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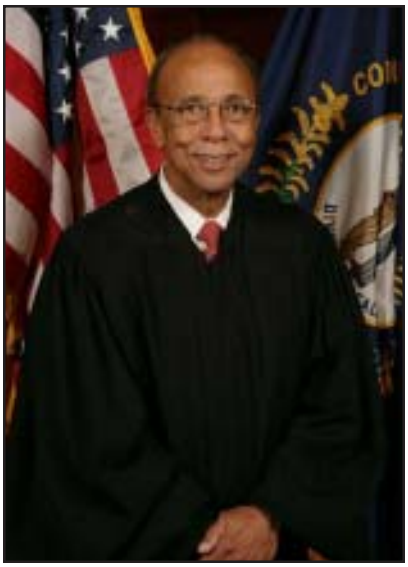

A Tribute to Justice William E. McAnulty Jr.

- Countering the So-Called "*CSI* Effect"
- Juvenile Transfer: Recent Research And Commentary
- Ingredients for Telling Your Story Correctly
- Constitutionality of Declaring the Sex Offender Registry Statute Unconstitutional in Question

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**With Privilege comes Responsibility
not to rescue but to serve.**

— Ana Ghoreishian

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

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

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FROM THE EDITOR...

Jeff Sherr

In August of this year, Kentucky lost a giant in the legal profession, Justice William E. McAnulty, Jr. Justice McAnulty made an impact on the lives of people across the commonwealth. In this edition, we share stories from Department of Public Advocacy staff who had the privilege of knowing this great man.

There has been much debate among those in the criminal justice system whether television shows about forensic science solving previously "unsolvable" crimes has an impact on real world juries. In **Countering the So-Called "CSI" Effect,** DPA Appellate public defender Susan Jackson Balliet writes of the efforts of prosecutors to cite the "CSI Effect" as a reason courts should relax evidentiary standards. The article offers strategies for defense attorneys using the evidence rules and caselaw to counter the move to allow more junk science into the courtroom.

In **Juvenile Transfer Issues: Recent Research and Commentary**, Eric Y. Drogin provides and overview of the most up-to-date resources regarding the harmful consequences of transferring juveniles to the adult justice system. These resources are essential reading for criminal defense attorneys representing children in transfer hearings.

Mark Stanziano lays out a storytelling continuum in **Building a Better Bombshell: Considerations for Mixing the Ingredients of Your Story Correctly.** The continuum ranges from broad "*Notions"* such as "Honesty is the best policy" to detailed *"Narratives"* of the story of the case. Mark Stanziano discusses the specifics of the points of on the continuum and tips on choosing the correct point on the continuum to use at different points in the trial.

In 2006, the General Assembly passed sweeping changes to laws related to sex offenses. Recently, several courts have determined the expansion of restrictions applicable to the residency of sex offenses violate the ex post facto clause of both the United States and Kentucky Constitutions. In **Any Place Where a Person Sleeps**, Samuel N. Potter explains these decisions.

A summary of the law governing revocation hearings in Kentucky is provided in **The Due Process Requirement for Revocation Hearings** by J. Brandon Pigg and Samuel N. Potter.■

JUSTICE WILLIAM E. MCANULTY JR. IN MEMORIAM

Justice William E. McAnulty

From Don Morehead, Appeals Branch:

Bill McAnulty is my friend and mentor.

I use the term "is" intentionally because of my belief and more importantly his belief, that we survive the deaths of our bodies.

I first met the man who would become Justice McAnulty when he was an Appeals Court Judge after I had just passed the bar. I was seeking his advice on just how I should proceed on this legal journey. On the recommendation of a mutual friend he, sight unseen, he invited me to his office in downtown Louisville and gave me an audience for over two hours. He, with great patience, listened to me pontificate about Constitutional and political matters and from the very outset he treated me like a colleague—that was a very empowering moment for a brand new lawyer. When I told him I was thinking about a solo practice his sage advice to me was "Don't hang your shingle right out, you'll starve to death and your wife will leave you before you do." Later in our conversation when I asked him if I could use him as a reference he without hesitating said, "Of course." Two weeks later I called him and told him I was interviewing with Scott West for a position with the Murray Trial Office of DPA, he said simply, "That (DPA) is a good organization; you will get good training and experience there." Then he added, "Murray!? Work hard and don't let me down." After Scott hired me I asked him if he called Judge McAnulty. He told me he did and true to his word he gave me a ringing endorsement.

