The Advocate

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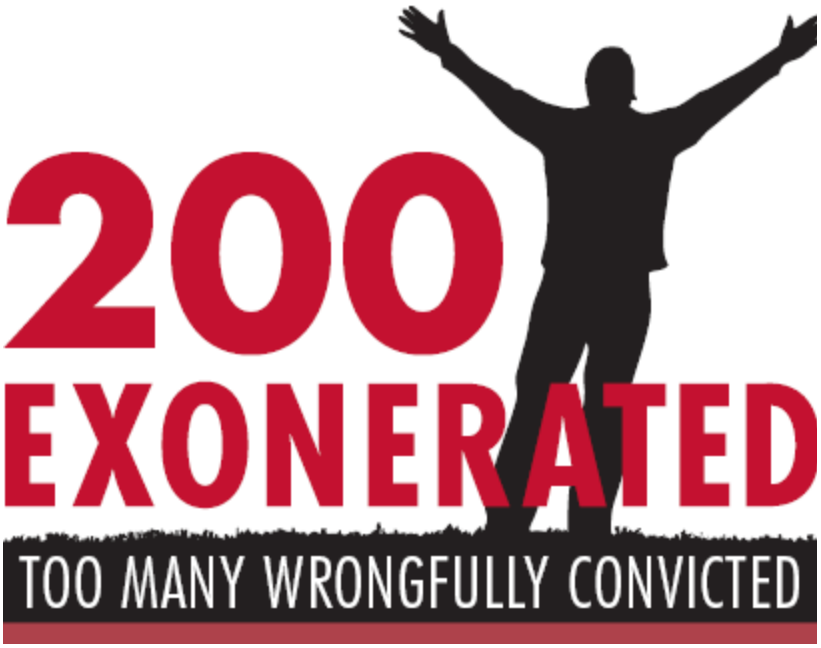

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Ky DPA's Journal of Criminal Justice Education and Research

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

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FROM THE EDITOR...

Jeff Sherr

200 DNA Exonerations Nationwide: As of April of this year, DNA testing has freed 200 innocent people from prison. Together, they served a total of 2,475 years in prison for crimes they didn't commit. Kentucky has seen four exonerations (not all due to DNA) since 2000.

Susan Balliet provides a detailed description of the state of the law in Kentucky in **Directed Verdict in Kentucky: What's Reasonable?** She encourages Kentucky defenders to "know these rules, cherish these rules and use all of them."

In this edition we publish a speech by Judge Joseph M. Hood, **Judicial Criticism** given to members of the federal bar at a luncheon in Lexington. Judge Hood addressed the audience on the question of whether recent attacks on the judiciary threaten judicial independence.

On the **40th anniversary of the In re Gault** decision, May 15, 2007, United States Senate passed a resolution commemorating the decision and expressing support for strategies to improve the juvenile justice system that appreciate the unique nature of childhood and adolescence. **Senate Resolution 194** was a bipartisan effort, introduced by Senator Edward M. Kennedy (D-MA) and co-sponsored Gordon H. Smith (R-OR).

This summer brings **changes to the Kentucky Rules of Evidence**. These changes and commission notes are available in this edition.

Glenn McClister, Education Branch Staff Attorney, outlines the new **Kentucky Public Defender College**. With the increase in our new attorney class due to the success of the Justice Jeopardized campaign, the DPA Education Branch has revamped its training for new public defenders.

The DPA held its **35th Annual Awards Banquet** on June 19. Profiles of award winners are provided on page 20. ■

After 200 DNA Exonerations Nationwide, State Begins to Look at Causes of Wrongful Convictions

By Marguerite Thomas, Adult Post Conviction Branch Manager

In Illinois when the new DNA tests proved that Jerry Miller did not commit a brutal rape in Chicago for which he was convicted in 1982, the Innocence Project said that Miller was the 200th person in the nation exonerated through DNA evidence.

On Monday, April 23, 2007, in Chicago, Peter Neufeld and Barry Scheck, who co-founded the Innocence Project at Cardozo School of Law in 1992 and are Co-Directors of the national organization, said the 200 DNA exonerations "are the greatest data set ever on the causes of wrongful convictions in the U.S. and yet just the tip of the iceberg," since so few cases involve evidence that can be subjected to DNA testing.

Immediately following Miller's exoneration, the Innocence Project launched "200 Exonerated, Too Many Wrongfully Convicted," a month-long national campaign to address and prevent wrongful convictions. A booklet and video released today by the Innocence Project, along with other resources that are part of the educational campaign in all 50 states, are online at www.innocenceproject.org/200.

Kentucky is not immune to wrongful convictions. The state exonerated William Gregory in 2000 after DNA proved he had not committed the rape he had been convicted of in 1993. Gregory was only the 70th person in the United States exonerated by DNA evidence at the time of his exoneration. Herman May was convicted of rape and sodomy in 1989 and served thirteen years before DNA proved his innocence. Tim Smith was convicted of first degree sodomy and sentenced to serve twenty years before Kenton County Judge Patricia Summe vacated the conviction. She cited numerous errors made by trial counsel and counsel's failure to challenge the credentials and testimony of an expert who had identified herself as a doctor, only possessed the degree via an unaccredited, online university.

"The first 200 DNA exonerations have transformed the criminal justice system in this country. These exonerations provide irrefutable scientific proof of the causes of wrongful convictions, and they provide a roadmap for fixing the criminal justice system," Scheck said. "As a result of the first 200 DNA exonerations, laws and policies around the country have changed, but it's only a beginning. We still have a tremendous amount of work to do to make the criminal justice system fair and accurate."

And change is on the horizon for Kentucky. The Department of Public Advocacy's Kentucky Innocence Project is co-sponsoring a conference to address how best to protect against wrongful convictions in the state. The state's three premier law schools, University of Louisville, University of Kentucky and Chase Law School and Eastern Kentucky University are also sponsoring the event, a conference to Advance Justice in the Commonwealth to be held at the University of Louisville on November 16, 2007. The conference is expected to bring together stakeholders from all parts of the criminal justice community and national experts to focus on the preservation of evidence, the value of video-taped confessions and innocence commissions. We will also hear the testimony of a victim who made a mistaken identification and has worked to remedy the errors in our criminal justice system that led her to the wrongful conviction of an innocent man. Innocence commissions to address these and other related issues have been created in North Carolina, California, Pennsylvania, Connecticut, Illinois and Wisconsin. At least nine states are currently considering legislation to create such commissions.

According to the Innocence Project, DNA exonerations have shown that the leading causes of wrongful convictions include eyewitness misidentification, forensic science errors, false confessions/statements, and faulty information from incentivized informants and inmates. In more than 70 of the first 200 DNA exoneration cases, DNA didn't just free an innocent person – it helped identify the true perpetrator of the crime, according to the Innocence Project. In some of those cases, the true perpetrator had gone on to commit other crimes after an innocent person was wrongfully convicted for the earlier crime.

"DNA has transformed the criminal justice system. We hope to use the lessons learned from the first 200 DNA exonerations to make our criminal justice system more accurate," said Ernie Lewis, Public Advocate. "Public safety is enhanced when we prevent wrongful convictions and make sure the true perpetrators are apprehended. We owe it to our communities to learn from these 200 DNA exonerations in order to enhance the accuracy of our criminal investigations and prosecutions – and thus prevent future wrongful convictions."■

Directed Verdict in Kentucky: What's Reasonable?

By Susan Jackson Balliet, Appeals Branch

The arguments in this article were developed in the case Timothy Willis Finley, who won directed verdict on appeal in the unreported case, ***Bowling v. Commonwealth****, 2007 WL 1159621 (Ky., 2007). He had a 20 year sentence. He had served over a year when he was convicted, and put in another year afterwards, before he won on appeal. Finley walked out of prison 17 years early, after winning directed verdict on appeal.*

The knowledge that eyewitness misidentification, junk science, false confessions, and snitch testimony cause wrongful convictions has focused attention on the evidence we allow in our courtrooms.[1] But we should also be looking at the standards and definitions we use to evaluate evidence, to make sure we are not interpreting these in a way that increases the risk of wrongful conviction. This article reviews Kentucky's directed verdict standard, and posits that ever since *Commonwealth v. Sawhill*, 660 S.W.2d 3, 4 (Ky. 1983), Kentucky has been trying to simplify a reasonableness standard that defies simplification, and that skipping the details of what's reasonable violates the federal constitution.

Sawhill and _Benham_ tried to simplify directed verdict rules.

After Dr. Fred Sawhill won a directed verdict of not guilty in the early 1980s, the commonwealth complained that the trial court had used the wrong standard, the equal probability standard, which provided that:

> [viewing the evidence in the light most favorable to the Commonwealth] …if the evidence points to innocence as well as to guilty [sic] if it could be either way, it's the duty of the court to decide in favor of the defendant. *Id.*

Sawhill purported to throw out the equal probability standard, saying it created "confusion," it was "difficult to apply and [gave] rise to the impression that a different standard is to be used in a circumstantial evidence case." *Id.* Pointing to the concept of "reasonableness" running through all the earlier cases, *Id.,* the Kentucky Supreme Court tried to boil down the standard for directed verdict —for all cases circumstantial and non-circumstantial alike— to a simple rule of reasonableness:

> [viewing the evidence in the light most favorable to the Commonwealth] …if from the totality of the evidence the judge can conclude that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient to allow the case to go to the jury even though it is circumstantial. *Id.*

Eight years after *Sawhill*, the court restated the directed verdict rule in *Commonwealth v. Benham*, emphasizing reasonable inferences, but again trying to boil down the rule:

> [viewing the evidence in the light most favorable to the Commonwealth]… the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. … the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (emphasis added)

The rule for what's reasonable is not simple.

The rule for measuring reasonableness cannot be contained in a simple brief statement. This is obvious from the fact that after trying to state the rule briefly, the *Sawhill* court immediately felt constrained to add that "[n]othing in this decision should change any of the original grounds for a directed verdict." The court felt constrained to acknowledge additional requirements for a verdict to be deemed reasonable: the requirement of reasonable inferences, the requirement that there be more than a scintilla of evidence, and the requirement that there must be evidence of a certain kind, evidence of substance. *Sawhill* at 5. These additional requirements are not contained inside the shorthand statement of the rule, but they are essential elements of the *Sawhill* rule, because they define the kind and amount of evidence it takes for reasonable minds to fairly find guilt. As discussed below, they reincorporate what *Sawhill* was

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trying to throw out. And it is a good thing they do, because –as argued below— allowing a guilty verdict to stand, when circumstantial evidence would equally support an inference of innocence, as well as guilt, would violate Due Process. Due Process requires proof beyond a reasonable doubt. Allowing a guilty verdict to stand when the evidence could equally support innocence reduces the standard to a preponderance and shifts the burden to the defendant.

In addition to restating the rule requiring reasonable inferences, *Benham* also restated *Sawhill*'s definitional requirements that there be "evidence of substance," and more than "a mere scintilla of evidence":

> As stated in *Sawhill*, there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.
>
> *Benham*, 816 S.W.2d at 187 -188 (emphasis added).

Neither *Sawhill* nor *Benham* nor any other Kentucky case defines evidence of substance or scintilla. In order to know what "reasonable" means in *Sawhill* and *Benham*, we must look elsewhere.

Critical definitions lie outside *Sawhill* and *Benham*.

From the facts in *Benham* we can infer what is more than a scintilla. Circumstantial evidence, motive, presence at the scene, statements by the defendant proved to be false, a confession, and written acknowledgment of that confession (all present in *Benham*) add up to more than a scintilla:

> Benham was in the area of the barn fire and had an opportunity to commit the crime. An officer and a bystander saw Benham wet and muddy which could have come from the area where the fire started; he had a motive because the mayor had had Benham arrested previously; Benham admitted setting the fire, and there was a handwritten statement by his cousin which documented Benham's admission of guilt. Benham's statement to the police was that he noticed smoke, but neither smoke nor fire was visible from the road. Benham also said he saw sparks and juice from electrical wires through which no current flowed. *Id.*

But we must look at two cases involving marginal evidence for the definition of what is less than a scintilla: *Hodges v. Commonwealth*, 473 S.W.2d 811 (Ky. 1971) and *Johnson v. Commonwealth*, 885 S.W.2d 951 (Ky. 1994). *Hodges* was purely circumstantial. Hodges' co-defendant Moore was seen crawling out of a hole in the wall of a store where several country hams had just been stolen. Five hours later the police found Hodges with Moore near the store, under a log. Neither man had anything from the store, but Hodges was there with Moore, and when an officer "hollered," he and Moore took off running. "These men were under the log together on a Sunday morning in January, without any apparent reason for being in such an unusual position." *Hodges* at 812. Moore's conviction was upheld. But the case against Hodges was thrown out, because the evidence against Hodges –including presence near the scene, close association with a known perpetrator, and flight evidence – added up to less than a scintilla because altogether it did not point "**unerringly**" to guilt:

> There is nothing in the competent evidence which indicates that Hodges was at the crime scene, nor is there anything other than his being found with Moore five hours after the latter's flight from the store, tending to prove his complicity in the crime. These circumstances, suspicious though they certainly are, do not point so **unerringly** to Hodges' involvement as to warrant submission of the case to the jury.
>
> *Hodges*, 473 S.W.2d at 814 (emphasis added).

Hodges requires that for evidence to be more than a scintilla, it must point "unerringly" to guilt. *Sawhill* approved and adopted the reasoning in *Hodges*, saying that "the cases following the line of *Hodges* …represent a better expression of the proper standard." *Sawhill* at 5. The "unerring" requirement is key to the proper standard's "better expression" in *Hodges*. It is also part of the standard adopted in *Sawhill*. *Id.*

There is no effort in *Sawhill* to explain what possible difference there could be between the disapproved equal probability rule and the implicitly endorsed *Hodges* unerring rule. *Sawhill* reincorporates with one hand what it tries to throw out with the other. And it's a good thing it does, because otherwise it would violate Due Process.

Like *Hodges*, *Johnson* describes what is less than a scintilla. In *Johnson* the evidence was that the defendant may have run a red light when he crashed into a woman's truck and killed her. *Johnson* said this evidence was insufficient and less than a scintilla because it presented a "mere possibility of wrongdoing."[2] Like the *Hodges* unerring rule, the *Johnson* rule also reincorporates the essence of the equal probability rule, because "equal probability" situations still present no

more than a mere possibility of guilt. Whether the probability of guilt is 10 percent or 50 percent, it is still a mere probability, a mere possibility.

Sawhill acknowledges that there is "varying language" in which the directed verdict rule has been stated, and that the language will continue to vary. *Sawhill* at 4. The various statements of the rule do not change *Sawhill*'s simplified statement of the rule. *Id.* But they explain and define what is meant by the word "reasonable" contained in that rule.

We need all the tools we have for deciding what's reasonable.

Applying the simply stated rule and concluding that a verdict seems reasonable –without going deeper—can take less than three minutes. Applying the complete rule and rigorously analyzing whether all the requirements for a verdict to be reasonable have been met, takes longer. It is tempting for overworked counsel and overworked courts to apply the simplified rule and to conclude quickly that a guilty verdict "seems reasonable." With so many wrongful convictions being exposed,[3] we should require deeper analysis in every case whether a guilty verdict would meet all the requirements for reasonableness. *Sawhill* and *Benham* achieved a simple statement of the rule. They did not change or simplify what it takes for a conclusion to be reasonable.

Kentucky's microscope for reasonableness

Some cases present such unreasonable facts that they can be decided using *Sawhill* and *Benham* alone. But Kentucky has developed an important line of cases designed for evaluating reasonableness in the tough cases. The *Pengleton v. Commonwealth*, 172 S.W.2d 52 (Ky. 1943), line of "no inference on inference" cases holds that a conviction is unreasonable, and cannot stand when it is founded on an inference that is founded on another inference. *Pengleton* is like a microscope for looking deep into the logical structure of the inferences supporting a potential verdict, and determining if those inferences are reasonable.

Here is where the longing for a simple three-minute rule really kicks in. Inferences? Can't we just apply the *Sawhill* and *Benham* boiled down rule of we-know-reasonable-when-we-see-it? No. We must talk about inferences. *Sawhill* and *Benham* may have achieved a boiled down description of a complex rule, but they did not eliminate the complexity. They did not eliminate the well-recognized requirement that verdicts must be based on reasonable inferences.[4] And they did not eliminate the need for "evidence of substance." In order to represent our clients well, we have to know what an inference is, what evidence of substance is, and the difference between an inference and evidence of substance.

Each inference must stand on solid factual "evidence of substance."

An inference is a conclusion drawn from known basic facts.[5] An inference is valid insofar as there is no possible situation in which all the basic facts are true and the conclusion false. *Id.* When there is more than one possible conclusion that could be true based on a set of facts, and one of them is innocence, an inference of guilt is invalid and unreasonable. Over time, a rule allowing juries to infer guilt based on facts that also support innocence would guarantee a certain percentage of invalid, unreasonable, wrongful convictions. Kentucky has no such rule. *Hodges* and *Johnson* alone require acquittal whenever evidence does not point "unerringly" to guilt, or when guilt is a mere "possibility." Kentucky's *Pengleton* rule defining reasonable inferences goes back at least to 1916, when the predecessor to the Kentucky Supreme Court ruled that an inference must stand upon evidence "of substance," *i.e.*, clearly established, rock solid fact:

> . . . . it is held that conjecture affords no sound basis for a verdict. It is not sufficient, therefore, to present a number of circumstances about which one might theorize as to the cause of the accident. **Where it is sought to base an inference on a certain alleged fact, the fact itself must be clearly established. If the existence of such a fact depend on a prior inference, no subsequent inference can legitimately be based upon it.**'
>
> *Sutton's Adm'r v. Louisville & N.R. Co.*, 181 S.W. 938, 940 (Ky. 1916) (emphasis added).

The same court applied the no-inference-on-inference rule to reverse Kate Pengleton's conviction. Kate walked into a store with her boyfriend, who was carrying two stolen chickens, and her daughter, who was also carrying two stolen chickens. *Pengleton, supra*. It seemed reasonable to conclude that Kate was a chicken thief. Without commenting whether it was proper for the jury to infer Kate possessed the chickens, the court held it was improper to infer further, based on that inference, that she had stolen them. The court succinctly stated Kentucky's no-inference-on-inference rule:

> The jury may not in determining the facts base an inference upon an inference. When an inference is based on a fact, that fact must be clearly established and if the existence of such a fact depends upon a prior inference, no subsequent inference can legitimately be based upon it. *Pengleton* at 53.

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The requirement of an immediate, direct connection between the underlying evidentiary facts and any inference from those facts was reaffirmed in Kentucky in 1949:

> An inference may be drawn from a clearly established fact, but, if the conclusion is drawn upon a fact dependent for proof of its existence upon a prior inference, the evidentiary fact is too remote to support the conclusion.
>
> *Le Sage v. Pitts*, 223 S.W.2d 347, 352 (Ky. 1949).

Again in 1966, the Kentucky Supreme Court applied the no-inference-on-inference rule in a civil case that involved a "pyramiding of inferences":

> What the appellee asks is that an inference be drawn that new bearings were ordered for this tractor; that another inference be drawn, upon the first one, that the tractor without the new *bearings* was unsafe; and that a third inference then be drawn that the accident happened by reason of the previously inferred defective condition of the tractor. **Such a pyramiding of inferences is not allowable.**
>
> *Klingenfus v. Dunaway*, 402 S.W.2d 844, 846 (Ky. 1966) (emphasis added).

In 1970, Kentucky again ruled against "piling inference upon inference" and said why: because it "leads to speculation." *Briner v. General Motors Corp.*, 461 S.W.2d 99, 102 (Ky. 1970).6 As recently as 1998, the Kentucky Court of Appeals has expressly followed the no-inference-on-inference rule, describing it as "well-founded." *Smith v. General Motors Corp*. 979 S.W.2d 127, 131 (Ky.App. 1998).[7]

In this post-*Daubert*[8] world the trend is to rely more on scientific principle, and less on human gut feeling. Kentucky has embraced and adopted *Daubert*[9] and empowered its courts to weed out unreliable opinion evidence from our courtrooms. The *Pengleton* cases serve a similar beneficial purpose, by requiring adherence to an elementary rule of scientific logic as part of its standard for evaluating evidence, instead of allowing quick gut-level decisions regarding what's reasonable.

The *Pengleton* rule is constitutionally mandated.

Everyone knows that the Due Process Clause of the United States Constitution forbids a criminal conviction based on anything less than proof of every element beyond a reasonable doubt:

> …we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.
>
> *In re Winship*, 397 U.S. 358, 364 (1970).[10]

But it might be surprising that long before *Daubert,* the United States Supreme Court endorsed and adopted a scientific rule of logic —the no-inference-on-inference rule— as a constitutionally mandated measure of what's reasonable. Yes, the United States Supreme Court has held that the validity of an inference depends on the strength of the connection between the "basic" underlying (real world) evidentiary fact and the "elemental" or "ultimate" fact sought to be established by the inference.[11] According to our highest Court, an inference lacking a strong connection to "basic" real world fact violates Due Process:

> Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime-that is, an "ultimate" or "elemental" fact-from the existence of one or more "evidentiary" or "basic" facts…. The value of these evidentiary devices, **and their validity under the Due Process Clause**, vary from case to case, however, **depending on the strength of the connection between the particular basic and elemental facts involved** and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently.
>
> *Francis v. Franklin*, 471 U.S. at 314-115 (1985) (emphasis added).[12]

The rule in *Francis*, *Ulster*, and *Barnes* is nothing more or less than the basic definition of reasonable inferences adopted from the scientific world of logic—a definition by now readily available from the internet, as well as from any book on logic.

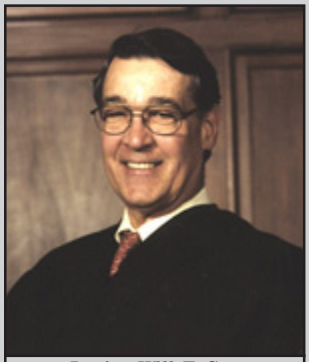
Could the commonwealth argue that this case is a puzzle, and though some of the puzzle pieces are missing, the jury will be able to "see" or "fill in" the rest of the picture in order to know your client is guilty? This argument is a dead giveaway that critical pieces of evidence are missing, and the jury will have to stack inferences on top of other inferences in order to convict. Do the logic math. Analyze each inference the jury would have to draw to convict your client. Is every necessary inference supported by solid fact? If you anticipate a "puzzle" argument, you might prepare a demonstrative aid puzzle for your own closing, to show that while there are missing pieces, the gaps could also be filled in a way that points to innocence.

Kentucky's proud heritage of reason

In addition to the oversimplified *Sawhill* and *Benham* rules, we should remember and argue Kentucky's proud heritage of thoughtful, consistent rules defining what's reasonable. There must be more than a scintilla of evidence.[13] More than a scintilla means evidence pointing unerringly to guilt.[14] More than a scintilla means evidence presenting more than a mere possibility of guilt.[15] All inferences must be "reasonable" and "fairly" drawn.[16] No inference may be based on a prior inference.[17] At the base of each inference, there must be evidence of substance.[18] As Kentucky defenders, we need to know these rules, cherish these rules, and use all of them.

Endnotes:

1. In over 200 DNA exoneration cases eyewitnesses had identified the defendant in 75% of the cases, junk science was introduced in 65%, false confessions appeared in 25%, and over 15% of the cases featured false snitch testimony. See www.innocenceproject.org.
2. *Johnson*, 885 S.W.2d at 952-953; *DeAttley v. Commonwealth*, 220 S.W.2d 106 (Ky. 1949).
3. As of June 2007, 203 DNA exonerations had been reported on the national Innocence Project website, citing eyewitness misidentification, junk or limited science, false confessions, and snitch testimony as leading causes. See www.innocenceproject.org.
4. See 31A C.J.S. Evidence § 133, "Classes of presumptions and distinctions—presumptions of fact—necessary basis." Updated June 2007; and 5 A.L.R.3d 100, "Modern status of the rules against basing an inference upon an inference or a presumption upon a presumption."
5. See http://en.wikipedia.org/wikiLogic#Deductive_and_inductive_reasoning, or any book on elementary logic.
6. *See also, Brown v. Rice,* 453 S.W.2d 11, 13 (Ky. 1970) (the position of the watch after the accident indicates at the most a possibility, not a probability, that Rice was in the crosswalk when hit. Thus there is a basis only for conjecture, rather than an inference, of the disputed fact.)
7. Citing "the well-founded rule of law that such relationship may not be proved by an inference which is itself based upon an inference."
8. *Daubert v.Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) ("general acceptance" is not necessary precondition to admissibility of scientific evidence; trial judge must ensure expert's testimony rests on reliable foundation).
9. *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995), *overruled in part by*, *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999).
10. *See also*, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) and *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 - 837 (Ky. 2003).
11. *Francis v. Franklin*, 471 U.S. 307, 314-115 (1985); *cf. Barnes v. United States*, 412 U.S. 837 (1973) (statutory inference comports with due process if the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt).
12. *Ulster County Court v. Allen*, 442 U.S. 140, 156 (1979) (inferences violate the Due Process Clause if the conclusion is not one that reason and common sense justify in light of the proven facts.)
13. *Johnson, Benham, Sawhill*, *Hodges.*
14. *Sawhill*, *Hodges.*
15. *Johnson*.
16. *Benham*, *Sawhill*, *Pengleton*.
17. *Francis, Ulster. Pengleton.*
18. *Benham, Sawhill*, *Pengleton.* ■



Justice Will T. Scott

Supreme Court Deputy Chief Justice Will T. Scott encouraged 149 new attorneys to carry out their work with courage at the annual Law Day ceremony May 1 at the Capitol.

"It's not the number of times you fall down in life that counts – it's the number of times you get up!" said Justice Scott, who gave the keynote address for Law Day. "In my lifetime I've seen a lot of young lawyers who were so afraid of making mistakes they were afraid to try. If you're going to be successful in life you have to try and at times you will fail, but if you're not afraid of falling down, you will be successful and that's living. It falls to you now to help define our world's ever-changing shape, speed and boundaries. You will do this with your skills, with your humanity, at times with your courage, but always with your integrity."

