Act; 2) exhaustion of administrative remedies is an affirmative defense and thus inmates do not need to plead or demonstrate exhaustion in the complaint; 3) failure to exhaust administrative remedies is not grounds for early dismissal of a complaint for failure to state a claim upon which relief can be granted; 4) exhaustion under the Prison Litigation Reform Act does not require an inmate to name all parties to the suit in the grievance; and, 5) the failure to exhaust a claim in a §1983 suit does not require dismissal of the entire complaint but rather should proceed with the exhausted claims only. Underlying the Court's ruling was that "adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts."

***Burton v. Stewart*,**
127 S.Ct. 793 (2007) (per curiam) (non-capital)
Successive *habeas* petition v. initial *habeas* petition

Although *certiorari* was granted in this non-capital case on a different issue, the Court dismissed the case for lack of jurisdiction on the basis that Burton's petition was a successive *habeas* petition for which he did not seek authorization to file as required under 28 U.S.C. §2244(b)(3)(A). The Ninth Circuit had held that Burton's *habeas* petition was not successive because he had a legitimate excuse for not raising the claim in his previous *habeas* petition, namely that the claims in his second-in-time *habeas* petition had not been exhausted in state court at the time of his first-in-time *habeas* petition and thus were not ripe for adjudication. Distinguishing *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), on the ground that the competency to be executed claim had been raised in the initial *habeas* petition but dismissed as unripe, the Court held that Burton's claim was a successive petition because his original *habeas* petition was adjudicated on the merits and his claim was not presented in that petition even though it could have been.

David M. Barron

Statute of limitations under the AEDPA when conviction affirmed and sentence reversed: 28 U.S.C. §2244(d)(1)(A) says the statute of limitations for filing a federal *habeas* petition begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Relying on a 1937 case, the Court ruled that final judgment in a criminal case means sentence. Thus, the Court held that for purposes of the AEDPA, the statute of limitations for filing a federal *habeas* petition did not begin to run until both the conviction and sentence became final by the conclusion of direct review or the expiration of the time for seeking such review.

Note: The Court noted that it has not addressed the issue of whether an unripe claim that is not raised in an initial habeas petition will be considered initial or successive if raised in a later petition. To ensure that competency to be executed claims (and any other claim like it) is addressed in federal court, counsel should raise the claim in the first-in-time habeas petition, even if it is not ripe. If this is done and the claim is dismissed as unripe, under Martinez-Villareal, the claim is cognizable in a later habeas petition without being subject to the stringent requirements for raising a successive petition.

Note: Although it is a per curiam opinion, Burton resolves an issue that had not been clearly resolved beforehand - - that is when must a habeas petition be filed if the state court affirms the conviction but grants sentencing phase relief. As explained above, the statute of limitations begins to run when the sentence becomes final.

***Ayes v. Visciotti*,**
No. 06A-711 (Jan. 19, 2007)

Court order by Justice Kennedy staying an evidentiary hearing pending supplemental briefing in the Supreme Court which are to address two questions: (1) Did Visciotti raise before the state court the claim to be addressed by the scheduled evidentiary hearing?: and (2) Did Visciotti raise before the district court prior to the Supreme Court´s decision in Woodford v. Visciotti, 537 U.S. 19 (2002) (per curiam), the claim to be addressed by the evidentiary hearing?

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***Carey v. Musladin*,**
127 S.Ct. 649 (2006) (non-capital)

(Thomas, J., for the Court, joined by, Roberts, C.J. and Scalia, Ginsburg, Breyer, and Alito, JJ.); Stevens, J., concurring; Kennedy, J., concurring; Souter, J., concurring): The state court held that buttons displaying the victim's image worn by the victim's family during trial did not deny the defendant the right to a fair trial. Relying on a body of Supreme Court case law finding state-sponsored courtroom practices could be so inherently prejudicial as to deprive a defendant of a fair trial, applying the Anti-Terrorism and Effective Death Penalty, the Ninth Circuit granted the writ of *habeas* corpus. The United States Supreme Court granted certiorari to determine whether the state court's ruling was contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court. Finding that no Supreme Court cases addressed the effect of spectator conduct on a defendant's fair trial rights, the Court held that no Supreme Court case was on point and thus the state court ruling could not have been contrary to or an unreasonable application of clearly established federal law.

Stevens, J., concurring in judgment: Stevens wrote separately to explain that the portion of *Williams v. Taylor*, 529 U.S. 362 (2000), that said that "clearly established Federal law, as determined by the Supreme Court of the United States" refers to "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision" is dictum itself. Because this "dictum about dicta represents an incorrect interpretation of the statute's test, and because its repetition today is wholly unnecessary," Justice Stevens did not join the Court's opinion. Instead, he believes that "it is quite wrong to invite state court judges to discount the importance of guidance [from dicta in Supreme Court opinions] on the ground that it may not have been strictly necessary as an explanation of the Court's specific holding in the case."

Kennedy, J., concurring in judgment: Relying on the fundamental principle of due process that "trials must be free from a coercive or intimidating atmosphere," Kennedy would hold that the rule settled by these cases requires a court to "order a new trial when a defendant shows his conviction has been obtained in a trial tainted by an atmosphere of coercion or intimidation . . . whether the pressures were from partisans, or . . . from persons reacting to the drama of the moment who created an environment so raucous that calm deliberation by the judge or jury was likely compromised in a serious way." According to Kennedy, the "AEDPA does not require state and federal courts to wait for some nearly identical factual patterns before a legal rule must be applied." But, because, in this case, there is no indication the atmosphere at trial was one of coercion or intimidation, Kennedy believes relief should be denied.

Souter, J., concurring in judgment: Souter would hold that the clearly established law is whether the practice or condition presents "an unacceptable risk of impermissible factors coming into play in the jury's consideration of the case," which Souter would hold reaches the behavior of spectators. However, Souter believed that the state court did not act unreasonably in finding that the risk here did not rise to an unacceptable level for two reasons: 1) because the majority of courts that have considered the influence of spectators' buttons have let the convictions stand; and, 2) an interest in protected expression on the part of the spectators wearing mourners' buttons has been raised, but not given focus or careful attention in this or any other case that has come to our notice.

Supreme Court Grants of Certiorari

***Uttecht v. Brown*,**
No. 06-413, decision below, 451 F.3d 946 (9th Cir.), granted 1/12/07

In *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Darden v. Wainwright*, 477 U.S. 168 (1986), this Court held that a state trial judge may, without setting forth explicit findings or conclusions, remove a juror for cause when the judge determines the juror's views on the death penalty would substantially impair his or her ability to follow the law and perform the duties of a juror The Court further held that a federal judge's ability to observe the juror's demeanor and credibility, and apply the statutory presumption of correctness to the judge's implicit factual determination of the juror's substantial impairment. Did the Ninth Circuit err by not deferring to the trial judge's observations and by not applying the statutory presumption of correctness in ruling that the state court decision to remove a juror was contrary to clearly established federal law?

***Panetti v. Quarterman*,**
No. 06-6407, decision below, 448 F.3d 815 (5th Cir), granted 1/5/07

Does the Eighth Amendment permit the execution of a death row inmate who has a factual awareness of the reason for his execution but who, because of severe mental illness, has a delusional belief as to why the state is executing him, and thus does not appreciate that his execution is intended to seek retribution for his capital crime?

***Fry v. Pliler*,**
No. 06-5247, decision below,
2006 WL 249542, granted 12/7/06

If constitutional error in a state is not recognized by the judiciary until the case ends up in federal court under 28 U.S.C. §2254, is the prejudicial impact of the error assessed under the standard set forth in *Chapman v. California*, 386 U.S. 18 (1967), or as enunciated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)? Does it matter which harmless error standard is employed? And, if the *Brecht* standard applies, does the petitioner or the State bear the burden of persuasion on the question of prejudice.

***Roper v. Weaver*,**
No. 06-313, decision below, 438 F.3d 832 (8th Cir.), granted 12/7/06

Since this court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be, does a court of appeals exceed its authority under 28 U.S.C. §2254(d)(1) by overturning a capital sentence on the ground that the prosecutor's penalty phase closing argument was "unfairly inflammatory?"

Stays of Execution

Michael Joe Byrd, Edward Jerome Harbison, Daryl Keith Holton (volunteer), and Pervis T. Payne: On February 1, 2007, the Governor of Tennessee granted a reprieve from execution until May 2, 2007, so the Department of Corrections can "complete a comprehensive review of the manner in which the death penalty is administered in Tennessee." According to the Governor, a "recent review has highlighted deficiencies in the written procedures intended to ensure that all legal executions will continue to be carried out appropriately." As a result, he revoked "the current protocols and any related procedures, whether written or otherwise, used by the Department of Correction and related to the administration of death sentences in Tennessee, both by lethal injection and by electrocution," and ordered the Commissioner of the Department of Corrections to "review the state's protocol and any related procedures, whether written or otherwise, related to the administration of death sentences, both by lethal injection and electrocution." To complete this review, he ordered the Commissioner to "utilize all relevant and appropriate resources, including but not limited to scientific and medical experts, legal experts, and Correction professionals, both from within and outside of Tennessee. As a component of this review, the Commissioner is further directed to research and perform an analysis of best practices used by other states in administering the death penalty." By no later than May 2, 2007, the Commissioner was directed to establish new protocols and written procedures for carrying out executions and to provide those procedures along with a report outlining the results of the review completed pursuant to this executive order.

***Marcus Robinson and James Edward Thomas*,**
No. 07-cvs-001109 (Superior Ct. Wake County, N.C. Jan. 25, 2007)
(also staying the execution of James Campbell)

N.C.G.S. 15-188 says "[t]he superintendent of the State penitentiary shall also cause to be provided, in conformity with this Article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death and qualified personnel to set up and prepare the injection, administer the preinjections, insert the IV catheter and to perform other tasks required for this procedure in accordance with the requirements of this Article" According to the court, this statute prevents the Warden and the Secretary of Corrections from significantly altering the protocol for the manner and method of execution without first submitting such changes to the Governor and Council of State for review and approval. Nonetheless, in light of a recent North Carolina Medical Board decision prohibiting physicians from participating in executions, the North Carolina Department of Corrections unilaterally decided that a physician will not supervise or participate in the injection of any drugs or the monitoring of the prisoner's medical condition. Because the removal of a physician from the protocol had not been submitted to these people for review and approval, the court held that the current protocol violates N.C.G.S. 15-188. Thus, the court enjoined Plaintiffs' executions until a protocol is adopted in conformance with N.C.G.S. 15-188.

***Ronald Chambers v. Quarterman*,**
No. 06A-606 (Jan. 22, 2007)

Stay of execution granted by Justice Scalia pending disposition of the writ of certiorari raising the same issue concerning jury instructions on mitigation in Texas capital cases that was recently argued in three cases before the Court.

Larry Swearingen: The Texas Court of Criminal Appeals stayed the execution based on evidence that the presence of insects from the site where the victim's body was found suggest that Swearingen was in custody when the murder took place.

***Kenneth Biros, James Filiaggi, Christopher Newton* (volunteer):** The Governor of Ohio granted reprieves to these three death-sentenced inmates so he would have adequate time to fully review the records in the cases to determine whether clemency would be appropriate.

***Norman Timberlake v. State*,**
2007 WL 102583 (Ind. Jan. 17)

Timberlake filed a request for leave to file a successive post conviction action arguing that he was incompetent to be executed. Because the Eighth Amendment to the United States Constitution prohibits the execution of a person who is insane at the time of the execution, the Indiana Supreme Court ordered a competency evaluation. After determining that Justice Powell's concurrence in *Ford v. Wainwright*, 477 U.S. 399, 422 (1986), that a person in incompetent to be executed if they are "unaware of the punishment they are about to suffer and why they are to suffer it," is the appropriate legal standard, the Indiana Supreme Court ruled that Timberlake was competent to be executed because although he is mentally ill and believes he is being tortured by a computer driven machine, he knew that he was to be executed and why.

Continued on page 30

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After the Indiana Supreme Court denied Timberlake's competency to be executed claim, the United States Supreme Court granted certiorari in *Panetti v. Quarterman*, 127 S.Ct. 852 (2007), to decide, "does the Eighth Amendment permit the execution of a death row inmate who has a factual awareness of the reason for his execution but who, because of a severe mental illness, has a delusional belief as to why the State is executing him, and thus does not appreciate that his execution is intended to seek retribution for his crime?" Recognizing that the Supreme Court has never articulated the standard for determining competency, even though in dicta Justice O'Connor later adopted Justice Powell's concurrence, the Indiana Supreme Court realized that *Panetti* could define competency to be executed in broad terms that would include Timberlake. Thus, after noting that it was not constrained by the limitations of the Anti-Terrorism and Effective Death Penalty Act that applies to federal *habeas* petitions and after noting that the balance of the equities are in Timberlake's favor, the Indiana Supreme Court held Timberlake's petition for rehearing in abeyance and stayed his execution pending the United States Supreme Court's decision in *Panetti*.

United States Court of Appeals for the Sixth Circuit

***Slagle v. Bagley*,**
2007 WL 283831 (6th Cir. Feb. 2, 2007) (denial of rehearing en banc) (to be published).

Boggs, C.J., concurring in denial of rehearing en banc: Boggs wrote only because of a concern over how the lack of a response to a dissent from the denial of rehearing en banc would appear. According to Boggs, "[b]ecause dissents from our court's denial of rehearings en banc are quite rare, the lack of any countering views at the time of such a dissent may be taken to mean that the contrary views presented are unanswerable. Instead, it is usually the case that the original opinion has carefully considered and answered any substantive points made in the dissent from the denial of rehearing en banc." In regard to this case, Boggs believes the panel decision was correct because "[t]he law never has been, in a capital case or otherwise, that every or even multiple prosecutorial errors, objected to or not, cured or not, can bring a grant of *habeas* corpus in federal court years or decades down the road. Instead, the law prescribes a method for analyzing the import, motive, frequency, and prejudice from any such remarks, which is exactly what the [majority] opinion did, and that opinion fully answers the substantive portion of the dissents."

Moore, J., dissenting from the denial of rehearing en banc: Moore dissents for the reasons expressed in her opinion dissenting from the panel decision.

Martin, J., dissenting from the denial of rehearing en banc: Martin's dissent is so strong that it is worth repeating almost the entire dissent verbatim:

I fully join Judge Moore's thorough dissent from the panel opinion, and write separately only to underscore what I view as a systemic problem fostered by capital punishment that is highlighted by this case Any student or practitioner of the law – indeed, any casual viewer of *Law & Order* - - would find it obvious that the repeated, unduly prejudicial comments of the prosecutor in this case were highly improper And yet an attorney not only admitted to practice in Ohio, and not only employed by the state prosecutor's office, but charged with the duty to prosecute a criminal trial with the highest possible stakes, found it appropriate to repeatedly make such comments. Further, the state trial judge, who is entrusted with profound Constitutional responsibilities, presided over a trial where these comments were made over and over again. The debasement of the ethical code of our profession and the rules of evidence and procedure that occurred at Slagle's trial are emblematic of how the politicization of the death penalty has undermined the administrations of criminal law in this country. . . .

According to the majority, no less than fifteen comments made by the prosecutor were improper. The prosecutor consistently assaulted Slagle's character by repeatedly suggesting that the murder was motivated by religious animus, and unnecessarily opining that Slagle represented one of the 'greatest threats against community and civilization as we know it.' He violated the rule against making references to facts outside of the record, by insinuating without any basis, for example, that Slagle would have harmed the children if they had woken up. The prosecutor unethically denigrated a defense expert witness by labeling his testimony as 'liberal quack theories.' Further, he vouched for the prosecutorial witnesses with comments like 'I do very much stand behind the police work.'