He was not afraid of controversy. When I did not understand his political strategy in accepting an appointment form the Fletcher administration; he quoted Dr. King's social, philosophical and theological treatise "*Why We Can't Wait*." He had a since of history and not just his place in it, but all African-American attorneys who would come after him. Later after his appointment to the Supreme Court, I called him at his new office to talk about a personal matter. I was surprised when he answered his own telephone. "Justice McAnulty", I said, "you just got a promotion and a raise, and you shouldn't have to answer your own phone." He just laughed and said, "I'm the new guy, they make me do everything around here." He set the bar very high as a man, lawyer and social trailblazer. I will miss his physical presence but because of the genuine truths he spoke to me I will never be without him.

"Work hard and don't let me down" I will, good and gentle sir, I will.

From Joanne Lynch, LaGrange Trial Office

Justice McAnulty showed everyone who entered his courtroom that being decisive and being compassionate were not mutually exclusive. You wanted your toughest cases in Jefferson Circuit Court to be in front of him because you always knew how you, your client and your case would be treated: with respect, attention to detail and solid reasoning.

Justice McAnulty did not play favorites. He asked hard questions of criminal defense lawyers. He did not rubber-stamp the wishes of the prosecutors. He listened, usually with fingertips firmly pressed together an inch or two in front of his face, and ruled according to his best interpretation of the law.

His untimely death robbed Kentucky of a jurist unmatched in civility and his commitment to justice under the rule of law.

From Russell Crusott, Elizabethtown Office

I knew Bill McAnulty when he was a Jefferson County trial commissioner. I worked in his first judicial campaign delivering flyers to law firms and supporters. The most fun came after I passed the bar and he appointed me on occasion to work in his place as deputy trial commissioner. Gave a new lawyer a unique perspective. I took him to the Jefferson Club when we were both just new to our world but we wanted a peek into the oyster. He seemed to get a kick out of it. Since then I have never been surprised by the success he had not just as the first African-American, black or as he said at KBA "worse", but as a person who, like the Colossus of Rhodes, stood astride the entrance to the harbor of racial harmony and success without color. To list the impact he had would go on for pages and still fall short of the mark of the man. He dodged nothing and applied reason, patience, passion and boundless intelligence to all. To say he will be missed underestimates the vacuum left where he stood.

Al Adams, Law Operations Division Director
In the 1980s and 90s when I worked in downtown Louisviille, Judge and I ate breakfast together every day at the Jefferson Club. I have fond memories of many great conversations. From that time to now no matter what he was doing or who he was talking to he would always stop what he was engaged in and speak and call me by name.

What a great man.

Roger Gibbs, Eastern Region Manager
I tried my first Circuit case before this patient and capable jurist. The lessons of that trial remain with me today. Although that was many years ago, he never hesitated to say hello whenever our paths crossed and he never forgot my name. The legal community has lost a truly excellent jurist and a finer man.

From Ernie Lewis, Public Advocate
My strongest memory of Justice McAnulty is sitting in the Supreme Court of Kentucky, with Capitol Avenue off in the distance, watched the Chief Justice place the robe on him, and listening to him evoke the memory of Dr. Martin Luther King, Jr., who had marched up that avenue some 40+ years before. Justice McAnulty seemed to be acutely aware of the moment, to be both humbled by it but also to be inspired by his place in our common history. While he has been cut short, tragically so, and while his voice will now be stilled, his having risen to that place has forever changed the history of Kentucky, and makes it now possible for other persons of color to rise to assume that place, just as he did.

SUPREME COURT INVESTITURE REMARKS

By Justice William E. McAnulty

Thank you, Chief Justice Lambert, and thank you colleagues for the very kind words on my behalf. If I were a smart lawyer, I would merely submit the case for consideration and say no more. However, I am obligated to say a few things and I relish that opportunity. I'm going to engage in a number of thank yous and, bear with me through this, but first and foremost, to my former chief who, when I was on the Court we referred to as "Chiefy," and she always will be my Chiefy — Judge Sara (Combs) thanks for your kind comments, and to my colleagues for the last eight years on the Court of Appeals who gave me an incredible opportunity to engage in the appellate process and for their support and the outstanding support staff of the Court of Appeals. To Governor Fletcher, thank you for having the confidence to appoint me to this important and prestigious position. I continue my commitment to work hard on behalf of the citizens of this Commonwealth, of all the citizens of this Commonwealth. Judge Kemper, what can I say … outstanding. What a wonderful voice, what a wonderful moment. And to my dear friend, Justice Johnstone — sorry about the unkind words that I spoke to you last week. You called at the wrong time, I was in my 12th box in preparation for this week and, if I said anything inappropriate, I deeply apologize. But let me tell you how proud I am to succeed you on this great Court, just as I followed you to the Court of Appeals and the Circuit Court. You leave a great legacy on this Court, and I treasure our professional association and our friendship. Time does not permit recognition of every dignitary in the courtroom and the hallway. Even more perilous would be to name some, excluding others; however I would like to recognize generally the members of the clergy who have come from Louisville, who have been so supportive in this journey, and I will allude to some later in my comments. However, if I do not mention family, it will be a long ride home, so you must bear with me as I single them out. Let me begin by indicating that my dear mother who has passed, Ann McAnulty, is looking down on us today and, having read the article about me in Jet Magazine, I know she