JUDICIAL CRITICISM

By Judge Joseph M. Hood

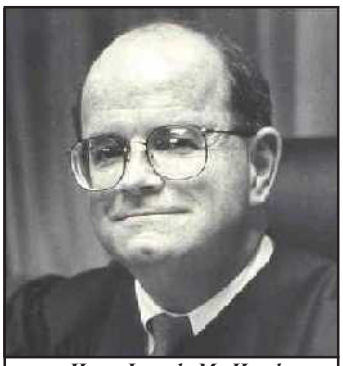
On December 6, 2006, members of the federal bar attended a luncheon in Lexington. DPA had staff in attendance who practice in federal court on behalf of habeas clients. Judge Joseph M. Hood addressed the audience on the question of whether recent attacks on the judiciary threaten judicial independence. Judge Hood was appointed to the federal bench in 1990. A graduate of the University of Kentucky College of Law, Judge Hood served in Vietnam as an infantry commander. Before he assumed the mantel of federal judge, he was a federal magistrate for nearly fifteen years. He was named the KBA's outstanding judge in 1999. His perspective after over three decades of making tough decisions impacting the lives and cases of clients in federal court are thought provoking, inspiring and thus, worthy of consideration.

Last year at this same luncheon, I was privileged to speak to you on the topic of judicial independence. Today I would like to speak on a corollary topic, judicial criticism as a threat to judicial independence.

Recently some leaders of the bench and bar, including most notably retired Justice Sandra Day O'Connor, have lamented about what they describe as unprecedented threats to the independence of the judiciary. Although the fringes of American politics offer some disturbing examples of ignorance of the judicial function, I still believe today's judiciary is still strong despite the attacks on it.

Criticism of the courts by both of the other two branches of government is not a new phenomenon; it is scarcely unprecedented. Indeed, shortly after the ratification of our Constitution, Thomas Jefferson feuded with his fellow Virginian Chief Justice John Marshall. Franklin Roosevelt, dissatisfied with the Supreme Court's rejection of some of his New Deal programs, tried to stack the Court. However, the most vitriolic of the attacks on the judiciary stemmed from the controversy surrounding the recent case involving Terry Schiavo.

The outcry in reaction to the outcome of the Schiavo case was immediate, intense and impassioned. Her death was described as "judicial murder." Many newspapers wrote editorials about the matter and one classified the case as an example of "judicial tyranny." Congress weighed in with one congressman speaking of the possibility of impeachment, while another spoke of reducing the funding of the judicial branch. Tom DeLay, then the House Majority Leader and a long time critic of the judiciary, stated that the judges in the case would have to "answer for their behavior." As an aside, I must quote Julius Caesar, "Et tu, Brute?" The state trial judge who heard the case was placed under the protection of federal marshals due to numerous death threats. Yes, this criticism was harsh but hardly unprecedented. To describe it as unprecedented is to diminish the abuses and the ostracism that earlier giants of the federal judiciary such as Frank Johnson, John Minor Wisdom and Skelly Wright endured during the civil rights struggles in the Deep South. Or for that matter, what James Gordon was subjected to in Louisville after ordering the integration of the schools there.



Hon. Joseph M. Hood

Political leaders, individuals and commentators from both sides of the political aisle fortunately came forward in response to these attacks declaring their support for an independent judiciary. Many major newspapers wrote editorials condemning the threatening rhetoric of some legislators and emphasizing the important role of the judiciary in providing a necessary check on the other branches of government. Nevertheless, it is likely that, in an effort to influence the courts to adopt positions more acceptable to their views, advocacy groups from the social and political spectrum will continue to criticize, yes even denigrate, the judges of our courts, not only federal, but state and local as well.

But is harsh criticism wrong? I think not. In some instances the judiciary has rendered decisions that are unjust, decisions worthy of rebuke. Slavery and desegregation were, to say the least, exacerbated by the decisions of the Supreme Court in the *Dred Scott* Case and *Plessy v. Ferguson*, pernicious decisions rivaled by the Court's decision in *Korematsu v. United States*. Not only was criticism of these decisions fair, it was essential to the progress of our constitutional republic. That was true when Lincoln opposed *Dred Scott* and when Thurgood Marshall, as an attorney, argued that the Court depart from *Plessy*.

Threatening or intimidating judges, and inciting public antagonism are seemingly the antithesis of judicial independence. Moreover, respect for the rule of law and our

legal system is said to be jeopardized when political, religious and civic leaders describe judges as "out of control," "running amok," and committing "judicial tyranny." The emotions of litigants - not to mention the public - are often at the kindling point during heated litigation. Those sparks need not be fanned by irresponsible rhetoric for the results may be tragic. As examples, a Fifth Circuit judge was killed opening a package bomb at his home, a package bomb sent by someone upset with the judge's ruling in an abortion case, and a district judge was killed in his front yard while mowing the grass by the father of a litigant in a sexual harassment case. Even more recently, the mother and husband of a district judge in Chicago were murdered by a dissatisfied litigant.

In summation, I submit that fair criticism of the law or the judiciary which interprets it, can through the democratic process produce a change in the law. Suffice it to say not all laws are just; no judge is infallible. While fair criticism of the judiciary can be healthy for our democratic republic, irresponsible rhetoric can lead to tragedy. ■

Client-Centered Representation Standards
Client Advisory Board of the New York State Defenders Association

Clients Want A Lawyer Who—

1. Represents a person, not a case file; represents a client, not a defendant.
2. Listens to them and represents them with compassion, dignity and respect.
3. Makes sure the client's privacy is respected and that communications take place in a space and by means that protect the confidential nature of the client-attorney relationship.
4. Refrains from displays of affection and other behavior with the prosecution that might project the image of a conflict of interest.
5. Meets with them and visits them when incarcerated, accepts phone calls, answers letters, and takes time to counsel and explain in a manner that communicates understanding and respect.
6. Listens to the client's family and with permission of the client shares and exchanges information so that the client, lawyer, and client's family remain informed.
7. Uses language in court, legal writing, and conversation that is clear and understandable to the client.
8. Pursues an investigation of the facts of the case, is culturally sensitive, appreciates the dimensions of the client's life, and becomes familiar with the communities from which his or her clients come.
9. Acknowledges personal cultural values, beliefs, and prejudices that might affect his or her ability to effectively represent a client and takes appropriate steps to shield the client from resulting harm.
10. Thoroughly and carefully reads all documents, discusses them with his or her client, and provides the client with copies.
11. Knows the law and investigates the facts, and applies the knowledge of both creatively, competently, and expeditiously.
12. Aggressively seeks resources, such as interpreters, experts and investigators, necessary for effective representation.
13. Works and strategizes in collaboration with his or her client.
14. Is committed to obtaining the best outcome for the client, zealously advocating on the client's behalf.
15. Identifies disabilities of his or her client, and obtains assessments and services to address needs.
16. Informs the client about plea negotiations, tells the client when a plea has been offered, explains the importance of the client's decision whether or not to plead guilty, advises the client on the appropriateness of any plea and all of its consequences and, acting in the best interest of the client, helps the client reach an informed decision.
17. Aggressively pursues alternatives to incarceration, assesses immigration and collateral consequences of a client's criminal conviction, acts to prevent such consequences, and explains the reason for any fines or penalties.
18. Relays to the client what criminal history information is being relied upon, makes sure the information is accurate, and sees that errors are corrected.
19. Accurately informs the client about sentencing, reviews the presentence report with the client, makes sure the court removes any errors in the report, ensures that the client has a copy of the report, and files where appropriate a comprehensive defense presentence memorandum.
20. Accurately informs the client who may be incarcerated about the incarceration process, including jail and prison programs, and works with the client to plan the future in terms of treatment while incarcerated, transitional issues, and reentry. (Also approved and endorsed by the Board of Directors of the New York State Defenders Association, October 7, 2005.)

U.S. Senate Resolution Commemorating *In re Gault*

110th Congress 1st session **S. RES.**

Commemorating the 40th anniversary of the landmark case *In re Gault*, *et al.*, in which the Supreme Court declared that all children accused of delinquent acts have a right to counsel in the proceedings against them.

IN THE SENATE OF THE UNITED STATES

Mr. Kennedy submitted the following resolutions; which was referred to the Committee on

RESOLUTION

Commemorating the 40th anniversary of the landmark case *In re Gault*, *et al.*, in which the Supreme Court declared that all children accused of delinquent acts have a right to counsel in the proceedings against them.

Whereas, on may 15, 1967, the Supreme Court announced in *In re Gault, et al.*, 387 U.S. 1 (1967) that all children accused of delinquent acts have a right to counsel in the proceedings against them;

Whereas the Supreme Court concluded that proceedings against juveniles must measure up to the essentials of due process and fair treatment, as a requirement which is part of the due process clause of the 14th amendment for the Constitution;

Whereas the Supreme Court issued this seminal ruling with regard to procedural protections for juveniles by holding that due process of law is a basic and essential term in the primary and indispensable foundation of individual freedom;

Whereas the *Gault* decision broadened the constitutional protections of the due process to safeguard children adjudicated in juvenile courts by extending to juveniles the right to fundamental procedural safeguards, including the right to advance notice of the charges, the right to counsel, the privilege against self-incrimination, and the right to confront and cross-examine witnesses; and

Whereas, 40 years after the *Gault* decision, many children appear in court without the benefit of well-resourced and well-trained legal counsel, and too many with no counsel at all: Now, therefore, be it

Resolved, That the Senate

(1) recognizes and celebrates the 40th anniversary of the decision in *In re Gault*, *et al.*, 387 U.S. 1 (1967);

(2) encourages all people of the United States to recognize and celebrate the 40th anniversary of the *Gault* decision;

(3)Expresses support for strategies to improve the juvenile justice system that appreciate the unique nature of childhood and adolescence in order to meet the goals set forth in the *Gault* decision; and

(4) renews its commitment to continuing and building on the legacy of *Gault* with a pledge to acknowledge and address the modern-day disparities that remain.

"Under our Constitution, the condition of being a boy does not justify a kangaroo court."
- In re Gault, 387 U.S. 1 (1967)

Forty years ago, in the *Gault* case, the United States Supreme Court declared that all children accused of delinquent acts have the right to counsel in the proceedings against them. Despite this clear mandate, many children appear in court without the benefit of well-resourced and well-trained legal counsel, too many with no counsel at all.

The *Gault* at 40 Campaign will use 2007 to focus on ensuring excellence in juvenile defense and will devise strategies to improve children's access to competent counsel.

The goal of the Campaign is to raise awareness and draw attention to the problems children face in the juvenile indigent defense system and to ensure that all children will be treated with respect, dignity, and fairness.

The *Gault* at 40 Campaign will conduct a number of activities and events in 2007- know your rights nights, symposia, new materials and publications, movie screenings, and more. Browse the site http://www.gaultat40.info/ to read about these events and actions, learn how to get involved, and to find resources to help you in this important work. Please send your ideas, information, new materials and suggestions to create momentum around access to and quality of counsel.

NJDC: A Campaign for Children's Rights, supported by the National Juvenile Defender Center

SUPREME COURT OF KENTUCKY

IN RE:
ORDER AMENDING
KENTUCKY RULES OF EVIDENCE (KRE)

2007-02

In accord with KRE 1102(a), and the Chief Justice having reported to the Kentucky General Assembly proposed changes to KRE 103, KRE 404, KRE 410, KRE 701, KRE 702 and KRE 1103, and the General Assembly not having disapproved amendment to the Rules of Evidence by resolution during the 2007 Regular Session, the following Kentucky Rules of Evidence are hereby immediately effective:

A. KRE 103 Rulings on evidence

The amendments to subsections (1) and (2) of section (a) of KRE 103 shall read:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and

(1) Objection. If the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. If the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. Injury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Motions in limine. A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. The court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial . A motion in limine resolved by order of record is sufficient to preserve error for appellate review. Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine.

(e) Palpable error. A palpable error in applying the Kentucky Rules of Evidence which affects the substantial rights of a party may be considered by a trial court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Evidence Rules Review Commission Notes (2007)

The 2007 amendment to this provision of the Rules makes two changes in the original (1992) rules on preserving errors for review. Both of the changes are in the first subsection of the provision(KRE103(a)). None of the other subsections are affected by the 2007 amendment.

The first of the changes involves the requirement that a party make "specific" rather than "general" objections when the party desires exclusion of offered evidence. Under the 1992 version of this rule, a party was required to give grounds for objection only when requested to do so by the trial court; under the 2007 amendment, a party is required to state grounds for an objection in order to preserve error for review (and not just when requested to do so by the court) unless the ground for the objection was apparent from the context. The reasons for making this change include all of the following:

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(1) One of the reasons for requiring specific objections is to impose on lawyers an obligation to assist the trial judge with difficult issues of evidence law so that the judge may rule intelligently and quickly on those issues. This policy is sufficiently sound to require a statement of grounds in all instances and not merely upon request by the court.

(2) The amendment brings KRE 103(a)(1) into alignment with FRE 103(a)(1). Uniformity with the Federal Rules has been consistently pursued by drafters of the Kentucky Rules and would be advanced by this amendment.

(3) The amendment would bring Kentucky law into alignment with the prevailing if not universal rule of other states and would bring the law into alignment with a proposal made by the drafters of the 1992 version of the Kentucky Rules. See Study Committee, Kentucky Rules of Evidence, Final Draft, pp. 2-4 (Nov. 1989).

The second of the changes involves the requirement that a party made a "proper offer" of proof in order to preserve error when offered evidence is excluded by the trial judge. Under the 1992 version of this rule, lawyers were required to use witnesses when making a record of evidence ruled inadmissible by the judge; the rule left no room for what is known widely as a "proffer" of evidence (*i.e.*, where the lawyer states for the record what the witness would have said if allowed to testify). Under the 2007 amendment, lawyers are required to make the substance of excluded testimony "known to the court by offer" but are not required to do so through testimony of witnesses (thereby opening the door to the use of "proffers" of evidence). The reasons for this change include all of the following:

(1) It is more efficient and less burdensome to allow the lawyers to state for the record what a witness would say in testimony if permitted (using the "proffer") and should in some instances enhance the fluidity of the production of evidence, all without imposing any burden on the opposing party or on the affected courts (trial and appeal).

(2) The amendment brings KRE 103(a)(2) into alignment with FRE 103(a)(2), brings Kentucky's law into alignment with the law of most if not all other states, and adopts a position first advanced by the original drafters of Kentucky's Rules of Evidence. See Study Committee, Kentucky Rules of Evidence, Final Draft, pp. 2-3 (Nov. 1989).

(3) The amendment also serves to eliminate an ambiguity in KRE 103 because of the inconsistency of saying on the one hand that an offer of excluded evidence must come from the witness(as in the original version of KRE103(a)(2))but then saying on the other hand that the trial judge "may direct the making of an offer in question and answer form" (as has always been stated in KRE 103(b)).

B. KRE404 Character evidence and evidence of other crimes

The amendments to subsection (1) of section (a) of KRE 404 shall read:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action inconformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character or of general moral character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule404(a)(2),evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of victim generally. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, other than in a prosecution for criminal sexual conduct, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witnesses. Evidence of the character of witnesses, as provided in KRE 607, KRE 608, and KRE 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith . It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

(c) Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

Evidence Rules Review Commission Notes (2007)

The 2007 amendment to this rule makes a change with respect to the admissibility of evidence of the character of an accused (as provided in subsection (a)(1) of the provision)and leaves all of the other provisions of the rule unchanged.

The change expands the circumstances under which the prosecution is permitted to prove a defendant's character to show the commission of a criminal act. Under the 1992 version of this rule, the prosecution could not introduce evidence of a defendant's character except in rebuttal of character evidence first offered by the defendant (*i.e.*, the defendant's character was not in issue until he had put it in issue). The change opens the door for the prosecution to prove the bad character of a defendant after the defense has attacked the character of the victim (although keeping his own character out of the issues of the case).

The drafters of the Federal Rules made this same change in year 2000 and offered the following explanation for doing so:

> "The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent disposition, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. . . . Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim." See Fed.R.Evid. 404, Advisory Committee Notes, 2000 Amendment.

Needless to say, the 2007 amendment to the Kentucky Rules serves to bring KRE 404(a)(1) into full alignment with its counterpart in the Federal Rules.

It needs to be noted, as stated in the commentary to the Federal Rules that "the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609." See Fed. R .Evid. 404, Advisory Committee Notes, 2000 Amendment.

C. KRE 410 Inadmissibility of pleas, plea discussions, and related statements

The amendments to sections (2), (4)(A) and (B) and new paragraph of KRE 410 shall read:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;

(2) A plea of *nolo contendere* in a jurisdiction accepting such pleas;

(3) Any statement made in the course of normal plea proceedings, under either state procedures or Rule 11 of the Federal Rules of Criminal Procedure, regarding either of the foregoing pleas; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a plea or statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

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Evidence Rules Review Commission Notes (2007)

The overall purpose of KRE 410 is to bar the use of certain pleas and plea discussions when later offered into evidence in a civil or criminal trial. The 2007 amendment to this provision of the Rules makes two changes. The first change is minor but substantive and the second is solely for the purpose of correcting an error made in the original enactment of the Rules.

The first change is to eliminate some language that was unwisely added to the rule during the course of its original enactment, specifically the language prohibiting the use of "a plea under *Alford v. North Carolina*, 394 U.S. 956 (1969)." (Also – called "Alford plea" is a guilty plea by a criminal defendant who refuses to acknowledge guilt but waives trial and accepts all the consequences of a conviction.) This added language created a question as to whether prior convictions based on "Alford pleas" might be introduced as evidence(for impeachment purposes or to prove persistent felony offender status), which the Supreme Court has resolved in favor of admissibility. See *Pettiway v. Commonwealth*, 860 S.W.2d 766 (Ky. 1993). The proposed change eliminates language from the rule that serves no useful purpose and simultaneously brings the Kentucky provision into alignment with its federal counterpart.

The second change is designed to correct an error that was made upon the original enactment of the Rules. By mistake, the last sentence of the provision (beginning with the words" However, such a statement is admissible: "and ending with the words "in the presence of counsel.") has been published as an exception applicable only to subsection (4) of the rule when it was intended by drafters, the Supreme Court, and the General Assembly to be an exception applicable to all of the subsections of the rule. See Study Committee, Kentucky Rules of Evidence, Final Draft, p.33 (Nov.1989). The proposed change modifies the rule as needed to accomplish its original objective, while simultaneously achieving uniformity between the Kentucky and Federal Rules on this point.

D. KRE 701 Opinion testimony by lay witnesses

The amendments to sections(a),(b) and new section(c) to KRE 701 shall read:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

(a) Rationally based on the perception of the witness,
(b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and
(c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Evidence Rules Review Commission Notes (2007)

With the adoption by the Kentucky Supreme Court of the analysis required by the decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), there was a risk that courts could be asked to avoid the reliability standards set out in that case by the simple process of offering "scientific, technical, or other specialized knowledge "evidence through a witness that an attorneys ought to identify as a "lay witness." The Federal Rules of Evidence, Rule 701, avoided this error, by specifically adding language that excludes such evidence from the operation of Rule 701. The addition of subsection ©to Kentucky Rule of Evidence, Rule 702, follows the exact language of the Federal Rule amendment. This subsection requires that an attempt to introduce testimony that is a part of "scientific, technical, or other specialized knowledge," must be tested for reliability under Rule 702.

The amendments to Rules 701 and 702 must be read together. The introduction and reliability of the evidence is determined not by asking whether the witness is lay or expert, but, instead, by asking whether the testimony to be offered is lay or "scientific, technical, or other specialized knowledge." If it is of the former, then Rule 701 is applicable. If it is of the latter, then Rule 702 must be used.

E. KRE 702 Testimony by experts

The amendments to KRE 702 shall read:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Evidence Rules Review Commission Notes (2007)

When the Kentucky Rules of Evidence were adopted in 1992, Ky.Rule 702 used the same language as Federal Rule of Evidence 702. In addition, the Kentucky Rule was interpreted to follow the traditional rule of *Frye v. United States*, 293 F. 1013 (D.C. Cir.1923). The "Frye Test" would allow admission of scientific evidence if it was generally accepted in the scientific community.

The United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) over ruled the "Frye Test" and interpreted Federal Rule of Evidence 702 to require an analysis off actors by the trial judge in order to determine whether the scientific evidence was admissible. In order to admit such evidence the trial court was to act as a "gatekeeper" and make a preliminary determination that the underlying science was, in fact, "valid." In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the "Daubert Test" was extended to cover not only "scientific" evidence, but also any evidence of "scientific, technical, or other specialized knowledge."

In 2000, Rule 702 of the Federal Rules of Evidence was amended in order to codify the approach taken in *Daubert*. The items listed as numbers (1), (2), and (3) are not intended to specifically state the factors found in *Daubert* and *Kumho Tire*. They are, instead, intended to indicate that the court is to determine the reliability of such evidence based upon the flexible factors suggested by such cases. Although there is no attempt to codify the specific factors from that case, the purpose of the amendment is clearly stated by the Federal Advisory Committee Notes to that amendment.

No attempt has been made to "codify" these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. . . . The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

In 1995, the Kentucky Supreme Court followed the lead of the United States Supreme Court and adopted the rationale of the *Daubert* decision as the appropriate interpretation of the language of Rule 702. *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky.1995). In 2004, the Kentucky Supreme Court restated the flexible standard originally espoused in *Daubert* in *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35 (Ky. 2004).

The 2007 amendment to Kentucky Rule of Evidence, Rule 702 is designed to follow the development and adopts exact language set by the Federal Rules. The amendment will codify the approach taken in the *Daubert* case, followed in the Toyota Motor Corp. case and allow the trial court to act as gatekeeper to the introduction of "scientific, technical, or other specialized knowledge." The amendment does not specifically require the use of all or anyone of the factors suggested by the court. It allows the trial court to use those factors that are appropriate to the case at trial.

F. KRE 1103 Evidence Rules Review Commission

The amendments to section(a) of KRE 1103 shall read:

(a) The Chief Justice of the Supreme Court or a designated justice shall serve as chairman of a permanent Evidence Rules Review Commission which shall consist of the Chief Justice or a designated justice, one (1) additional member of the judiciary appointed by the Chief Justice, the chairman of the Senate Judiciary Committee, the chairman of the House Judiciary Committee, a member of the Board of Governors of the Kentucky Bar Association appointed by the President of the Kentucky Bar Association, and five (5) additional members of the Kentucky bar appointed to four (4) year terms by the Chief Justice.

(b) The Evidence Rules Review Commission shall meet at the call of the Chief Justice or a designated justice for the purpose of reviewing proposals for amendment or addition to the Kentucky Rules of Evidence, as requested by the Supreme Court or General Assembly pursuant to KRE 1102. The Commission shall act promptly to assist the Supreme Court or General Assembly and shall perform its review function in furtherance of the ideals and objectives described in KRE 102.

All concur.
ENTERED: MAY 1 2007. ■

KPDC's Recent Past and Hopeful Future

By Glenn S. McClister, Education Branch

In light of the fact that the new Kentucky Public Defender College (KPDC) graduated its first 49 new attorneys in February and March of this year, this might be a good time to look back at what we have accomplished with KPDC so far, and to look forward to what we still hope to achieve.

In 2006, the DPA received dozens of new trial attorney positions to aid with our caseload crisis. With this increase in the number of new public defenders to train, DPA's Education Branch renovated our training with the creation of the new trial public defender track of the Kentucky Public Defender College.

What We've Accomplished So Far

Initially, Jeff Sherr and I conceived of the College in order to accomplish three goals. We wanted to 1) get class sizes back down to 12-15 attorneys per class, 2) condense training, where possible, so that we could shorten the time new attorneys spent away from the office, and 3) re-prioritize the subject matter we trained on. To achieve this, we designed three, week-long training sessions, two of which we would repeat again and again till all the new attorneys had attended all the sessions. Reducing class sizes made it possible to return to a more interactive style of learning and also made it easier for participants to get to know each other. Condensing the training meant fitting separate training sessions on subjects such as evidence, mental health and perservation into the new structure. Re-prioritizing the subject matter included designing an entirely new district court training, offering a new session on trial law, and trying to spend more time on basics such as sentencing law and advocacy.

We continue to modify the program as we go but as it stands, in order to graduate, each new attorney has to attend and participate in over 85 hours of lectures and training over the three-week period. The training includes the following:

Week One: District Court: The first half of week one consists of two days of interactive training in which new attorneys work their way through 32 of the most common scenarios and legal issues involved in district court practice. Each new attorney researches and analyzes the legal issues in his or her case, interviews the "client," negotiates either a bond reduction or a plea offer with a "prosecutor," and then argues before a "judge" as we call the district court docket. With the aid of a new 40-page District Court Law Review, the new attorneys cite relevant statutes, criminal rules and case law as they argue for bond reductions or present their client's legal arguments to the court.

Week One: Juvenile Court: In the second half of week one new attorneys learn Juvenile Court practice by working together on a single case problem which takes them through all the most important aspects of fully litigating a case in juvenile court. They learn all the relevant statues and case law as they pursue the case through juvenile court, up to circuit court, and back down to juvenile court. The training ends with teams of new attorneys explaining the law and then arguing at the client's detention hearing, transfer hearing, a suppression hearing, an equal protection motion, and finally the disposition hearing.

Week Two: Faubush: Week Two of KPDC is Faubush which, according to our most recent surveys, continues to be the single most memorable and rewarding training we offer. Led by a nationally-known faculty of veteran trainers and coaches from all over the United States, Faubush is our week-long trial skills institute. Using case problems or their own actual cases, students start with developing themes and theories and then progress through actual voir dire practice and then into opening arguments, direct examinations, cross-examinations, and closing arguments. In each exercise they are coached by experts at the art of storytelling at trial.

Week Three: Circuit Court: The final third week of training is an intense, consolidated training including sessions on developing client relationships, discovery, evidence, trial law, sentencing, search and seizure, *Daubert*, mental health, preserving the record, and handling sex offense cases.

In all our training, we try to insist on a positive, "total success" approach. Although we do put students "on the spot" by asking them to actually stand and make arguments (the best way to learn the law), we insist that they are not being *tested* in any way. Instead, the point of all our interactive training is to give each new attorney the tools and the coaching to get up during training and *get it right*.

What We Still Hope to Achieve

Some of our continuing goals for KPDC include the following:

Developing More Training Tracks. We intend eventually to expand the function of the College to embrace the training needs of all our employees. In the upcoming year, we will be working on developing separate new training tracks for investigators and post-trial attorneys as well as a track on leadership development for those wishing to assume greater responsibilities in the agency.

Recruiting and Training More Coaches. Since the class sizes are now smaller, we may have to repeat district, juvenile, and circuit court training up to four times a year. This means we need four times as many coaches and trainers. KPDC needs lots and lots of "adjunct professors"!

I try never to forget that all our fine coaches and presenters are volunteers who take on responsibilities which are not part of their job descriptions. They sacrifice their time and effort simply to give something of their knowledge and experience to others. The fact is, however, that DPA simply cannot continue to assure the highest standards of quality education for its attorneys without the help and sacrifice of these volunteers. We have always needed, and will continue to need, attorneys who will express an interest in coaching and training other attorneys.

We have added a train the trainer workshop for the development of the next generation of public defender trainers and coaches.