A prosecutor who diligently attempts to promote justice by fairly presenting his case and relying on relevant evidence and testimony may have a harder task ahead of him than one who uses irrelevant and vitriolic attacks to win the jury's vote. Yet the ethical duties of his profession require that he follow the former path rather than the latter. Such misleading comments and insults hindered the jury's ability in this case to properly perform its truth-finding function. Prosecutors who employ such tactics abuse the trust of jurors, who naturally rely on the candor of prosecutors when making determinations of guilt.

This type of prosecutorial misconduct is in no small way influenced by public opinion, for prosecutors depend on votes to maintain their positions. Unfortunately, a public official may be given an incentive to abuse his power and disregard his ethical obligations when his livelihood is dependent upon

> public approval. And the frequent and overzealous pursuit of the death penalty - - not only as a medium by which to gain publicity, but to earn favorable standing in the public eye - - is a vehicle used by prosecutors to garner votes in the next election. Sadly, some prosecutors, such as the one in Slagle's case, have allowed the incentives of political gain to trump their duties of professional responsibility. . . .
>
> I also note that the judge who presided over this case is not immune from blame. Ohio's policy of electing judges subjects them to the same political pressures that affect prosecutors. As Justice Stevens has noted, 'capital judges may be too responsive to a political climate in which judges who covet higher office - - or who merely wish to remain judges - - must constantly profess their fealty to the death penalty.' The impact of such a political climate may well be reflected in this trial judge's laissez faire attitude, most notably evidenced by his failure to control the prosecutor's frequent use of inflammatory comments to which the defense did not object.
>
> So long as the Supreme Court deems the death penalty to be permissible under the Constitution and so long as prosecutors and state court judges are subject to political pressure to be 'tough on crime' and pro-death penalty, the politicization of the death penalty will only accelerate. As Justice Frankfurter aptly stated, '[w]hen life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect . . . [is] very bad.' This sensationalization is at odds with the Constitutional guarantee of a fair trial, and all members of the legal profession - - lawyers and judges alike - - have an ongoing duty to combat it.

***Davis v. Coyle*, 2007 WL 208521 (6th Cir. Jan. 29, 2007)**
(Daughtrey, J., for the Court, joined by, Cole, J.; Gibbons, J., concurring in judgment)

Davis' death sentence was reversed by the Ohio Supreme Court on direct appeal. At resentencing, Davis sought to present testimony of his good prison conduct on death row that would have shown that he had no discipline or conduct problems on death row, that he helped conduct tours of death row, that he had a pleasant attitude and personality towards others while on death row, that he had been given more freedom than others on death row, and that he had been placed in positions of trust while on death row. The three judge panel, however, refused to allow Davis to introduce this evidence, holding that at a resentencing, a defendant is only allowed to introduce evidence that existed at the time of the first trial. After being resentenced to death and exhausting state appeals, Davis filed a *habeas* petition that eventually reached the Sixth Circuit, which ruled that the state court's refusal to allow Davis to present good prison conduct evidence that took place after he was originally sentenced to death was contrary to and an unreasonable application of clearly established law by the United States Supreme Court that a capital defendant must be allowed to introduce good prison conduct evidence as mitigation. Thus, the court granted the writ of *habeas* corpus.

Good prison behavior evidence is admissible in mitigation even if it takes place after the first trial: The Sixth Circuit held that the United States Supreme Court's decisions in *Lockett v. Ohio*, 438 US. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); and, *Skipper v. South Carolina*, 476 U.S. 1 (1976), require the admissibility of all relevant mitigating evidence at resentencing regardless of whether it existed at the time of the initial trial. In *Lockett*, the Supreme Court held that the Eighth Amendment requires that "the sentencer not be precluded from considering, as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings* held that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. *Skipper* held that evidence of defendant's good behavior in prison and any evidence that the defendant would not pose a danger if spared from death must be considered mitigating and thus cannot be excluded from the sentencer's consideration. Accordingly, the Sixth Circuit recognized that "the core of the analysis in *Skipper* reflects the Court's understanding that the right of a defendant to present evidence of good behavior in prison is particularly relevant when a prediction of future dangerousness figures centrally in a prosecutor's plea for imposition of the death penalty," as was the case here. Thus, the Court held that the "Ohio Supreme Court's decision to exclude the proffered testimony, based on the court's belief that the facts of Davis's case could be distinguished from *Skipper*'s solely on the basis of timing, was both an unreasonable application of the decision in *Skipper* and contrary to the holding in that opinion and its antecedent cases," which "require that, at resentencing, a trial court must consider any new evidence that the defendant has developed since the initial sentencing hearing."

Reweighing the aggravators and mitigators is not possible in this case: Under *Skipper*, when a trial court improperly excludes mitigating evidence or limits the fact finder's consideration of such evidence, the case must be remanded for a new sentencing hearing. Here, because the improperly excluded evidence was never put into the record but rather was only summarized by defense counsel's proffer, reweighing is impossible.

Allowing a defendant who was sentenced to death by a judicial panel to be eligible for death at resentencing when a defendant sentenced to death by a jury is not eligible for death at resentencing does not violate the equal protection clause: Davis asked the state court to revisit its precedent on this issue, but the state court refused. Thus, the state court did

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not decide this claim on the merits so AEDPA does not apply, meaning that federal courts review the claim de novo. Because prisoners do not belong to a suspect class, Davis' claim is subject to rational basis scrutiny, which requires upholding a statute unless there is no conceivable basis to sustain the statute. The court held that the basis for the differential treatment - - it would be more difficult to reassemble the original trial jury to preside over a resentencing then it would be to reassemble the original panel of judges in a non-jury trial - - is sufficient to survive rational basis scrutiny.

Gibbons, J., concurring: Gibbons characterized the issue before the court as "whether the presentation of evidence of mitigating and aggravating factors must be reopened when a death sentence is reversed for a reason unrelated to the presentation of evidence." Finding that the cases cited by the majority only dealt with exclusion of evidence at the original sentencing phase and that there is no Supreme Court law on point, Gibbons would hold that the Ohio Supreme Court's decision was neither contrary to nor an unreasonable application of clearly established law as articulated by the Supreme Court of the United States. However, *Gardner v. Florida*, 430 U.S. 349 (1977), prevents a defendant from being sentenced to death in part on the basis of information for which the defendant had no opportunity to deny or explain. Because the prosecutor argued that Davis would be a future danger if not sentenced to death, under *Gardner*, Davis had a right to introduce mitigating evidence that came into existence after his first trial as rebuttal evidence. Thus, Gibbons would have granted the writ of *habeas* corpus based on this due process violation rather than the denial of the right to introduce mitigating evidence under the Eighth Amendment.

***Cooey v. Strickland*,**
2007 WL 96744 (6th Cir., Jan. 16, 2007)

A federal district court granted Kenneth Biros' motion to intervene in Cooey's lethal injection lawsuit and then enjoined his execution. The State of Ohio appealed. Under the internal operating rules of the United States Court of Appeals for the Sixth Circuit, despite the fact that the *Cooey* case was pending in the Sixth Circuit on an interlocutory appeal, this case was assigned to the panel that decided the appeal of the denial of Biros' *habeas* petition. This panel then transferred the state's motion to vacate the injunction to the panel that was handling the *Cooey* case for three reasons: 1) one panel of the court should be asked to decide the merits of the *Cooey* case and the stay-related motions that have arisen in connection with it to ensure "consistent, uniform and fair application of federal law in all such lethal injection cases before the Court"; 2) the Cooey panel will resolve the merits question that underlies the State's motion and Biros' response; and, 3) judicial economy favors asking the panel that is most ultimately familiar with the underlying merits issues to resolve this motion.

***Benge v. Johnson*,**
2007 WL 91690 (6th Cir., Jan. 16, 2007)

In this post-AEDPA case, the Sixth Circuit addressed three issues, denying relief on all: 1) whether the prosecution withheld favorable evidence; 2) whether the defense counsel had an actual conflict of interest stemming from his concurrent representation of a potential prosecution witness in an unrelated case; and, 3) whether a jury instruction incorrectly precluded the jury from considering the affirmative defense of voluntary manslaughter.

The failure to disclose a witness' prior statement to police and grand jury testimony did not violate *Brady*: Under *Brady v. Maryland*, 373 U.S. 83 (1963), the state must "turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment, including evidence that could be used to impeach the credibility of a government witness." To be material, there must be a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Here, the Sixth Circuit held that because the content of the witness' statement, which dealt with where the witness was when Benge made incriminating statements, did not undercut the trial testimony, the undisclosed information would not have been exculpatory. The court also held that the statement was not material because the witness' prior statement could have been used to impeach the undisclosed evidence. In addition, the court held that evidence was not even subject to *Brady* because Benge knew the essential facts that would have permitted him to take advantage of the allegedly exculpatory evidence, and the alleged exculpatory evidence was not suppressed by the state, but rather resulted from the witness' refusal to speak with Benge's attorney.

AEDPA prohibits finding a conflict of interest from the fact that Benge's attorney simultaneously represented a potential prosecution witness in an unrelated case: Under Sixth Circuit precedent, *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Supreme Court case that held that "in order to establish a violation of the Sixth Amendment [based on a conflict of interest], a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance," only applies to joint representation. Because the United States Supreme Court has not extended *Sullivan*, there is no clearly established federal law from the Supreme Court upon which to base Benge's claim. Thus, the AEDPA prohibits relief from being granted on this claim.

Note: Mickens v. Taylor, 535 U.S. 162 (2002), the United States Supreme Court's latest case on conflicts of interest, expressly stated that whether Sullivan should be extended to successive representation remains an open area. Thus, the extension of Sullivan is fertile ground.

Benge's ineffective assistance of counsel claim based on counsel's dual representation of a witness on an unrelated charge is waived: Because Benge's brief on appeal does not present a general ineffective assistance of counsel claim on this issue, the Sixth Circuit held that he waived this claim. The court did note though that Benge mentioned it in a single sentence of his reply brief but held that this was insufficient to preserve the issue because "it is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argument are deemed waived."

Benge's claim that the trial court improperly instructed the jury that it could not consider Benge's guilt as to the charge of voluntary manslaughter if it concluded that he was guilty of aggravated murder is not constricted by the AEDPA but has no merit: This claim was not preserved by trial counsel so post conviction counsel attempted to excuse the claim by raising ineffective assistance of counsel. The state court addressed the claim under the plain error standard. Because the ineffective assistance of counsel standard is less burdensome and can be satisfied when the plain standard is not satisfied and because the state court never addressed this claim under the ineffective assistance of counsel standard, the Sixth Circuit ruled that the state court's decision was not an adjudication on the merits, meaning that the AEDPA does not apply. Under de novo review, the court ruled that Benge did not satisfy the prejudice prong to excuse his default because the evidence refutes the series of events that Benge argued would support a manslaughter instruction and because some of Benge's statements to police show that the killing was not manslaughter. Noting the dissent's point of view that the erroneous jury instruction foreclosed the possibility that the jury could have found Benge guilty of robbery but not murder, the court ruled that there is no reasonable probability that a properly instructed jury would have done so.

Martin, J., dissenting: After explaining that trial counsel was ineffective for not objecting to the erroneous instruction, Martin expressed his belief that the death penalty is unconstitutional. Specifically, Martin said, "I also continue to adhere to my belief that the arbitrary enforcement of the death penalty, in Ohio and elsewhere in this country, violates the Eighth Amendment's prohibition of cruel and unusual punishment and the Fourteenth Amendment's Due Process Clause." Martin believes that death sentences imposed in situations like the one in this case promotes rather than prevents the arbitrary application of the death penalty, because a person who commits a murder during a robbery is eligible for death but a person who impulsively kills his wife by beating her in the head with a tire iron is not. Committing a murder and robbery to support a drug habit "is better characterized as a pathetic act of a sick and miserable man than as a factor that makes this murder more heinous or deserving of the death penalty than any other." As a result of the imposition of the death penalty in this case and other cases that Martin has reviewed during his tenure on the Sixth Circuit, he joined Justice Blackmun's famous statement that "the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness - - individualized sentencing." Thus, Martin concluded, as Justice Blackmun did many years ago, that society must accept "the fact that the death penalty cannot be administered in accord with our Constitution."

Martin then listed the arbitrary reasons that are just as likely to have resulted in Benge being sentenced to death as the circumstances of the offense. These arbitrary factors are: 1) the ability of Benge's trial counsel, noting that "in our capitalist society you get what you pay for. We are yet to show a willingness to adequately compensate members of many professions (public school teachers, military and emergency response personnel, social workers, and yes, attorneys who represent indigent defendants, to name a few) whose competent performance is most important to the functioning of our democracy"; 2) race of the victims; and, 3) location of his trial within Ohio. Together, these factors, according to Martin, underscore Justice Blackmun's prediction that "death will continue to be meted out in this country arbitrarily and discriminatorily." As a result, Martin encouraged the Supreme Court to rule that the death penalty must be abandoned altogether.

***Holton v. Bell*,**
No. 06-6178 (unpublished order, Jan. 9, 2007)
(Merritt, Gibbons, and Griffin))

The Federal Defender Service filed a federal *habeas* petition without Holton's consent and despite Holton's desire to waive appeals and be executed. The district court dismissed the *habeas* petition as unauthorized, holding that the Federal Defender Service failed to demonstrate reasonable cause to believe that Holton was not competent to dismiss the federal *habeas* petition. The district court, however, issued a certificate of appealability as to that issue. The Federal Defender Service moved the Sixth Circuit to expand the certificate of appealability. After inquiring of Holton as to whether he wished to pursue his appeal and learning that he did not, without explanation, the Sixth Circuit affirmed the district court's dismissal of the *habeas* petition as unauthorized and denied the Federal Defender Service's motion to expand the certificate of appealability.

***Bonnell v. Mitchell*,**
2007 WL 62628 (6th Cir., Jan. 8, 2007) (unpublished)
(Daughtrey, J., for the court, joined by, Gilman and Sutton, JJ.)

This post-AEDPA case dealt with three issues: 1) whether the state improperly suppressed exculpatory evidence; 2) whether the prosecution failed to correct materially false

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testimony at trial; and, 3) whether the prosecution was guilty of misconduct throughout the trial.

No violation of the state's obligation to disclose material and exculpatory evidence took place: Bonnell alleged that the prosecution violated due process by failing to disclose numerous items of evidence, including: 1) police reports on whether gunshot residue tests performed on Bonnell's jacket and hands were positive or negative; 2) police reports showing that another individual should have been considered a suspect; 3) police reports discussing one of the prosecution's witnesses; 4) police reports that could have been used to impugn the credibility of prosecution witnesses; and, 5) police reports detailing where blood was found. The Sixth Circuit denied relief because: 1) given the remaining overwhelming evidence of Bonnell's guilt, there is no reasonable probability that the undisclosed evidence would have altered the verdict; 2) some of the undisclosed evidence was not exclusively in the possession of the prosecution, thereby not implicating the state's obligation to disclose; 3) Bonnell had the opportunity to cross-examine witnesses at trial about any inconsistencies in their story; and, 4) even though the evidence discussed herein was not disclosed, Bonnell was able to make the arguments to the jury that he would have made had the evidence been disclosed.

The state's witnesses did not present materially false testimony: Due process is violated when a conviction is obtained through the use of false evidence, known to be false by representatives of the state, or when the state allows false evidence to go uncorrected. Here, the Sixth Circuit denied relief because it believed that the questionable statements could be interpreted in multiple ways.