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leaned back and proudly said, "that's my boy." My dad and his wife Augusta were unable to make the trip from Indianapolis, but I feel their strength and encouragement. Dad, of course, will be critiquing the tape of these proceedings and offering any number of suggestions for me, and the rest of you, I can assure you. Throughout my childhood there were three pieces of advice that he gave me, which always linger. The first was to be home at 11 o'clock, and don't hang around with those hoodlums. The second was, don't burn up all my gas, expletive deleted. And the last one, which really sticks, is why do I care what they say about me, they don't pay my, expletive deleted, bills. A special recognition to my wife, Kristi, who has been such a force in my life, so supportive, and a great partner and mother of Shannon and Will. And my oldest, Patrick, who doubles as a great son and a great friend. My self-proclaimed favorite child, Kate — of all the parental advice that I gave her over the years, the only thing that seemed to stick was an admonition I made a number of years ago at a drive-thru restaurant when I retorted, "Did I ask you for ketchup?" For those of you who have experienced the frustration of drive-thru restaurants, it was wonderful that she remembered that great admonition. And next to the best in-laws a person could ever have, Pat and Wakeman Taylor, from Owensboro, Kentucky, my sister Sara Ann and her daughter Julie, Kristi's brothers, Carey and his wife Jennifer, her brother Kendall and his wife Mary Kay, John and Becky Sykes, who have come from Henderson, and a very special guest, my cousin Mike Harold from Louisville, who, now that I have identified the fact that we are cousins, has moved to Washington, D.C. And last but not least, my sister, the Rev. Jean Smith, and my favorite niece, Kelly Lamb. As always, they have been there for me, and I am so fortunate to have them in my life. I also would like to recognize … who did I miss? I didn't miss Will! — my son Will, the heart of my life, the light of my life. He sits there, beaming, and for one week leading up to this, he has hugged me and held me, and told me how proud he was of me. I, too, am proud of you, my son. And also let me recognize two former Justices of this Court, Justice Walter Baker and Justice John Palmore. I am pleased to have you both with me today as well. You know, it was difficult preparing for this day because knowing the format and knowing that I would be the only thing between us and the finger sandwiches and the cheese balls, all of my drafts ended up making me sound like Gary Cooper in the Lou Gehrig story, and that famous line, today, I am the luckiest man in the world. And it sounded so corny, and I couldn't say that. But this morning, as I tried to finalize my comments, I realized that it was not that sappy, it was not that corny, because as I look upon my beautiful family, and beautiful friends, and wonderful colleagues, I truly am the luckiest man in the world. And to those of you who thought that I should have waited for this moment, the thought also passed through my mind that those were thoughts expressed to many friends of mine over the years — Lyman Johnson comes to mind. He was told to wait in 1947, just wait Lyman, and your time will come. Well, Lyman is a very impatient man and he could not wait. Or Ben Shobe, who was denied an opportunity to attend law school in this Commonwealth and had to leave the state for his legal education. Just wait. For my dear, dear friend, C. Mackie Daniel, who was told in the 60s, oh no, you can't eat here, you just, just wait. Well, they didn't wait and, like those men, I don't have time to wait. And to those many, many before me, thank you, thank you for not waiting, and thank you in the words of Langston Hughes, who once said, I too sing America. And on that note, I wish to leave you, because we too, and we all, sing America, and I am deeply proud and I'm deeply honored to have accepted the appointment to have the opportunity to serve with these fine jurists. And I make only the commitment that your cases, as they are presented to this Court, will be argued vigorously, even vociferously, and the debate will be great, but the result will be pure, and I appreciate the opportunity to participate. Thank you so much for coming. ■