Standardizing the Training Materials. We have the materials our original presenters have put together and are in the process of recording all their presentations. Nevertheless, we need two or three different attorneys who can present on every topic we cover. Once we finish recording and standardizing all of our training, a new presenter on any topic can simply watch the presentation of the original author, and then take the materials and be able to fill-in when necessary. Unlike the past, new volunteer trainers will not be expected to spend the time and effort of doing their own research, writing an outline, and providing all the other materials. The materials will already be here, ready to be taught.

Updating Training Materials. For those perhaps not comfortable with coaching or who want to contribute but do not have the time to spend days at a time training attorneys in Frankfort or elsewhere, we need attorneys who are willing to volunteer to ensure that our training materials stay up-to-date.

Providing More Distance Learning on "Sub-Specialties." We have designed new attorney training to address the kinds of topics which fall into two categories: 1) subjects every attorney simply has to know, and 2) subjects every attorney will need to know sooner or later. That leaves a whole range of subjects which attorneys may only need to become an expert in for one or two cases. We want to provide Distance Learning modules on such topics. So, if you have a special knowledge of DNA, ballistics, eyewitness identification, arson investigation, working with social workers, etc., we would like to hear from you as well. This may some day develop into an "advanced degree program."

Continue to Seek Feedback and Improve. Your feedback will continue to be our most valuable source of information about how we can continue to improve our training of new DPA staff. Please do not hesitate to make criticisms or suggestions for improvement.

Lastly, on behalf of the whole Department I would like to thank all of the current faculty which has already worked so hard to provide the foundation of our current curriculum. All our future efforts will build on your work. ■

Realizing Justice
35th Annual DPA Awards Banquet
Honored DPA Champions
and Orleans Parish Defenders

By Dawn Jenkins, Executive Advisor

Some 350 public defenders joined Ernie Lewis in recognizing the outstanding accomplishments of defenders for indigent defense, who realize justice everyday, at the 35th Annual DPA Awards Banquet on June 19.

Jay Barrett

Jay Barrett received DPA's much revered G*ideon Award* for his service as the Trial Division Director, outstanding attorney, and accomplished leader in DPA for 12 years. Under his leadership, DPA achieved a full-time statewide public defender system with thirty trial offices covering all 120 counties in the Commonwealth. Ernie Lewis stated, "Jay is a hard working, honest and a highly principled leader. The Department Of Public Advocacy established the *Gideon Award* in 1993, in celebration of the 30th Anniversary of the U.S. Supreme Court's landmark decision in *Gideon v. Wainwright*. Upon receiving the *Gideon Award*, Jay stated, "I take real satisfaction in knowing that we have been able to bring highly qualified attorneys into defender positions across the state and equip them through our training to provide zealous advocacy for the clients that we are privileged to serve."

Neal Walker, Capital Defender, Celebrated In Memoriam

The *William Henry Furman Award* was given in memory of Neal Walker, a capital defender whose work on behalf of capital clients, including Faye Foster in Kentucky and many others in New Orleans, is nationally recognized. This award was established in the spirit of *Furman v. Georgia*, the landmark case which abolished the death penalty in 1972.

"We will always remember Neal for his devotion to saving the lives of his clients and for living life with zeal."
— Ernie Lewis

"Neal was a gentle, but fierce, giant in our community…If we all try to be more like him in some small way, we will honor his time with us."
— Monica Foster

Neal Walker

Orleans Defenders receive *Lincoln Leadership Award* Rebuilding Orleans Parish Public Defender System Post-Katrina

Defenders in New Orleans were honored with the prestigious *Lincoln Leadership Award* for leading the reorganization and rebuilding of the Orleans Parish Public Defender System following the devastation of Hurricane Katrina.

Hurricane Katrina left the Orleans Parish Public Defender system in disarray. It exacerbated an already existing

problem, in part because Louisiana finances indigent defense through traffic fines. During the worst days, the system was left with as few as eight attorneys and grossly inadequate resources. A Justice Department report stated that the Orleans Public Defender System "should be scrapped, staff replaced

Ernie Lewis giving award to New Orleans Parish Leadership Team: Christine Lehmann, Jon Rapping, and Steve Singer

and funding overhauled." The State Supreme Court issued a unanimous decision ruling that Louisiana had failed to adequately fund a program to provide attorneys for poor defendants, as required by the constitution.

Kentucky defenders including Jeff Sherr, Ernie Lewis, and Dan Goyette have been extraordinarily helpful in assisting in the redesign of the Orleans Parish defender system.

"Louisiana should be respected for a balanced justice system, not a system criticized by many as one of the worst in the country," said Christine Lehmann, Chief Public Defender in Orleans Parish.

Lynda Campbell

Lynda Campbell, a Lifetime of Dedicated Service,
Nelson Mandela Lifetime Achievement Award

After 26 years as a public defender and more than 10,000 cases, including 12 cases in which the defendant faced a possible death sentence, Lynda Campbell was honored with the *Nelson Mandela Lifetime Achievement Award.* This award honors the lawyer who best represents a lifetime of dedicated services and outstanding achievements in advancing the right to counsel for Kentucky indigent criminal defendants. "Our court system cannot provide justice if the quality of an accused person's defense depends of whether they can afford to hire a competent attorney," Lynda said in an interview with the *Richmond Register*. "For the system to work properly, we must have competent defenders as well as competent prosecutors and judges." Lynda states, "I was never tempted to leave my public defender's job by the prospect of more income as a private practice defense attorney."

"Lynda was always honest about the sorry mess of many of her client's lives yet could find a reason to argue that they be treated with compassion regardless of that sorry mess," states Rebecca DiLoreto, longtime colleague and friend. Nicholas Hayes said of Lynda, "my colleagues and I never cease to be amazed by Lynda's effortless prose and witty strategy…she always achieves noteworthy results." Lynda will be missed by everyone in the Department of Public Advocacy.

Ernie Lewis and Alice Hudson

The Spirit of Rosa Parks,
Alice Hudson

The Rosa Parks Award was given to Alice Hudson in the Frankfort Office. This award honors the non-attorney who has galvanized other people into action through their dedication, service, sacrifice and commitment to the poor. After Rosa Parks was convicted of violating the Alabama bus segregation law, Martin Luther King, Jr. said, "I want it to be known that we're going to work with grim and bold determination to gain justice . . . And we are not wrong . . . If we are wrong justice is a lie. And we are determined . . . to work and fight until justice runs down like water and righteousness like a mighty stream." Alice is described as a "voice of hope to our clients," by Jessie Luscher, and "a critical and integral part of DPA's team," by Donna Boyce.

Anthony Lewis Media Award
Goes to Reporter Paul A. Long

Kentucky Post reporter Paul A. Long received the Kentucky Department of Public Advocacy's Anthony Lewis Media Award. Long was honored for making significant contributions to informing the public on issues of a balanced criminal justice system, the importance of indigent defense and other issues of criminal defense.

The award, named for *New York Times* columnist Anthony Lewis, author of "Gideon's Trumpet," recognizes excellence in media and coverage of the role public defenders play in a fair court process.

Long is a 22-year veteran of *The Post* and has covered courts for 17 years. He worked for the State Journal in Frankfort before joining The Post.

— *Cincinnati Post*, June 21, 2007

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Ernie Lewis & LaMer Kyle-Griffiths

La Mer Kyle-Griffiths,
***In Re Gault* Awardee**

La Mer Kyle-Griffiths was awarded the *In Re Gault Award* for advancing the quality of representation for juveniles in Kentucky.

La Mer has represented children and youth in Paducah, Maysville and now as Directing Attorney in Cynthiana, all highly challenging courts. Her skill and advocacy in the courtroom is noteworthy. She reminds us all that neither the *Fourteenth Amendment* nor the *Bill of Rights* are for adults only.

Tim Arnold of the Post-Conviction Juvenile Division, says, "La Mer has been a stalwart advocate for high quality representation. She is an invaluable asset to DPA as trainer, manager and attorney."

It always seems impossible until it's done.

-- Nelson Mandela

Ernie Lewis & Marcia Allen

Marcia Allen, Defining and Emulating Professionalism and Excellence

Marcia Allen was honored with the *Professionalism and Excellence* Award, which is defined by the 1998 Public Advocate's Workgroup on Professionalism and Excellence, goes to a DPA staffperson who best exhibits these qualities:

Prepared and knowledgeable, respectful and trustworthy, supportive and collaborative. The person celebrates individual talents and skills, and works to insure high quality representation of clients, and takes responsibility for their sphere of influence and exhibits the essential characteristics of professional excellence.

"Marcia Allen can feel pride in her part of raising DPA's standard of excellence. I have observed as DPA has strategically developed the full-time, statewide public defender system. You are now the largest law firm in the Commonwealth. You are providing quality indigent defense, quality service to indigent defendants in all 120 counties, and improving the criminal justice system. Thank you Ms. Allen, for helping to develop policies, educating and directing staff, and modeling professionalism and excellence during your seven years of service and as the Personnel Branch Manager."

—Jane Dyche, KBA President-Elect ■

Let us realize the arc of the moral universe is long but it bends toward justice.

— Martin Luther King Jr.

Kentucky Bar Association's Awards Banquet

By Rebecca Ballard DiLoreto, Post Trial Division Director

The Kentucky Bar Association hosted its Annual Banquet on Thursday, June 21, 2007 at the annual convention for the members of the bar. DPA staff attended the conference. Two noteworthy members of the bar were honored at the convention. Judge Boyce F. Martin, received the Outstanding Judge of the Year Award, and Daniel T. Goyette, received the Outstanding Lawyer of the Year Award.

Judge Boyce F. Martin
Outstanding Judge of the Year

Judge Boyce F. Martin, Jr.

Judge Martin was the first chief judge of the Kentucky Court of Appeals and served from 1976 to 1979. Appointed by President Jimmy Carter to the federal bench, he began his service on the Sixth Circuit Court of Appeals in 1979. He served as chief judge from 1996 to 2003 and is now Chief Judge Emeritus. Judge Martin presided over many significant cases in his years on the federal court. One recent opinion of note for DPA was Judge Martin's eloquent dissent in the case of *Moore v. Parker,* 425 F.3d 250 (C.A.6, 2005). This death penalty case came out of Louisville, Kentucky.

Judge Martin noted the following in dissent:

> In this death penalty case, Brian Keith Moore's attorneys performed reasonably at trial. These same attorneys, however, failed their client at sentencing. If the Majority is correct and this kind of lawyering is "not even deficient performance, let alone prejudicial," Maj. Op. at 254, the legal profession ought to take a good look in the mirror. I believe Brian Keith Moore is entitled to a new sentencing hearing and I respectfully dissent….
>
> I have been a judge on this Court for more than twenty-five years. In that time, I have seen many death penalty cases, and I have applied the law as instructed by the Supreme Court, and I will continue to do so for as long as I remain on this Court. This my oath requires. After all these years, however, only one conclusion is possible: the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair.

Rebecca DiLoreto

The flaws are numerous and the commentators have documented them well. There have been numerous death row exonerations. In fact, in some states the pace of exonerations competes with the pace of executions. *See, e.g., Death Penalty Information Center Searchable Database*, http://www.deathpenaltyinfo.org/executions.php, last accessed September 6, 2005 (indicating that since 2000, Louisiana has executed two individuals while five individuals have been exonerated from death row). Blatant racial prejudice continues to infest the system. *See, e.g,. Miller-El v. Dretke*, — U.S. ——, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). Peremptory challenges tilt the balance from the outset in favor of death. *Id.* at 2340 (Breyer, J., concurring). The election of state judges creates another subtle bias toward death. Justice John Paul Stevens, Address to the American Bar Association Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005), available at http://www.supremecourtus.gov/publicinfo/speeches /sp_08-06-05.html. Crime labs are unreliable, *See Ralph Blumenthal, Officials Ignore Houston Lab's Troubles, Report Finds*, N.Y. TIMES, A10 (July 1, 2005); *The Innocence Project, DNA News*, http://www.innocenceproject.org/dna news/index.php (documenting suspension of DNA testing in Houston, Texas as a result of lab incompetence); *see also House v. Bell*, 386 F.3d 668 (6th Cir.2004), cert. granted — U.S. — —, 125 S.Ct. 2991, 162 L.Ed.2d 910 (2005), witness identifications continue to prove faulty, and false testimony and false confessions plague the system, *See, e.g., The Innocence Project*, http://www.innocenceproject.org/case/displayprofile.php?id=07 (case of Rolando Cruz). The death penalty has proved to be an ineffective cure for society's ills, public support continues to erode, and we share the dubious distinction of being the only western democracy that continues to put its own citizens to death. Of particular relevance to this case, the bad lawyering and incomprehensible arbitrariness that permeate the system should disgust any person concerned with the fair administration of criminal justice. Many of these flaws

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are rightfully brought to the attention of the nation's political leaders. Notwithstanding, many of these flaws are legally relevant to the Eighth Amendment question-namely, under "evolving standards of decency," *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion), "whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable." *Furman v. Georgia*, 408 U.S. 238, 360, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Marshall, J., concurring). An even better argument, in my opinion, is that the death penalty violates the Fourteenth Amendment because it is so transparently arbitrary that the system in its entirety fails to satisfy due process. More than ten years have passed since Justice Blackmun's statements in *Callins v. Collins*, 510 U.S. 1141, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994) (Blackmun, J., dissenting from denial of *certiorari*), regarding the failure of the death penalty system due to the absence of consistency, rationality, and fairness in its administration. It has only gotten worse. Justice Stevens's recent address to the American Bar Association thoughtfully makes the case that there are "special risks of unfairness" in the administration of the death penalty. Justice John Paul Stevens, Address to the American Bar Association Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005) ("[W]ith the benefit of DNA evidence, we have learned that a substantial number of death sentences have been imposed erroneously. That evidence is profoundly significant-not only because of its relevance to the debate about the wisdom of continuing to administer capital punishment, but also because it indicates that there must be serious flaws in our administration of criminal justice ... My review of many trial records during recent years has, however, persuaded me that there are other features of death penalty litigation [aside from ineffective assistance of counsel] that create special risks of unfairness.").

As noted above, while the system suffers from many flaws, much of the arbitrary imposition of the death penalty stems from the exceedingly distressing fact that during all my years on the bench, the quality of lawyering that capital defendants receive has not substantially improved. In many cases it has deteriorated. In fact, one of the most clear examples of the arbitrariness of the death penalty is the common knowledge that those defendants with decent lawyers rarely get sentenced to death. Death has more to do with extra-judicial factors like race and socio-economic status than with whether death is deserved. A system, whose basic justification is the interest in retribution and general deterrence, is not served when guided by such irrelevant factors. Nor should a system of life and death hinge on the proficiency of counsel.

I have no delusions of grandeur and I know my place in the judiciary. My oath requires me to apply the law as interpreted by the Supreme Court of the United States. I will continue to do as I am told until the Supreme Court concludes that the death penalty cannot be administered in a constitutional manner or our legislatures abolish the penalty. But lest there be any doubt, the idea that the death penalty is fairly and rationally imposed in this country is a farce. *Moore v. Parker*, 425 F 3d 250 at 270 (CA 6, 2005)

Dan Goyette
Outstanding Lawyer of the Year

Dan Goyette

Dan Goyette, our own long-time director of Louisville-Jefferson County Public Defender Corporation, was honored as the Outstanding Lawyer of the Year by the KBA. Dan graduated from Marquette University, Rome Center of Liberal Arts, and the University of Oklahoma College of Law. Recognized as a true believer, Dan was snatched right out of law school by Colonel Tobin, then Executive Director of Louisville's Public Defender Corporation. From 1974 to 1977, Dan worked in the public defender's office. He switched sides for a brief twelve months from 1976 to 1977 to serve as an assistant Commonwealth Attorney and then returned to the public defender's office.

Dan and his wife, Kathy, just recently celebrated thirty-five years of marriage and are the proud parents of four gifted and highly competent daughters. As an active member of his community, Dan has maintained a commitment to family while energetically dedicating himself to the cause of justice and fairness in our criminal justice system.

Most of us know Dan Goyette as the Executive Director of the Louisville-Jefferson County Public Defender Corporation, where he has served since 1982. Yet, in addition to that job, Dan has been active for many years in creating quality, cutting-edge education for members of the bar to serve the KBA, the Louisville Bar Association and DPA. He has also served for the past thirty years as an active member or board member of the NLADA, ABA and NACDL. A founding member of the Kentucky Association of Criminal Defense Lawyers, Dan is currently First Vice-President of KACDL. He served as co-chair of this year's 2007 KBA Annual Convention CLE Committee.

Dan's lifelong career in indigent defense exemplifies how a strong advocate for poor people can also play a leadership role in the bar and thereby promote the professionalism of public defenders in the criminal justice system. Dan is past president of the Louisville Bar Association and the Louisville Bar Foundation. He has been a member of the adjunct faculty

at the University of Louisville Brandeis School of Law since 1979. He is past president of the Kentucky Academy of Justice. Dan currently serves along with former Deputy Public Defender, Ed Monahan, on the KBA Ethics Committee. Addressing challenges to fairness in the system, Dan also serves as a member of the Chief Justice's Commission on Racial Fairness in the Courts.

The Outstanding Lawyer of the Year Award was clearly not the first recognition for Mr. Goyette. Dan received our own DPA Gideon Award in 1994 for his commitment to equal justice. He is a recipient of the American Bar Association's prestigious Dorsey Award, a 2003 recipient of the Brandeis School of Law Dean's Service Award, a recipient of the 2003 KBA Justice Thomas B. Spain Award, and a charter member of Louis D. Brandeis American Inn of Court.

Dan's ongoing commitment to our clients can be seen in his day to day effort to run a quality indigent defense program on a shoestring budget, his effort to make sure the public defender perspective is at the table when he attends committee meetings and community events and his active presence as counsel of record in two death penalty post conviction cases. Kentucky, DPA, and our clients have greatly benefited by the dedication with which he has committed himself to his chosen profession.■

Book Review:
Politics, Religion and Death by Carl Wedekind

Published 2006 by The Kentucky Coalition to Abolish the Death Penalty

By Margaret Case, General Counsel

You had a civics or government class when you were in school, and you studied Article II of the Constitution. Right? (Just in case you've forgotten, that's the part that deals with the presidency.) But, do you honestly think you learned much about what goes on inside the White House? Doesn't it take something like "The West Wing" to flesh out what Article II means in real life?

The world of legislators is like that, too. You can read Sections 29-62 of the Kentucky Constitution, and you can study the rules that govern the proceedings of the Kentucky General Assembly. But, they don't come close to describing how the state legislature actually operates. Carl Wedekind's book, *Politics, Religion and Death,* just might be the "West Wing" of the Kentucky General Assembly.

This is a very readable, first-person account of how one citizen of the Commonwealth got sucked "behind the looking glass" into the surreal world of the Kentucky General Assembly, and how he came out relatively unscathed, ready to live and lobby another day. It covers the years from 1998 through 2002, when the author took part in efforts to pass Kentucky's Racial Justice Act and to abolish capital punishment in the Commonwealth.

It starts with the story of Harold McQueen.

Harold McQueen was the first Kentucky death row inmate to be assigned a realistic execution date following reinstatement of capital punishment here. It was 1997. Carl Wedekind, a lawyer and an ACLU member in Louisville, was recruited to join a team representing McQueen in a constitutional challenge against electrocution as constituting cruel and unusual punishment.

Margaret Case

The challenge was mounted on two fronts: state court and federal court. Wedekind describes the elation that reigned as a stay of execution poured out of the fax machine from the federal district court. Next it was on to the state supreme court for an argument there. As he tells the story:

> All in all I thought the argument went very well and I was very hopeful. We had our restraining order from the federal district court, so the execution couldn't take place unless something bad happened.
>
> Something bad happened . . .

The ending of the Harold McQueen story is well known. The state courts would not halt the execution. The Sixth Circuit Court of Appeals ordered that the federal stay be vacated. And ultimately, McQueen was killed in Kentucky's electric chair.

It was at this point that Carl Wedekind became an abolitionist. Everything in him abhorred the very idea that he could be forced to become a killer by virtue of the government killing a human being in his name. When he finally gave in to the

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realization that the government did indeed have the power to kill in his name, "This taste of powerlessness lit a flame that became a fire in my belly. . . . Harold McQueen's journey ended, and my journey as an abolitionist began."

For much of the remainder of Wedekind's book, his tone is reminiscent of nothing so much as an old-timer, sitting in a front porch rocker and sharing stories.

He tells the story of Paul Stevens, whose daughter was murdered in Indiana, but who later moved to Kentucky, became a comforting friend to death row inmates at the Kentucky State Penitentiary, and grew into a compellingly calm and strong voice against the state's practice of executing his fellow man.

He tells the saga of Frank Tamme, twice tried and sentenced to die without his real story ever getting to a jury. He tells the story of Father Dick Sullivan, Tamme's childhood friend, who donated part of his inheritance to pay for an investigator who eventually tracked down the witnesses to prove someone else committed the crime that Tamme was to die for.

Names that are familiar to DPA readers abound in this book: Pat Delahanty, Diana Queen, Ernie Lewis, Larry Osborne, Ed Monahan, and Kenyon Meyer.

But mostly Wedekind tells amazing stories of his interactions with legislators, many of whom are still making Kentucky law right now.

There was his meeting with one legislator who ran a successful real estate business. The senator listened pleasantly as Wedekind gave his usual arguments against the use of capital punishment. But, when he turned his attention to the use of the death penalty against children in particular, and when he began explaining the late emotional and cognitive development of children that often extends into their early twenties, the legislator jumped in with some surprisingly off-topic comments:

> You know what? We own some real estate, some buildings, and do you know what those kids of yours do? Those kids put stuff all over the sides of my buildings. Not just once, but a bunch of times . . . graffiti . . . all sorts of stuff . . . some of it about me. You know what I'd like to do to those kids? What we should do to those kids is a caning . . . a public caning, downtown. That would be the last time they'd paint on my buildings, I tell you."

It was but one of several Wedekind narratives that paint a picture of how legislators' personal interests can color their approaches to public policy, which is another of the real-life civics lessons offered in Wedekind's book.

Politics, Religion and Death is subtitled, "Memoir of a Lobbyist." And, indeed, the single most appropriate genre/pigeonhole probably is *memoir*. But, the narrative takes interesting side-trips into history (of capital punishment in Kentucky), science (of execution through electrocution), and biography (of legislators such as Kathy Stein and Robin Webb).

The book is definitely more than the story of four years in Carl Wedekind's life. It is a glimpse into the ways that power is used by those who have it. For example, there's the response given by a House committee chair, who was asked to explain why he consistently refused to allow even a hearing on a death penalty abolition bill, much less call such a bill for a vote:

> Banging his fist on the desk, he announced, "I don't have to tell you why I do anything. I don't owe you, or anyone else, any explanation for what I do."

While it was death penalty abolition bills that this single legislator wielded the power to block in Kentucky, the opposite was true next door in West Virginia. Wedekind relates a conversation with William Wooton, chair of the Senate Judiciary Committee in West Virginia, where there is no death penalty:

> "Is it tough," I asked, "keeping the death penalty from being reinstated in West Virginia?"
>
> He looked at me in some surprise, and said, "I don't want to know what the popular opinion on the death penalty is in West Virginia. There is always pressure on us to reinstate it."
>
> "It would be a real blow to us if you did. Do you think that will happen?"
>
> "Not as long as I am chairman of the Judiciary Committee. The reinstatement bills are never called."

We still have capital punishment in Kentucky, despite the best efforts of Wedekind and his cohorts. How does a lobbyist keep going and going and going, after defeat followed by defeat followed by defeat? It must be the personality trait that is revealed in this statement from Wedekind: "I believed that if we kept up the lobbying, without taking the defeats too seriously, the justice of our cause would finally be recognized and all the barriers would be overcome."

Many civics lessons fail to teach what civics is really all about. They fail because they are presented in hypothetical and theoretical form, rather than being practical and realistic. They fail because, quite frankly, they are boring. *Politics, Religion and Death*, on the other hand, teaches us some valuable civics lessons through really good stories from real life, about people we actually know, either from experience or from the daily headlines. It is far from boring. ■

Recent Cases in Juvenile Law (2000-Present)

Compiled by Tim Arnold, JPDB Manager
Updated by Gail Robinson and Tim Arnold May 2007

Public/Status Offender Cases
Final And Published (*i.e.*, Cite To Your Heart's Content)

J.D. v. Commonwealth, 211 S.W.3d 60 (Ky. App. 2006)
Boykin applies in juvenile proceedings, even when a child is represented by counsel, and court has read him his KRS 610.060 "arraignment rights" (clarifying holding in *D.R. v. Com*., 64 S.W.3d 292 (Ky. App. 2001))

N.T.G. v. Commonwealth, 185 S.W.3d 218 (Ky. App. 2006)
Juvenile Court may not impose probated detention sentence on thirteen (13) year old child when KRS 635.060 (4) prohibits detention for children under fourteen (14).

A.W. v. Commonwealth, 163 S.W.3d 4 (Ky. 2005)
Child can be found in contempt of court for violating a condition of probation. Court may impose sentence longer than sentence that was probated. Contempt sanction may be longer than the maximum detention time permitted for a public offender, as statute was not intended to limit court's contempt powers.

T.D. v. Commonwealth, 165 S.W.3d 480 (Ky. App. 2005)
KRS 159.140 and 630.060 requiring that CDW may not receive an habitual truancy complaint unless adequate assessment of reasons for truancy has been performed by Director of Pupil Personnel must be followed since the statutes are jurisdictional. Child's attorney must be permitted to make closing statement at juvenile court adjudication.

Q.C. v. Commonwealth, 164 S.W.3d 515 (Ky. App. 2005)
Juvenile court has inherent authority to revoke probation, and juvenile probation is sufficiently similar to adult probation that KRS 533.050 applies. Due process requires the Commonwealth to file written notice of alleged violations of probation. However, appeal was dismissed as moot since Q.C. was over 18.

M.M. v. Williams, 113 S.W.3d 82 (Ky. 2003)
A juvenile who wishes to have their judgment stayed pending appeal must file for mandamus in the Court of Appeals. Habeas corpus not appropriate to review issue of whether the judgment is stayed by operation of law.

D.R.T. v. Commonwealth, 111 S.W.3d 392 (Ky. App. 2003), discretionary review denied
August 13, 2003

A person who is over 18 at the time of disposition may not be ordered into detention as a disposition.

X.B. v. Commonwealth, 105 S.W.3d 459 (Ky. App. 2003)
Before a child can be committed and removed from the home, the juvenile court must make formal findings which demonstrate that commitment and removal from the home is the least restrictive alternative.