Prosecutor's improper comments and questions of witnesses do not require reversal: The critical inquiry when examining claims involving improper comments by a prosecutor is the fairness of the trial not the culpability of the prosecutor. Thus, United States Supreme Court case law requires courts to determine "whether the improper comments or actions so infected the trial with unfairness as to make the resulting conviction a denial of due process." To determine this, the Sixth Circuit applies a two-prong test. First, the court determines whether the prosecutor's conduct or remarks were improper. If the answer is yes, then the court determines whether the improper acts were sufficiently flagrant to require reversal, which is determined by considering: 1) whether the evidence against the defendant was strong; 2) whether the conduct of the prosecution tended to mislead the jury or prejudice the defendant; 3) whether the conduct or remarks were isolated or extensive; and, 4) whether the remarks were made deliberately or accidentally. Here, Bonnell alleged that the prosecutor improperly questioned witnesses about animosity Bonnell might have towards one of the prosecution's witnesses, including that Bonnell had threatened the witness' life. Although the Sixth Circuit found that the improper comments were intentional, it held that relief was not warranted because: 1) the trial court promptly and consistently sustained objections raised by counsel; 2) the evidentiary case against Bonnell was extremely strong; 3) the improper remarks were only parts of brief exchanges with two witnesses; and, 4) the trial court's instructions to the jury and his evidentiary rulings ensured that the finders of fact were not misled by any improper comments and also that the petitioner was not unduly prejudiced by them.

***Joseph v. Coyle*,**
469 F.3d 441 (6th Cir. 2006)
(*Moore, J., joined by Cole and Clay, JJ.)*

In this post-AEDPA case, the court denied relief on a *Miranda* claim, a prosecutorial misconduct claim based on improper prosecutorial arguments, a failure to disclose exculpatory and material information, and a Sixth Amendment claim based on pretrial publicity. But the court affirmed the district court's grant of *habeas* relief on numerous grounds stemming from the fact that Joseph was sentenced to death based on a capital specification that did not exist under Ohio law.

The application of the Anti-Terrorism and Effective Death Penalty Act: The court reviews de novo a district court's decision to grant or deny a petition for a writ of *habeas* corpus. Under the AEDPA, a federal court can grant the writ of *habeas* corpus on a claim adjudicated on the merits only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." A state court decision is contrary to "if the state court applies a rule that contradicts the governing law set forth in the Supreme Court's cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from that precedent." A state court decision is an unreasonable application if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case," or if it "either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context." The limits of these provisions, however, only apply when there is a state court adjudication on the merits. In addressing the application of the AEDPA, the court reviews "the last state court to issue a reasoned opinion on the issue."

The invalid capital specification: Under Ohio law, murder in the commission of one of the enumerated felonies is a capital offense only if the "offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design." The Ohio Supreme Court has interpreted the principle offender provision to mean that the defendant had actually killed the victim. Here, the indictment substituted the word "kidnapping" for "aggravated murder,"

thereby alleging that Joseph was the "principle offender in the commission of the kidnapping. In other words, the indictment did not include the requirement that Joseph actually killed the victim. This mistake was adopted by counsel for both parties during the guilt phase and emphasized by the prosecution during closing argument, and it then found its way into the trial court's instructions to the jury at the end of the guilt phase. Trial counsel did not object to the incorrect aspects of the instruction.

The evidence was not sufficient to convict Joseph as the actual killer: Under *Jackson v. Virginia*, 443 U.S. 307 (1979), in a due process challenge to the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Here, the evidence presented at trial shows that Joseph's co-conspirator was also present at the time and place of murder. But, no evidence establishes that Joseph struck the fatal blow. Thus, the evidence is insufficient to show that Joseph was the actual killer as defined under Ohio law, making the state court's denial of relief on this claim an unreasonable application of *Jackson*.

Joseph's death sentence under an improper capital specification violates the Eighth Amendment narrowing requirement in capital cases: A capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." This is usually accomplished by requiring the jury to find at least one statutory aggravating circumstance before imposing death. Because Joseph's jury sentenced him to death pursuant to a verdict that he was "the principal offender in the commission of the kidnapping" rather than "the principal offender in the commission of the aggravated murder," Joseph was sentenced to death based on a capital specification that does not exist under Ohio law. Thus, the Sixth Circuit held that the jury never found the statutorily required capital specification, making his death sentence "unquestionably a violation of the Eighth Amendment." Because Joseph was not the only person present at the time of the murder and thus not the only person who could have committed the murder, the Sixth Circuit held that this error is not harmless.

AEDPA does not apply to an ineffective assistance of counsel claim presented for the purpose of establishing cause to excuse a procedural default.

Ineffective assistance of counsel excuses Joseph's default of his claim that his due process rights were violated by being tried pursuant to an indictment and jury instructions that incorrectly stated the only capital specification with which he was charged and serves as an independent ground for granting *habeas* relief: "Constitutionally ineffective assistance of counsel is cause for a procedural default." In other words, "ineffective assistance adequate to establish cause for the procedural default or some other constitutional claim is itself an independent constitutional claim," and separately can excuse the default of a substantive claim. Thus, to reach Joseph's underlying claims, the Sixth Circuit undertook an ineffective assistance of counsel analysis under the traditional *Strickland* standard for determining ineffectiveness, which requires a showing that counsel's performance was deficient under an objective standard of reasonableness measured under prevailing professional norms, and that the deficient performance prejudiced the defendant in that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. "A reasonable probability is less than a preponderance of the evidence, as a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, a "reasonable probability is a probability sufficient to under confidence in the outcome." Counsel, of course, has a constitutional duty to conduct adequate factual investigations. Likewise, the Sixth Circuit ruled that "it can hardly be doubted that defense lawyers have a constitutional obligation to investigate and understand the law as well." Here, the principal offender specification was the only thing that made Joseph eligible for the death penalty. "Understanding the elements of the specification that makes a defendant eligible for the death penalty is perhaps the most basic aspect of representing a capital defendant" - - a fact that the Sixth Circuit found "obvious," and that it noted is grounded in the ABA Guidelines for Performance in Capital Cases. Because trial counsel did not understand the law and could have realized that Joseph was charged under an invalid capital specification merely by reading the statute or conducting minimal case research, trial counsel's failure to object to the improper capital specification was deficient performance, which prejudiced Joseph in three ways: 1) a reasonable probability exists that the prosecution would not have sought death if trial counsel had raised the issue of improper capita specification; 2) there is a reasonable probability that a properly instructed jury would have found Joseph not guilty of the capital specification; and, 3) a reasonable probability exists that, if the jury found Joseph guilty of the capital specification, the judge would have set aside the verdict or rejected the jury's recommendation of death. Thus, *habeas* relief is warranted on Joseph's independent ineffective assistance of counsel claim, which necessarily means that he has established cause to excuse his default.

Note: To determine that the prejudice standard of Strickland establishes prejudice for the purpose of cause and prejudice to excuse a default, the Sixth Circuit relied on the fact that the Supreme Court has ruled that prejudice to excuse default can be established by showing Brady materiality. Given that the Brady materiality standard parallels the prejudice standard under Strickland, the Sixth Circuit ruled that

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establishing prejudice under Strickland is likewise sufficient to establish prejudice to excuse a default. The Sixth Circuit's analysis in this regard should be used by counsel to argue that courts should conduct a cumulative analysis of the prejudice resulting from Brady and ineffective assistance of counsel claims rather than merely looking at them individually.

Due process was violated when Joseph was sentenced to death on invalid capital specification: Recognizing that "no principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts," and that these fundamental principles apply in the penalty phase of a capital case, for the reasons previously discussed for reversing Joseph's conviction based on the invalid capital specification, due process is violated and the error is not harmless. For the same reasons, the Sixth Circuit also held that Joseph's constitutional rights were violated when the court gave the erroneous jury instruction on the capital specification.

***Apanovitch v. Houk*, 466 F.3d 460 (6th Cir. 2006)**
(Boggs, C.J., for the Court, joined by, Daughtrey and Moore, JJ.)

In this pre-AEDPA case, Apanovitch raised for issues: 1) whether the trial improperly admitted the testimony of a prisoner who made an out-of-court statement to the prosecution but recanted that statement during voir dire; 2) whether the trial court improperly admitted inflammatory and prejudicial hearsay evidence by allowing witnesses to testify about the victim's fear of the defendant; 3) whether sufficient evidence exists to support the conviction; and, 4) whether the state failed to disclose material and exculpatory evidence (*Brady* claims) by not disclosing: a) a police report on statements made by Apanovitch; b) coroner notes concerning an unidentified hair on the victim's body; c) documents reflecting that other people enjoyed access to the victim's home; d) documents reflecting that the police knew that the victim was a blood type A secretor; e) evidence that could have been use to impeach the prosecution's witnesses; f) evidence that the police had investigated other possible suspects in the murder; and, g) documents that may have impeached the coroner's report with respect to the time of the victim's death. The Sixth Circuit denied all claims with the exception of some of the *Brady* claims, which the court remanded for an evidentiary hearing. The court also ordered the district court to consider the state's request for DNA testing. The procedural history of this case is important and will be discussed first.

The convoluted procedural history: an example of how to litigate federal *habeas* cases: While state court open records litigation was pending, Apanovitch filed a petition for a writ of *habeas* corpus in the Northern District of Ohio. Shortly thereafter, Apanovitch filed a motion to expand the record under Rules 5 and 7 of the Rules Governing *habeas* cases by state prisoners. Specifically, Apanovitch asked the district court to order the state to release documents that were not part of his open records litigation. The federal district court granted the motion in 1992, and ordered the state to release 1) certain photographs; 2) the hair found on the victim's hand; 3) police department homicide file, including a list of detectives, police officers and others who had been present at the crime scene; and, 4) any documents indicating the names of people whose hair had been compared to the hair found on the victim's hand.

Meanwhile, the Ohio Supreme Court ordered the release of some documents that were the subject of Apanovitch's open records request. Apanovitch then filed a second motion to expand the record, challenging the Ohio Supreme Court's refusal to release every document that was the subject of the open records litigation. When he received the documents that were released due to the open records litigation, Apanovitch filed a third motion to expand the record, this time to include this newly obtained evidence. Without ruling on these motions, the district court denied the *habeas* petition. Apanovitch filed a motion to alter or amend the judgment under Federal Rules of Civil Procedure, Rule 59, which was quickly denied. Apanovitch then appealed to the Sixth Circuit Court of Appeals and filed a motion asking the Sixth Circuit to hold his appeal in abeyance pending further state court action based on the information recently disclosed through the open records litigation. The state court rejected the successive state post conviction petition on the ground that the denial of *habeas* relief had binding res judicata effect. Apanovitch appealed, and also filed a Freedom of Information Act (FOIA) petition seeking to obtain the results of FBI fingerprint analysis. Through FOIA litigation in the District of Columbia, Apanovitch received additional information.

Shortly after receiving documents from the FBI, the Ohio appellate court upheld the denial of Apanovitch's successive state post conviction act. Apanovitch sought discretionary review before the Ohio Supreme Court and simultaneously filed another successive state post conviction petition; this time relying on the information disclosed through the FOIA litigation. The third post conviction action was quickly dismissed, was affirmed on appeal, and the Ohio Supreme Court declined to exercise jurisdiction over these successive petitions.

With the two successive state post conviction petitions having been exhausted, in 1996, the Sixth Circuit lifted its order holding Apanovitch's *habeas* appeal in abeyance. Apanovitch promptly filed a motion to remand the proceedings to the district court in order to conduct an evidentiary hearing. The Sixth Circuit took no action on this motion for nearly eight years. In 2004, the Sixth Circuit denied

the motion to remand. Apanovitch then filed a motion to expand the record in the Sixth Circuit, which the Sixth Circuit granted in part, but denied it in regard to the records from Apanovitch's second and third state post conviction action. As such, the Sixth Circuit limited its review to documents that were placed before the district court, including documents attached to Apanovitch's unsuccessful motions to the district court to expand the record.

Pre-AEDPA standard of review: Federal *habeas* courts can "make its own independent determination of [the] federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings." A district court's disposition of a *habeas* petition is reviewed de novo and its finding of facts for clear error. Primary or historical facts found by the state courts are rebuttable only by clear and convincing evidence, but state court determinations of federal law and mixed questions of federal law and fact are reviewed *de novo*.

The law of procedural default: A federal court generally cannot review claims that were not decided on the merits by state courts. To determine whether a claim is procedurally defaulted, the Sixth Circuit applies a four-prong test: 1) determine if there is such a procedural rule that is applicable to the claim at issue and whether the petition did, in fact, fail to follow it; 2) if the answer to one is yes, decide whether the state courts actually enforced their procedural sanction; 3) if the answer to both of these is yes, the court must decide if the state's procedural forfeiture is an adequate and independent ground on which the state can rely to foreclose review of a federal constitutional claim, which usually requires an examination of the legitimate state interests behind the procedural rule in light of the federal interest in considering federal claims; and, 4) if the answer to these three questions is yes, the federal court can only address the claim if the petition can establish cause for his failure to abide by the procedural rule and that he was actually prejudiced by the alleged constitutional error, or that a miscarriage of justice will result from enforcing the procedural default in the petitioner's case.

Cause and prejudice to excuse the default of a *Brady* claim: Citing *Banks v. Dretke*, 540 U.S. 668 (2004), the Sixth Circuit held that "withholding of documents in violation of *Brady v. Maryland*, wherein the Supreme Court ruled that the 'suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution,' implicitly constitutes a *per se* excuse for procedural default in *habeas* cases." In other words, cause is established when the reason for not developing the facts in state court is the state's suppression of the evidence, and prejudice is established by showing that the suppressed evidence is material. When conducting this analysis, according to the Sixth Circuit, court's must "assume that the petition has stated a claim of constitutional magnitude, and proceed to discern whether the petitioner was actually prejudiced by the asserted errors." Materiality (prejudice) is defined as a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability of a different outcome exists where the government's suppression of evidence undermines confidence in the outcome." Thus, a petitioner need not show that the exculpatory evidence would have rendered the overall evidence insufficient to convict. And, the "withheld items of evidence must be considered collectively, not individually, to determine materiality."

What is an abuse of discretion? The Sixth Circuit addressed a recurring situation that is not commonly answered in case law—when does a lower court abuse its discretion? According to the Sixth Circuit, "an abuse of discretion occurs when the district court relies on clearly erroneous findings of fact, improperly applies the law, or employs an erroneous legal standard."

Standard for granting an evidentiary hearing pre-AEDPA: A *habeas* petitioner is entitled to an evidentiary hearing in federal court if the petition "alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing." Even when this standard is not satisfied, a federal court can exercise its inherent authority to grant an evidentiary hearing at its sound discretion.

Note: In post-AEDPA, once a petitioner gets beyond the requirements imposed by AEDPA for holding an evidentiary hearing, the pre-AEDPA standard for granting a hearing applies.

Note: The Sixth Circuit also noted that its 2004 denial of Apanovitch's motion to remand does not preclude the court from remanding Apanovitch's case for an evidentiary hearing because the 2004 ruling was based on the court's determination that the issue was not yet ripe for a remand because the issue had not been squarely presented to the court, meaning that the court had not yet had the opportunity to review the merits of the claims. This is significant for three reasons. First, this does not mean that a motion to remand will not be granted before briefing is completed. Rather, it will depend on whether the factual and legal basis for the remand can be fully decided before briefing is completed. Second, attorneys filing a motion to remand before briefing is concluded should include all information necessary to make a determination as to whether the case should be remanded and fully brief the underlying issues that are the basis for the remand even if those issues will later be discussed in detail in the merits brief (squarely present the issues to the court in the motion to remand). Finally, Apanovitch is a great example of why attorney should renew their motion to remand once briefing

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is completed even if their motion to remand was denied before the conclusion of briefing. Attorneys should also keep in mind that they can request en banc review of the denial of motions.

Apanovitch did not waive his *Brady* claim by not presenting to the lower federal court in time: One of Apanovitch's *Brady* claims involves evidence that a detective's recollection of Apanovitch's oral statement was written down, which contradicts the prosecution's statement that it was not. Apanovitch did not raise this issue in his *habeas* petition, because the information had not yet been revealed to him. Because the federal district court did not grant the motion to expand the record to include this information, the district court did not review this claim. But, because Apanovitch raised the "essential issue" at an early stage of the litigation and discussed the substance of the instant claim in his brief, the Sixth Circuit held that "Apanovitch's failure to raise this precise issue in the lower courts is excusable, and so the issue has not been waived."

A remand is necessary to determine if a *Brady* violation occurred, which will determine whether to excuse the procedural default that resulted when the state court refused to consider the claim for failing to comply with its procedural rules: Because the Sixth Circuit could not determine from the record whether much of the withheld evidence was material, the Sixth Circuit held that the district court abused its discretion in refusing to grant Apanovitch's third motion to expand the record and remanded the issue to the federal district court for reconsideration and, if necessary, an evidentiary hearing.

Note: The Sixth Circuit's opinion discusses the facts of the individual Brady claims and how the withheld evidence may violate Brady. Anyone litigating Brady claims should read the opinion in detail to determine whether their case is factually analogous to Apanovitch.

Apanovitch's claim that the trial court allowed a witness to testify even though he had already recanted the statement he was to testify about was not defaulted: Apanovitch had raised this issue in state court as an evidentiary matter not as a violation of due process, which would normally mean that the claim is procedurally defaulted. But, relying on *Picard v. Connor*, 404 U.S. 270 (1971), the Sixth Circuit held that the claim was not defaulted because the substance of the federal *habeas* corpus claim was presented to the state court.

Allowing a witness to testify even though the witness had already recanted the statement about which he was to testify did not violate due process: "An issue concerning the admissibility of evidence does not rise to the level of constitutional magnitude unless it can be viewed as being so egregious that [the petitioner] was denied a fundamentally fair trial." Although the court noted that the testimony from a witness who recanted his statement before trial should only be admitted for the limited purpose of determining the witness' credibility, the court held that this error did not rise to the level of a constitutional violation because, unlike other cases that were reversed on similar grounds, this testimony would not have sufficient by itself to sustain Apanovitch's convictions.

The admission of hearsay evidence that the victim feared the defendant did not violate due process: Because the hearsay evidence that the victim feared the defendant was duplicative of the unchallenged testimony of another witness and because the evidence was admissible under the state of mind exception to the hearsay rule, the Sixth Circuit denied this claim.

The evidence was sufficient to sustain his conviction: Under *Jackson v. Virginia*, 443 U.S. 307 (1979), "sufficient evidence exists to support a conviction if, after viewing the evidence in the light most favorable to the prosecution, the court can conclude that *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." As summarized by the Sixth Circuit, the evidence against Apanovitch was: 1) he had the same blood type as the perpetrator; 2 he had a scratch on the left side of his face consistent with that of a scratch from a fingernail; 3) he could not adequately account for his whereabouts on the night in question; 4) his signed agreement to paint a portion of the victim's house was found on the kitchen table the day after the murder was discovered; 5) he was familiar with the peculiar layout of the victim's house; 6) he knew the victim and had made statements to others about his desire to have sexual relations with her; 7) the victim was fearful and apprehensive of Apanovitch; 8) he spoke with the victim on the day of the murder; 9) he told the police that it did not mean anything if they found his fingerprints in the house, even though he had only painted the exterior of the house; and, 10) he offered a variety of inconsistent stories about his whereabouts on the night of the murder. From this evidence, the Sixth Circuit held that the evidence available at trial was sufficient for a reasonable juror to have found Apanovitch guilty of the charges for which he was convicted.

***Spisak v. Mitchell*,**
465 F.3d 684 (6th Cir. 2006)
(*Clay, J., for the Court, joined by, Martin, J.; Moore, J., concurring dissenting in part)*

This post-AEDPA case dealt with 1) whether the trial court improperly struck the testimony and reports of expert witnesses and incorrectly refused to submit Spisak's insanity defense to the jury; 2) whether trial counsel rendered ineffective assistance during the sentencing phase by degrading his client during closing argument and for failing to adequately investigate Spisak's background; 3) the acquittal first jury instruction; 4) whether the state courts erred by upholding Spisak's death sentence after re-weighing

the aggravating and mitigating circumstances; and, 5) whether the prosecutor made improper comments throughout the trial. The court granted *habeas* relief on the ineffective assistance of counsel claim for trial counsel denigrating his client and on the acquittal first jury instruction and denied relief on all other claims.

The application of the AEDPA: The court applied the same general interpretation of the AEDPA that is discussed in other cases in the other cases in this update with two notable additions: 1) "the inquiry is limited to an examination of the legal landscape as it would have appeared to the [] state courts in light of Supreme Court precedent at the time the conviction became final"; and, 2) a state court decision can be an unreasonable application of clearly established law when the state court "either unreasonably extends a legal principle from a Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply."

The trial court did not err by excluding expert testimony and evidence that Spisak was insane and thus the court did not err by failing to instruct the jury on insanity: The Sixth Circuit went through great lengths explaining a defendant's right to present a defense. "The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. Having the opportunity to be heard is an essential component of procedural fairness. Being allowed to present relevant evidence is integral to that right." But this right is subject to reasonable state interests and will be upheld unless the state interest or rule is arbitrary or disproportionate to the purposes they are designed to serve. In a factually intensive analysis, the court held that the state court's exclusion of Spisak's insanity evidence was neither based on a rule that was mechanistically applied nor in violation of his right to present a defense, because Spisak's evidence did not support a finding of insanity and was contradictory. The court also held that there is no right to present evidence of insanity cumulatively by cobbling together pieces of evidence from different witnesses that collectively may support an insanity defense.

The acquittal first jury instruction violated Supreme Court that says an instruction cannot require unanimity as to the presence of a mitigating factor: Spisak's jury was instruction as follows: you must determine whether, beyond a reasonable doubt, the aggravating circumstances, which the defendant has been found guilty of committing in the separate counts are sufficient to outweigh the mitigating factors present in this case. If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweighs the mitigating factors, then you must return that finding to the Court. I instruct you, as a matter of law, that if you make such a finding then you must recommend to the Court that a sentence of death be imposed. . . . on the other hand, if . . . you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant have been found guilty of committing in the separate counts outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court." Spisak argued that there is a reasonable likelihood that the jury applied this instruction to mean that they had to find the existence of a mitigating circumstance unanimously before the jury could consider it as a basis to spare Spisak's life, which violated the Eighth Amendment. Relying on the fact that the instructions as to how to acquit for death and impose a life sentence did not differ at all from the instructions as to how to impose death and the trial court informed the jury that all twelve signatures were required to impose death, acquit for death, and to impose a life sentence, the Sixth Circuit agreed with Spisak.

Trial counsel was ineffective for denigrating his client: At the sentencing phase, Spisak's attorney repeatedly stressed the brutality of the crimes and demeaned him. Specifically, trial counsel told the jury that "so little really needs to be said about the degree of aggravating factors, clearly horrendous," and pointed out that no one involved in the trial was ever going to forget it or Spisak. Trial counsel continued by saying that Spisak has a "sick twisted mind," and then told the jury that sympathy is not part of its consideration and even if it was he demands none for he has done no good deeds and is never going to be any different. The federal district court held that these statements were part of trial counsel's strategy to confront the heinousness of the murders before the prosecution had the opportunity and that once counsel did so, he could then explain to the jury that their feelings were misplaced because Spisak was mentally ill. Reviewing this conclusion de novo, as is done with all mixed questions of fact and law, the Sixth Circuit ruled that "[h]ad [Spisak's] trial counsel actually done the latter and spent a substantial amount of time humanizing and rehabilitating [Spisak] in the eyes of the jury by arguing that [Spisak] was misguided or mentally ill and deserved to have his life spared, then the district court might be correct that this was permissible trial strategy." Admittedly, trial counsel did try to stress that Spisak was mentally ill, but trial counsel then proceeded to undermine this limited effort and concluded his closing argument "not with the discussion of the reasons why Spisak's mental illness made him deserving of mitigation, but rather to discussing all the other participants in the trial." By pursuing this strategy, counsel abandoned his duty of loyalty to his client, and essentially aligned himself with the prosecution against his own client. "Much of [Spisak's] counsel's argument during the closing of mitigation could have been made by the prosecution, and if it had, would likely have been grounds for a successful prosecutorial misconduct claim." "The effect counsel created was not one of pity for a pathetic Defendant, but one of hostility toward the hated and violent freak." The Sixth Circuit held that there can be objectively reasonable tactical

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reason for demeaning the client and emphasizing the brutality of the crime as Spisak's counsel did and that a reasonable probability exists that if counsel did not do this, at least one juror may have voted for life instead of death.

Moore, J., concurring in part and dissenting in part: Moore concurred in all aspects of the majority opinion with the exception of its treatment of the insanity defense. Moore believes that cumulatively, his psychiatric experts provided support for the necessary elements of insanity defense and thus the jury should have been instructed on the defense insanity. Moore also believes that the state court mechanistically applied the rules of evidence in violation of due process.

United States District Courts for Kentucky

***Taylor v. Simpson*,**
2007 WL 141052 (E.D. Ky., Jan. 17)
(Coffman, J.)

In connection with his federal *habeas* petition, Taylor requested independent DNA testing both in support of his *habeas* claims and as a matter of federal constitutional law. Relying on *Alley v. Key*, 2006 WL 1313364 (6th Cir. 2006), the court held that there is no liberty interest in DNA testing protected by substantive due process, no procedural due process right to DNA testing, and no right to DNA testing stemming from the state's obligation to disclose material and exculpatory evidence. As for whether DNA testing is reasonably necessary to Taylor's claims for *habeas* relief, because Taylor had moved for DNA testing prior to the enactment of K.R.S. 422.285 and challenged the constitutionality of K.R.S. 422.285, but never sought DNA testing under K.R.S. 422.285, the court held that Taylor had not presented both the operative facts and the controlling legal principles to state court. Thus, the court held that Taylor's motion for DNA testing was an unexhausted claim for relief. Finding that there is not sufficient factual information in the trial court record to conclude that Taylor's failure to request DNA testing during the nine-month period between the Kentucky Supreme Court upholding the constitutionality of K.R.S. 422.285 and Taylor's motion in federal court for DNA testing was inexcusable, the court stayed and abated Taylor's *habeas* proceedings so he could exhaust his DNA claim in state court.

Kentucky Supreme Court

***Martin v. Commonwealth*,**
207 S.W.3d 1 (Ky. 2006) (non capital)

The Kentucky Supreme Court held that claims that could have been or were raised on direct appeal as palpable error are cognizable as ineffective assistance of counsel claims in RCr 11.42 proceedings because the ineffective assistance of counsel standard is less onerous than the palpable error standard. The Court ruled that this result was dictated by the Court's decision in *Humphrey v. Commonwealth*, 962 S.W.2d 870 (Ky. 1998), and then explained the difference between the palpable error standard and the ineffective assistance of counsel standard. Under palpable error, a conviction or sentence can only be reversed if the error rises to the level of manifest injustice, which the Court defined as error "so fundamental as to threaten a defendant's entitlement to due process," or that "the defect in the proceeding was shocking or jurisprudentially intolerable." In this regard, the palpable error standard is an outcome determinative test. The ineffective assistance of counsel standard, on the other hand, is not. It requires a court to determine not only what happened at trial, but also "why it happened, and whether it was a result of trial strategy, the negligence or indifference of counsel, or any other factor that would shed light upon the severity of the defect." A litigant can prevail on an ineffective assistance of counsel claim "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Thus, "as a matter of law, a failure to prevail on a palpable error claim does not obviate a proper ineffective assistance claim."

Note: Many Kentucky death-sentenced inmates lost IAC claims because the Kentucky Supreme Court ruled that the claim could have been or was raised as palpable error on direct appeal. Counsel should re-raise these claims, arguing that Martin makes clear that the claims should have been addressed on the merits. One way of raising the claim is to file a CR 60.02 motion on the RCr 11.42 motion or other proceeding where the court found the claim defaulted. If the federal district court did not address the merits of the claim because of the state court default, a Federal Rules of Civil Procedure, Rule 60(b) motion should be filed. If the Sixth Circuit relied on the default, a motion to recall the mandate can be filed, but it will only be granted under extraordinary circumstances. The 60(b) motion should definitely be filed first. ■

If I look at the mass, I will never act. If I look at the one, I will.

— Mother Teresa

Recent U.S. Supreme Court Non-Capital Decisions

By Rebecca Ballard DiLoreto, Director, Post Trial Division

The Supreme Court ruled unanimously that its major ruling on the Confrontation Clause in Crawford v. Washington*, 541 U.S. 36,* is not to be applied retroactively, to cases that were final before that ruling came down on March 8, 2004. Justice Alito wrote, in Whorton v. Bockting (decided February 28, 2007), that the decision limiting out-of-court statements as criminal evidence was a new rule and was not a "watershed rule" so it does not apply to earlier cases. The Crawford decision overruled Ohio v. Roberts, 448 U.S. 56 (1980), and laid down the rule that a statement made out of court by a witness who cannot or does not appear at the trial cannot be admitted in the trial unless the accused had a prior opportunity to cross-examine that witness.

By ruling against retroactivity, the Supreme Court denied Marvin Bockting of Las Vegas relief. He cannot use Crawford to challenge in federal court his state court sexual assault conviction secured with the use of out-of-court statements made by his six-year-old step-daughter.

The Supreme Court used a formula laid down in Teague v. Lane, 489 U.S. 288 (1989), for deciding when a Court decision on criminal law is to be applied in federal *habeas* proceedings to state convictions that had already become final. The Supreme Court avoided addressing a separate question posed Nevada in its appeal — that is, whether the Antiterrorism and Effective Death Penalty Act of 1996 imposing new restrictions on *habeas* rights does, in fact, incorporate the Teague v. Lane exceptions to non-retroactivity. Since the Supreme Court did not find either exception applied here, it had no reason to decide that issue.

Justice Alito's opinion had four parts: first, it applied the Teague v. Lane mode of analysis; second, it found that Crawford created a new rule of criminal law and thus did not apply an old rule; third, it ruled that the new rule was procedural and not substantive; and, fourth, because it could not qualify as a rule that implicated the fundamental fairness and accuracy of the criminal trial, it could not be retroactive. Thus, the Crawford rule applies only to new cases or to those that were still pending on direct review when that decision came down in 2004.

The Supreme Court noted that, since Teague, it had rejected every claim that a new rule satisfied this final requirement implicating fundamental fairness and accuracy. A new rule meets that test, the Court noted, only if it is necessary to prevent a risk of an inaccurate conviction, and only if it alters the understanding of bedrock requirements for fairness. Crawford, it found, meets neither test.

It compared the impact of that ruling on criminal trials with the one precedent that the Court has said was necessary to prevent an inaccurate conviction — the right of a poor person facing criminal charges to a free lawyer, laid down in the 1963 decision of Gideon v. Wainwright**.** "The Crawford rule is in no way comparable to the Gideon rule," Alito wrote. "The Crawford rule is much more limited in scope, and the relationship of that rule to the accuracy of the fact-finding process is far less direct and profound." While it may improve accuracy of fact-finding in some cases, he added, it will not significantly do so. Alito also said that Crawford does not involve a change in the understanding of "bedrock" constitutional rights, as did the Gideon precedent.