Commonwealth v. M.G., 75 S.W.3d 714 (Ky. App. 2002)
A child has a right to personally confront the victim in a sex offense case, and a juvenile court may not violate that right by conducting an *ex parte* interview of the victim. Social workers are required to *Mirandize* a child before interviewing them, if the worker is acting as an agent of law enforcement. Juveniles have a right against self incrimination in the disposition of a juvenile case, so a child may not be punished for not admitting to his offense as part of a sex offense evaluation.

D.R. v. Commonwealth, 64 S.W.3d 292 (Ky. App. 2001)
Generally a child cannot waive counsel unless they have first had occasion to speak with counsel. (Note: modified by amendment to KRS 610.060). *Boykin* applies in juvenile proceedings.

J.D.K. v. Commonwealth, 54 S.W.3d 174 (Ky. App. 2001)
Juvenile sex offender not required to give blood sample to the Department of Corrections for inclusion in sex offender DNA database.

M.J. v. Commonwealth, 115 S.W.3d 830 (Ky. App. 2003), discretionary review denied
October 15, 2003.

Trial court did not err by continuing trial for two weeks after Commonwealth announced closed, in order to allow the Commonwealth to meet the burden of proof. Continuations are in the sound discretion of the court, and the unavailability of the witness at the time trial commenced justified the trial court letting the Commonwealth re-open their case after announcing closed.

Commonwealth v. J.T. ex. rel. Deweese, 141 S.W.3d 372 (Ky. App. 2003), discretionary review denied October 24, 2004
Juvenile not entitled to discovery before automatic transfer hearing. KRS 610.342 not a rule of discovery, as legislature is not permitted to create a rule of practice and procedure. Discovery rules do not apply to preliminary hearings, such as transfer hearings.

Not to be Published

Note: CR 76.28(4) (c) was revised effective 1-1-07 to permit citation of unpublished decisions rendered after 1-1-03, "if

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there is no published decision that would adequately address the issue before the court." The opinion must be identified as unpublished and a copy must be attached to the pleading.

K.M. v. Commonwealth, 2006 WL 1719752 (Ky. App. 2006)
Miranda did not apply to preclude admission of statements juvenile made to social worker admitting drug use, where there was no allegation that juvenile was either in custody or under interrogation by social worker when she made statements admitting to drug use.

W.L. ex. rel. Deweese v. Commonwealth,
2004 WL 406537 (Ky. App. 2004)
Finding that a child used a deadly weapon for the purpose of the Robbery statute does not necessarily equal "use of a firearm" for the purpose of automatic transfer statute, KRS 635.020(4).

C.I. v. Commonwealth, 2003 WL 22461730 (Ky. App. 2003)
Juvenile court not required to conduct a hearing on CR 60.02 motion arguing that the juvenile could not be a sexual offender because he is mentally retarded. While some evidence tended to support allegation of mental retardation, that evidence was insufficient to overcome presumption that original judgment was correct.

I.K. v. Foellger, 2003 WL 22271357 (Ky. App. 2003)
District court may impose a no contact order as condition of release, even where that condition burdens the public school. However, district court may not continue that no contact order after commitment to the Department of Juvenile Justice. DJJ's authority with respect to treatment and placement may not be overruled by the district court.

To Be Published But Not Final

Youthful Offender Cases
(Note: only those with significant application to juvenile practice are included. Only juvenile issues included in summary, so rulings on general criminal law or evidence law issues are not included unless they have special application to juvenile court)

Final and Published
Humphrey v. Commonwealth, 153 S.W.3d 854 (Ky. App. 2004), (discretionary review denied Feb. 9, 2005)

Juvenile's waiver of juvenile transfer hearing must be knowing voluntary and intelligent. Where only evidence of voluntariness of waiver was waiver form, and record was ambiguous about whether juvenile was properly advised by counsel, hearing was appropriate to determine whether the waiver was knowing, voluntary and intelligent.

Caldwell v. Commonwealth, 133 S.W.3d 445 (Ky. 2004)
Apprendi v. New Jersey, 530 U.S. 466 (2000) does not apply to juvenile transfer proceedings. Factors relevant to transfer do not have to be submitted to a jury or proved beyond a reasonable doubt.

Phelps v. Commonwealth, 125 S.W.3d 237 (Ky. 2004)
A juvenile court adjudication is not a "conviction" for the purposes of any offense under the penal code, so a youthful offender cannot be charged with being a "second or subsequent offender" or a "felon in possession of a firearm" on the basis of the offender's prior juvenile court record. Also, substantial defects in the degree of the offenses for which the child was indicted warrants dismissal of the indictment, and remand to juvenile court for a new transfer hearing.

Welch v. Commonwealth, 149 S.W.3d 407 (Ky. 2004)
Defendant was entitled to be informed of his *Miranda* rights before being asked to make incriminating admissions at a program for adjudicated juvenile sexual offenders. Admissions made to counselors without benefit of *Miranda* warnings are inadmissible. Admissions subsequently made to sheriff's deputies, while defendant was still a resident of the treatment program, were fruit of the poisonous tree.

Commonwealth v. Jeffries, 95 S.W.3d 60 (Ky. 2002)
Juvenile entitled to a meaningful opportunity to be heard at his 18 year old hearing. This right was denied when the trial court denied Jeffries the right to present evidence in mitigation, and to controvert the contents of a report submitted by the Commonwealth.

Commonwealth v. Townsend, 87 S.W.3d 12 (Ky. 2002)
Juvenile who agreed at his 18 year old hearing to be remanded to a DJJ institution for six months and then returned to court for a decision about whether to be probated or remanded to corrections, waived his right under the statute to be "finally discharged" upon the completion of the juvenile treatment program. (Note: KRS 640.030(2) amended subsequent to this to remove the "finally discharged" language).

Commonwealth v. Davis, 80 S.W.3d 759 (Ky. 2002)
Juvenile who did not challenge whether he met the minimum criterion for transfer to circuit court and trial as an adult in either the circuit or district court waived his right to make that challenge on appeal.

Manns v. Commonwealth, 80 S.W.3d 439 (Ky. 2002)
Juvenile court adjudication is not a "conviction" for the purpose of the rule of evidence permitting impeachment by prior "convictions." Statute permitting juvenile records to be used at sentencing or for impeachment is unconstitutional to the extent that it applied to the use of those records as impeachment. Juvenile court adjudications can be used at sentencing provided they meet the minimum qualifications provided by statute.

Barth v. Commonwealth, 80 S.W.3d 390 (Ky. 2001)
Co-defendant's statement, which was inadmissible at trial, was admissible at juvenile transfer hearing for the purpose of establishing probable cause. Rules of evidence do not apply in a transfer hearing.

Osborne v. Commonwealth, 43 S.W.3d 234 (Ky. 2001)
Fact that burglary charge was omitted from transfer order transferring child to circuit court for trial as an adult on robbery and murder charges did not deprive circuit court of jurisdiction over burglary count. KRS 640.010 provides process for transferring the child, not the charge, and indictment can vary from transfer order so long as the child would still be eligible for transfer on indicted offenses.

Gourley v. Commonwealth, 37 S.W.3d 792 (Ky. App. 2001)
Youthful Offender entitled to have PSI done by Department of Juvenile Justice, rather than Probation and Parole. Court order directing Probation and Parole to do PSI in YO case was prejudicial and reversible.

Stout v. Commonwealth, 44 S.W.3d 781 (Ky. App. 2001)
Decision about whether to transfer juvenile under KRS 640.010 (the "eight factors test") must be supported by substantial evidence.

Darden v. Commonwealth, 52 S.W.3d 574 (Ky. 2001)
Juvenile may not be tried as an adult for mere possession of a firearm. "Use of a firearm" is required under KRS 635.020(4), and possession does not equal use.

Not To Be Published

Note: CR 76.28(4) (c) was revised effective 1-1-07 to permit citation of unpublished decisions rendered after 1-1-03 "if there is no published decision that would adequately address the issue before the court." The opinion must be identified as unpublished and a copy must be attached to the pleading.

Hooten v. Commonwealth, 2006 WL 2578297 (Ky. App. 2006)
The Court of Appeals held that: (1) district court did not abuse its discretion when it waived jurisdiction over 16-year-old's first degree robbery case and transferred case to the circuit court based solely on three of the eight factors relevant to transfer (seriousness, offense against person, best interest of public) and (2) statute that provided a discretionary scheme for the district court to waive jurisdiction over a juvenile offender and allow transfer of the case to the circuit court did not violate due process.

To Be Published But Not Final

Cases in the MDR Pipeline (MDR Pending Or Recently Granted Or Denied In Appellate Court)

Supreme Court
B.J. v. Com., 2006 WL 3524456 (Ky. App. 2006)
An adjudicatory hearing may not be conducted with the juvenile defendant voluntarily *in absentia*.
Discretionary Review Granted Mar. 14, 2007

Merriman v. Com., 2006 WL 891160 (Ky. App. 2006)
Kentucky Court of Appeals held that Kentucky's violent offender statute, KRS 439.3401, applies to youthful offenders as well as to adults.
Granted October 16, 2006.

Hickman v. Commonwealth, 2006 WL 1114194 (Ky. App. 2006)
Violent offender probation prohibitions of KRS 439.3401(3) do not apply to youthful offenders. KRS 640.030(2) allowing probation at 18 year old hearing takes precedence over KRS 439.3401(3).
Granted Sept. 13, 2006

Carneal v. Commonwealth, 2006 WL 1443803 (Ky. App. 2006)
Three year limitations period for filing RCr 11.42 motion was tolled during Carneal's minority and motion filed within three years of eighteenth birthday was timely even though Carneal was initially sentenced at age fifteen.
Granted May 16, 2007

S.K. et al. v. Commonwealth,
2006 WL 1443532 (Ky. App. 2006)
Juvenile Courts do not have jurisdiction to enforce restitution orders after juveniles have turned eighteen.
Granted Nov. 15, 2006.

W.D.B. v. Commonwealth, 2006 WL 3371746 (Ky. App. 2006)
Infancy defense rejected. Court found evidence sufficient and rejected claim of lack of corroboration of confession. Court upheld trial court's rejection of informal adjustment and denial of *Daubert* hearing concerning sex offender evaluation.
Granted Mar. 14, 2007

B.B. v. Commonwealth, Case No. 2005-SC-814 – Were statements by a complaining witness to a nurse and social worker admissible at B.B.'s sodomy trial? Was the 4 year old child a competent witness? Granted. Oral arguments heard. Decision expected to be rendered shortly.

Court of Appeals of Kentucky

C.S. v. Commonwealth, Case No. 2006-CA-1989 – Whether a juvenile judge may make a disposition of a case without a suitable prior disposition report.
Granted

J.C.D. v. Commonwealth, Case No. 2007-CA-129 – Whether a juvenile is entitled to a jury trial when the offense charged by the Commonwealth makes him eligible for declaration by the Court as a juvenile sex offender.
Granted

J.W. v. Com., Case No. 2006-CA-2047 – Was juvenile's "confession" to sex abuse 1st degree sufficiently corroborated?

I.B. v. Com., Case No. 2006-CA-2657 – Case involves 16-year old girl charged with sex abuse first degree based on having sexual contact with 29-year-old woman when both were intoxicated. Issues are competency of 4 year old witness, admission of prejudicial and irrelevant evidence, sufficiency of the evidence, and lack of access to sex offender's evaluation. ■

Capital Case Review

By David M. Barron, Capital Trial Branch

Supreme Court of the United States

***Roper v. Weaver*, 127 S.Ct. 2022 (2007)** *(dismissed as improvidently granted) (Roberts, C.,J. concurred in result; Scalia, Thomas, Alito, JJ., dissenting from dismissal)*
Certiorari had been granted to decide whether the circuit court of appeals exceeded its authority under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) by setting aside a capital sentence on the ground that the prosecutor's closing argument was unfairly inflammatory. But, after oral argument, the Court realized that the federal district court was wrong in dismissing his habeas petition (filed before the effective date of AEDPA) because the inmate was simultaneously seeking certiorari from the denial of state post conviction relief. Without deciding whether this means the AEDPA is inapplicable to this case, the Court held that it is "appropriate to exercise [its] discretion to prevent [Weaver and his] virtually identically situated [codefendant] from being treated in a needlessly disparate manner, simply because the District Court erroneously dismissed respondent's pre-AEDPA petition." The closing argument made in this case was essentially identical to the argument he made in the case of Weaver's co-defendant and another person, both of which were reversed under pre-AEDPA law as a result of the improper closing argument.

Note: This case gives rise to numerous constitutional arguments to use in cases: 1) that is unconstitutional for a defendant to be treated differently or receive a different sentence than a co-defendant when they are equally culpable; 2) that reversal in one case automatically requires reversal in all other cases (regardless of whether the case involves codefendants) where the same improper conduct has taken place; 3) AEDPA cannot be applied to prohibit relief to one person when relief would be granted under the same circumstances in a pre-AEDPA context.

***Chambers v. Quarterman*, 127 S.Ct. 2126 (2007)** (granted, vacated, and remanded for further consideration in light of *Abdul-Kabir v. Quarterman*)

***Schriro v. Landrigan*, 127 S.Ct. 1933 (2007)** *(Thomas, J., joined by, Roberts, C.J., Alito, Scalia, Kennedy, JJ.; Stevens, J., dissenting, joined by, Souter, Ginsburg, and Breyer, JJ.)*

During the sentencing phase, Landrigan refused to permit counsel to call the two mitigation witnesses counsel had intended to offer testimony from, Landrigan's ex-wife and his birth mother. At the trial court's request, defense counsel proffered what the witnesses would have told the court. During the proffer, Landrigan repeatedly interrupted and contradicted defense counsel's positive characterization of events. In state post-conviction, Landrigan claimed that trial counsel had performed deficiently in failing to investigate mitigation. He also argued that his father could have corroborated his mother's use of drugs and alcohol during her pregnancy with Landrigan, something that defense counsel had intended to have the birth mother testify about at the sentencing hearing. The trial judge, presiding over the postconviction proceedings, found it difficult to comprehend how Landrigan could allege deficient performance in light of his instruction to counsel not to present mitigation. As for Landrigan's claim that he would have cooperated had different mitigation been offered, the court found this assertion belied by Landrigan's statements at the sentencing hearing. Deeming the ineffective assistance of counsel claim frivolous, the court denied it without an evidentiary hearing. In federal district court, Landrigan expanded the record to include additional mitigation evidence. The district court held, though, that Landrigan was unable to establish prejudice and thus denied relief. An en banc panel of the Ninth Circuit reversed, ruling that Landrigan had been entitled to an evidentiary hearing. The appeals court held counsel had done little to prepare for the sentencing phase and an investigation would have unearthed a wealth of mitigating evidence. As for prejudice, the court held that the state court unreasonably determined the facts when it found that Landrigan would not have permitted the presentation of any mitigating evidence, instead of just barring testimony by his ex-wife and birth mother. Further, the Court held that any instruction by Landrigan to not present mitigating evidence does not justify counsel's failure to conduct a reasonable mitigation investigation. Finding a reasonable probability that if Landrigan's allegations were true the state court would have reached a different result, the Ninth Circuit remanded for an evidentiary hearing. Certiorari was granted to determine whether this ruling was contrary to the AEDPA.

David M. Barron

Because Landrigan would likely have prevented any mitigation from being presented, as shown by his behavior, no prejudice exists from trial counsel's failure to investigate

mitigation where Landrigan instructed him not to do so: The Supreme Court held that in determining whether to grant an evidentiary hearing, both 2254d's limitation on relief and whether the record refutes the petitioner's factual allegations must be taken into consideration. The Court ruled that the district court was entitled to conclude that regardless of what information counsel would have uncovered, Landrigan would have thwarted efforts to present it and thus Landrigan could not, even with an evidentiary hearing, develop a record entitling him to relief. Noting that it had never addressed a situation where a capital defendant interfered with his attorney's attempt to present mitigating evidence (distinguishing *Rompilla v. Beard* on the grounds that Rompilla refused to assist in developing mitigation but never informed the trial court that he did not want it presented) the Court ruled that at the time of the state post conviction court's decision, it was not objectively unreasonable to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish prejudice under *Strickland* for failure to investigate further mitigating evidence.

Even if a waiver of mitigation must be "informed and knowing," Landrigan is not entitled to relief: Assuming this is a requirement, something the Court observed it has never held, the Court ruled against Landrigan because: (1) Landrigan did not make this argument in state court until a motion for rehearing and so he was barred by § 2254(d)(2) from getting a federal evidentiary hearing to develop it; (2) in Landrigan's presence, trial counsel informed the court that he had explained to Landrigan the importance of mitigating evidence; and (3) Landrigan's statement to the court inviting a death sentence if the court wished to impose it demonstrated that Landrigan clearly understood the consequences of his telling the court he was unaware of any mitigating circumstances.

Mitigating evidence would not have made a difference: The evidence at issue related to: (1) exposure to alcohol and drugs in utero which led to cognitive and behavioral deficiencies consistent with fetal alcohol syndrome: (2) abandonment by his birth mother, and childhood issues with abandonment and attachment, as well as other behavioral problems; (3) his adoptive mother was an alcoholic; (4) Landrigan's alcohol and substance abuse began at an early age; and (5) given Landrigan's biological family's history of violence, Landrigan may have been genetically predisposed to violence. The Court pointed out that all but the last piece of information could have been presented to the sentencing court had Landrigan permitted his biological mother and ex-wife to testify, and that the state court had received much of the same information from counsel's proffer. Because of this, the Court found that it was reasonable for the district court to conclude that any additional evidence would not have made a difference in sentencing.

***Smith v. Texas*, 127 S.Ct. 1686 (2007)** *(Kennedy, J., joined by, Stevens, Souter, Ginsburg, and Breyer, JJ.); Alito, joined by, Roberts, C.J., Scalia, and Thomas, JJ., dissenting).*

Smith was sentenced to death in Texas in the interim between *Penry I* and *Penry II*. In *Penry I*, the Court addressed the special issue questions then submitted to Texas juries to guide their sentencing determinations in capital cases and held that the Texas special issues (requiring death if the jury concluded the murder was deliberate, the defendant would pose a future danger, and the killing was an unreasonable response to provocation by the victim) were insufficient to allow proper consideration of some forms of mitigating evidence. At Smith's trial, the judge instructed the jury to nullify the special issues if the mitigating evidence, taken as a whole, convinced the jury Smith did not deserve the death penalty. After Smith's trial, *Penry II* held a similar nullification charge insufficient to cure the flawed special issues because it created a logical and ethical dilemma that prevented jurors from giving effect to the mitigating evidence when the evidence was outside the scope of the special issues by requiring the jurors to ignore instructions. The Supreme Court remanded Smith's case in *Smith I*. Despite this, the Texas Court of Criminal Appeals denied Smith relief, holding that Smith's pretrial objections did not preserve the claim of constitutional error he asserts; thereby, requiring Smith to show egregious harm. The Supreme Court reversed, holding that the requirement that Smith show egregious harm was predicated on a misunderstanding of the federal right Smith asserts. Specifically, the Court held that although the ethical and logical quandary caused by the jury nullification charge may give rise to distinct error, it was not the basis for reversal in *Smith I*. Rather, *Penry I* and *Penry II* (by extension, *Smith I*) do not rest on separate errors arising from the nullification instruction, but, instead, rest on the fact that significant mitigating evidence was presented but was undeniably beyond the scope of the special issues, thereby preventing the jury from giving effect to the mitigating evidence. Because Smith's argument stems from "Penry error," a claim which he preserved, the Texas Court of Criminal Appeals could not apply the "egregious harm" standard it applies to unpreserved errors. In light of the Court's finding of *Penry* error in *Smith I*, the Court also ruled that the Texas Court of Criminal Appeals is required to defer to its ruling in *Smith I* that Smith is entitled to relief in the form of a new sentencing hearing. Because of this resolution of the case, the Court expressly did not reach the question of whether the nullification charge resulted in a separate jury-confusion error, and if so whether that error is subject to harmless error review.

Souter, J. concurring: Souter wrote separately to point out that the Court may later be required to consider whether harmless error review is ever appropriate in a case with *Penry* error (significant mitigating evidence had been presented to the jury but the jury had no means to give effect to that mitigating evidence)

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Note: Counsel should take Souter's hint and argue that any barrier to a juror giving effect to mitigating evidence and/or a juror's refusal to give effect to mitigating evidence requires automatic reversal.

***Abdul-Kabir*, 127 S.Ct. 1654 (2007)** *(Stevens, J., joined by, Kennedy, Souter, Ginsburg, and Breyer, JJ.); Roberts, C.J., joined by, Scalia, Thomas, and Alito, JJ., dissenting) (post-AEDPA)* The Court held that the instructions given to Abdul-Kabir's jury created a reasonable likelihood that the constitutionally relevant mitigating evidence he had presented was not given meaningful consideration, and that the state courts' failure to recognize and remedy this error was both contrary to, and involved an unreasonable application of, clearly established federal law.

At trial, Abdul-Kabir presented two types of mitigating evidence: (1) testimony from two relatives describing his history of neglect and abandonment; and (2) testimony from two expert witnesses who described the consequences of his troubled history, and acknowledged that petitioner would remain dangerous for some time. According to the Court, "the strength of [Abdul-Kabir's] mitigating evidence was not its potential to contest his immediate dangerousness, to which end the experts' testimony was at least as harmful as it was helpful. Instead, its strength was its tendency to prove that his violent propensities were caused by factors beyond his control – namely, neurological damage and childhood neglect and abandonment." In jury selection and closing argument, the prosecutor "discouraged jurors" from considering the mitigating value of this evidence, and urged them instead to focus solely on Texas' two "special issues" – whether the offense had been deliberate, and whether petitioner would pose a future danger.

In deciding whether the state court's denial of relief resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, the Court reviewed its case law that has made clear that well before 1989, it was firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future. The Court also explained that *Penry I* held that while Texas's special issues could be adequate to facilitate consideration of mitigating evidence under some circumstances, "[w]hen the evidence proffered is double edged, or is as likely to be viewed as aggravating as it is as mitigating, the statute most obviously fails to provide for adequate consideration of such evidence."

Turning to the state court's resolution of the claim, the Court rejected the lower court's determination that the issue "must be determined on a case by case basis, depending on the nature of the mitigating evidence offered and whether there exists other testimony in the record that would allow consideration to be given." The Court likewise found the state court's decision to be unreasonable for three reasons: (1) "the ruling ignored the fact that even though [Abdul-Kabir's] mitigating evidence may not have been as persuasive as Penry's, it was relevant to the question of [his] moral culpability for precisely the same reason as Penry's"; (2) "the judge's assumption that it would be appropriate to look at 'other testimony in the record' to determine whether the jury could give mitigating effect to the testimony of [petitioner's relatives] is neither reasonable nor supported by the *Penry* opinion"; and (3) "the fact that the jury could give mitigating effect to some of the experts' testimony, namely, their predictions that [petitioner] could be expected to become less dangerous as he aged, provides no support for the conclusion that the jury understood it could give such effect to other portions of the experts' testimony or that of other witnesses." The Court concluded that "Our cases following *Lockett* have made clear that when the jury is not permitted to give meaningful effect or a "reasoned moral response" to a defendant's mitigating evidence – because it is forbidden from doing so by statute or a judicial interpretation of a statute – the sentencing process is fatally flawed.

***Brewer v. Quarterman*, 127 S.Ct. 1706 (2007)** *(Stevens, J., joined by, Kennedy, Souter, Ginsburg, and Breyer, JJ.); Roberts, C.J., joined by, Scalia, Thomas, and Alito, JJ., dissenting)*

In this companion case to *Abdul-Kabir*, the Court noted that it has "long recognized that a sentencing jury must be able to give a reasoned moral response' to a defendant's mitigating evidence - - particularly that evidence which tends to diminish his culpability - - when deciding whether to sentence him to death." This so-called "*Penry* error" occurs "whenever a statute, or a judicial gloss on a statute, prevents a jury from giving meaningful effect to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence." Applying this law to Brewer's case, the Court held that it was materially indistinguishable from *Abdul-Kabir* even though Brewer never presented expert testimony at the sentencing phase of his trial but instead presented evidence of mental illness and substance abuse. As a result, the Court held that the Texas state court's decision to deny relief was both "contrary to" and an "unreasonable application of" clearly established Federal law.

***Lawrence v. Florida*, 127 S.Ct. 1079 (2007)** *(Thomas, J., joined by, Roberts, C.J., Alito, Scalia, Kennedys, JJ.; Ginsburg, J., dissenting, joined by, Stevens, Souter, and Breyer, JJ.)*

The issue before the Court was, does a state post conviction petition remain "pending" under AEDPA during the period of time when a petition for a writ of certiorari is pending before the Supreme Court, thereby tolling the one-year statute of limitations for filing a federal habeas petition? The Court answered this in the negative because: 1) state review ends when the state courts have resolved an application for state post conviction; and, 2) after the state's highest court has issued its mandate of denied review, no other state avenues for relief remain open, meaning that an application for state post conviction review no longer exists and thus cannot be considered "pending" while a petition for certiorari is before a federal court. The Court also held that equitable tolling does not apply to Lawrence's case because circuit precedent was clear that the statute of limitations is not tolled while certiorari from state post conviction proceedings is sought and because attorney error in calculating a filing deadline is insufficient to warrant equitable tolling. The Court also held that a state court appointing counsel and maintaining supervisory authority over counsel does not change this.

Note: The holding in Lawrence means that the tolling of the statute of limitations while an inmate is pursuing state post conviction remedies ends when the highest state court to which review can be sought has denied rehearing or the time for seeking such review has expired. This overrules Sixth Circuit precedent and also means that even where an inmate won in state court, a protective habeas petition may need to be filed in case the U.S. Supreme Court reverses.

Note: The time during which certiorari is sought from the denial of direct appeal (or the time for seeking such review has expired if review is not sought) still tolls the one year statute of limitations. This is because the language "time for seeking" appears in the AEDPA when referring to direct review instead of the language pending during state post conviction or other collateral review, which appears in reference to post conviction proceedings.

Supreme Court Grants of Certiorari

Danforth v. Minnesota, No. 8273 (non-capital)

Are state supreme courts required to use the standard announced in *Teague v. Lane*, 489 U.S. 288 (1989), to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases, or may a state court apply state-law-or state-constitution-based retroactivity tests that afford application of Supreme Court decisions to a broader class of criminal defendants than the class defined by *Teague*?

Medellin v. Texas, No. 06-984,
certiorari granted on March 30, 2007.
1. Did the President of the United States act within his constitutional and statutory foreign affairs authority when he determined that the states must comply with the United States' treaty obligations to give effect to the [World Court's] *Avena* judgment in the cases of the 51 Mexican nationals named in the judgment?

2. Are state courts bound by the Constitution to honor the undisputed international obligations of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* judgment in the cases that the judgment addressed?"