Our clients in prison received a New Year's present authored by Chief Justice Roberts in *Jones v. Bock, Warden*, 127 S.Ct. 910 (2007). The *Jones* case addressed the Sixth Circuit's application of the Prison Litigation Reform Act (PLRA), 110 STAT. 1321-71, as amended, 42 U.S.C. Section § 1997e et seq. The PLRA, enacted in 1995, was a piece of federal legislation designed to make it harder for prisoners to secure relief on conditions of confinement litigation. Among other inhibitors of relief, the PLRA requires prisoners to exhaust prison grievance procedures before filing suit. The Sixth Circuit interpreted this rule in three ways that have made it even more onerous for prisoners in its bailiwick to file a federal action. First, the Sixth Circuit required that prisoners attach proof of exhaustion to their complaints to avoid dismissal. Second, the Sixth Circuit required that in the first step of the required prison grievance process, prisoners identify each individual who would be named in any subsequent lawsuit to properly exhaust administrative remedies. Third, the Sixth Circuit would not permit a suit to advance unless all of the claims presented were properly exhausted, if a single claim was not exhausted, the suit was to be dismissed.

This case may be an example of where the strict constructionist analysis we could anticipate from Chief Justice Roberts renders a decision in our clients' favor. In *Jones, supra* the Court held that a) exhaustion is an **affirmative** defense that must be pled by the defendant [in this case, the state]; b) exhaustion is not per se inadequate under the PLRA when an individual later sued was **not** named in the earlier grievance. (the *Jones Court* reasons that this interpretation is correct because the exhaustion requirement is not designed to give potential defendants early notice of a possible lawsuit); c) if a petitioner has presented exhausted and unexhausted claims, the federal district court need only dismiss the exhausted claim, the petitioner is **entitled** to proceed with his unexhausted claim.

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When our clients who are not American citizens are convicted of certain criminal offenses the Federal Government often makes the decision to deport them. 8 U.S.C. §1101(a)(43)(G); §1227(a)(2)(A). The prisoner in the case of *Gonzalez, Attorney General v. Duenas-Alvarez,* 127 S.Ct. 815 (January 17, 2007), was ordered deported for having been convicted under a California state statute for aiding and abetting in a theft. The Ninth Circuit reversed the deportation decision affirming the argument that aiding and abetting a theft does not fit the generic definition of a theft and thus deportation was inappropriate. The United States Supreme Court reversed the Ninth Circuit, stating that "to find that State law creates a crime outside the generic definition of a listed crime in a Federal Statute requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct falling outside the generic definition." California law holds a defendant responsible for any conduct that naturally and probably results from his intended criminal activity. This application of the law does not unduly expand the generic definition of a theft. The Court advises that an offender can prove that the state statute creates a *nongeneric* definition of a crime by pointing to his own case or other cases in which the state court did in fact apply the statute too broadly.

With a *per curiam* decision the Supreme Court not only refused to grant petitioner relief but directed that his *habeas* be dismissed in *Burton v. Stewart*, 127 S.Ct. 793 (2007). *Certiorari* had initially been granted for the Court to address the retroactivity of *Blakely v. Washington*. The Supreme Court did not answer this question because they judged Petitioner's *habeas* to be an unauthorized second or successive *habeas*. Petitioner initially challenged a 1998 conviction in a *habeas* action. At the time he filed the action, he had not completed state review of his case. Thus, the review of his conviction and sentence was not yet final. He filed his second *habeas* to attack his sentence after state review of his conviction and judgment. The court ruled that the second *habeas* was successive despite the premature nature of his first *habeas* action. Having failed to comply with the gate-keeping requirements of 28 U.S.C. §2244(b), his case was dismissed.

The Supreme Court ruled against a Mexican citizen on a deportation case in *United States v. Resendiz-Ponce*, decided January 9, 2007. The Ninth Circuit had previously held that the indictment was flawed because it failed to allege commission of a specific overt act in re-entry and that the omission was not subject to harmless error analysis. The Supreme Court held that "an indictment alleging attempted re-entry under §1326(a) need not specifically allege a particular overt act or any other "component part" of the offense." It was enough for the indictment to point to the relevant criminal statute and allege that respondent "intentionally" attempted to re-enter the United States. The Supreme Court went on to state that there are two constitutional requirements that an indictment must meet. First, it must contain the elements of the offense charged and fairly inform the defendant of the charge against which he must defend. Second, it must enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense.

In a surprise move, the Supreme Court overruled the Eighth Circuit and in turn the Board of Immigration Appeals on behalf of Petitioner Lopez who was a legal permanent resident alien. Lopez had been convicted in state court of aiding and abetting another person's possession of cocaine. South Dakota law defined the crime as a felony offense. In *Lopez v. Gonzales*, decided December 5, 2006, the Supreme Court held that, "conduct made a felony under state law but a misdemeanor under the Controlled Substances Act [CSA] is not a "felony punishable under the CSA for Immigration and Nationality Act [INA] purposes." A state offense comes within the quoted phrase only if it proscribes conduct punishable as a felony under the CSA. In essence, the CSA trumps state law. Had the Government's interpretation prevailed, simple possession would have been treated like a trafficking charge. The Supreme Court refused to apply such a harsh interpretation to §924(c).

In *Cunningham v. California*, decided January 22, 2007, the Court held that California's Determinate Sentencing Laws [DSL] violate a defendant's right to trial by jury by placing sentence-elevating fact-finding within a judge's province. The Supreme Court looked to *Apprendi v. New Jersey*, 530 U.S. 466 (2000) for guidance: "any fact that exposes a Defendant to a sentence in excess of the relevant statutory maximum must be found by a jury, not a judge, and established beyond a reasonable doubt not by a mere preponderance of the evidence." The DSL violates this rule. The Supreme Court held that correcting the California sentencing scheme so that it comported with the federal constitution was a job for the state.

In *Carey v. Musladin*, decided December 11, 2006, the Supreme Court reversed the Ninth Circuit. At trial, victim family members wore buttons with the victim's pictures on them and sat in the front row. Reversing the lower court, the Ninth Circuit found that this practice was contrary to or an unreasonable application of clearly established law. The United States Supreme Court reversed the Ninth Circuit noting that "clearly established Federal Law" in §2254(d)(1) refers to holdings and not mere dicta. The Supreme Court distinguished this case from those where state actors created the unfair courtroom environment. The Court noted that there was a lack of guidance from its bench about such practices when a state actor could not be blamed, creating a divergence of opinion in the federal circuits. This divergence of opinion reflects that there is not clearly established law on the point.

Statutes of limitation for false arrests that violate the federal civil rights act begin running from the date of arrest, rather than after dismissal of a charge or reversal of a conviction according to the Supreme Court's decision in *Wallace v. Kato*, February 21, 2007. ■

KENTUCKY CASE REVIEW

By Roy Durham, Appeals Branch

William Wells v. Commonwealth
Rendered 11/22/06, To Be Published
2006 S.W.3d 332
Affirming
Opinion by Graves, Dissent by C.J. Lambert

William Wells was convicted of Rape in the Third Degree and Incest for which he was sentenced to fifteen years' imprisonment.

The admission of incompetent evidence is not prejudicial where it is related to a fact about which there is no dispute. The trial court violated Well's Sixth Amendment right to confrontation by admitting DNA test results as a business record. The better practice would have been to present the laboratory personnel and the phlebotomist who drew the blood from the parties, however, the error itself is insufficient to entitle Appellant to relief. The error in admitting the DNA test results must have had a prejudicial effect on Appellant in order to grant relief. In two letters that were admitted at trial, Appellant admitted the paternity of the child he shared with the juvenile. Moreover, paternity was not a required element of either the rape or incest charge. Thus, despite the obvious inadmissibility of the evidence, it was not prejudicial since it regarded a fact that was not at issue or even disputed by Appellant. Therefore, it was held harmless.

As long as a juror is impartial, there is no requirement that a juror be dismissed for cause based on knowledge of the case. A juror admitted to hearing rumors about Appellant and the juvenile and having seen them in public. The juror further admitted that she had asked people what was going on because of the tremendous age difference. The trial court, however, asked the juror whether she could put the rumors out of her mind. She answered affirmatively. The juror additionally stated that she had no bias against Appellant and did not favor the Commonwealth because she knew what she had heard were only rumors and not facts. When the circumstances are viewed in their totality, the action of the trial court in not dismissing the juror for cause did not meet the clearly erroneous standard.

Rosalee Brewer v. Commonwealth
Rendered 11/22/06, To Be Published
206 S.W. 3d 342
Affirming
Opinion by Scott

Rosalee Brewer was convicted of one count of engaging in organized crime, four counts of trafficking in five or more pounds of marijuana, and four counts of trafficking in eight or more ounces but less than five pounds of marijuana. Appellant was sentenced to sixty years' imprisonment.

Joint representation of co-defendants by the same attorney does not deny the right to conflict-free counsel. Appellant asserted that the colloquy which took place between the judge and Appellant was insufficient to comply with the requirements of RCr 8.30. However RCr 8.30 does not fashion a requirement of length or word count as to what justifies sufficiency. RCr 8.30(1)(a) simply indicates that the judge should explain the possibility of conflicts of interest and that what may be in the best interest for one defendant may not be in the best interest of the other. The manner in which this is to be accomplished is not indicated in the statute. Whether a trial court judge has upheld his obligation in ensuring that a defendant is informed of possible conflicts on interest under RCr 8.30 will turn on the specific facts and circumstances of the individual case.

In this case, Appellant and her husband had previously been informed of the implications of joint representation in district court. Appellant and her husband thereupon signed a waiver. Again at circuit court, Appellant and her husband were brought before the judge and questioned as to whether they were comfortable with joint representation bearing in mind what they had gone over in district court and what they had gone over with their attorney, as well as receiving additional words of caution from the judge at that time. Appellant answered unequivocally that she had no reservations regarding dual representation, and the judge properly approved the waiver. The Court concluded that clearly the Appellant waived her right of joint representation in full compliance with RCr 8.30. Additionally, even if the requirements of RCr 8.30 had not been satisfied, "failure to comply with RCr 8.30 is harmless error when the record does not show even a possibility of prejudice resulting from joint representation of the accused.

Clarence Robinson v. Commonwealth
Rendered 11/22/06, To Be Published
2006 WL 3386410
Affirming in part, Reversing and Remanding in part.
Opinion by McAnulty

Clarence Robinson was convicted of three counts of second-degree rape, three counts of third-degree rape, and one count of first-degree rape. Robinson committed all the offenses against a juvenile, S.M.H., whom Robinson married in Tennessee when Robinson was 37 years old when S.M.H. had just turned 14 years old. Additionally S.M.H was six months pregnant with Robinson's child at the time of the marriage. Robinson was sentenced to a total of 61 years.

The trial court erred in refusing to instruct the jury under KRS 510.035 because the evidence was undisputed that

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Robinson and S.M.H were married when S.M.H. was 14 years old. Robinson requested that the trial court give an instruction on marriage as a defense to the second and third-degree rape charge. The trial court held that a valid marriage was a prerequisite to the defense under KRS 510.035 and Robinson's marriage to S.M.H. was invalid. First, the court concluded that the marriage in Tennessee was in violation of at least three Tennessee statutes: (a) the county clerk did not wait the requisite three days under T.C.A.§ 36-3-104(b)(1) before issuing the license; (b) under T.C.A §36-3-105(a), it is unlawful for a county clerk to issue a marriage license if one of the contracting parties is under that age of 16; and (c) T.C.A. §36-3-106(a) requires the consent of the parent or guardian when either applicant is between the age of 16 and 18. Second, the trial court concluded that the marriage was in violation of KRS 402.020, which states that a marriage is prohibited and void when at the time of the marriage, either person is under 16, unless the female is pregnant, in which case the district court must grant permission to marry. Third, the court considered KRS 402.040, which states: "[i]f any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized, unless the marriage is against Kentucky public policy."

Upon review, the Supreme Court concluded that there was evidence to support the instruction on the third-degree rape charges, but not on the second-degree rape charges because S.M.H. testified that she and Robinson did not marry until about one month after her 14th birthday when she was already 6 months pregnant. Robinson was not entitled to an instruction under KRS 510.035 for the time period preceding the marriage.

Robinson's marriage to S.M.H. was voidable, not void. If the legislature had intended to declare an underage marriage against the public policy of the state, it would have made it absolutely void – as it has done with incestuous marriages and same-sex marriages. Thus the trial court erred in refusing to instruct the jury under KRS 510.035 for the period when the parties were married.

Lee Roy Brewer v. Commonwealth
Rendered 11/22/06, To Be Published
206 S.W.3d 343
Affirming in part and Reversing in part

Trial court erroneously ordered forfeiture of firearms seized from Brewer's home even though there was no evidence linking any of the firearms to narcotics. Detective Derek Boyd testified on behalf of the Commonwealth that in his "experience as a narcotics officer … guns are often found and accompany … drug trafficking." However, Boyd also testified that there was no evidence linking any of the firearms found at Appellant's home to narcotics.

Nevertheless, the Commonwealth sought forfeiture of Brewer's firearms, pursuant to KRS 218A.410(1)(f)(j). While firearms are not specifically mentioned in the statute, they are "personal property" and, thus, subject to forfeiture. Moreover, the statute provides that personal property is merely subject to forfeiture, meaning that the Commonwealth's argument in favor of automatic forfeiture was incorrect, especially in light of the fact that citizens have a constitutional right to bear arms and a right to due process of law.

When the Commonwealth seeks to forfeit firearms allegedly used in furtherance of a violation of KRS 218A, it bears the initial burden of producing some evidence, however slight, to link the firearms it seeks to forfeit to the alleged violations of KRS 218A. The burden only shifts to the opponent of the forfeiture if the Commonwealth meets its initial burden.

A police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information and the taking of that action is an issue in the case. The Commonwealth's Attorney improperly presented "investigative hearsay" by allowing several police officers to testify as to what they were told by various other co-defendant's and suspects. The officer's actions were never at issue. No question was ever raised as to the propriety of the steps taken by the police, which eventually culminated in a search of Appellant's residence and property. As such, the admission of those hearsay statements was in error. However, the error was held harmless under RCr 9.24 because the improper testimony was cumulative due to the fact that the sources of the alleged hearsay statements both testified and were subject to thorough cross-examination. Furthermore, the evidence adduced by the Commonwealth as to guilt was overwhelming.

Commonwealth v. Michael Edward Sears
Rendered 11/22/06, To Be Published
206 S.W.3d 309
Reversing
Opinion by Wintersheimer

Sears, a licensed and practicing dentist, was indicted on six counts of illegally prescribing controlled substances in violation of KRS 218A.1404(3). All six counts of the indictment were similar except for the name of the drug and the name of the person receiving the prescription. Sears moved to dismiss for failure to state a charge and for lack of jurisdiction prior to trial which was denied. Thereafter, he entered a conditional guilty plea to three counts of illegally prescribing controlled substances.

Sears appealed his indictment, arguing that he could not illegally prescribe controlled substances pursuant to KRS 218A.1404(3), because he was a dully licensed and practicing dentist with an appropriate DEA permit. The Court of Appeals found that the indictment did not charge a crime because Sears was authorized by law to prescribe controlled substances. The Supreme Court reversed that decision.