Stays of Execution

North Carolina and Federal executions as a result of lethal injection litigation.

***Jose Moreno* (Texas)** (by the Texas Court of Criminal Appeals to reconsider Moreno's case in light of the United States Supreme Court decision in *Abdur-Kabir*.

***State v. Carey Moore*, 730 N.W.2d 563 (Neb. 2007)**
On reconsideration on its motion, the Nebraska Supreme Court stayed the execution of this volunteer because it will soon hear oral arguments on the constitutionality of electrocution, Nebraska's sole method of execution, and thus "were [the court] to conclude that electrocution is no longer constitutional, then [the court] would have undeniably permitted a cruel and unusual punishment only a few months earlier. The damage to Moore, and to the integrity of the judicial process, would be irreparable. . . . our citizens' confidence in this court and the rest of the judicial branch as a bastion of civil rights might suffer irreparable harm."

Note: This opinion is a must read for anyone with a client close to execution and anyone representing a "volunteer." It has strong language about the court's inherent authority over death penalty cases at any procedural posture, its ability to stop an execution regardless of the inmate's wishes, and its authority to ensure that the Constitution is upheld and that executions are carried out in a constitutional manner, which always supersedes the wishes of the death row inmate.

***Cathy Henderson* (Texas)** (to provide more time to examine recent scientific developments that could establish that the baby died from a fall rather than a beating to the head; execution rescheduled for June 13, 2007).

United States Court of Appeals for the Sixth Circuit

***Cooey v Strickland*, No. 05-4057 (June 1, 2007)** *(Gilman, J., joined by, Martin, Daughtey, Moore, Cole, and Clay, JJ., dissenting from the denial of rehearing en banc)*

The dissenters believe that rehearing en banc should have been granted "to ensure that the law of circuit conforms with Supreme Court precedent and to prevent the judicial

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inefficiency of juggling repetitive, simultaneous, and contradictory litigation from death-sentenced prisoners." Specifically, the dissenters believe that the statute of limitations for challenges to the chemicals and procedures used in lethal injections begins when the execution becomes imminent and the plaintiff knows or has reason to know of the facts giving rise to the claim. The dissenters believe that any other accrual date is problematic because the state's ability to change the execution protocol can prevent an inmate from knowing when the statute of limitations accrues and because any it would result in new lethal injection challenges each time the execution protocol changes in a way that implicates constitutional concerns. The dissent also noted that **challenges to the chemicals and procedures used in lethal injections are no longer cognizable in habeas proceedings.**

Van Hook v. Anderson, 2007 WL 1501249 (6th Cir. 2007) (en banc) (McKeague, J., joined by, Boggs, C.J., Batchelder, Gibbons, Rogers, Sutton, Cook, and Griffin, JJ.); Cole, J., dissenting, joined by, Merritt, Martin, Daughtrey, Moore, Clay, and Gilman, JJ.; Merritt and Martin, JJ. Also delivered separate dissenting opinions)

In this pre-AEDPA capital case, the Court held that police may approach a suspect who has previously requested an attorney if the police have been informed by a third party that the suspect may now want to speak with the police without counsel present. Specifically, the Court held that "permitting a suspect to communicate a willingness and a desire to talk through a third party is consistent with the interest protected by *Edwards* [*v. Arizona*, 451 U.S. 477 (1981)]," i.e., "to protect against government coercion." The Court then ruled that the state court's factual findings about the detective's conversation with Van Hook's mother, which led to the detective initiating contact with Van Hook, were supported by the record. As a result, the court affirmed the district court's denial of relief and remand to the circuit panel for consideration of the remaining claims on which a certificate of appealability had been granted.

Cole, J., dissenting: Cole believes that "only the suspect or his attorney may initiate discussions with the police after a suspect has invoked his right to counsel."

Durr v. Mitchell, 2007 WL 1452280 (6th Cir., May 18, 2007) (Suhreinreich, J., joined by, Batchelder, J.,; Cole, J., concurring)

The trial court did not err in failing to appoint an independent psychologist to provide the jury with mitigating evidence: Under *Ake v. Oklahoma*, 470 U.S. 68 (1985), an indigent defendant is entitled to expert assistance when the defendant's sanity at the time of the offense is likely to be a significant issue at trial, or where the prosecution submits evidence of a capital defendant's future dangerousness through the state's own psychiatrists. Because neither of these situations occurred in Durr's case, he was not automatically entitled to an expert.

Counsel was not ineffective for failing to investigate mitigating evidence: Durr argued that trial counsel was ineffective for failing to present testimony that Durr was always respectful to his previous girlfriend and that Durr took care of others by making sure they got good grades in school. The Court held that the failure to present this evidence was not prejudicial because it was cumulative of what was presented at trial and would have opened the door for the prosecution to introduce rebuttal evidence of how Durr treated other women, including his prior rape convictions.

The Court also denied ineffective assistance of counsel claims involving the failure to obtain experts, the failure to object to portions of the state's closing argument, and the failure to object to jury instructions. Finally, the court held that, although it was a close call, it could not conclude that the state court's decision that the circumstantial evidence of rape was sufficient to support a conviction of rape was contrary to or involved an unreasonable application of the clearly established law that says evidence is sufficient as long as "any trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Foley v. Parker, 2007 WL 1437435 (6th Cir. May 17, 2007) *(Cook, joined by, Gilman, J.; Martin, J., dissenting on change of venue and refusal to strike jurors for cause claims)*

Standard of review in post-AEDPA cases: There is only one notable aspect of the AEDPA review applied by the Court: it "may look to lower courts of appeals' decisions, not as binding precedent, but rather to inform the analysis of Supreme Court holdings to determine whether a legal principle had been clearly established by the Supreme Court."

Trial counsel was not ineffective for failing to investigate and present any mitigating evidence: Foley contended that his trial counsel should have called six family members, five friends, and a school teacher who had not seen him since the 1970's to describe Foley in positive terms as a nice, giving, loving, sweet, hard working, good family man. According to the court, the testimony would also have shown Foley's penchant for violence, and there was no medical evidence to substantiate Foley's claim that he suffered head injuries. Notably, Foley has never presented any evidence of a difficult childhood or mental problems that might have portrayed him in a more sympathetic light or otherwise proved that he was mentally impaired at the time of his crimes. In light of this, the Court held that the state court's ruling that Foley failed to establish prejudice (reasonable probability of changing the jury's decision to sentence him to death) was not unreasonable.

Other claims: The Court also held as follows: 1) Foley was not deprived of a fair trial by the prosecution's elicitation of substantive evidence of guilt during rebuttal; (2) the Kentucky Supreme Court's decision rejecting Foley's challenge to the denial of his change of venue motion was neither contrary to nor involved an unreasonable application of Supreme Court precedent; (3) the Kentucky Supreme Court's finding that the trial court was justified in denying Foley's continuance motion was not arbitrary; (4) state court's decision denying Foley's challenge to ten jurors was neither contrary to nor involved an unreasonable application of Supreme Court precedent; and (5) the Kentucky Supreme Court's rejection of his knowing presentation of false evidence claim was neither contrary to nor involved an unreasonable application of Supreme Court precedent.

***Henley v. Bell*, 2007 WL 1412309 (6th Cir. May 15, 2007)** (*Cook, J., joined by, Siler, J.; Cole, J., concurring in part and dissenting in part*) (affirming denial of habeas relief) (AEDPA)

Systemic exclusion of women from grand jury foreperson position as due process violation: The Court held that the state court's determination that the U.S. Supreme Court case allowing a due process challenge to the racial composition of the grand jury used to indict a defendant does not apply retroactively was neither "contrary to" nor an "unreasonable application of" clearly established law.

State court was not unreasonable in ruling that Henley was not prejudiced by the failure to call additional lay witnesses and a psychiatric expert to testify: At trial, Henley's grandmother gave a favorable and detailed description of Henley, but the jury may have been hostile towards her. The court, however, concluded that the limited relationship the lay witnesses presented in post conviction had with Henley at the time of murders and their personal knowledge of Henley's drug use at the time of the murders made it reasonable for the state court to conclude that the failure to call these witnesses did not prejudice Henley. As for the psychiatric expert, the Court held that his testimony that Henley "has learning disabilities, and dropped out of school, and was, at the time of the offense, suffering from depression and/or acting out of character" is so similar to the evidence presented in *Strickland v. Washington* that the defendant was "chronically frustrated and depressed" due to his inability to support his family financially that it was not unreasonable for the state court to find no prejudice from the failure to present expert testimony on this.

Vouching for credibility of witness and reference to deterrence does not require reversal:
During closing argument, the prosecution vouched for a witness by saying, "I thought [the witness] made one of the best witnesses I've ever seen." Although this comment was improper, in light of the limited nature of the argument, the Court held that the state court's determination that no prejudice arose from this statement was neither contrary to nor an unreasonable application of Supreme Court precedent. The Court also held that the state court's ruling that the curative instruction given when the prosecution referenced deterrence as sufficient to cure any improper argument on deterrence was neither contrary to or an unreasonable application of clearly established law.

The jury instruction did not require unanimity as to finding mitigating circumstances: The jury was instructed, "If the jury unanimously determines that at least one statutory aggravating circumstance . . . [has] been proven by the State beyond a reasonable doubt, and said circumstance . . . [is] not outweighed by any sufficiently substantial mitigating circumstances, the sentence shall be death . . . If the jury unanimously determines that no statutory aggravating circumstance . . . [has] been proved by the State beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance . . . [has] been proven by the state beyond a reasonable doubt, but that the circumstance . . . [is] outweighed by one or more mitigating circumstance, the punishment shall be life imprisonment." The verdict form read, "We, the Jury, unanimously find the following listed statutory aggravating circumstance or circumstances . . . Secondly, we, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above" The Eighth Amendment prohibits requiring a jury to be unanimous in determining that a mitigating factor exists. Because the state court did not address this claim on the merits, the court reviewed the claim de novo. The Court, however, held that the instruction and verdict form here did not raise a "substantial possibility" that the jury believed it had to be unanimous as to a finding of mitigation but instead told the jury that it had to be unanimous as to the weighing of aggravating and mitigating circumstances.

Cole, J., dissenting: Cole believes that Supreme Court law permitting a due process claim, alleging that women were underrepresented in the selection of grand jury foreperson is not a "new rule," because it was dictated by precedent. Thus, Henley should received the benefit of the law, meaning the state court's determination to the contrary was an unreasonable application of clearly established Supreme Court law. Cole also believes that trial counsel was ineffective at the sentencing phase because there is no evidence that he investigated Henley's background or spoke to Henley's family about testifying at the sentencing phase and that this prejudiced Henley because, in front of the jury, Henley's mother refused to testify when called to do so at the sentencing phase and because, if she had been prepared to testify, Henley's mother would have been willing to testify and would have testified about her son's life, her love of him, and her belief that he would not have committed the

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crimes "if he was at his right mind." In so ruling, Cole noted that "having multiple family members plead for a defendant's life humanizes the defendant and makes it more likely that at least one juror will spare his life."

***Workman v. Bredesen*, 2007 WL 1311330 (6th Cir., May 7, 2007)** *(Sutton, J., joined by Siler, J..; Cole, J., dissenting)*

A federal district court granted Workman a temporary restraining order barring his execution so the court could hear further arguments and evidence on whether Tennessee's newly adopted lethal injection protocol (went into effect a few days before Workman's execution date) created an unnecessary risk of pain and suffering in violation of the Eighth Amendment. The state moved to vacate the restraining order. The Sixth Circuit held that it had jurisdiction to review the grant of a temporary restraining order and held that the district court abused its discretion by granting the restraining order.

The court has jurisdiction to review the grant of a TRO barring an execution: Ordinarily, because of its short duration, an appellate court does not have jurisdiction to review temporary restraining orders. However, here, the order essentially operates as a traditional injunction because it prevents Workman's execution from taking place. Thus, the Court construed the TRO as a preliminary injunction, which is reviewable under 28 U.S.C. §1292(a)(1).

Standard of review on TRO and factors to consider in granting injunction: A district court's decision to issue a temporary restraining order is reviewed for abuse of discretion, which occurs only when the appellate court is left with "a definite and firm conviction that the trial court committed a clear error of judgment," such as where it "relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard." In reviewing the decision to grant a TRO or an injunction, an appellate court considers the same four factors that the district court must consider: 1) whether the claimant has demonstrated a strong likelihood of success on the merits; 2) whether the claimant will suffer irreparable injury in the absence of a stay; 3) whether granting the stay will cause substantial harm to others; and, 4) whether the public interest is best served by granting the stay.

Workman's likelihood of success on the merits is low: Because the U.S. Supreme Court has never invalidated a method of execution (last addressed the issue on the merits in 1878), because no court has invalidated the three-drug protocol used by Tennessee while several states have upheld it, because Tennessee has taken steps to improve its lethal injection protocol, and because the Sixth Circuit vacated an injunction granted to another Tennessee death row inmate under the prior execution protocol, the Court held that Workman's likelihood of success on the merits of his lethal injection challenge are dim. As a result, the Court vacated the injunction.

Workman's undue delay in bringing this action bars injunctive relief: Workman's suit was filed five days before the sixth execution date Tennessee set for him during the twenty-fives years Workman has been on death row. Because the new execution protocol is only slightly different from the old one and because Workman does not point to any provision in the new protocol that is worse than the old one, the timing of the new protocol does not excuse Workman's delay in pursuing his claims. Because the claim could have been filed earlier and the late filing of the claim prevents the trial and appellate courts from reaching the merits of the claims without staying his execution, the strong equitable presumption against a grant of a stay of execution where the claim, as is the case here, could have been brought earlier prohibits granting an injunction.

Cole, J., dissenting: Cole believes that the court has no jurisdiction over this case because appellate courts have no jurisdiction to review a temporary restraining order, which serves the modest purpose of preserving the status quo for no more than ten days to give the court time to determine whether a preliminary injunction should issue. Cole also believes the district court did not abuse its discretion in granting a temporary restraining order. According to Cole, Workman presented an impressive record that included an 82 page complaint detailing extensive allegations with respect to the infirmity of the revised protocol, a 55 page memorandum of law in support of his motion for a TRO with 48 exhibits, affidavits from two physicians familiar with lethal injection protocols, a recent medical study critical of lethal injections, and execution logs from two botched executions. In addition, the district court had the benefit of oral argument from the parties. Based on this, Cole concluded that Workman had met his burden of establishing a likelihood of success at proving Tennessee's execution protocol creates an "unnecessary risk of unconstitutional pain or suffering." Cole then went into detail discussing the risks associated with Tennessee's lethal injection chemicals and protocol. Cole also noted that the public interest of ensuring that executions are carried out in a constitutional manner, the irreparable injury that will occur to Workman, that Workman diligently pursued his lethal injection claim as soon as the new protocol was released, and that Tennessee will suffer little to no harm from a short delay favors allowing the temporary restraining order to stand.

***Workman v. Bell*, 484 F.3d 837 (6th Cir. 2007)** *(Siler, J., joined by, Sutton, J.,; Cole, J., dissenting)*

Workman sought a stay of execution in connection with his Fed. R. Civ. P. 60(b) motion contending that the Tennessee Attorney General perpetrated a fraud upon the district court during Workman's habeas proceedings. In deciding whether

to stay an execution, a court must weigh the following four factors: 1) whether there is a likelihood the inmate will succeed on the merits of the appeal; 2) whether there is a likelihood the inmate will suffer irreparable injury; 3) whether the stay will cause substantial harm to others; and, 4) whether the stay would serve the public interest. The success on the merits inquiry is impacted by the applicable standard of review. A district court's ruling on a 60(b) motion can be reversed only when the trial court abuses its discretion, which takes place where the district court relies on clearly erroneous findings of fact, employs an erroneous legal standard, or improperly applies the law. In a factually intensive analysis, the Court held that Workman has little to no likelihood of success on the merits, because: 1) the claims of fraud on the court are exceedingly attenuated and vague; 2) the Tennessee Court of Criminal Appeals has rejected the premises of two of the claims; 3) Workman has been given considerable process during the 25 years since he was sentenced to death; 4) and he cannot seriously contend that his allegations have any bearing on a claim of actual innocence given that he testified at trial that he killed one officer and wounded another. Although the Court admitted that Workman will undeniably suffer irreparable injury if executed, the Court held that this is outweighed by the unlikelihood of success on the merits and the public's interest in finality.

Cole, J., dissenting: Cole believes that the inquiry is not whether Workman has a likelihood of success on the underlying claims in his 60(b) motion, but rather, the likelihood of success on the entitlement to an evidentiary hearing on the claims in the 60(b) motion. Because of the uncertainty over the legal standard for granting an evidentiary hearing on a 60(b) motion and because a different panel of the Sixth Circuit granted a stay of execution seven months ago in a case in the same procedural posture and raising the same legal issue, Cole would grant a stay of execution.

***(Filiaggi) v. Strickland*, 484 F.3d 424 (6th Cir. 2007)** *(Batchelder, J., joined by, Cole and Gibbons, JJ.)*

The federal district court denied Filiaggi's motion to intervene in Cooey's lethal injection litigation because, before moving to intervene, Filiaggi failed to exhaust his administrative remedies as required under the Prison Litigation Reform Act, a failure that cannot be excused by Cooey's exhaustion of administrative remedies, and because Filiaggi's motion was untimely since it was filed only days before his execution. Because the motion to intervene was denied, the district court held that it had no basis to stay Filiaggi's execution. For these reasons, the Sixth Circuit affirmed, noting that Filiaggi had not demonstrated any likelihood of success on his motion to intervene and the untimeliness of his motion to intervene prevents the court from staying his execution.

***Nields v. Bradshaw*, 482 F.3d 442 (6th Cir. 2007)** *(Gilman, J., for the Court; joined by, Boggs, C.J., and Sutton, J.) (AEDPA)*

Trial counsel was deficient for not objecting to improper comment but no prejudice: The court held that the prosecutor's comment to the jury during closing argument, "how about how [the victim] felt when she was being viciously beaten" was improper and that trial counsel was ineffective for not objecting to it. However, the Court held that Nields was not prejudiced by this, because the jury was instructed that arguments are not evidence and consideration of non-statutory aggravators, even if contrary to state law, does not violate the Constitution, and because the state courts reweighed the relevant statutory aggravating circumstances.

Trial counsel was not ineffective for failing to investigate and present mitigating evidence: Nields argued that counsel was ineffective for failing to present mitigating evidence that would have humanized him before the jury by showing that Nield's childhood home life was chaotic and neglectful, that he was an expert and dedicated musician whose life was once very focused, that he had several successful employment experiences and was a hard worker, he did not drink while he was working, and he was a dependable, kind-hearted friend and an extremely helpful, friendly person. The Court rejected this claim, because trial counsel investigated (150 hours investigating and 30 hours interviewing) and presented substantial mitigating evidence, and because this mitigating evidence was relatively weak.

Use of Juror Affidavits to Support Prejudice: Nields argued that a juror affidavit alone establishes the prejudice prong of his ineffective assistance of counsel claims, in that it establishes a reasonable probability that at least one juror would have struck a different balance. Ohio argued that the affidavit was not admissible because Ohio Rule of Evidence 606(b) prohibits a juror from testifying, after the verdict, about "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict . . or concerning his mental processes in connection therewith." Without directly addressing this issue, the Court noted that it does not believe Rule 606(b) bars consideration of the affidavit, which concerns exclusively post deliberation, post-verdict evidence, the Court denied this argument on the basis that the content of the affidavit was insufficient to establish prejudice. Specifically, the Court noted that the affidavit never says "she would have reached a different result had she had the benefit of the unintroduced evidence at the time of sentencing. She instead simply notes that she would have given the evidence 'considerable weight.'"

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Perhaps Nields should not be eligible for death: At the conclusion of its opinion, the Court noted that "the circumstances of this case just barely get Nields over the death threshold under Ohio law," and then went on to explain why. The Court's language (which should be read by those with capital clients close to execution) indirectly urges the Governor to grant clemency because the "death penalty [must] be sparingly, and prudently, applied," and the facts of this case does not suggest that this is the case here.

The Court also rejected the following claims: 1) failure to retain an expert to testify to the causal relationship between Nields' alcoholism and his behavior on the night of the murder; 2) failure to request a voir dire of the jurors after learning that several had seen Nields in handcuffs; 3) failure to introduce evidence of remorse.

***Cooey (Biros) v. Strickland*, No. 06-4660 (6th Cir. 2007)**
Because the federal district court had allowed Biros to intervene in Cooey's lethal injection litigation and because Biros joined the petitioner for rehearing en banc Cooey filed in the Sixth Circuit (by filing his own rehearing petition), the Sixth Circuit denied the state's motion to vacate the injunction barring Biros' execution, but did so without prejudice so the motion could be refilled if rehearing en banc is denied.

***Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007)**
(Suhreinrich, J., joined by, Siler, J.; Gilman, J. dissenting)
The issues before the Court in this interlocutory appeal were: 1) whether a death row inmate's objection to the lethal injection chemicals and procedures is cognizable as a 42 U.S.C. §1983 action instead of as a habeas action; 2) whether a death row inmate's §1983 method of execution challenge accrues, for statute of limitation purposes, when execution is imminent or at some earlier stage in state and federal proceedings; and, 3) whether res judicata is a bar to a death row inmate's claim concerning the means and methods of execution when similar issues were raised, or the specific claim could have been raised, in a previous habeas action. Because *Hill v. McDonough*, 126 S.Ct. 2096 (2006), resolved the first issue in Cooey's favor, the court did not address this issue. The Court also found that the third issue was moot because Cooey's claim had to be dismissed because it was filed after the expiration of the applicable statute of limitations. In so ruling, the Court rejected the district court's holding that the accrual date occurs when execution is imminent and all state and federal remedies have been exhausted; instead, choosing when the inmate should have known, based on reasonable inquiry, of the facts giving rise to the claim and could have filed suit and obtained relief as the accrual date.

Burden and standard of proof on statute of limitations defenses: Statute of limitations is an affirmative defense. The party invoking statute of limitations as a defense has the burden of demonstrating that the statutory period had run before the action was filed. A district court conclusion that a complaint was filed within the applicable statutory period is reviewed de novo.

Applicability of statute of limitations to §1983 actions: Under Supreme Court law, §1983 claims are best characterized as tort actions for the recovery of damages for personal injuries. Because of this, federal courts must borrow the statute of limitations governing personal injuries actions from the state where the §1983 action was brought. If a state has more than one statute of limitations for personal injuries, the state's residual or general statute of limitations governing personal injury actions is applied to all §1983 actions brought in that state. While state law determines the length of the statute of limitations, federal law determines when the statute of limitations for a civil rights action begins to run.

Note: A large body of case law says there is no statute of limitations for actions seeking purely equitable relief, including §1983 actions. This was not discussed in Cooey and thus remains a viable argument as to why the statute of limitations does not apply to lethal injection challenges seeking only declaratory and injunctive relief as opposed to damages.

When the statute of limitations begins to run for challenges to lethal injection chemicals and procedures: The Court struggled immensely with this issue. Ordinarily, the accrual date starts at the point when the actual harm is inflicted. But, this can not be the case with lethal injection because it would mean the claim does not accrue until execution, at which time the claim would also become moot. With this time period not viable and by relying in part on the AEDPA, the Court concluded that the most "logical" and most "attractive" accrual date is upon the conclusion of direct review in the state court or the expiration of time for seeking such review. Yet, the Court did not expressly adopt any of these standards. Instead, the Court rejected the concept of actual knowledge as the triggering point and held that "the test is whether he knew or should have known based upon reasonable inquiry, and could have filed suit and obtained relief." Applying this standard, the Court ruled that Cooey should have known of his action in 2001 at which point the names and quantities of the lethal injection chemicals had been released to the public, and, a newspaper article on the chemicals, which stated that DOC was willing to release more specific information upon request, had been published. Because, Cooey filed suit more than two years after this (Ohio has a two year statute of limitations), the Court held that Cooey's suit was filed after the expiration of the applicable statute of limitations and thus must be dismissed. In so ruling, the Court rejected both the argument that the statute of limitations did not begin until the law said the claim was cognizable in a §1983 action and the argument that changes to the execution protocol restarted the statute of limitations. Because the

changes did not go to Cooey's core complaints and are not implicated as a basis for Cooey's expert's conclusions, the Court held that these changes were minor and irrelevant to the core claims within the suit.

Note: Under Cooey, when the statute of limitations begins to accrue is a highly factually intensive inquiry that is state and sometimes inmate specific.

Gilman, J., dissenting: Gilman believes the statute of limitations begins when the execution becomes imminent and the inmate has reason to know of the facts giving rise to the claim. He also believes that, practically, the statute of limitations will rarely be an issue because once the claim is ripe, the state will likely be moving for an execution date, thereby requiring the court to rely upon the equitable factors for granting a stay of execution. Gilman also believes that the changes to Ohio's protocol were substantial and that Cooey could not have filed suit when the majority says he should have, because circuit precedent at that time said the claim was not cognizable.

United States District Courts For Kentucky

***Moore v. Rees, et al.,* 2007 WL 1035013 (E.D. Ky.)** (*Caldwell, J.)*(deciding numerous motions in lethal injection litigation)

Standard for granting preliminary injunction: In determining whether to grant an injunction, the following four factors must be considered: 1:) whether the movement had demonstrated a strong likelihood of success on the merits; 2) whether the movant would suffer irreparable injury without the injunction; 3) whether the injunction would cause substantial harm to others and, 4) whether the injunction would serve the public interest. Injunctive relief may be particularly appropriate when necessary to preserve the court's ability to render a meaningful decision on the merits. But, there is a strong equitable presumption against an injunction that would temporarily bar an execution where the claim could have been brought at such a time as to allow consideration of the merits without requiring entry of an injunction.

Preliminary injunction barring execution denied: Although Moore referenced testimony in a Kentucky state court lethal injection trial and orders from other courts concerning lethal injection litigation, Moore's failure to present sworn testimony from medical experts and his failure to present a verified complaint prevents the court from having any evidentiary record upon which it may conclude that Moore has demonstrated any likelihood of success on the merits. Further, the fact that the Kentucky Supreme Court has upheld Kentucky's chemicals and procedures for lethal injection and numerous other courts have upheld lethal injection establish that the legal precedent is in Defendants' favor when it comes to success on the merits. As for irreparable harm, the Court held that it is not likely to take place since no execution date has been set and Moore has been granted DNA testing in state court. Finally, because Moore did not join the state court lethal injection litigation filed in 2004, the Court concluded that Moore's delay in bringing this suit is unreasonable and thus the balance of the injunction factors require denying the injunction. But, the Court noted that its factual and legal conclusions are based upon the limited nature of the record before it, and thus are not binding upon the parties in subsequent proceedings or upon a full trial on the merits.

Challenge to electrocution must be dismissed because a facial challenge to a method of execution is, under Sixth Circuit precedent, the functional equivalent of a second or successive habeas petition for which authorization to file must be sought from the circuit of appeals. Because of this, Moore is not entitled to compel disclosure of Corrections' electrocution protocol.

Note: Whether Sixth Circuit law on this is still valid in light of the U.S. Supreme Court's recent decisions on method of execution challenges remains to be seen.

Moore is entitled to depose the execution team, the warden, and nurses at the penitentiary: Because the warden will play a prominent role in implementing the execution protocol and because the parties dispute the role of Dr. Hiland, Moore is entitled to discovery from them. Security and safety of execution team members is not so paramount that it prevents discovery of any kind from the people who have actual knowledge directly relevant to the claims asserted in the complaint. Thus, Moore is entitled to depose the execution team.

Defendants cannot be compelled to document attempts to draw blood from Moore: The All Writs Act (28 U.S.C. 1651), the provision Moore filed under, allows a court to issue all writs necessary or appropriate in aid of its jurisdiction. A writ is in aid of a court's jurisdiction when it gives practical effect to a degree or injunction already entered by the court, or is necessary to ensure the court is not divested of jurisdiction or that the jurisdiction is rendered null by the court's practical inability to enforce its judgments. This provision, however, applies only when no other statute or provision applies. Thus, it cannot be invoked to avoid or contradict the Federal Rules of Civil Procedure. Because the Rules of Civil Procedure govern discovery, the All Writs Act cannot be invoked to create discoverable documents, requiring Moore's motion to be denied.

The law of request for admissions: There are only five types of responses that can be made to a request for admission: 1) an unqualified admission; 2) an unqualified denial; 3) a statement that the respondent has conducted a reasonable

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investigation into the substance of the request but that the information known or readily available to him or her is insufficient to enable him to admit or deny the request; 4) a qualified admission which explains the need for and substance of the qualifications or explanation; and, 5) an objection to the request. Only the propriety of the fourth and fifth type of response can be challenged prior to trial. If an objection is not appropriate, the court can compel a party to respond to the request for admission and if an answer does comply with the rules, the court can deem the matter admitted or require an amended answer to the request for admission. Objections on the ground that a party has already responded to the requested information in the answer or that the information has already been disclosed to counsel through another case are not valid. If the response to the request may be determined by reference to another source within the respondent's control, respondent must take the necessary steps to review that information and determine its response. Any objection to disclosure based on the attorney-client privilege must be specific, particularized, and supported by sufficient information to permit the Court to assess the applicability of the privilege.

***Sanborn v. Parker*, 2007 WL 495202 (W.D. Ky.)** *(Coffman, J.) (granting sentencing phase relief)*

The court denied relief on numerous claims but vacated Sanborn's death sentence on one ground. The prosecution expert had been allowed to evaluate Sanborn because he had intended to raise an extreme emotional disturbance defense. When the expert first interviewed Sanborn, Sanborn denied even being near the victim when she was killed. Later, Sanborn admitted to the expert that he was with the victim and then proceeded to describe the circumstances leading up to the murder. When asked why he failed to provide the expert with this account at the initial interview, Sanborn stated that he had intended to but had gone off on something else. The expert then asked whether Sanborn had met with anyone else after the first meeting, to which Sanborn responded that he met with one of his attorneys. The expert asked what the trial strategy would be and Sanborn explained that he intended to argue that the murder was committed while he was under emotional distress. At the resentencing hearing, the Commonwealth was permitted to elicit testimony from the expert that Sanborn's story had changed after he met with someone, as well as what Sanborn had said about his trial strategy. The Court held that the expert's testimony constituted an unconstitutional governmental interference with his relationship with his attorney: "While not necessarily improper when considered independently, [the prosecution expert´s] conjoined questions-about (1) Sanborn´s meeting with his attorney and (2) his defense strategy-were tantamount to her asking what he and his attorney had discussed in that meeting. The unnecessary question about the meeting with counsel was not critical to her assessment of Sanborn´s credibility and was a clear intrusion into the attorney-client relationship." Further, "[b]y eliciting [the expert's] testimony that Sanborn had altered his statements after talking to 'someone,' the prosecution unnecessarily conveyed privileged attorney-client information to the jury, thus prejudicing" Sanborn. Although "Sanborn was not prevented from presenting his EED defense," nevertheless "an improper interference with his attorney-client relationship substantially undermined his key argument against the imposition of the death penalty," requiring that Sanborn's death sentence be vacated.

***Bowling, et al. v. Haas, et al.*, 2007 WL 403875 (E.D. Ky.)** *(Caldwell, J.)*

Plaintiffs filed a civil action seeking a declaration that. because a doctor does not directly inject the lethal injection chemicals, obtaining the drugs without a prescription from a doctor violates the Federal Controlled Substances Act, and that, because the lethal injection drugs have not been approved by the FDA for use in lethal injections, using these chemicals for that purpose violates the Federal Food Drug and Cosmetic Act. Because it was clear from the complaint that Plaintiffs failed to exhaust administrative remedies prior to filing suit as required by the Prison Litigation Reform Act (PLRA), the Court dismissed the suit without prejudice. In doing so, the Court rejected the argument that exhaustion is not required because Plaintiffs complain about prospective injuries and that the Department of Corrections' rejection of a grievance challenging the chemicals and procedures used in lethal injections as non-grievable because it involves a statute and a court order covers the parameters of this suit. The court also ruled that the PLRA requires exhaustion of administrative remedies even when doing so would be futile.

Kentucky Supreme Court

***Willoughby v. Commonwealth*, 2006 WL 3751392 (Ky.) (unpublished)** (affirming denial of RCr 11.42 relief)

Funding in post conviction proceedings: The Court held that the purpose of post conviction collateral attacks "is to provide a forum for known grievances and not the opportunity to search for grievances," and that "[t]he requirement to provide funds to indigent defendants for necessary experts as held in *Binion v. Commonwealth*, 891 S.W.2d 383 (Ky. 1995), has not been extended to post-conviction matters."

Other claims: Based on case specific facts, the Court also denied ineffective assistance of counsel claims: 1) for calling an expert witness who testified that Willoughby suffered from anti-social personality disorder; 2) for failing to prepare for the mitigation phase until after Willoughby was found guilty (the Court found that the facts presented at the state court evidentiary hearing established that trial counsel began a mitigation investigation well before the trial began); and, 3) for failing to provide Willoughby's life history records to

trial counsel's mental experts. In denying these claims, the Court also noted that the majority of Willoughby's unpresented mitigating evidence was presented to the 11.42 court via a CR 59.05 motion and thus could not be properly considered by the Court, and that the ineffective assistance of counsel expert who testified at the state post conviction evidentiary hearing did not specify that gathering of records to supply experts was the standard of practice when Willoughby was tried in 1983, noting that the ABA Guidelines were not adopted until 1989.

***Baze and Bowling v. Rees, et al.*, 217 S.W.3d 207 (Ky. 2007)** *(Wintersheimer, J.)*

Baze and Bowling brought an action under Kentucky Rules of Civil Procedure Rule 57, which outlines the procedure for obtaining a declaratory judgment pursuant to K.R.S. 418.040, seeking a declaratory judgment that electrocution and the chemicals and procedures used in Kentucky lethal injections create an unnecessary risk of pain and suffering in violation of the Eighth Amendment. As recited in the Kentucky Supreme Court's opinion, Kentucky lethal injections are performed in the following manner and order: 1) a therapeutic dose of Valium is available to the inmate if requested; 2) certified phlebotomists and emergency medical technicians are allowed up to an hour to insert the appropriate needles into the arm, hand, leg or foot of the inmate; 3) three grams of sodium thiopental, a fast acting barbiturate that renders an inmate unconscious, is injected; 4) line is flushed with 25 milligrams of a saline solution; 5) fifty milligrams of pancuronium bromide, which serves the purpose of suspending muscular movement and stopping respiration, is injected; 6) line is flushed with 25 milligrams of a saline solution; 7) 240 milliequivalents of potassium chloride, which causes cardiac arrest, is injected. After reviewing this process, the Kentucky Supreme Court held that an Eighth Amendment violation had not been established.

Standard of review for declaratory judgment action: Questions of law in a declaratory judgment action are reviewed de novo, and the plaintiff must establish the constitutional violation by a preponderance of the evidence. Matters of fact tried before a judge without a jury are to reviewed under the clearly erroneous standard.

Eighth Amendment cruel and unusual punishment standard: Considering the evolving standards of decency, a method of execution is cruel and unusual punishment when the chemicals and/or procedures "creates a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death;" does not comport with "contemporary norms and standards of society;" "offends the dignity of the condemned or society;" or, "inflicts unnecessary physical pain or psychological suffering."

Note: Although not mentioned by the Kentucky Supreme Court, other cases say the Eighth Amendment prohibits the ***unnecessary*** *risk of pain and suffering. Counsel should argue that any risk of pain and suffering that can be easily avoided is unnecessary and thus violates the Eighth Amendment.*

Electrocution is constitutional: "Based on a review of a number of executions within different jurisdictions," the Kentucky Supreme Court found "no reason to change the view that electrocution remains a constitutionally viable method of execution."

The chemicals and procedures used in lethal injection are constitutional: Relying on the fact that Eddie Harper (the lone inmate executed by lethal injection in Kentucky) went to sleep within 15 seconds to one minute from the moment the execution began and never moved or exhibited any pain subsequent to losing consciousness, and that state and federal courts have regularly rejected arguments that lethal injection as a method of execution is cruel and unusual, the Court held that Baze and Bowling have not proven by a preponderance of the evidence that the chemicals and procedures used in Kentucky lethal injections violate the Eighth Amendment's prohibition of cruel and unusual punishment.

Note: No member of the execution team was allowed to be deposed or could be compelled to testify in this case. Whether information that could be learned from them would result in a different decision remains to be seen and should be explored in future cases.

Note: For more information about the lethal injection process and/or lethal injection litigation, contact the author of the Capital Case Review.

***Stopher v. Commonwealth*, 2006 WL 3386641 (Ky.) (unpublished)** (affirming denial of RCr 11.42 and CR 60.02 relief)

Standard of review for RCr 11.42 motions: A direct appeal issue may not be relitigated merely by repeating it as an argument for ineffective assistance of trial counsel, and an RCr 11.42 motion must set out all facts necessary to establish an alleged constitutional violation. 11.42 does not permit review of alleged trial errors **which do not rise to a denial of due process**.

Availability of relief under CR 60.02: "In a criminal case, CR 60.02 relief may be obtained only when it is not available by direct appeal or by RCr 11.42. The rule may be used only once a defendant has availed himself of his right to direct appeal and sought relief under RCr 11.42. CR 60.02 is not a separate method of appeal to be pursued in addition to other remedies."

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Newly discovered evidence and/or perjured testimony cannot serve as the basis for an RCr 11.42 motion

Recanted testimony as to whether Stopher was intoxicated does not justify relief: "The recanted testimony of any trial witness is viewed with suspicion and does not normally require the granting of a new trial." The standard of review in such a situation is abuse of discretion. The Court held that the trial court correctly ruled that only one witness claimed to have recanted trial testimony and even that recantation was not materially different from the trial testimony to the point where it can be said that the recantation would have resulted in a different outcome. Factually, the trial witnesses testified that Stopher was "crazy," "mad," and "angry." Apparently, the post conviction affidavits established that this meant that Stopher was on LSD or, at least, should not have been interpreted to mean that he was not on LSD.

Other claims: The court also denied the following ineffective assistance of counsel claims involving trial counsel: 1) not obtaining medical records to determine the size of Stopher's pupils when arrested to determine if he was intoxicated when he committed the murder; 2) not calling additional witnesses to bolster an intoxication defense; 3) not introducing a witness' statement through an investigator to show that Stopher was on LSD when he committed the murder; 4) failure to obtain social security and criminal records of witnesses; and, 5) failing to call three long-time acquaintances of Stopher as mitigation witnesses, whose testimony the Court characterized as something Stopher believes "would have been able to convince the jury that the person who killed the deputy was an outstanding member of the community." The Court also denied a claim involving the prosecution suborning perjury, finding that the witness involved gave a variety of inconsistent affidavits to Stopher's investigators and none of the affidavits mention or otherwise establish the prosecutor urged her to lie at trial.

A juror failing to disclose that she had a brief negative encounter with the defendant in the past is not juror misconduct: Merely by stating that a negative encounter with a victim would not give a defendant a basis to challenge a juror for cause and that a remote or speculative influence on a juror does not affect the right of peremptory challenge, the Court denied Stopher's juror misconduct claim stemming from a juror's failure to disclose that she may have had an unpleasant encounter with Stopher prior to the incident giving rise to this case. Without explaining why and merely by citing to *Tanner v. United States*, 483 U.S. 107 (1987), the Court held that Stopher was not entitled to an evidentiary hearing on this issue.

***Commonwealth v. Marlowe*, 2006 WL 3386629 (Ky.) (unpublished)** *(affirming RCr 11.42 grant of sentencing phase relief and denial of guilt phase relief)*

Trial counsel's failure to investigate and present mitigating evidence was ineffective assistance of counsel that cannot be excused by the fact that Marlowe's family was in the courtroom during the trial: The mitigating evidence presented in RCr 11.42 proceedings was as follows: "The Marlowe family was locked inside a fence. The defendant's father shot the defendant's mother and the defendant's siblings. He hit them with buckles, wrenches, battery cables, and fishing rods. The defendant had to sleep under the house many nights. The defendant's father raped his own daughter and he repeatedly referred to the defendant as a bastard. The refrigerator was kept locked." The circuit court made the factual finding that if Marlowe's attorney had conducted an investigation of Marlowe's background, numerous people would have been available to testify about these facts, and concluded that there is a reasonable probability that the jury would have imposed less than death had they heard this evidence. Recognizing that a decision not to investigate must be directly assessed for reasonableness, the Kentucky Supreme Court held that the circuit court's factual findings were not clearly erroneous and affirmed its ruling that trial counsel was ineffective. In doing so, the Court rejected the Commonwealth's arguments as to why trial counsel did not investigate as "nothing more than mere speculation in the absence of any showing that Appellant's counsel attempted to interview but was rebuked by Appellant's family and childhood acquaintances." As for prejudice, the Court held that the unpresented mitigating evidence, discussed above, considered in totality with the fact that Marlowe was only twenty years old at the time of the crime and had no prior criminal record created sufficient prejudice to entitle Marlowe to a new sentencing hearing.

No *Brady* violation took place from failing to disclose favorable treatment to witness:
A new trial is required, under *Brady v. Maryland*, 373 U.S. 83 (1963), where the prosecutor withheld materially exculpatory evidence, which is defined as evidence whereby there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Whether particular evidence is material under *Brady* is reviewed de novo. Here, the Commonwealth failed to disclose that a key Commonwealth's witness' bond was reduced to personal recognizance shortly after the witness told the Commonwealth about Marlowe's inculpatory statement. Because this witness had been impeached at trial when he admitted that he was awaiting trial for robbery charges, and that he had been in jail "lots of times," the Court held that there is no reasonable probability of a different outcome had the information been disclosed at or before trial. ■

KENTUCKY CASE REVIEW

By Sam Potter, Appeals Branch

Michael Cain v. Judge Abramson & Commonwealth
(Real Party in Interest)
Final 5/24/07, To Be Published
2007 WL 188030
Cain's Writ of Prohibition Denied
Unanimous Opinion by J. Scott

Michael Cain was charged with three counts of first degree robbery and for being a second degree persistent felony offender. Cain filed notice of his intent to assert the defense of mental illness and insanity. The Commonwealth moved to have Cain examined for criminal responsibility by its psychiatric expert, and Judge Abramson granted the motion. Cain requested the presence of his counsel during the Commonwealth's examination, asserting his state and federal constitutional right to counsel. After hearing arguments, Judge Abramson excluded Cain's counsel from the examination but appointed another psychiatrist from the Kentucky Correctional Psychiatric Center to observe the examination on behalf of Cain. Cain then filed a writ with the Court of Appeals requesting his counsel be ordered to attend the examination. The Court of Appeals denied the writ, and Cain appealed to the Kentucky Supreme Court.

A writ of prohibition was not the appropriate remedy. A writ of prohibition may be granted if (1) the lower court is acting outside its jurisdiction and no other remedy from an intermediate court exists, or (2) the lower court is acting erroneously within its jurisdiction, no other remedy exists, and great injustice and irreparable injury will result. (*citing Hoskins v. Maircle*, 150 S.W.3d 1, 10 (Ky. 2004)). Cain argued the trial court would be acting erroneously by denying his right to counsel at the examination. However, the Supreme Court found that another adequate remedy existed.

The Court determined that RCr 7.24(3)(b) protected Cain's rights. RCr 7.24(3)(b) provided that no statements made by defendants during a mental health examination or testimony about the statements or examination would be admissible against them in criminal proceedings unless the defendants assert a defense based on their mental condition. This means that if Cain incriminated himself to the Commonwealth's expert during the examination, Cain could prevent introduction of that evidence by not introducing evidence of his mental condition at trial. Further, Cain had requested that Judge Abramson permit Cain's defense expert to participate in the Commonwealth's expert's examination as alternative to having his counsel present. Thus, the Supreme Court concluded that no irreparable injury would occur by not granting the writ.

Sam Potter

A psychiatric evaluation by the Commonwealth performed after a defendant asserted a mental health defense was not a critical stage in the adversarial process that activated the constitutional right to counsel. The constitutional right to counsel applies at a critical stage of the judicial process. A critical stage occurs when accused people find themselves confronted by the procedural system, just as at trial, or by their expert adversary, or both. Cain was confronted by the procedural system when deciding whether to raise a mental condition defense, and he had access to his lawyer in making this decision. (However, when defendants have not pled guilty or have not raised a mental health defense, they have the right to counsel to advise them whether to submit to an examination. *See, Estell v. Smith*, 541 U.S. 454, 471 (1981).)

The examination by the Commonwealth's expert is not part of the procedural system. No decisions about legal strategy or tactics will be at issue, including the right to remain silent. Also, the Commonwealth's expert is not an expert adversary. The psychiatrist is an expert in mental health rather than substantive and procedural criminal law. The psychiatrist's job is to impartially examine the mental condition of the accused. Additionally, the Court believed the presence of defense counsel would frustrate and undermine the accuracy and usefulness of the examination through objections and admonishments. Based on this, the Court concluded that an examination by the Commonwealth's mental health expert was not a critical stage of the proceedings, and Cain had no constitutional right to counsel.

Commonwealth v. Patrick McKenzie
Final 3/17/07, To Be Published
214 S.W.3d 306
Reversed
Unanimous Opinion by J. Scott, J. Minton Not Sitting

On September 3, 2000, someone broke into the Cold Spring Roadhouse Restaurant. Over $10,000 in cash, gift certificates, sales receipts, and credit card slips were stolen. McKenzie was indicted on May 31, 2001 for third degree burglary. The trial was held on March 12, 2002. At the close of the Commonwealth's case, it moved to amend the indictment to

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include the charge of complicity to commit third degree burglary. McKenzie objected, arguing unfair surprise and insufficient time to prepare an adequate defense. The trial court allowed the indictment to be amended and instructed the jury on both principal and complicity third degree burglary. The jury convicted McKenzie of complicity to commit third degree burglary and for being a first degree persistent felony offender and sentenced him to 15 years in prison. The Court of appeals reversed his convictions, and the Commonwealth sought discretionary review.

RCr 6.16 allows the trial court to amend an indictment "any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." The trial court's decision to permit the indictment to be amended to include complicity did not change the offense. When people are found guilty of complicity to a crime, they occupy the same status as if they were found guilty of the principal offense. (*See, Parks v. Commonwealth*, 192 S.W.3d 318, 326-327 (Ky. 2006).) Complicity to third degree burglary is not an additional or different offense from principal to third degree burglary.

McKenzie suffered no prejudice to his substantial rights when the indictment was amended. The Court held there was no *per se* prejudice to the substantial rights of a defendant to amend an indictment during trial to include complicity with the underlying charge, overruling *Brown v. Commonwealth*, 498 S.W.2d 119 (Ky. 1973). Also, the Commonwealth had notified McKenzie prior to trial that it would introduce evidence that he was at the least an accomplice in the burglary. This theory did not change during trial or when it asked to have the indictment amended, which differs from the "dramatic, 180 degree turn" that effectively subjected the defendant to "ambush[] at trial with a new theory of the case." *Wolbrecht v. Commonwealth*, 955 S.W.2d 533, 537-538 (Ky. 1997). Finally, McKenzie did not seek the relief he was entitled to under RCr 6.16, which was a continuance.

James Brooks v. Commonwealth
Final 4/12/07, To Be Published
217 S.W.3d 219
Affirmed
Opinion by C.J. Lambert, Cunningham and Scott, JJ., Concur, No Dissent

The police discovered a working methamphetamine (meth) lab in Brooks' home. He attempted to prove that other people were living at the residence and that he had no involvement with the lab. They jury found Brooks guilty of manufacturing meth, trafficking in meth, and possession of drug paraphernalia. The jury imposed a sentence of 30 years upon him.

Convictions for both trafficking and manufacturing the same meth does not violate the double jeopardy clause. Before 1998, these were not two separate offenses. Manufacturing meth was included under the general trafficking in controlled substances statutes. The General Assembly passed a series of changes in 1998 that removed meth from the jurisdiction of the general controlled substances laws and treated meth separately. Additionally, the General Assembly classified trafficking in meth and manufacturing meth as two different crimes governed by two different statutes and provided different penalties for each. In 2000, the General Assembly repealed the trafficking in meth statute and placed meth back under the general trafficking in controlled substances statutes. However, the General Assembly retained the special definition it had adopted in 1998 for trafficking in meth that exempted the manufacture of meth. Presumably then, the General Assembly meant for the special definition to continue to be used. Thus, manufacturing meth and trafficking in meth are two separate crimes with separate elements independent of each other. No double jeopardy violation occurred when Brooks was convicted of manufacturing and trafficking the same meth.

Circumstantial evidence may be used to connect a writing to its alleged author. The police found three notebooks on the kitchen table that contained handwritten names and amounts. A deputy testified that the notations indicated money was either paid or owed to Brooks, though Brooks' name was nowhere mentioned in them. He offered this opinion based on his experience in over 100 other drug cases, many of which involved ledgers similar to the notebooks in Brooks' case. KRE 901(b)(4) provides that circumstantial evidence may be used to connect a writing to its alleged author. The notebooks were found in Brooks' residence. Brooks' possessions in the house suggested he was living there. Other testimony corroborated this. No error occurred in admitting the notebooks and the deputy's opinion testimony.

Any comment by the Commonwealth about the meaning of reasonable doubt is not automatic reversible error. The Commonwealth told the jury that beyond a reasonable doubt was not equivalent to beyond all doubt. Counsel may not comment on the meaning of "reasonable doubt." *See, Commonwealth v. Callahan*, 675 S.W2d 391 (Ky. 1984). However, there was no objection. The Court reviewed it under the palpable error rule, but found that no manifest injustice occurred because the Commonwealth did correctly state the standard as beyond a reasonable doubt. Still, contrasting the correct standard with the phrase "beyond all doubt" was improper. Even though the Court did not reverse Brooks' convictions, it did express its frustration that the *Callahan* rule continues to be violated more than 20 years after it was announced. (Justices Cunningham and Scott offered a one paragraph opinion that concurred in the result. They believed that the Commonwealth's statement did not violate *Callahan*.)

Marquis Heard v. Commonwealth
Final 4/12/07, To Be Published
217 S.W.3d 240
Affirmed in Part, Reversed in Part, and Remanded
Unanimous Opinion by C.J. Lambert

Heard and Angel Saunders had an infant daughter together. While Angel and the child were visiting Angel's grandmother, Sara Saunders, Heard came to see Angel. Sara would not let Heard in. He returned later after Sara had left. Heard kicked down the door, hit Angel with either a gun or his hand, took the child, and left. Sara returned and called the police. Angel implicated Heard to Officer Gilbert. As this discussion was taking place, Heard called his cell phone, which he had left at Sara's house. Heard admitted hitting Angel to a paramedic during this phone conversation. Angel was taken to a hospital and made more statements that implicated Heard to Dr. Wicker. Before trial, Angel recanted her accusations of Heard. Though under subpoena, she refused to testify. A jury convicted Heard of first degree criminal trespass and second degree assault based in part on Officer Gilbert's testimony of the statements Angel made to him that incriminated Heard.

This case presents a succinct and excellent summary of recent confrontation clause jurisprudence. The Sixth Amendment of the U.S. Constitution ensures that people accused of crimes shall enjoy the right to confront the witnesses against them. The Court summarized the old rule of *Ohio v. Roberts*, 448 U.S. 56 (1980), which allowed liberal admission of out of court testimonial statements if they possessed sufficient indicia of reliability. The new rule of *Crawford v. Washington*, 541 U.S. 36 (2004) held that the confrontation clause requires the unavailability of a witness and a prior opportunity for cross examination before out of court testimonial statements can be admitted. *Crawford* also held that admission of testimonial statements against an accused without an opportunity to cross examine the declarant is alone sufficient to establish a violation of the confrontation clause. Testimonial statements include statements made during interrogation, but *Crawford* left for another day the definition of interrogation.

This day arrived in the case of *Davis v. Washington*, 126 S.Ct. 2266 (2006). *Davis* explained that nontestimonial interrogation statements occur when objective circumstances indicate that the police are conducting the interrogation primarily to deal with an ongoing emergency. Testimonial interrogation statements occur when objective circumstances indicate that no ongoing emergency exists and that the police are conducting the interrogation primarily to ascertain past events that might be relevant to a future criminal prosecution.

Admission of Officer Gilbert's testimonial interrogation statements was not harmless beyond a reasonable doubt. The trial court allowed Officer Gilbert to testify about seven statements Angel made to him shortly after his arrival at the scene. These statements included that Heard hit Angel in the head with a gun and that Heard said he would have shot Angel had the gun not been broken. While Angel was unavailable to testify — recall her refusal to do so — Heard had not had the opportunity to cross examine her under oath about these statements prior to trial. Because these testimonial interrogation statements provided the "most damning" evidence of Heard's guilt regarding the second degree assault conviction, the Court reversed that conviction.

Admission of similar statements made to a family member do not violate the confrontation clause if they fall within one of the exceptions to the hearsay rule. Angel told Sara after she returned home that Heard broke down the door and hit her in the head with a gun. While these statements are similar in content to the statements Angel made to Officer Gilbert, the Supreme Court did not apply *Crawford* and *Davis* to them. The opinion does not express why, though two reasons seem likely. First, Sara was Angel's grandmother instead of a police officer. Second, the primary purpose of the statements were not to ascertain past events that might be relevant to future criminal prosecution but to ascertain the health and safety of close family relatives. The Supreme Court instructed the trial court to conduct a hearing to determine whether any hearsay exceptions, such as excited utterances, might apply to Sara's testimony.