Prescribing drugs in a manner authorized by law does not relate exclusively to the status of the prescriber but to the manner and purpose of the prescription. Dentists and other

licensed medical personnel are not exempt from the requirements of KRS 218A.1404(3), which reads that "no person shall dispense, prescribe, distribute, or administer any controlled substance except as authorized by law." When a dentist writes a prescription for a purpose not related to dental treatment or diagnosis, the act of prescribing is not authorized by law.

The first principle of statutory construction is to use the plain meaning of the words used in the statute. It is abundantly clear that the legislature proscribed illegal prescribing of controlled substances by any person, not any person except dentists. It exempted, as not illegal, those instances that are authorized by law. There is no law that authorizes a dentist to prescribe controlled substances to a non-patient for the purpose of receiving illicit drugs from such non-patients.

Commonwealth v. Gerald Young
Rendered 11/22/06, To Be Published
2006 WL 3386545
Reversing
Opinion by Minton

A jury convicted Young of murder by complicity in which he was sentenced to death. On direct appeal, the Supreme Court reversed the sentence imposed and remanded the case back to the trial court to conduct a new sentencing phase of the trial proceeding. At the conclusion of the trial on remand, Young was sentenced to life in prison. This appeal is taken from the Court of Appeals decision to deny relief on all issues in his 11.42 motion except Young's claim that his counsel was ineffective for failing to object to the improper allocation of peremptory challenges.

The Court had held that it would presume that counsel's deficient performance prejudiced Young because a trial court's failure to allocate the proper number of peremptory challenges mandates reversal on direct appeal.

Prejudice must be shown and may not be presumed. Young and his co-defendants received one less peremptory challenge at trial than they were entitled to RCr 9.40 and *Springer v. Commonwealth*, 998 S.W.2d 439 (Ky. 1999). Additionally, Young's counsel did not object to that improper allocation. If properly preserved, an improper allocation of peremptory challenges may be grounds for an automatic reversal on a direct appeal. However, the per se reversal rule applies only to direct appeals when the error is properly preserved, not to collateral attacks where the error was unpreserved.

Stickland v. Washington, 466 U.S. 668 (1984) expressly requires, with a few limited exceptions, a movant claiming ineffective assistance of counsel to make an affirmative showing that counsel's alleged deficiencies resulted in demonstrable prejudice. Thus, the court of Appeals erred when it held that Young was entitled to a presumption of prejudice stemming from his counsel's failure to object to the improper allocation of peremptory challenges.

Young argued that prejudice was shown because he would have received a new trial had counsel objected to the lack of peremptory challenges. However, the test for prejudice is not success on appeal, but at trial.

Viewed in that light, Young's RCr 11.42 failed because he did not allege any identifiable prejudice at trial that resulted from his counsel's alleged error (*e.g.*, that he would have struck a particular juror with the extra peremptory challenge).

John Ray Williams v. Commonwealth
Rendered 12/21/06, To Be Published
2006 WL 3751220
Reversing and Remanding
Opinion by Minton

Williams was convicted of three counts of third degree rape and was sentenced to fifteen years imprisonment. The Court of Appeals affirmed his convictions. On discretionary review, the Supreme Court reversed and remanded to the Calloway Circuit Court for a new trial.

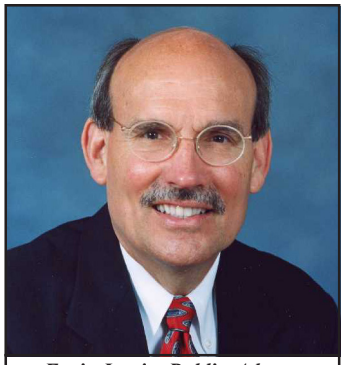
The crimes for which Williams was convicted stemmed from allegations made by S.S., age 14. These allegations stated that Williams, age 39, attempted to have sexual intercourse with her on three separate occasions, and on one occasion forced her to perform oral sex.

At trial, significant evidence concerned changes in S.S's recollection of her relationship with Williams. The commonwealth's first witness, Captain Dennis McDaniel, testified that the charges arose out of an interview with S.S. in which she alleged "attempted" sexual intercourse only. He went on however, to testify that S.S. changed her story twice, finally claiming Williams fully penetrated her on three occasions. On direct examination S.S. recalled only two sexual encounters, but during cross her story evolved to a claim of as many as five occasions of sexual intercourse.

An instruction on a lessor included offense may be authorized even if inconsistent with the defendant's theory of the case, e.g. if it is supported by the Commonwealth's evidence. *Cooper's Kentucky Instructions to Juries*, (Criminal) §1.05 (3rd ed. 1993): Under Kentucky law, it is the duty of the trial judge to prepare and give instructions on the whole law of the case … [including] instructions applicable to every state of the case deducible or supported to any extent by the testimony. The Court of Appeals had found that William's counsel's failure to offer proof that the victim fabricated the allegations permitted the trial court's limited instructions.

The Supreme Court held that the victim's prior statement established an issue for the jury as to whether intercourse occurred on three occasions, was attempted, or did not occur. There was sufficient evidence to permit the jury to believe S.S.'s prior statement that intercourse did not occur but only an attempt, and thus, Williams was entitled to an instruction which would allow that determination. ■

PLAIN VIEW . . .



Ernie Lewis, Public Advocate

***Commonwealth v. Jones*,**
2006 Ky. LEXIS 299, 2006 WL 3386490 (Ky. 2006)

The Kentucky Supreme Court, in an opinion by Justice Minton, has affirmed a previous decision by the Court of Appeals holding that a pat-down search of Jones had exceeded the scope of the "plain feel" exception.

This case began when Officer John Teagle of Harlan went to Charles Jones house to serve an EPO warrant on him. He saw a man leaning into the window of a car, who then walked away when Teagle got near him. Teagle told Jones to stop, but Jones kept going into his house. Teagle prevented him from entering the house. Teagle then saw a "bulge" in Jones' pocket, which Jones said was "nothing." Teagle patted Jones down and felt what he thought was a prescription medicine bottle. Teagle told Jones to remove the bottle from his pocket. Jones "opened the bottle; and flung its contents, which turned out to be Oxycontin pills, into a nearby ditch." Jones was arrested and indicted. Jones' motion to suppress was denied, although neither side called a witness and the trial court did not enter findings of fact or conclusions of law. Jones entered a conditional plea of guilty and was sentenced to two years in prison.

The Court of Appeals reversed holding that "because it was not immediately apparent that the pill bottle in Jones's pocket contained contraband, Teagle exceeded the permissible scope of a *Terry* stop and frisk when he ordered Jones to remove the pill bottle from his pocket. The dissent opined that Teagle's search of Jones was a valid warrantless search under the totality of the circumstances. Despite the fact that the issue of whether Jones consented to the search was neither argued nor ruled upon by the trial court, the dissent also concluded that the warrantless search of Jones was proper because Jones had consented to the search by virtue of having assented to "Teagle's request to remove the bottle from his pocket."

The question before the Supreme Court was whether the plain feel exception to the warrant requirement would apply to the facts and circumstances. The Court affirmed that in order to fit within the plain feel exception, the illegal nature of the item had to be "immediately apparent," relying upon *Commonwealth v. Whitmore*, 92 S.W. 3d 76 (Ky. 2002) and *Minnesota v. Dickerson*, 508 U.S. 366 (1993). This in turn required probable cause to believe that the item was contraband. "[P]robable cause must be met at the time the officer touches the item in question and post-touching conduct cannot be used retroactively to find probable cause," citing *Commonwealth v. Crowder*, 884 S.W. 2d 649 (Ky. 1994).

The Court held that the plain feel exception would not apply because the item could not be identified as contraband "until the item was moved or manipulated by the officer." The Court noted that there was nothing in the record indicating that Jones lived in a high crime neighborhood. And while Jones' declining to approach the officer might be considered "flight," "that flight, in and of itself, is insufficient to establish probable cause." The Court was not impressed that Jones was leaning into the window of a car. And the Court noted that feeling the pill bottle did not reveal its nature as contraband. "'Prior to inspecting the pill bottle [after it was] removed from Jones's pocket, [Teagle] had no way to know whether or not Jones had a valid prescription for the medicine in the bottle, thus the contraband nature of the item was not readily apparent.'" Finally, the Court did not view the fact that Jones had denied having something in his pocket as particularly incriminating.

The Court declined to review the Commonwealth's argument that Jones had consented to the search of the pill bottle because the Commonwealth had failed to preserve this argument for appeal.

Justice Scott dissented, joined by Justices Wintersheimer and Graves. The dissent believed that under the totality of the circumstances there was probable cause to seize the pill bottle. Justice Scott also warned that the "precedent set by the majority opinion in this case would require an officer, confronted with an individual suspected of being armed, to have proof beyond probable cause before seizure of suspected contraband can occur. Such a result is not only unnecessary under the Fourth Amendment, but is not required under the totality of the circumstances present in this case."

***Kupper v. Commonwealth*,**
2006 WL 3754924, 2006 Ky. App.
LEXIS 388 (Ky. Ct. App 2006)

Cardwell was pulling out of his driveway when he saw a BMW pull up at the end of his driveway and pause in front of his mailbox. As he pulled out, he saw the BMW do the same thing at his neighbor's mailbox. Believing that he was

seeing someone stealing items from mailboxes, he followed the car and called the Louisville Police. The police eventually pulled over the BMW, driven by Virginia Kupper. They questioned Cardwell about what he had seen. Then they asked Kupper for consent to search her car, and found evidence of forgery, stolen mail, stolen credit cards, and other items. After Kupper had her suppression motion denied, she went to trial and was convicted, receiving a 15 year sentence, which she appealed.

In a decision written by Judge Johnson, joined by Judges Taylor and Huddleston, the Court of Appeals affirmed the trial court's denial of the motion to suppress. The Court held that there was reasonable suspicion to pull over Kupper's car based upon the information given them by Cardwell. The Court characterized Cardwell as a citizen rather than a confidential informant, a status that allows for greater reliance by the police. As a result, the stopping was based upon reasonable suspicion, and the search of the car was based upon consent.

***Botto v. Commonwealth*,**
2006 WL 3691034, 2006 Ky. App. LEXIS 377 (Ky. Ct. App. 2006)

Tracy Botto worked at a Kroger's in Elizabethtown. Her boyfriend was Jackie Jaggers. Jaggers drove a Jeep along with Ray Dupin to the Kroger's on October 18, 2004. Major Troy Dye of the Elizabethtown Police Department was working as a loss prevention officer at the Kroger's when he spotted Jaggers buying an "excessive quantity" of kitchen matches, which have an ingredient that can be used to manufacture methamphetamine. He called other officers who headed for the Krogers. Botto and Jaggers left the Krogers and walked to the Jeep to talk with Dupin. When the officers arrived, they saw Botto, Jaggers, and Dupin talking in the parking lot. The officers approached the three and asked for identification and consent to search. While Jaggers and Dupin agreed, Botto tried to return to work. Officer Turner asked her to return, at which point she too allegedly agreed to a search. Botto would later testify that she had not consented and that they had reached into the pocket of her work smock without permission and seized the two aluminum foil strips. The search resulted in two aluminum foil strips being found in a glasses case. The foil strips contained a black burnt substance believed to be methamphetamine. Botto was arrested and charged. Her motion to suppress was denied, after which she entered a conditional plea of guilty. She received three years in prison probated for five years.

The Court of Appeals, in an opinion written by Judge Combs and joined by Judges Acree and Knopf, affirmed the trial court. The Court rejected the trial court's finding that Botto had not been seized for Fourth Amendment purposes. "Botto was trying to terminate the encounter by going back to the Kroger store when she was asked to return. Under these circumstances, we certainly cannot say as a matter of law that a reasonable person would have felt free to terminate the encounter."

However, the Court went on to find that there was reasonable suspicion that Botto was involved in criminal activity given her "proximity to Dupin under the circumstances." "When the police arrived at the Kroger parking lot, Botto was in the company of a methamphetamine trader known to one of the police officers. They were standing near a vehicle that contained his recently purchased large quantity of an ingredient used in the manufacture of methamphetamine. In light of these facts, coupled with Dye's experience that methamphetamine users 'usually run with other meth users,' we conclude that there was adequate support for a reasonable suspicion that Botto might be involved in criminal activity and that a brief investigatory stop was justified."

The Court also deferred to the trial court's finding that consent to search had been voluntarily given. "Dye's testimony, which the trial court determined was credible, provided substantial evidence to support its finding that Botto voluntarily consented to the search."

***Southers v. Commonwealth*,**
210 S.W.3d 173 (Ky. Ct App. 2006)

Charles Southers and his girlfriend Lynnis Landrum were staying in Greg Swift's motel room in Breathitt County. The police were called to investigate a disturbance. They saw Janie Turner leave the Swift motel room and asked if the person causing the disturbance was there. The officer asked who was inside the room. "Turner then opened the door further and yelled inside, 'the police is here—the police is here.'" The officer moved Turner out of the way and opened the door, seeing Southers and Landrum sitting on a bed with a baggie containing syringes and orange caps. Southers went to the bathroom and the officer followed, preventing Southers from flushing a pill bottle with morphine in it down the toilet. Southers was arrested and charged with a variety of controlled substance crimes. Southers represented himself at trial and lost his suppression motion. Southers was found guilty of possession of a controlled substance and given 2 ½ years in prison. He appealed his conviction, with an attorney representing him on appeal.

In an opinion by the Court of Appeals, written by Judge Rosenblum and joined by Judges Taylor and Miller, the Court reversed. The Court declined the Commonwealth's urging that Southers had no standing to challenge the search because the Commonwealth had failed to make that argument in the trial court. The Court further agreed with Southers that there was no probable cause to enter into the motel room without a warrant. "Officer Barrett's testimony did nothing other than establish that he had a vague suspicion

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that a burglary, or some other crime, may have been in progress. Under the totality of the circumstances those facts are insufficient to establish probable cause to believe that criminal activity was afoot."

The Court also rejected the Commonwealth's argument that exigent circumstances justified the warrantless entry into the room. "Absent probable cause **and** exigent circumstances, law enforcement officers may not enter an individual's private residence in order to conduct a warrantless search…Even if an exigent circumstance existed, it does not excuse the burden on the Commonwealth to show that probable cause justifying the search was present."

The Court also rejected the Commonwealth's argument that probable cause existed as a result of seeing drug paraphernalia on the bed in plain view. "Officer Barrett was able to see the drug paraphernalia in plain view only *after* opening the door to the motel room in violation of the warrant requirement. Because Officer Barrett had no justifiable reason to enter the room without first obtaining a warrant, the fruits (*i.e.*, the drugs and paraphernalia) of the illegal entry should have been suppressed."

Commonwealth v. Rose, 2007 WL 79433, 2007 Ky. App. LEXIS (Ky. Ct. App. 2007)

On November 19, 2003, Deputy Sheriff Kevin Hardy was on his way to serve bench warrants on Heather Rose. He saw that she was a passenger in a car traveling the opposite direction, so he turned around and stopped the car in which she was riding. Here's the puzzling point: despite the fact that Dep. Hardy "testified that he noticed Rose was a passenger in a vehicle," he would later testify at a suppression hearing that he then approached the car driven by Danny Rose who told Dep. Hardy that Heather was "in the trunk." Dep. Hardy removed her from the trunk and arrested her. Danny then consented to a search of the car. Hardy found a purse and searched it and found a check that didn't belong to Heather. He found three other stolen checks in a change purse and in a small leather bag. Heather was indicted on four counts of possession of stolen mail and three counts of criminal possession of a forged instrument in the second degree. She filed a motion to suppress, challenging the search of the purses and leather bag. The trial court agreed and suppressed the evidence found during the search. The trial court found that Danny's consent to search the personal items was invalid and that Dep. Hardy could not have believed that he had the authority to consent to the search. The Commonwealth appealed.