Neal Scott Stone v. Commonwealth
Final 4/12/07, To Be Published
217 S.W.3d 233
Reversed
Unanimous Opinion by J. Cunningham

Robert Delonjay was arrested for selling drugs in August 2001. In exchange for his charges being dismissed, he agreed to become a confidential informant for the Greater Hardin County Narcotics Task Force. Delonjay contacted Detective Thomas Roby on November 28, 2001 and informed him that he could buy crack from Neal Stone, whose apartment was right beside Delonjay's. Roby gave Delonjay money and instructions about how to make the purchase. Delonjay returned a few minutes later with a rock of crack and said he bought it from Stone. Stone's theory of defense at trial was that Delonjay got the crack from his apartment and that the police lost sight of Delonjay because the apartments were located down an embankment from the police's location. Stone was convicted of first degree trafficking in a controlled substance, subsequent offense, and sentenced to 20 years in prison.

Defendants have a right under the Kentucky Constitution to hybrid representation. At his arraignment on November 7, 2002, Stone requested to act as his own lawyer until he could secure one. The trial court agreed and appointed DPA to fill in until then. At the next hearing, DPA informed the trial

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court (**erroneously**) it was not the practice of DPA to act as standby counsel. Being presented with the choice of either full representation or no representation, Stone decided to proceed *pro se*. § 11 of the Kentucky Constitution guarantees defendants with the right to be heard by themselves and counsel. The rule in Kentucky is not either/or but both/and if such representation is requested.

***Faretta* warnings must be given to defendants who choose to represent themselves.** The trial court simply allowed Stone to represent himself as described above without any meaningful colloquy. When defendants want to represent themselves, the trial court must provide certain warnings as required by *Faretta v. California*, 422 U.S. 806 (1975). When trial courts do not provide *Faretta* warnings to defendants proceeding *pro se*, their Sixth Amendment right to counsel is violated.

Defendants have the right to be represented by counsel at a critical stage in the proceedings, though no precise meaning exists for what is a critical stage. A critical stage can be any point in the prosecution—formal or not, in court or not—where the absence of counsel might impede a fair trial. A critical stage may also occur when available defenses will be lost if not raised. If counsel's presence is necessary to mount a meaningful defense, this is a critical stage. If the presence of counsel could avoid substantial prejudice, this is a critical stage. Citations for these propositions can be found at *Stone,* 217 S.W.3d at 238.

Guilty plea negotiations are a critical stage of the proceedings for purposes of right to counsel. The trial court finally provided Stone with the *Faretta* warnings 13 months later on May 21, 2004, only 20 days before trial. The trial court also appointed DPA as standby counsel for Stone's trial. Thus, Stone's right to counsel was honored at trial. However, the Supreme Court reviewed the hearings that occurred during the 13 months he was denied his right to counsel to determine whether any critical proceedings occurred.

During these 13 months, the Commonwealth made two different offers to Stone. One was to plead guilty to a lesser offense for time served. The second was to plead guilty and the sentence would run concurrent to a pending federal charge that Stone faced. Stone rejected both was convicted of first degree trafficking in a controlled substance, second offense, and received the maximum sentence of 20 years. Had counsel, even standby counsel, been present during these negotiations, Stone might have taken the deal and received significantly less time. Thus, the Court concluded that guilty plea negotiations were a critical stage of the proceedings.

Denial of right to counsel is *per se* reversible error. The Commonwealth argued on appeal that any error should be held harmless because Stone received a fair trial. However, the US Supreme Court dictated that the complete denial of counsel at a critical stage is reversible error *per se* and not subject to harmless error analysis. *U.S. v. Chronic*, 466 U.S. 648, 659 (1984). ■

NEW RESOURCES: Eyewitness Identification and Interrogation

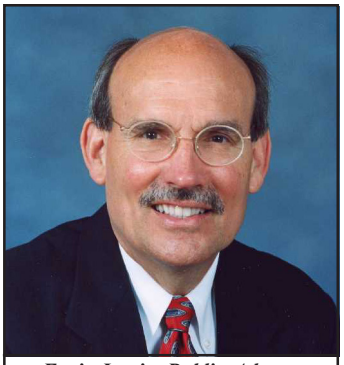
The Justice Project, in conjunction with **The Justice Project Education Fund**, has issued two comprehensive policy reviews designed to facilitate communication among local law enforcement agencies, policymakers, practitioners, and others who are concerned about the issues of eyewitness identification and the electronic recording of custodial interrogations. The reviews examine each of these issues and identify pitfalls and "best practices" with the latest research behind them. The reviews also offer model legislation that lawmakers can use to address these concerns in their states.

The **eyewitness identification** review indicates that a small number of changes to identification procedures can help improve the reliability of these identifications. Such changes include offering witnesses cautionary instructions before showing them a lineup, using the appropriate types of people as line-up fillers, documenting identification procedures, using a double-blind process in lineups, and presenting lineup participants sequentially instead of all at once.

The review concerning **recording of interrogations** concludes that the virtue of this practice lies not only in its ability to help guard against false confessions, but also in its ability to develop the strongest evidence possible to help convict the guilty. The review recommends audio or video taping of interrogations so that there is a full and accurate account of the circumstances surrounding a confession. The paper urges the taping of all interrogations involving serious felonies, and notes that it is especially important to record interrogations involving juveniles, those with mental retardation, or those with mentally illness.

The resources are available at http://www.thejusticeproject.org/solution/

PLAIN VIEW . . .



Ernie Lewis, Public Advocate

Scott v. Harris
127 S.Ct. 1769, 167 L. Ed. 2d 686, (2007)

"We consider whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind. Put another way: Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?" That is the issue discussed in this case.

Victor Harris was speeding (73 in a 55) down a two-lane Georgia road when a police officer tried to pull him over. Harris fled, driving at 85 miles per hour or above. Deputy Scott joined in the pursuit of Harris. During the chase, Harris hit Scott's car after being boxed in in a parking lot. Scott continued to pursue Harris, eventually being told by his supervisor to "take him out." This was in response to a request to utilize a "precision intervention technique", which apparently means to hit the car in the rear causing the car being chased to "spin to a stop." The "precision intervention technique" was apparently not so precise, since once applied Harris lost control and overturned, rendering Harris a quadriplegic.

Harris filed a 42 USC § 1983 action against Scott alleging the excessive use of force during an unreasonable search and seizure. The district court overruled Harris' motion for summary judgment and the Eleventh Circuit affirmed, finding that Harris was not entitled to qualified immunity and that he had been under fair notice that his actions were violative of the Fourth Amendment. The US Supreme Court granted *cert*, and reversed in a decision written by Justice Scalia and joined by all but Justice Stevens.

Justice Scalia summarizes the steps required for an analysis of whether the officer is entitled to qualified immunity, utilizing *Saucier v. Katz*, 533 U.S. 194 (2001). First, in the light most favorable to the injured party, do the facts show the violation of a constitutional right? Second, was the right violated "clearly established?"

The first inquiry featured an "added wrinkle." Since the first inquiry analyzes the facts based upon the injured party's perspective, the existence of a videotape contradicting those facts changes things. The Court found that the facts demonstrated not a driver under control as found by the Eleventh Circuit, but a "Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." As a result, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." "Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him." **NOTE: Appellate lawyers can use videotapes from the record to urge the appellate court to find that the lower court erred in its fact-finding.**

Thus, the Court found that Deputy Scott did not violate Harris' Fourth Amendment rights. There is no question that Scott's act of ramming Harris' car was a "seizure." The question is whether Scott's seizure of Harris was "objectively reasonable." The Court utilized the balancing test to arrive at the reasonableness determination. The Court found that Harris "posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." This was balanced against the actions of Scott, which were described as posing "a high likelihood of serious injury or death to respondent." In arriving at the answer to this question of balance, the Court looked interestingly at "relative culpability." Based upon relative culpability, the Court had "little difficulty in concluding it was reasonable for Scott to take the action that he did."

The Court declined to second guess the police decision to chase a suspect who, after all, was only driving 18 miles over the speed limit at the time the chase began. "[W]e are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger."

The rule left by this case is clear: "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."

Justice Ginsburg wrote a concurring decision. She stressed that the clarity described above was elusive, and that in fact the question is always going to be fact specific.

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Justice Breyer also wrote a concurring decision. Interestingly, he invited all of us to watch the car chase on the link in the Court's opinion to the videotape. "Having done so, I do not believe a reasonable jury could, in this instance, find that Officer Timothy Scott (who joined the chase late in the day and did not know the specific reason why the respondent was being pursued) acted in violation of the Constitution." Breyer also would overrule the *Saucier v. Katz*, 533 U.S. 194 (2001) requirement that the constitutional question be decided prior to the qualified immunity question in 1983 cases due to the fact that the constitutional determination is highly fact dependent. Finally, Breyer also agreed that there should not be a *per se* rule as indicated by the Court opinion. "[W]hether a high-speed chase violates the Fourth Amendment may well depend upon more circumstances that the majority's rule reflects."

Justice Stevens wrote in dissent. He primarily criticizes the use of the videotape to resolve the case. "Relying on a *de novo* review of a videotape of a portion of a nighttime chase on a lightly traveled road in Georgia where no pedestrians or other 'bystanders' were present, buttressed by uninformed speculation about the possible consequences of discontinuing the case, eight of the jurors on this Court reach a verdict that differs from the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are…Rather than supporting the conclusion that what we see on the video 'resembles a Hollywood-style car chase of the most frightening sort,'..the tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue. Most important, it surely does not provide a principled basis for depriving the respondent of his right to have a jury evaluate the question whether the police officers' decision to use deadly force to bring the chase to an end was reasonable."

Stevens also asked the question of what would have happened had the police stopped chasing Harris. "We now know that they could have apprehended respondent later because they had his license plate number." Stevens cites an *amicus* brief for the Georgia Association of Chiefs of Police indicating that "pursuits should usually be discontinued when the violator's identity has been established to the point that later apprehension can be accomplished without danger to the public."

Deboy v. Commonwealth
214 S.W.3d 926 (Ky. Ct. App 2007)

Deboy was stopped by a Williamsburg police detective on suspicion of driving on a suspended license. While arresting Deboy, the officer noticed a lot of movement from two passengers in Deboy's car. The officer caused the passengers to get out and patted them down, and then searched the car, finding three handguns. Deboy was charged with driving on a suspended license as well as being a felon in possession of a handgun. The passengers were charged with carrying a concealed deadly weapon.

Deboy moved for a directed verdict based upon the illegality of the traffic stop. A suppression hearing was not held. Deboy was convicted and he appealed to the Court of Appeals.

The Court of Appeals, in an opinion written by Judge Buckingham joined by Judges Abramson and Guidugli, affirmed the judgment. Deboy asserted that just because the officer knew his license had been suspended months before on a traffic violation did not give the officer reasonable suspicion to pull him over months later. The Court held instead that "'an officer's knowledge that a driver's license was suspended at some relatively recent time is sufficient to create reasonable suspicion of unlawful activity and support an investigatory stop of the vehicle.'"

The Court also rejected Deboy's arguments due to his attorney's failure to move to suppress. The Court rejected his argument that the admissibility of the guns could be raised by a directed verdict motion. "We conclude that Deboy's objection to the admissibility of the evidence was not timely because it was not made either before trial or at the appropriate time during the trial. The proper time for objecting during the trial was when the Commonwealth sought to introduce the testimony of the officer, not during the directed verdict motion." Thus, because of the failure to move to suppress prior to or during trial, the issue was not preserved for appeal.

Ritchie v. Commonwealth
2007 WL 1378148

In January of 2005, Officer Eric Jackson of the Paducah Police Department filed an affidavit for a petition to search Ritchie's house, saying that he had received an anonymous tip that Ritchie was "involved in selling illegal drugs." The affidavit said that based upon the tip, the officer had conducted a "trash pull" at Ritchie's house and had found a "piece of a baggie", mail, and a marijuana stem. A warrant was issued and the police found methamphetamine and drug paraphernalia. He was indicted on possession of a controlled substance enhanced by possession of a firearm and possession of drug paraphernalia. After his motion to suppress was denied, he entered an *Alford* plea to the charges and was sentenced to 18 months in prison.

The Court of Appeals affirmed the denial of the motions to suppress in an opinion written by Judge Buckingham and joined by Judge Lambert. They rejected Ritchie's argument that the affidavit was insufficient to establish probable cause. Ritchie had argued that the failure to specify when the

information was received or how Ritchie was involved in selling drugs was fatal to the affidavit. He further alleged that the lapse of 3 months between the tip and the trash pull rendered the information stale. The Court held that the tip was corroborated by the trash pull, and that the trash pull alone would have been sufficient to support the finding of probable cause. The Court relied upon *Bowles v. State*, 820 N.E.2d 739 (Ind.App. 2005) for the proposition that a "'single trash search may be sufficient to establish probable cause.'" The Court did not indicate how the finding of one marijuana stem in the trash was supportive of the allegation that Ritchie was selling drugs.

The Court also rejected Ritchie's argument that there was a *Franks v. Delaware*, 438 U.S. 154 (1978) issue, stating that the officer had made deliberate or reckless misstatements in his affidavit. The Court relied upon the trial court's findings, saying that the "court obviously found the evidence presented by the Commonwealth more persuasive and credible than the evidence presented by Ritchie."

Judge Stumbo wrote a dissenting opinion. "The affidavit was insufficient in that the date given for the anonymous tip failed to state what year the tip was conveyed, only the month of August. The trash pull that resulted in the finding of the evidence of marijuana use occurred some three months later and revealed only some baggies and a single marijuana stem. Apparently other trash pulls disclosed no evidence of illegal drug related activity. At what point does an anonymous tip become too stale to form a basis for an affidavit? I submit that three months of finding nothing renders a tip, without other corroborating evidence, inherently unreliable."

Hallum v. Commonwealth
219 S.W.3d 216 (Ky. Ct. App. 2007)

This case explores the nexus of the Fourth Amendment and social service intervention. In 2004, a child protective services investigator received a referral regarding the conditions of Hallum's house, saying it smelled, was dirty, and the children were hungry and unsupervised. In addition, the informant stated that Hallum and his wife were using meth and marijuana. The worker contacted the Hopkins County Sheriff and asked that one of the deputies go with her to investigate the allegations. Three police offices went with the child protective services investigator. Under KRS 620.040(1), there was a duty for the child worker to conduct a room-by-room investigation under certain circumstances. Hallum invited the worker and officers into the house, while at the same time he closed a door to a bedroom. The child worker found that the Hallums were obtaining electricity from a nearby home by splicing a cord, and found that to be a health hazard. She would later testify that this was a health hazard, and that because there was a child under three present, a room-by-room investigation was required. The worker asked to look at the bedroom the door to which Hallum had shut. Hallum said there was no need to look into the bedroom because it was used for storage. The worker said that she had to search each room, to which Hallum responded, "'fine then, go ahead.'" Notably, the child protective worker had received training in meth detection. She saw while there empty boxes of Sudafed, tubings, cans, and a gun. An officer was in the room with her. The officer smelled the odor of meth manufacturing. One officer left to obtain a search warrant, while two of the officers remained behind to secure the house. A warrant was issued, and when the warrant was executed, firearms, hose, a plastic bag, digital scales, starting fluid, paper towels, corner bags, coffee filters, meth, marijuana, drug paraphernalia, ammunition, lithium batteries, pseudoephedrine tablets, and pseudoephedrine pads were found. Notably, the child protective services worker "unsubstantiated most of the referral because the children were supervised, and they did not appear to be hungry." Hallum was arrested and charged with numerous drug offenses. His motion to suppress was denied. He was tried and convicted on the charges and sentenced to 6 years in prison.

The Court of Appeals affirmed in an opinion written by Judge Moore and joined by Judges Combs and Nickell. The Court found that Hallum had consented to the entry of the house. The Court further found that the entry into the bedroom by the officer was not unreasonable "because the visit was not criminal in nature. Thus, the detective did not need to receive Appellant's consent to enter the bedroom." Curiously, the Court noted that "once Ms. Finnerty told Appellant that she was required to look in the bedroom, Appellant told her to go ahead and do so. He did not tell the detective that he could not go into the room with her." The Court did not detail how one could have a state worker accompanied by 3 police officers investigating an allegation of meth and marijuana use and for that not to be viewed as criminal in nature. Nor did the Court detail how Hallum could have more forcefully noted that he did not consent to the bedroom door being opened.

The Court did go onto say that even if there was no consent to search the bedroom, the search was nonetheless reasonable under the exigent circumstances doctrine. The Court did not detail the exigent circumstances. Evidence found in the bedroom was said to be in "plain view" and thus eligible for seizure.

This is a disturbing case. There has long been in existence the "stalking horse" doctrine that looks behind the justification first offered by a probation officer, or a CDW, or even a citizen, where the police use a "stalking horse" (here the social services worker) to justify a violation of a privacy right. Here there was an allegation of marijuana and meth use. The child worker asked the police to accompany her, and 3 did so. She told Hallum that she was required by law to look in every room, and Hallum's desire for privacy was

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overborne. All of this occurred under the rubric of a child protection law, when it was clearly a criminal investigation. A public policy argument can be made that connecting child protection to law enforcement in this manner threatens the safety of the child protection worker, an unintended consequence of what occurred in this case.

United States v. Tackett
2007 WL 1470100, 2007 U.S. App. LEXIS 11960, 2007 FED App. 0187P (6th Cir. 2007)

Tackett had an accident in Tennessee in 2004. After the accident, he pulled a backpack out of his car and took it with him to the road. While tending to him, police noticed that he was "worried" about the backpack sitting nearby. The police accommodated him by conducting an "inventory search" and found an unlawful firearm and silencers. Tackett was charged with a firearms violation, after which his motion to suppress was denied. He appealed his 2 year probated sentence.

The Sixth Circuit affirmed the conviction in an opinion written by Judge Cook joined by Judges Rogers and Gwin. The Court rejected Tackett's allegation that an improper inventory search had been conducted. The Court found that no written inventory policy need exist where a standard policy is described. The Court also rejected Tackett's allegation that the police had inventoried his bag out of an investigatory motive rather than pursuant to the inventory policy and had merely justified their search with the policy. Finally, Tackett raised a state law question saying that an inventory was prohibited under Tennessee law which required the police to deliver his belongings to third parties. The Court held that because this was a state law matter, the remedy was in state court through a civil action.

United States v. Buckmaster
2007 WL 1308804, 2007 U.S. App. LEXIS 10776, 2007 FED App. 0161P (6th Cir. 2007)

Buckmaster suffered a fire at his home. The police and fire departments both responded. During the investigation into the cause of the fire as well as ensuring the house was safe, they entered the furnace room, where they saw illegal fireworks and explosives. Buckmaster was charged with unlawful possession of explosives, and pled guilty after losing his suppression motion.

In an opinion by Judge Martin, the Sixth Circuit affirmed. Buckmaster argued that the police had violated his Fourth Amendment rights by entering the furnace room in the basement, citing *Michigan v. Tyler*, 436 U.S. 499 (1978), and *Michigan v. Clifford*, 464 U.S. 287 (1984). The Court rejected the argument because neither case dealt with the exigencies present in this case. "*Tyler* and *Clifford* focused on the reasonable period firefighters may remain in a burned-out residence to investigate the cause and origin of the fire for a very simple reason: they were both cases in which fire investigators had a strong suspicion of arson. The two cases say little, however, about the often more common, and more obvious, reason that fire officials may remain in a fire-damaged residence: namely, to make sure that the residence is safe for its inhabitants to return to." In the present case, the Court found that an exigent circumstance existed as a result of electrical dangers. Because the police and fire department had a right to be in the furnace room where they saw the evidence in plain view, there was no violation of Buckmaster's Fourth Amendment rights when the police seized the explosives and fireworks.

United States v. Atchley
474 F.3d 840, 2007 Fed.App. 0034P (6th Cir. 2007).

In 2001, an anonymous tip was made to the Chattanooga police department, alleging that three or four people were in room 139 of the Suburban Lodge and that they were manufacturing methamphetamine. Four officers were sent to investigate. They saw four people near the room standing close to a truck that fit the description given by the informant. They approached the four, and asked for identification from Atchley, who gave them his driver's license. Atchley denied renting the motel room. An officer took Atchley's driver's license to the motel office, where the officer found that Atchley had indeed registered to stay in room 139. The officer went back and confronted Atchley with this fact, at which point he became "nervous and nonresponsive." The officer handcuffed Atchley, at which point he began to struggle with the officers, as did the other three people standing near the truck. Atchley was pepper sprayed, and then placed under arrest. Officers went to room 139 and saw through an open door a handgun on the bed, and smelled the odor of meth manufacturing. The officers entered the room and found two glass jars containing a solvent, a bottle of gas line anti-freeze, rubbing alcohol, and a police radio scanner. They searched a refrigerator, and found additional evidence. The officers left the room, and thereafter another officer obtained written consent from Atchley to search the room. The room was searched again and more evidence was located. Atchley was charged in federal court, and after losing his motion to suppress, was convicted by a jury. He was sentenced to 320 months imprisonment, and appealed his conviction.

The Sixth Circuit, in an opinion by Judge Martin and joined by Judges Norris and Gibbons, affirmed the conviction. The Court found that the officers did not need a justification to approach Atchley and his companions initially. Once the officers discovered Atchley's lie, and saw his nervous reaction, they had reasonable suspicion to justify the detention and questioning. Based upon the circumstances, the Court did not have a problem with the handcuffing of

Atchley. "Such a measure is appropriate even when police are merely detaining, but not arresting, a suspect." Thereafter, the officers had a reasonable fear for their safety justifying the protective sweep of the motel room. Once inside the room, the officers seized evidence they saw in plain view during the protective sweep. Once they seized the evidence, they had a reasonable suspicion that meth manufacturing was occurring, which created an exigency justifying the search of the refrigerator.

United States v. Cohen
481 F.3d 896, 2007 Fed.App. 0135P (6th Cir. 2007)

On December 17, 2004, someone called 911 from 8502 Wooded Glen Court in Jeffersontown, Kentucky. They hung up before saying anything. Officers Koenig and Pender went to the home, and saw a car turning from Wooded Glen Court onto Wooded Glen Road. The officers stopped the car. When asked for identification, Cohen said, "just shoot me." Cohen agreed to go to the officer's car and sit while they checked out his license number. The police dispatcher let the officers know that Cohen was possibly in violation of probation, and also that there was a domestic violence order in existence. The dispatcher thereafter told the officers that Cohen's driver's license was suspended and that there was a warrant for his arrest for a probation violation. Cohen was arrested. A search of Cohen's car revealed a handgun and ammunition. Cohen was indicted on being a felon in possession of ammunition and a handgun. Cohen filed a motion to suppress, which was denied by the magistrate, but granted by the district judge. The government appealed.

In an opinion by Judge Moore, and joined by Judges Gibbons and Sargus, the Court affirmed the district judge's decision. The Court held that there was not a reasonable suspicion sufficient to justify the stopping of Cohen's car. The 911 call "is most analogous to an anonymous tip." This call neither asserted any illegality nor did it identify a particular person. Rather, it was a call during which no one said anything. "Given the almost complete absence of information communicated by the silent 911 hang-up call and the limited additional information known to Officer Pender when he stopped Cohen's car, we conclude that the totality of the circumstances did not provide reasonable suspicion for the police to make an investigatory stop."

United States v. Johnson
2007 WL 1518075, 2007 U.S. App. LEXIS 12202 (6th Cir. 2007)

Officer Richard Dews of the Cincinnati Police Violent Crime Squad on July 22, 2003, was watching Johnson's great-grandmother's house at 4704 Peabody Avenue, suspecting that drugs were being sold. Johnson as well as Sims, Howard, Thornton, and three women were on the front porch. Dews saw Sims and Thornton approach cars, take money from them, and give them something. Dews thought both were taking instructions from Johnson. Dews next saw a Geo Tracker park in front of the house and a heavy set man get out. Johnson met him on the sidewalk, and then they sat down on the couch. Dews saw Johnson give a "'wad of money'" to the heavy set man. Johnson went to a van and put something in it. At that point, officers approached the porch, and Johnson went inside. Officers chased Johnson inside and found him in the closet of a bedroom on the second floor. Johnson threw a handgun out of the closet. Johnson was arrested and charged with distributing crack cocaine, as well as several firearms violations. Johnson's motion to suppress was denied. Johnson was convicted of the cocaine charge and being a felon in possession of ammunition and was sentenced to 262 months in prison. Johnson appealed.

In an opinion written by Judge Lawson and joined by Judges Merritt and Griffin, the Sixth Circuit affirmed. The Court rejected Johnson's argument that the knock and announce rule was violated. The Court did not consider the recent change in knock and announce law caused by *Hudson v. Michigan*, 126 S.Ct. 2159 (2006), deciding instead that there were exigent circumstances justifying the warrantless entry into the house. The Court found that the police did not have to knock and announce due to the fact that they had reason to believe that Johnson would destroy evidence if they delayed their pursuit.

United States v. Sanford
476 F.3d 391, 2007 FED App. 0055P (6th Cir. 2007)

On February 25, 2005, Deputy Pruitt saw Hill driving 65 mph on I-75 in Tennessee where the speed limit is 70. Hill had to break hard due to a slow moving truck, barely avoiding an accident. Pruitt decided to stop Hill as a result of seeing Hill brake. Pruitt obtained Hill's driver's permit, and saw fifteen air fresheners hanging on the turn-signal. Pruitt asked Sanford for his identification, which Sanford could not do. Pruitt asked both to get out of the car and questioned them separately resulting in inconsistent answers. Pruitt called Johnson to come to the car with his narcotics dog. Hill consented to a search of the car. Pruitt found several cell phones, money, and a pager on Hill. He patted Sanford down and felt a bulge and asked if that was marijuana, to which Sanford said yes. As Pruitt began the search, Hill ran. The search produced eight kilograms of powder cocaine. Hill and Sanford were indicted for conspiracy to distribute cocaine as well as possession with intent to distribute cocaine. Their motion to suppress was denied, and they were both convicted at a jury trial.

The Sixth Circuit affirmed in an opinion by Judge Griffin, joined by Judge Sutton. The Court described in some detail the "degree of confusion in this circuit over the legal standard governing traffic stops." The Court cited with approval *Gaddis v. Redford Twp.*, 364 F.3d 763 (6th Cir. 2004), which

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held that the police may stop a vehicle for a criminal violation when they have a reasonable suspicion, while they must have probable cause to stop for a civil traffic violation. The Court held that because the offense involved in this case was a misdemeanor traffic offense the stop was to be analyzed under the reasonable suspicion standard. The Court went on to say that Pruitt had probable cause to stop Hill for a traffic violation.