In an opinion written by Judge Johnson joined by Judges Guidugli and Combs, the Court of Appeals reversed. The Court found that Dep. Hardy's search was proper under the search incident to a lawful arrest exception as announced in *New York v. Belton*, 453 U.S. 454 (1981), which was followed in *United States v. White*, 871 F. 2d 41 (6th Cir. 1989). "In this case, Rose was arrested prior to the search of the vehicle in which she had been an occupant. It is of no consequence that Danny gave permission to search the vehicle. If an officer has made a lawful arrest of an occupant of a vehicle, the officer can conduct a search of the passenger compartment of that vehicle and any containers therein, even if the suspect is detained in a police cruiser away from the vehicle." The Court expressed disquiet with *Clark v. Commonwealth*, 868 S.W. 2d 101 (Ky. App. 1993). "*Clark* is inconsistent with federal case law regarding searches incident to arrest. The Court concluded that the passenger compartment did not come within Nutter's area of immediate control because he was arrested outside the car. However, as stated in *White*, upon arrest, officers can search the area that is or was in an arrestee's immediate control…Here, Rose was stopped while riding in the vehicle, and according to *White*, the passenger compartment could be searched because it was in Rose's immediate control when the vehicle was stopped. Also, the search in this case was contemporaneous to the arrest, unlike the 40-minute lapse of time from the arrest to the search in *Clark*."

Commonwealth v. Gilbert, 2007 WL 79435, 2007 Ky. App. LEXIS 15 (Ky. Ct. App. 2007)

On January 9, 2005, Office Rodney Moberly of the Elkton Police Department saw John David Gilbert drive away from a house that he had been watching for suspected drug activity. When he saw Gilbert's truck had faulty brake lights, he stopped him. When he saw that Gilbert was the driver, he recognized him as one who he had previously arrested on drug charges. He saw that Gilbert's eyes were bloodshot, and he saw empty beer cans in the back of the truck. Gilbert denied drinking, and passed two field sobriety tests. Moberly asked Gilbert if he could search his truck, and Gilbert declined. Moberly called for a K-9 unit from nearby Guthrie. 12-14 minutes later Officer Lancaster arrived and tried to get Gilbert to consent to the search. This time the officer saw a gun handle in the door. Realizing that he was a convicted felon, the officers then arrested him for being in possession of a handgun. The K-9 unit arrived, and the dog alerted on the truck. The search resulted in the seizure of a set of scales, marijuana, and methamphetamine. Gilbert was indicted on various drug and firearm charges in addition to PFO 1st. He moved to suppress the evidence seized from the truck, and his motion was sustained by the Todd Circuit Court. The trial court held that Gilbert was detained after the passing of the field sobriety points at which point there was no reasonable suspicion. The Commonwealth appealed.

In a decision by Judge Buckingham, joined by Judges Abramson and Guidugli, the Court of Appeals affirmed the trial court. The Court relied upon *Illinois v. Caballes,* 543 U.S. 405 (2005), to hold that the detention of Gilbert following the passing of the field sobriety tests violated his Fourth

Amendment rights. The Court rejected the Commonwealth's assertion that there was a reasonable suspicion due to Gilbert's having come from a house under suspicion for drug activity and due to his being a convicted felon. "[H]e had been to a residence where drug activity had been suspected but not confirmed. Further, the fact of Gilbert's prior record is not supported by other articulable factors so as to allow it to be considered a justification for Gilbert being further detained."

***United States v. Jackson*,**
470 F.3d 299, 2006 Fed.App. 0445 (6th Cir. 2006)

On January 9, 2004, police officers in Saltillo, Tennessee sent an informant to the home of Michael Jackson. The informant was equipped with money and a transmitting device. The police officers monitored what was occurring. The informant went to Jackson's trailer and purchased what was later identified as cocaine. After the purchase, the informant returned to the police and gave them what he had bought. The police then prepared an affidavit and a petition for a search warrant, which was signed by a judge. They executed the warrant later that day and seized 18 bags of crack cocaine, 9 guns, $400, and a small bag of marijuana. Jackson filed a motion to suppress, which was overruled by the district judge. Jackson then went to trial where he was convicted and given 78 months in prison. Jackson appealed.

The Sixth Circuit affirmed in a decision written by Judge Griffin and joined by Judges Gilman and Heyburn. The Court found that the affidavit had sufficient probable cause in it to justify the search warrant. Jackson had argued that the affidavit did not sufficiently vouch for the credibility of the informant. The Court noted that such an affidavit is not fatal to the finding of probable cause where there is sufficient corroboration. "Officer Cunningham's affidavit does not expressly vouch for the credibility or reliability of the informant. Nonetheless, Officer Cunningham's affidavit avers that he listened to the controlled buy via a monitoring device from a location near defendant's residence, visually observed the two individuals, heard defendant discuss the sale of crack cocaine, along with some earlier transactions, and identified defendant's voice as that of the seller. Officer Cunningham searched the informant before the purchase, supplied him with marked funds, and immediately met with the informant following the buy and field-tested the purchased substance. Consequently, although details concerning the informant's reliability gleaned from past encounters are lacking, the magistrate's finding of probable cause in this case was based on the affiant's personal knowledge and observations, rather than hearsay of the informant. Officer Cunningham's corroboration of events that occurred during the controlled buy, as set forth in the affidavit, provides sufficient probable cause to sustain issuance of the search warrant."

SHORT VIEW . . .

1. *United States v. Luong*, 2007 WL 779730, 2006 U.S. App. LEXIS 31952 (9th Cir. 2006). The Ninth Circuit has held that when determining whether the good faith exception should apply or not, and specifically in deciding whether the exception should apply allowing for suppression where there is a bare bones search warrant, that the reviewing court should stay within the four corners of the affidavit. Thus, where the affidavit is "bare-bones," and where the magistrate obtained oral evidence of probable cause, that additional evidence may not be considered by the reviewing court to decide whether the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."

2. *State v. Rincon*, 147 P.3d 233 (Nev. 2006). Slow driving is not enough in itself to indicate reasonable suspicion that someone is under the influence of alcohol. More is required to allow a stopping of the driver according to the Nevada Supreme Court.

3. *State v. Fugate*, 150 P.3d 409 (Or. Ct. App. 2006). Giving a police officer a small tin foil packet in response to his statement, "let me see it," is not consent, and thus the opening of the tin foil violated the defendant's Fourth Amendment rights. "In the totality of the circumstances, we conclude that a reasonable person would have understood that, by handing the folded tin foil to the officer in response to a request to 'see it,' defendant was consenting to an examination of the tin foil itself, not to its opening and the examination of its contents."

4. The following is a recent press release from Rhode Island:

ACLU Files "Racial Profiling" Lawsuit Against State Police
For Illegal Detention of Guatemalans in I-95 Stop

The Rhode Island ACLU today filed a federal lawsuit against the R.I. State Police, challenging the legality of the detention and transporting to immigration officials of fourteen people, all Guatemalans, who were stopped in a van on I-95 on July 11 after the driver changed lanes without using a turn signal. The lawsuit, filed by RI ACLU volunteer attorney V. Edward Formisano on behalf of eleven of the individuals, argues that the actions by the state police violated the state's Racial Profiling Prevention Act, as well as the driver and passengers' constitutional rights to be free from discrimination and from unreasonable searches and seizures.

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The lawsuit notes that the detention ensued even though Thomas Chabot, the state trooper who stopped the van, confirmed that the license and registration of driver Carlos Tamup were valid, and that Tamup had no criminal record. Chabot nonetheless proceeded to open the doors of the vehicle and, by utilizing Tamup as a translator, requested all the passengers to also provide identification. When some did not produce any ID, Chabot asked them if they possessed any documents demonstrating their U.S. citizenship, which none were able to produce. After some further delays, the trooper advised them that they would all be escorted to the Office of Immigration and Customs Enforcement in Providence. According to the complaint, Chabot instructed Tamup that if any passenger attempted to escape from the van en route to Providence, that passenger would be shot.

The suit argues that the defendants "knew or should have known that the search, seizure and detention of the Plaintiffs were without reasonable or probable cause and were therefore unlawful under the circumstances." The suit seeks a declaratory judgment that the defendants violated the constitutional rights of the driver and passengers, and an award of damages and attorneys' fees. Last month, the ACLU filed a separate open records lawsuit against the State Police, because the agency has refused to release copies of its traffic enforcement policies or the videotape of that portion of the van stop that was recorded on the police cruiser's camera.

The van stop has generated significant controversy in the civil rights community. In September, more than a dozen organizations sharply criticized State Police Superintendent Steven Pare's response to the incident, in which he rejected any suggestion of racial profiling, and instead claimed that the police "acted professionally and appropriately" in conducting the stop. Among other things, the groups noted that Pare never explained why the trooper, who was on speed radar patrol, chose to leave his post to pull over the driver, whose only infraction was failing to use a turn signal, not speeding; or why the trooper demanded identification, as well as citizenship papers, from the passengers when there was no suspicion of criminal activity.

The civil rights groups also noted that Pare's support of the trooper's actions in calling immigration officials came less than a month after a state police representative misleadingly told a large community forum that the State Police do not seek to enforce immigration laws. The groups have further claimed that Pare's approval of the detention has encouraged a "chill" in the Latino community, where residents are fearful of contacting the police to report crimes lest their own immigration status be investigated.

RI ACLU executive director Steven Brown said today: "Since the license and registration papers of the van's driver were valid and there was never any suggestion of criminal activity, the questioning and detention of the passengers was clearly based on one element: their ethnic appearance. This is the essence of racial profiling. That State Police officials have unequivocally supported these actions demonstrates the need for legislation to restrict these problematic law enforcement practices." Last week, the RI ACLU issued a detailed report calling for such legislation after documenting the continuing problem of racial profiling on the state's highways.

5. *United States v. Jones*, 471 F.3d 868 (8th Cir. 2006). The Eighth Circuit has decided that the protective sweep doctrine of *Maryland v. Buie*, 494 U.S. 325 (1990), extends to a nearby car parked off the property covered by the warrant where the officers executing the search warrant of a home have a reasonable belief that the car is occupied by someone who poses a threat to the officers. ■

Sixth Circuit Review

By Meggan Smith, Post Conviction Branch, LaGrange

***Bell v. Bell*, 460 F.3d 739 (C.A.6 Tenn.),** *Brady* case discussed in previous two editions of Sixth Circuit Review

Opinion vacated and *en banc* review granted December 15, 2006

***Eddleman v. McKee*, 471 F.3d 576 (C.A.6 (Mich.))**
Before Boggs, Chief Judge, Martin, Circuit Judge, and Oliver, District Judge

The Court establishes correct standard of review of state court's harmless error determination on federal habeas review.

David Eddleman was convicted of second-degree murder and a firearm offense in Michigan. On his direct appeal, the Michigan Court of Appeals held that the admission of Eddleman's confession was error but that the error was harmless. Eddleman then petitioned for a writ of *habeas* corpus in federal district court, and the court granted the writ, finding that the admission of Eddleman's confession was not harmless error. The warden appealed the granting of the writ.

Prior to the enactment of AEDPA, federal courts applied different harmless error standards depending on the procedural posture of the case. On direct review, a constitutional error can be deemed harmless only if the court found the error "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). On collateral review, errors were considered harmless unless the error "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Under AEDPA, circuits differed on what was the appropriate standard of review of state courts' determinations of harmless error. Some circuits determined whether the state court's harmless error analysis was contrary to or an unreasonable application of the *Chapman* standard, a standard the Sixth Circuit referred to as "*Chapman* plus AEDPA deference." Other circuits, including the Sixth Circuit, continued to apply the *Brecht* standard on *habeas* review despite the enactment of AEDPA.

In *Eddleman*, the Sixth Circuit reversed itself and held that "AEDPA replaced the *Brecht* standard with the standard of *Chapman* plus AEDPA deference when, as here, a state court made a harmless-error determination." Thus, on collateral review, a federal court must ask whether "the state court's harmless-error decision was contrary to, or an unreasonable application of, the clearly established federal rule that a trial error is harmless only if it is harmless beyond a reasonable doubt." The Court stated that it reconsidered its position in light of the Supreme Court decision in *Mitchell v. Esparza*, 540 U.S. 12 (2003), where the Court, in holding that the Sixth Circuit had given insufficient deference to a state court's harmless error analysis, discussed the "unreasonable application" standard of AEDPA, but never cited or discussed *Brecht*. (The Sixth Circuit noted that the *Brecht* standard continues to apply when a federal court is making a harmless error determination in the first instance, rather than reviewing a state court's harmless error determination.)

The Sixth Circuit went on to hold that the Michigan Court of Appeals' harmless error determination was an unreasonable application of *Chapman*. The Court considered the five indicia of the harmlessness of the wrongful admission of a defendant's confession set out in *Arizona v. Fulminante*, 499 U.S. 279 (1991): the strength of the government's case, the emphasis placed on the confession by the government, the relationship between the confession and other evidence, the evidentiary value of the confession, and the defendant's opportunity to attack the confession through cross-examination.

In Eddleman's case, the government's case relied on the testimony of witnesses of highly questionable credibility, including an alleged eyewitness who was granted immunity in exchange for his testimony and witnesses who supposedly heard Eddleman admit that he shot someone the night before, but identified the date of the admission in reference to a boxing match that did not occur until nine months after the shooting at issue. The prosecutor placed great emphasis on Eddleman's confession, both in his questioning and his closing argument, and used the confession to deflect attention away from the weaknesses in his case. As for the evidentiary value of the confession, because Eddleman allegedly made a full confession, the prejudice resulting from the erroneous admission was likely great. The Court did not believe Eddleman's opportunity to cross-examine the witnesses could have eliminated the prejudice resulting from the admission of the confession. When compared to the facts of *Fulminante*, the Court found that there was no reasonable basis for distinguishing Eddleman's case from Fulminante's, and therefore, the Michigan Court of Appeals' harmless error determination was an unreasonable application of clearly established federal law, as determined by the Supreme Court in *Chapman* and *Fulminante*.

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***Simmons v. Kapture*,**
— F.3d —, 2007 WL 188078 (C.A.6 (Mich.))
Before Martin and Daughtrey, Circuit Judges, and Reeves, District Judge

***Halbert*, which held that the right to counsel applied to discretionary first-tier appeals, applies retroactively.**

Patrick Simmons pled guilty to assault in Michigan state court. Thereafter, Simmons requested that the trial court appoint appellate counsel to assist him in filing an application for discretionary review in the Michigan Court of Appeals. His request for counsel was denied. Simmons pursued his appeal *pro se*, but the Michigan Court of Appeals denied his application for a discretionary appeal. Ultimately, Simmons filed a federal *habeas* action claiming, among other things, that the state court wrongfully denied him the assistance of counsel on his application for discretionary appeal.

While Simmons' *habeas* petition was pending, the Supreme Court issued a decision in *Halbert v. Michigan*, 545 U.S. 605 (2005), holding that "the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals." The Sixth Circuit was called upon to determine whether *Halbert* applied retroactively under the standard established in *Teague v. Lane*, 489 U.S. 288 (1988).

Under *Teague*, new rules of criminal procedure do not apply retroactively to cases proceeding on collateral *habeas* review, unless they fall within two exceptions. The exception relevant to Simmons' case was the exception for "watershed rules of criminal procedure." The Sixth Circuit held that *Halbert* did not establish a new rule and, therefore, applied retroactively to cases pending on collateral review.