The Court looked at the fact that Hill was following a vehicle within ten feet for "only a moment". The question was whether this violated the law against following too closely. The subtext was that of pretext. "Pruitt's ulterior motivations, if any, are irrelevant. *Whren v. United States*, 517 U.S. 806, 813 (1996). "The distance between the vehicles here, approximately ten feet, is significantly less than the distance in *Valdez* of twenty to thirty feet. Although momentary, the danger is substantial when both vehicles are traveling at interstate speeds…We hold that Pruitt had probable cause to believe that a traffic violation had occurred and therefore was justified in making the initial stop of Hill's vehicle. Pruitt had probable cause to believe that defendant Hill was following the truck 'more closely than is reasonable and prudent' when he came to within ten feet of the slow and steadily moving truck and had to 'slam on his brakes' to avoid a rear-end collision."

Judge Merritt wrote a dissenting opinion. "I do not believe that Officer Pruitt had probable cause or any reasonable ground to believe that a traffic offense had occurred under Tenn. Code Ann. #55-8-124(a)(1998), which forbids a motorist from following too closely. Rather, the Officer stopped this car with New York plates occupied by two black males a few minutes after the car had braked to avoid an accident. Officer Pruitt stopped the car because he had a hunch, in my judgment, that the two men might have some drugs….This ability to avoid an accident by braking is what Tennessee law requires. A crime does not occur every time a car speeds up to pass and then has to brake quickly in order to avoid an accident when cut off by another car coming up fast in the passing lane; nor does a crime occur when a motorist must brake quickly because the car in front brakes or slows quickly."

United States v. Rice,
478 F.3d 704, 2007 Fed.App. 0088P (6th Cir. 2007)

An FBI Agent heard on a wiretap on the phone of Shawn Bullitt what he thought was a reference to a shipment of a large quality of cocaine. The FBI used this to request a wiretap of Rice's phone, the results of which were used to indict Rice and others. The wiretap was based upon the Wenther Affidavit which included a section detailing that alternative investigative procedures were not available. Title III requires "that an application for a wiretap order contain 'a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.'" These alternative procedures were a physical surveillance, a confidential source, pen registers and a telephone toll analysis, a grand jury investigation, the use of search warrants, and trash pulls. Rice and others successfully moved to suppress the fruits of the wiretap, and the government appealed.

In a decision by Karen Moore joined by Judge Clay, the Sixth Circuit affirmed the suppression of the evidence. The Court found that the district court had not erred in determining that statements made demonstrating the necessity of the wiretap were misleading and recklessly made. Once those misstatements were omitted, the necessity requirements of Title III were not apparent. Finally, the Court decided that the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984) did not apply to applications for warrants under Title III.

Judge Bell dissented. He agreed that the good faith exception did not apply under Title III, but believed that the district court had erred in its decision regarding the Wenther Affidavit.

The Short View

1. *State v. Rodriguez*, 156 P.3d 771 (Utah 2007). The availability of telephonic warrants leads the Utah Supreme Court to hold that the fact that blood alcohol might dissipate does not necessarily lead to a finding of exigent circumstances sufficient to forego a warrant for the taking of blood without a warrant. *Schmerber v. California*, 384 U.S. 757 (1966), which had held that the police could take blood without a warrant under the particular circumstances, while still good law, must be viewed now under more modern contexts. "We are confident that, were law enforcement officials to take advantage of available technology to apply for warrants, the significance of delay in the exigency analysis would markedly diminish."
2. *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007). A defendant has a reasonable expectation of privacy in her cell phone despite the fact that the cell phone is owned by an employer. However, that holding did not provide relief in this case as the cell phone had been seized incident to a lawful arrest, thereby making the seizure and search lawful.
3. *Commonwealth v. Considine*, 860 N.E.2d 673 (Mass. 2007). The Fourth Amendment does not apply to the actions of private school administrators. Private school administrators are different from those addressed in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), which spoke of public schools.

4. *State v. Valdez,* 152 P.3d 1048 (Wash. Ct. App., 2007). When a person has been arrested and is out of the car, the police may not subject the car to a canine search as a search incident to a lawful arrest, according to the Washington Court of Appeals' interpretation of their own state constitution. The search incident to a lawful arrest exception to the warrant requirement is explicitly tied to protection of the officer and to maintenance of physical evidence. Once the person has been removed from the car, the need to continue to search to protect these two interests dissipates.
5. *United States v. Freeman*, 479 F.3d 743 (10th Cir. 2007). The interplay of the Fourth Amendment with state law in regards to the search of parolees and probationers was explored in this 10th Circuit case. Here, state law required a reasonable suspicion prior to the search of the home of a parolee. The monitoring firm conducted a random search of Freeman's home to ensure compliance with the wearing of an ankle bracelet, resulting in the seizure of a firearm and ultimately a conviction in federal court of being a felon in possession of a firearm. Prosecutors argued that under *Samson v. California*, 126 S. Ct. 2190 (2003), and *United States v. Knights*, 534 U.S. 112 (2001), the parolee's reduced expectation of privacy meant that the seizure was reasonable and thus not in violation of the Fourth Amendment despite being a violation of state law. The 10th Circuit disagreed, and found that the violation of state law was a relevant consideration. "*Samson* does not represent a blanket approval for warrantless parolee or probationer searches by general law enforcement officers without reasonable suspicion; rather, the Court approved the constitutionality of such searches only when authorized under state law."
6. *State v. Reed*, 641 S.E.2d 320 (N.C. Ct. App. 2007). "[O]ne simply cannot abandon property within the curtilage of one's own home." Here, Reed was being questioned by the police about a sex offense. He rejected their request for a sample for DNA comparisons, and shredded a cigarette butt he had smoked in order to deny them a sample. The police found another butt he had discarded in a trash pile on the cartilage of his house. The North Carolina Court of Appeals said that this warrantless seizure violated Reed's Fourth Amendment rights, differentiating this from matters that are put into the garbage outside of the curtilage.
7. *State v. Mullens*, 2006 WL 4099850, (W.Va. 2007). The West Virginia Supreme Court has established the rule under the state constitution that a warrant is required when the police send an informer into a suspect's home. "[W]e now hold that it is a violation of West Virginia Constitution article III, #6 for the police to invade the privacy and sanctity of a person's home by employing an informant to surreptitiously use an electronic surveillance device to record matters occurring in that person's home without first obtaining a duly authorized court order…"
8. *McClish v. Nugent*, 483 F.3d 1231 (11th Cir. 2007). The police cannot arrest someone without a warrant when he answers the door of his house, according to the 11th Circuit. Here, the police, who had probable cause but no warrant, went to arrest the defendant at his home. They knocked on the door and the defendant answered, resulting in his arrest. This violated the rule in *Payton v. New York*, 455 U.S. 573 (1980), according to the 11th Circuit in an opinion that differs with other circuits and states across the country. "McClish did not completely surrender or forfeit every reasonable expectation of privacy when he opened the door, including, most notably, the right to be secure within his home from a warrantless arrest…Simply put, the fact that an officer may view a subject in the interior of a home through an open door does not alter the basic rule that a warrantless entry into the home to effect an arrest is prohibited absent consent or exigent circumstances."
9. *State v. Bauder*, 2007 WL 777995 (Vt. 2007). The Vermont Supreme Court has continued to exercise its independent nature by holding that under the state constitution a warrant is required to search a car following an arrest. This enforces more rights than that accorded in *Belton v. New York*, 453 U.S. 454 (1981). The Court noted "traditional Vermont values of privacy and individual freedom" were the reason for the departure from the US Supreme Court's interpretation of Fourth Amendment law.
10. *State v. Jordan*, 156 P.3d 893 (Wash. 2007). Washington State has a constitutional provision that says "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision was interpreted in this case by the Washington Supreme Court to prohibit the random and suspicion-less search of motel registries in a search for fugitives. "[T]he information contained in a motel registry—including one's whereabouts at the motel—is a private affair under our state constitution, and a government trespass into such information is a search…A random, suspicion-less search is a fishing expedition, and we have indicated displeasure with such practices on many occasions." ■

History says, Don't hope on this side of the grave.
But then, once in a lifetime the longed-for tidal wave
Of justice can rise up, and hope and history rhyme.

— Seamus Heaney, "The Cure at Troy"

Sixth Circuit Review

By David Harshaw, Post-Conviction Branch

Discussed below are five cases. The first addresses a habeas statute of limitations question. The next two involve confrontation clause issues and are especially interesting when read in tandem. The fourth case addresses whether in a perjury trial a lawyer-witness can testify to "materiality." The last case involves whether a certificate of appeal-ability is required to appeal denial of a Rule 60(b) motion.

***Bachman v. Bagley*,**
— F.3d ——, 2007 WL 1452270 (C.A.6 (Ohio)),
before Guy, Cole, and McKeague, Circuit Judges.

The Court rules that being adjudicated a sexual predator does not reopen the underlying judgment for habeas purposes. In 1997, Ronald Bachman, convicted of various sexual crimes and serving a life sentence, exhausted his state court direct appeal. In 2004, in a subsequent proceeding, the trial court adjudicated Bachman a sexual predator. He appealed this finding and lost. He then filed a habeas petition challenging the constitutionality of his underlying conviction but not his status as a sexual predator.

Judge McTeague, for the unanimous Court, found that Bachman could not challenge his underlying conviction. The Court first laid out Bachman's argument:

> Bachman argues that the sexual predator designation should restart the statute of limitations period with respect to *any* claim related to his conviction. In support of this argument, he cites the Eleventh Circuit's decision in *Walker v. Crosby,* 341 F.3d 1240 (11th Cir.2003). In that case, the Eleventh Circuit held that where a habeas petition brings multiple claims, including a challenge to a resentencing decision, that resentencing restarts the statute of limitations period for *all* of the claims in a habeas petition, including those that arise from the original conviction. *Id*. at 1246. The court based its conclusion on the fact that "[t]he statute directs the court to look at whether the 'application' is timely, not whether the individual 'claims' within the application are timely. The statute provides a single statute of limitations, with a single filing date, to be applied to the application as a whole." *Id.* at 1243.

The Court then gave its reasoning for finding against Bachman:

> Sixth Circuit precedent dictates instead that courts determine the beginning of the one-year statute of limitations period based on the content of the prisoner's claim. The logic behind this rule was explained in *Fielder v. Varner,* 379 F.3d 113 (3d Cir.2004), in which the Third Circuit refused to adopt the Eleventh Circuit's *Walker* decision. The *Fielder* court observed that using the same beginning date for the statute of limitations for an entire habeas petition, regardless of the nature of the individual claims, "has the strange effect of permitting a late-accruing federal habeas claim to open the door for the assertion of other claims that had become time-barred years earlier," a result that Congress never intended when it designed the federal habeas statutes. *Id.* at 120.

***United States v. Arnold*,**
— F.3d ——, 2007 WL 1452230 (C.A.6 (Tenn.)), *en banc*.

The Court upholds the admission of excited utterances under both a hearsay analysis and under the confrontation clause. Joseph Arnold challenged his conviction of being a felon in possession of a handgun. The Court found the facts of the case as follows:

> At 7:43 a.m. on September 19, 2002, Tamica Gordon called 911 and told the emergency operator: "I need police.... Me and my mama's boyfriend got into it, he went in the house and got a pistol, and pulled it out on me. I guess he's fixing to shoot me, so I got in my car and [inaudible] left. I'm right around the corner from the house." Gordon identified her mother's boyfriend as Joseph Arnold, a convicted murderer whom the State had recently released from prison.
>
> About five minutes after the dispatcher told three police officers about Gordon's call, the officers arrived at 1012 Oak View, the residential address that Gordon had provided to the 911 operator. Gordon exited her car and approached the officers, "crying," "hysterical," "visibly shaken and upset," and exclaimed that Arnold had pulled a gun on her and was trying to kill her. JA 112-14. She described the gun as a "black handgun." JA 127.
>
> Soon after the officers arrived, Arnold returned to the scene in a car driven and owned by Gordon's mother. Gordon became visibly anxious again,

> exclaiming, "that's him, that's the guy that pulled the gun on me, Joseph Arnold, that's him." JA 115. She also told the officers that "he's got a gun on him." JA 116. Arnold exited the car, and the police patted him down to determine if he was carrying a weapon. When the pat-down did not produce a weapon, the officers asked Gordon's mother for permission to search the car. She consented, and the officers found a black handgun inside a clear, plastic bag directly under the passenger seat where Arnold had been sitting.

At trial, Gordon was not present. However, over Arnold's objection, her statements were admitted as excited utterance exceptions to the hearsay rule. The District Court also found that the admission of the statements did not violate the confrontation clause of the Sixth Amendment. On appeal, Arnold gained a reversal in a 2-1 panel decision. *En banc*, however, Arnold's conviction was affirmed. Other issues in the case, not discussed herein, are sufficiency of the evidence and the admissibility of testimony from an investigator to whom Gordon recanted.

Judge Sutton delivered the Opinion for the seven member majority. Thirteen members of the Court sat on the case. Judge Sutton first laid out the test for determining whether a statement met the excited utterance hearsay exception:

> Under *Rule 803(2) of the Federal Rules of Evidence*, a court may admit out-of-court statements for the truth of the matter asserted when they "relat[e] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." To satisfy the exception, a party must show three things. "First, there must be an event startling enough to cause nervous excitement. Second, the statement must be made before there is time to contrive or misrepresent. And, third, the statement must be made while the person is under the stress of the excitement caused by the event." *Haggins v. Warden, Fort Pillow State Farm,* 715 F.2d 1050, 1057 (6th Cir.1983). All three inquiries bear on "the ultimate question": "[W]hether the statement was the result of reflective thought or whether it was a spontaneous reaction to the exciting event." *Id.* at 1058 (internal quotation marks omitted).

All of Gordon's statements met this test. First, the threat to Gordon of being shot was a startling event. Second, Sixth Circuit caselaw supports that the time lapse here between Gordon being threatened and her statements was not as long as has been found in other cases as compatible with truthfulness. *See e.g. United States v. Baggett*, 251 F.3d 1087, 1090 & fn. 1 (6th Cir. 2001) (several hours elapsed after startling event). Third, testimony established that Gordon was visibly upset during all of the statements.

The Court then discussed whether the admission of the statements violated Arnold's right to confrontation. The test, first announced in *Crawford v. Washington*, 541 U.S. 36 (2004), hinges on whether the statements were testimonial/non-testimonial in nature. The Court found that the case of *Davis v. Washington*, 126 S.Ct. 2266 (2006) controlled their analysis:

> "Statements are nontestimonial," *Davis* explained, "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 2273-74. *Davis* applied this definition to two recurring types of witness statements: statements to 911 operators and statements to the police at the scene of the crime.

The Court stated that "the line between testimonial and non-testimonial statements will not always be clear." The Court stated that each statement must therefore be "assessed on its own terms." Analyzing the statements, the Court found that each was non-testimonial in nature. Of interest is the discussion of Gordon's statements to the police about the gun:

> During the few moments the officers spoke to Gordon, moreover, the primary purpose, measured objectively, of the question they asked her-for "a description of the gun,"-was to avert the crisis at hand, not to develop a backward-looking record of the crime. Contrary to the contention of the partial dissent, this question did not transform the encounter into a testimonial interrogation. Asking the victim to describe the gun represented one way of exploring the authenticity of her claim, one way in other words of determining whether the emergency was real. And having learned who the suspect was and having learned that he was armed, they surely were permitted to determine what kind of weapon he was carrying and whether it was loaded-information that has more to do with preempting the commission of future crimes than with worrying about the prosecution of completed ones. What officers would not want this information-either to measure the threat to the public or to measure the threat to themselves? *Cf. Davis,* 126 S.Ct. at 2276 (911 operator's questions regarding assailant's identity objectively aimed at addressing emergency because "the dispatched officers might" then "know whether they would be encountering a violent felon"). And what officer under these circumstances would have

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yielded to the prosecutor's concern of building a case for trial rather than to law enforcement's first and most pressing impulse of protecting the individual from danger?

Judge Griffin agreed with the majority's analysis of Gordon's statements except for the statements about the gun. He wrote:

> During her conversation with the officers, Gordon began to calm down, and the officers attempted to elicit a description of the gun from the complainant. As Officer Brandon testified,
>
> > [W]hen we got there ... we was [sic] trying to get a description of the gun, and she said it was a black gun, a black handgun, which is a very vague description, and we was [sic] trying to decide whether it was a revolver or semiautomatic revolver which would be the gun like you think a cowboy would have where you can spin it out, but a revolver-I mean a semiautomatic gun, most of them are chambered where you pull the hammer back. This is called a hammer, you pull it back, and she made the motion that he did that, which means there would be a round chambered, let us know that it was a semiautomatic black handgun. So that kind of narrowed it down.
>
> In response to these questions posed by the officers regarding the weapon allegedly possessed by Arnold, Gordon described the gun as a black handgun. She further described to the officers how defendant stood in the doorway with the gun in his hand and cocked the gun. Based on Gordon's hand gestures showing how the gun was cocked, the officers concluded the gun was a black semi-automatic handgun that would have a round chambered in it.
>
> In my view, the complainant's description of the gun was testimonial in nature and material in proving the felon in possession of a firearm charge against defendant. Once Gordon was safely in the protective custody of the three police officers, the perceived emergency had ceased. Accordingly, after that point, her responses to questions asked by the police regarding past events were testimonial and therefore subject to defendant's right to confrontation as guaranteed by the Sixth Amendment.
>
> The "safety of the officers" argument posed by the majority is not persuasive. The police knew defendant might be armed. Obtaining a description of the weapon was standard crime investigation.

Judge Moore, in dissent, would have each of Gordon's statements ruled inadmissible. She writes:

> The inescapable conclusion, then, is that post-*Davis,* the government retains the burden of defeating, by preponderance of the evidence, a defendant's Confrontation Clause challenge. This means that the government must establish facts showing that the proffered statements are nontestimonial, *i.e.*, that they were "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis,* 126 S.Ct. at 2273. On the record presently before the court, the government cannot meet this burden.

***Vasquez v. Jones*,**
— F.3d ——, 2007 WL 1324815 (C.A.6 (Mich.)),
before Rogers and Cook, Circuit Judges, and Gwin, District Judge.

The Court rules that the right to confrontation was violated when an absent witness was not able to be impeached with his prior felony record. Emilio Vasquez was present at a block party when a shootout erupted. During the free-for-all Vasquez said that in self-defense he fired a .22 rifle. A woman was killed by a 9-millimeter handgun. Vasquez was charged with her death.

Demond Brown testified at a preliminary examination hearing that he saw Vasquez fire a handgun during the melee. Brown subsequently was unavailable for trial. At trial, the prosecution successfully moved for Brown's preliminary hearing testimony to be admitted. Vasquez then sought to introduce Brown's prior criminal record to impeach his credibility. The trial court denied this request. The trial court invoked Mich. R. Evid. 609(a) which reads:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination....

The trial court reasoned that without Brown being present that no "cross-examination" as contemplated by the rule could take place. Vasquez thought this a hyper-technical interpretation of the rule. The prosecution maintained that Brown would not be able to explain the circumstances or rehabilitate himself if impeachment was allowed in Brown's absence.

Judge Cook, for the unanimous Court, found that Vasquez's Sixth Amendment confrontation rights had been abridged. Under *Davis v. Alaska*, 415 U.S. 308 (1974), Vasquez had a right to impeach Brown's credibility with his criminal record.

The Court found that *Davis* applies equally to impeachment by bias or credibility. Additionally, the Court found that Mich. R. Evid. 806 (which parallels KRE 806) allowed the unavailable Brown to be confronted and impeached with his criminal record.

Next, the Court needed to consider whether the error was harmless to Vasquez. The Court laid out the following test:

> To determine whether an error was harmless under *Chapman,* courts are to consider "a host of factors," including (1) "the importance of the witness' testimony in the prosecution's case," (2) "whether the testimony was cumulative," (3) "the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points," (4) "the extent of cross-examination otherwise permitted," and (5) "the overall strength of the prosecution's case." *Van Arsdall,* 475 U.S. at 684 (citing *Harrington v. California,* 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969)).

The Court then analyzed Vasquez's case under these factors and found that the error was not harmless.

To conclude, it is worth noting that Vasquez had also advanced a confrontation claim under *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). However, he defaulted the claim by not consistently raising it in the state courts. *Roberts* is the forbearer of *Crawford* and *Davis*, both discussed in the *Arnold* case above. All practitioners should be aware that the Confrontation Clause has multiple facets.

***United States v. Safa*,**
— F.3d ——, 2007 WL 959423 (C.A.6 (Mich.)),
before Daughtrey and Rogers, Circuit Judges, and Oberdorfer, District Judge.

In this perjury prosecution, the Court found that a prosecutor properly testified that if the defendant had answered truthfully at the grand jury that it would have been helpful to the government's case. The Court found that the testifying prosecutor did not invade the province of the jury by defining "materiality."

Steve Safa was summoned before a federal grand jury investigating illegal cigarette trafficking. Safa lied to the grand jury and was indicted for it. At Safa's trial, the Assistant United States Attorney who was in charge of the case was asked:

> Now, can you briefly, sir, explain to the members of the jury what does it mean for a question to be material before the grand jury?

Safa's counsel lodged an objection, which was sustained. However, the AUSA was allowed to testify that truthful answers by Safa "would…have assisted the Grand Jury's investigation" and that untrue answers "had a natural tendency to influence, impede, or dissuade the Grand Jury's investigation." Safa objected to the question that prompted this answer and such objection formed the basis of his appeal.

Judge Daughtrey delivered the Opinion for a unanimous Court. The Court found:

> In this case, the jury was charged with the responsibility to determine whether the alleged false statements made by Safa before the grand jury were so "material" as to affect the government's investigation into a possible conspiracy to distribute contraband goods. In order to provide evidence upon which the jurors could base their conclusion with regard to such an inquiry, the prosecution was allowed to ask an Assistant United States Attorney whether Safa's answers, "if false, would ... have influenced, impeded, or dissuaded the Grand Jury's investigation" and, if true, "would ... have assisted the Grand Jury's investigation." Although those questions paraphrased the definition of "material" that the district judge later charged to the jury, they did not ask the witness to reach the very legal and factual conclusions for which the jury was responsible. Indeed, without the information provided by the witness in response to the challenged questions, the jurors would have had no information on which to base their verdict because they could not have intuitively ascertained the relevance of Safa's testimony to the larger conspiracy investigation. The district judge, therefore, properly forbade the prosecution witness from explaining the concept of a "material question," but he properly allowed that same witness to testify that Safa's responses to inquiries before the grand jury did indeed have an impact upon the government's investigatory strategies. We find no abuse of discretion in this regard.

***United States v. Hardin*,**
481 F.3d 924 (C.A.6 (Ky.) 2007),
before Martin and Cook, Circuit Judges, and Tarnow, District Judge.

The Court rules that a certificate of appeal-ability is necessary before the appeal of the denial of a Rule 60(b) motion can be heard. In 1999, Corey Hardin pled guilty to federal drug offenses. In 2000, he filed a writ of *habeas corpus* pursuant to 28 U.S.C. § 2255. The District Court denied his collateral attack. In 2001, Hardin filed a motion under Rule 60(b) seeking relief from the judgment in his *habeas* case. The District Court, believing that Hardin had

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filed a successive *habeas* petition, referred the motion to the Sixth Circuit because under 28 U.S.C. § 2244, before a successive petition may be filed, the Circuit Court must grant permission. The Sixth Circuit denied Hardin authorization to bring a second petition.

In 2006, relying on the Supreme Court case of *Gonzalez v. Crosby*, 545 U.S. 524, 125 S.Ct. 2641 (2005), Hardin filed another 60(b) motion challenging the denial of his previous 60(b) motion. *Gonzalez* defined the difference between a proper 60(b) motion and an improper successive *habeas* petition. The Supreme Court found that in the context of a § 2254 petition brought from a state conviction that a 60(b) motion "is not to be treated as a successive *habeas* petition if it does not assert, or reassert, claims of error in the movant's state conviction." *Gonzalez* at 2651.

Although the Opinion is silent as to what happened next, it can be assumed that the District Court again referred Hardin's 60(b) motion to the Sixth Circuit. It is clear, however, that when the case reached the Sixth Circuit, the United States filed a motion to remand the case for the District Court to make a ruling on a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) requires such a certificate before any appeal may be heard in a *habeas* case.

Judge Martin, writing for the unanimous panel, ruled:

> It appears that eight other circuits have required a certificate of appealability as a prerequisite for a *habeas* petitioner's appeal of the denial of a *Rule 60(b)* motion. [citations omitted]. We believe that this prerequisite is consistent with the language of *section 2253*, and therefore hold that Hardin must obtain a certificate of appealability before his appeal of the denial of his *Rule 60(b)* motion can be heard. If the rule were otherwise, a petitioner who is denied *habeas* relief in the district court could simply circumvent the certificate of appealability requirement by filing a motion for relief from judgment under *Rule 60(b)*, and then styling his appeal as a challenge to the denial of the *Rule 60(b)* motion rather than the judgment. Allowing such an approach would undermine the requirements of *section 2253*, under which, as the Supreme Court has noted, we lack jurisdiction to hear a habeas appeal without a certificate of appealability. *Miller-El v. Cockrell,* 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). ■

You never really understand a person until you consider things from his point of view — until you climb into his skin and walk around in it.

—Atticus, *To Kill a Mockingbird*

Practice Corner
Litigation Tips & Comments

Recently, we've noticed an increasing number of situations where the victim or some member of his or her family was allowed to sit at counsel's table. The Commonwealth (and the defense) are allowed to have one person sit at counsel's table. However, when it is the victim or some member of his or her family, object, especially if the person is going to be a witness.

KRE 615 states that when a party requests separation, the trial court **shall** order witnesses excluded "so that they cannot hear the testimony of other witnesses…" In *Mills v. Commonwealth*, 95 S.W.3d 838, 840 (Ky. 2003), the Supreme Court said that allowing a witness to remain in the courtroom during testimony is likely to refresh the witness' memory, which violates KRE 615. In that case, the only witness to the robbery remained in the courtroom at the Commonwealth's table and heard every witness. "[B]y the time [the witness] took the stand, his memory was completely refreshed as to the details of the robbery and the description of the perpetrators. Since [the witness] was the only witness to the robbery that testified at trial, his overall credibility was crucial to the Commonwealth's case."

If it be coming up more frequently in your county, think about a motion in limine to prevent the practice. If you have questions or want to talk about preserving the issue, call one of us in the Appellate Branch.

If you have a practice tip to share, please send it to Julia K. Pearson, Supervising Attorney, Section C, Appellate Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601. ■

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