Under *Teague*, a case announces a new rule if "the result was not dictated by precedent existing at the time the defendant's conviction became final." The result in *Halbert*, according to the Sixth Circuit, was dictated by *Douglas v. California*, 372 U.S. 353 (1963), which held that states must appoint counsel for an indigent defendant's first-tier appeal as of right, notwithstanding the conflicting authority of *Ross v. Moffitt*, 417 U.S. 600 (1974), where the Supreme Court declined to extend *Douglas* to second-level discretionary appeals. The Court gave two reasons for its holding. First, it noted that the Supreme Court has explained that in determining whether a rule was dictated by existing precedent, "the mere existence of conflicting authority does not necessarily mean that a rule is new." Second, the Court noted that the Supreme Court had distinguished *Ross* from *Douglas* not because *Ross* involved discretionary appeals as opposed to appeals of right, but because *Ross* involved a second level of appellate review, where the assistance of counsel is not as vital. Because Simmons' case involved a discretionary *first-tier* appeal, he was entitled to the appointment of counsel.

Judge Reeves dissented, arguing that *Halbert* was not dictated by existing precedent. Reeves stated that, before the decision in *Halbert*, reasonable jurists disagreed over whether the issue presented in *Halbert* was controlled by *Ross* or *Douglas*. Therefore, according to Reeves, *Halbert* was not dictated by existing precedent and should not apply retroactively.

***Van v. Jones*, — F.3d —, 2007 WL 91660 (C.A.6 (Mich.))**
Before Boggs, Chief Judge, and Moore and Cook, Circuit Judges

Court held that a consolidation hearing is not a critical stage of a criminal proceeding, and therefore, the total absence of counsel at the hearing does not require reversal.

Roeur Van was arrested, along with three accomplices, and charged with intent to commit murder. An attorney was appointed to represent Van. The prosecutor moved to consolidate the four defendants' trials into one proceeding. At the hearing on the prosecutor's motion, Van's attorney was not in attendance, even though he had been notified of the hearing. After two co-defendants plead guilty, Van and the remaining co-defendant proceeded to trial, where Van was convicted of assault with intent to murder. Van filed a federal *habeas* action challenging the absence of counsel at the consolidation hearing, claiming it was a critical stage of the proceeding.

The Sixth Circuit framed the issues as:

(1) What is a critical stage?
(2) What analysis properly follows from a finding that a given component of a criminal proceeding is a critical stage?
(3) Is a Michigan consolidation hearing properly considered a critical stage?
(4) If so, what follows from a total denial of counsel at such a hearing?

Through a comprehensive review of Supreme Court and Sixth Circuit case dealing with critical stages and the denial of counsel, the Court determined that, if a component of a criminal proceeding is a critical stage, "a complete absence of counsel . . . is a *per se* Sixth Amendment violation warranting reversal of a conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error." The decisive question, then, is what is a critical stage?

To determine whether a component of the proceeding is a critical stage, the Sixth Circuit will determine "whether there was a reasonable probability that [the defendant's] case could suffer significant consequences from his total denial of counsel at the stage." The Court concedes that this definition of "critical stage" may revive the prejudice or harmless error analysis that it just determined was forbidden:

> Deciding whether a particular part of a criminal proceeding holds consequences . . . demands an inquiry into the *possibility* of consequences. If those consequences are possible but not certain, how do we answer if they are adequately possible without undertaking an analysis that resembles an inquiry for prejudice? . . . But however similar this derivative prejudice analysis is to the proscribed one, it – or some version of it – is exactly what precedent demands of us. (emphasis in original).

Applying this definition of critical stage, the Court holds that Michigan's consolidation hearing is not a critical stage because any possible consequences from the absence of counsel at the hearing are easily remedied by filing a motion to sever at a later date. Under Michigan procedures, any arguments that counsel could have raised in opposition to consolidation can be raised in a motion to sever.

Judge Moore dissented, arguing that the consolidation was a critical stage. In regards to the majority's definition of critical stage, Moore wrote,

> The majority and concurrence address the critical stage question by examining the details of the case at bar and asking whether Van was prejudiced by his counsel's absence under the particular facts of this case. By approaching the issue in this manner, they are engaging in an inquiry as to whether Van suffered prejudice. This approach does an end run around the rule that prejudice is presumed where one is denied counsel during a critical stage. In our determination of whether a proceeding or event constitutes a critical stage, we must broadly examine whether an unrepresented defendant would be subject to an unacceptable risk of prejudice. . . .[A] 'distant perspective' is exactly what is required when inquiring into whether a particular type of pre-trial proceeding constitutes a critical stage.

Because a defendant who is unrepresented at a consolidation hearing is exposed, in the abstract, to a serious risk of prejudice, Moore would hold that it is a critical stage. Therefore, Moore would grant Van's petition for a writ of *habeas corpus*.

***United States v. Watford*, 468 F.3d 891 (C.A.6 (Mich.))**
Before Moore and Gibbons, Circuit Judges, and Ackerman, Senior District Judge

Court rejected *Batson* claim even though prosecutor's explanation for the strike of an African-American juror was that he had the juror listed as white on his juror sheets and that "he had struck that one in error."

Marlon Watford was convicted of narcotics and firearm possession at a jury trial. Watford appealed his conviction, claiming, among other things, that the government had struck jurors in violation of *Batson*. The Court rejected all of Watford's claims.

During voir dire, the prosecutor used peremptory strikes against the only two African-American jurors on a venire of thirty-one. The prosecutor justified his strike of juror 271 on the grounds that the juror had a criminal record and that he had struck a white juror for the same reason.

The prosecutor's explanation of his strike of juror 298 is more troubling. The prosecutor explained that his strike of juror 298 had been a mistake and that his juror information sheet, prepared by his secretary, indicated that the juror was white. However, the questionnaire filled out by juror 298 clearly indicated that the juror was African-American, and during a bench conference, the prosecutor stood right next to juror 298, who clearly appeared African-American. Indeed, at the *Batson* hearing, the prosecutor told the trial court, "I don't really have any reason to strike that person. I now recall, he was the fellow that came to the bench that had drug use in his family, so – ." In further explanation of his strike, the prosecutor said, "I had a question mark by him for reasons unknown to me, so I struck the juror, struck in error," "I didn't know 298 was black," and "I don't see any reason to strike the person. Probably a good juror." Despite the prosecutor's failure to state a reason for the strike, the trial court found no evidence of purposeful discrimination in the prosecutor's strikes.

The Court accepted the district court's conclusion that Watford made out a *prima facie* case of purposeful discrimination, and concentrated on whether the prosecutor offered race-neutral explanations for his strikes and whether the trial court committed clear error in deciding the ultimate question of discriminatory intent. In finding that the prosecutor had offered race-neutral explanations for his strike of juror 298, the Court said, "Where the prosecutor has represented that he did not know juror 298 was an African-American, we are hard-pressed, on the record before us, to find discriminatory intent in the proffered explanation."

Ultimately rejecting Watford's *Batson* claim, the Court explained:

> The record shows that, having observed voir dire and the challenged strike firsthand, having heard Watford's counsel's *Batson* objection and the prosecutor's proffered justification, and having examined the prosecutor's list erroneously showing juror 298 as white, the District Court accepted the Government's representation of honest mistake. . . . Therefore, to reverse the District Court would require this Court to give greater weight to

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> inferences and assumptions drawn from the cold appellate record concerning what the prosecutor must have known, than to specific credibility determinations made by the District Court during voir dire with the benefit of firsthand observation.

Judge Moore dissented from the Court's *Batson* analysis, arguing that the prosecutor had not offered a race-neutral explanation for his strike of juror 298, but, in fact, had offered no reason at all. Moore voiced concerns about the future implications of the Court's decision: "To permit the United States to avoid the implications of the [inference of purposeful discrimination] by simply conceding – but not explaining – its error is to invite future violations."

This case should alert trial counsel in future cases to explicitly place the race of challenged jurors on the table and secure a concession from the prosecutor that he or she acknowledges knowledge of the race of stricken jurors **.**

***United States v. McPhearson*,**
469 F.3d 518 (C.A.6 Mich.)
Before Gibbons and Rogers, Circuit Judges, and Holschuh, District Judge

Affidavit stating only that McPhearson was arrested at his residence for a non-drug related offense and drugs were found in his pocket was insufficient to establish probable cause to issue a search warrant for the residence.

Police went to McPhearson's residence to arrest him on a warrant for simple assault. After arresting him on his porch, officers found crack cocaine in his pants pocket. The officers requested McPhearson's consent to search his residence, but he refused. Officers obtained a search warrant for the residence based on the following affidavit:

> Investigator Mathis, who makes oath that he has probable cause for believing and does believe that Martedis M. McPhearson . . . is in possession of the following described property, to wit: Illegal controlled substances, particularly crack cocaine, records, ledgers, tapes, electronic media and other items which memorialize drug trafficking or proceeds therefrom contrary to the laws of the State of Tennessee . . .. His reason for such belief and the probable cause for such belief are that Affiant has: Investigator Mathis and Wiser, received information from Officer A. Willis that Martedis McPhearson was wanted for simple assault. Officer Willis located McPhearson's vehicle at 228 Shelby Street. Inv. Mathis and Wiser went to 228 Shelby Street and knocked on the door. A black male answered the door and identified himself to be Martedis McPhearson. Investigators informed McPhearson that they were taking him in custody on the simple assault warrant. McPhearson was searched prior to being placed in the police car for transport to booking. Investigator Wiser discovered in McPhearson's right front pocket a clear plastic bag containing a white chalky substance that is consistent with, and appeared to be crack cocaine,. [sic] The substance was field tested by Inv. Mathis. The field test showed positive for the presence of cocaine. The substance weighed 6.4 grams. E-911 records revealed that 228 Shelby is the residence of Martedis McPhearson.

A judge granted the warrant, and, in their search, police discovered distribution quantities of crack cocaine and firearms in McPhearson's residence. Prior to the search incident to the warrant, officers had done a protective sweep of the residence to "make sure there was nobody in there with any kind of weapons that could do any kind of harm to [them]."

After a suppression hearing, the district court granted the motion, finding that the affidavit was insufficient to find probable cause, that a protective sweep was unnecessary, and that the officers could not have had a good faith belief in the warrant's validity. On appeal, the government challenged the district court's findings as to the warrant's validity and the application of the good-faith exception.

The Sixth Circuit agreed that the affidavit was insufficient. "[T]he affidavit must suggest 'that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought' and not merely 'that the owner of property is suspected of crime.'" (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978)). The fact that McPhearson, a resident of the property, was arrested for a non-drug related offense with crack in his possession did not establish the required nexus between the place to be searched and the evidence sought.

The Court distinguished prior cases that had held that an inference can be drawn that "an individual arrested outside his residence with drugs in his pocket is likely to have stored drugs and related paraphernalia in that same residence." In those cases, the defendants, unlike McPhearson, were known drug dealers when the police sought to search their homes. Even this additional fact, the Court added, will not always establish a sufficient nexus between a residence and criminal activity.

The Court went on to hold that the good-faith exception did not apply in these circumstances, because "the affidavit [was] so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable."

Judge Rogers, in dissent, would have held that the affidavit was sufficient to support a finding of probable cause, and, even if the affidavit was insufficient, the good-faith exception should apply. ■

Practice Corner
Litigation Tips & Comments

Financial Incentives to Act Competent?

A reliable source recently alerted us to the existence of the Behavioral Incentive Program at the Kentucky Correctional Psychiatric Center (KCPC). When inmates are admitted to KCPC for inpatient services (including evaluation), they are advised that they will be paid $2.00 for good behavior, $2.00 for keeping their cell clean, $2.00 for showering, and $2.00 for participating in recreation. Payments are made to the patients weekly. We have been further told that patients who do well in all four areas, but who decline or refuse to participate in the evaluation process are denied their payments.

If correct, this payment scheme is important because of the implications on the legitimacy of the evaluation process. Receiving a cash benefit for an action is a simple incentive that a person does not need to be competent to understand and respond to. Yet, reports from KCPC regularly cite a patient's willingness and ability to follow rules and act appropriately as support for their competency. Also, the denial of payment to non-compliant patients who "earned" payments creates a pressure to comply with the evaluations and may even impact the mental status of patients who believe they have been denied what was promised to them.

If you have a client heading to KCPC, you should consider including in your order that KCPC be prohibited from using the pay incentive program as it can cloud any accurate evaluation of competency.

Additionally, trial attorneys facing competency hearings should question the examiners about these incentives. Any report that uses the inmate's behavior at KCPC as support for their conclusion should be undermined by the Behavioral Incentive Program, if the above report is accurate.

Peremptory Strikes Based on Religion

It appears to be an open question in Kentucky whether peremptory strikes can be used against prospective jurors on the basis of their religion. Other states and scholars are split on the issue. *See generally U.S. v. DeJesus*, 347 F.3d 500, 505-511 (3d Cir. 2003), for discussion of the split. In the absence of state authority, a recent Indiana Supreme Court case might be useful to defense advocates.

In *Highler v. State*, 854 N.E.2d 823 (Ind. 2006), the court declared that the use of a peremptory strike against a juror because of the juror's religious affiliation would violate the equal protection clause of the federal constitution. However, the Court distinguished two situations where religion-related strikes are permissible. The first is where the juror's individual religious beliefs render the juror unsuitable for service. The second, which was the case in *Highler*, is where the juror's occupation is in a religious field. The court held that the prosecution's strikes were permissibly related to the juror's occupation rather than religion even though they were justified by the following explanation: "First of all Your Honor, in his profession he's a Pastor and I never take any Pastors, Ministers, Reverends, Priests on my jury panels just because they're more apt for forgiveness."

Despite affirming a questionable prosecution strike, the case can be helpful in a couple of ways. First, it does stand for the principle that peremptories cannot be used on the basis of religious affiliation. Second, since it is very possible that we may on occasion have a conservative pastor as a prospective juror who may be more likely to convict and impose a harsh sentence, we can rely on *Highler* to use a peremptory strike against that juror and justify it if necessary.

"With Your Verdict, Ladies And Gentlemen, You Can Send A Messa.." OBJECTION!!! (Please!!)

For the second time in recent months, the Kentucky Supreme Court has stated its disapproval with a prosecutor for asking the jury to "send a message." Unfortunately, for the second time, the Court did not reverse the conviction because the trial attorney had not objected and the error had to be reviewed under a heightened standard. Going farther than before, the Court in the *Ralph Scott* case (unpublished decision rendered 12/21/06) specifically rejected the distinction some prosecutors make that they are simply wanting to send a message to the defendant.

PLEASE be vigilant in objecting if the prosecutor in your case goes beyond permissible arguments in your case. Under the case law, you must object immediately to preserve the issue, even if the local custom is not to interrupt opposing counsel. A published reversal of a conviction solely because the prosecutor could not restrain his/her argument would certainly get the attention of prosecutors all over the state.

Here is the language from the unpublished opinion in *Scott*:

Lastly, Appellant complains of the Commonwealth's "send a message" comments during closing arguments. As Appellant did not object to these comments, the issue is unpreserved . Appellant requests a review for palpable error under RCr 10.26. The Commonwealth asserts that the comments were proper because the jury was asked to send a message only to Appellant, not to the community. We do not believe that this distinction renders the "send a message" mantra acceptable. Nonetheless, we cannot say that the comments constituted an error so fundamental as to threaten Appellant's entitlement to due process of law, as is required to demonstrate manifest injustice." However, had the issue been preserved, a more rigorous analysis would have been required. Thus, while such comments do not constitute manifest error in the instant case, we note that, generally, any benefit the Commonwealth perceives in utilizing such an argument is far outweighed by the risk of reversal on appeal. ■

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