COUNTERING THE SO-CALLED "*CSI* EFFECT"

By Susan Jackson Balliet, Appeals Branch

This article suggests strategies for countering irrelevant, inconclusive, cumulative, and otherwise doubtful forensics evidence flooding our courts supposedly to "counter *CSI*."[1]

When viewers of *CSI*[2] and other television shows that overstate and glorify the power of forensic science serve as jurors, they may be more critical and less persuaded by forensic evidence than is commonly presumed.[3] In fact there may be no link at all between *CSI* and a demand by jurors for more "scientific" evidence.[4] But these days when prosecutors tell trial courts they need to counter the "*CSI* effect," they are often allowed to present every preliminary, questionable scrap of forensic evidence they can find – relevant and probative or not—on the theory that without it, *CSI*-tainted jurors won't convict. By citing the *CSI* effect, the Commonwealth is asking the court to take judicial notice that such an effect exists, and to relax evidentiary standards because of it. Defenders should demand *Daubert*[5] hearings to force the Commonwealth to prove the *CSI* effect exists. Courts should not be allowed to grant a relevance, or *Daubert* override, based on speculation about some popular television show.

A *Daubert*, or KRE §§ 401, 403 override is the all-too-frequent result when the Commonwealth cries "*CSI*." For instance, one Kentucky prosecutor recently spent a good twenty minutes "countering the *CSI* effect" with detailed testimony regarding the mapping, measuring, and detailed photographing of dozens of red spots outside a crime scene, all of which –it turned out—were paint. Proving the spots were paint foreclosed any argument that the spots were the victim's blood. But since they were paint, it was irrelevant under § 401 how big each spot was, how many spots there were, and what the distance was between each spot. Under § 403 this additional forensics evidence wasted the time of everyone in the courtroom. Except, of course, the prosecution benefited by puffing and glorifying the thoroughness of its investigation.

In the same case, the court allowed lengthy testimony and photos of strings elaborately converging at the head of a bed to prove "*scientifically*" that the victim's head had been crushed *right where all the blood was*. Plotting trajectories of blood might conceivably have been helpful if the exact point of attack had been in question. But it was not in question, and the string trajectories had –at most— cumulative value. Testimony and photos of a myriad strings cross-webbing the room were impressive.[6] And because they were impressive, they were prejudicial, bolstering the credibility of the police investigation, making the police look oh-so-scientific.

Another Kentucky court recently allowed evidence of unconfirmed sniffer dog "alerts" to prove arson despite the fact that subsequent lab tests (which would have identified ignitable liquids –had they been present— at the miniscule level of 15 – 20 parts per million) were all negative. At the *Daubert* hearing, the court stated that due to the "*CSI* effect," the Commonwealth would be "prejudiced" if the dog's opinion did not come in, and allowed the unconfirmed dog evidence because the jury "expected the use of scientific tools."

This stuff fails to meet KRE §§ 401, 403, and 702.

Evidence like the tedious measuring and mapping of paint is objectionable under §401, relevance, or under §403 on the grounds that extensive evidence regarding mapping and measuring paint will confuse and mislead the jury into thinking the paint has significance, and will needlessly delay the proceedings. The objection to evidence like the string evidence is under §702, that no matter how scientific the Commonwealth's "string theory" might be, the jury needs no assistance in figuring out where this attack occurred. Under §403 the string evidence also constitutes "needless presentation of cumulative evidence." Unconfirmed dog evidence is objectionable under §702, *Daubert*, and *Kumho Tire*,[7] because by definition it is too unreliable to pass muster. An objection may not prevail,[8] and in Kentucky it will probably not prevail if the *sole* complaint is that the evidence is cumulative.[9] But the "*CSI* effect" has not been proved to exist, and should not be accepted as the ticket to an automatic relevance or *Daubert* override.

Preliminary tests are inadmissible under *Daubert* and *Kumho Tire*.

Inconclusive, preliminary test results —including but not limited to presumptive blood tests (including luminol and preliminary breath tests), presumptive drug tests, unconfirmed sniffer dog alerts, and –nowadays— microscopic hair analysis—constitute a major category of dubious, irrelevant forensic evidence prosecutors attempt to introduce to "counter *CSI*." This evidence should **not** come in. The Kentucky Supreme Court has recognized that preliminary, presumptive toxicology test results are properly excludable because they are by definition unreliable, lack probative value, and are highly prejudicial:

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> … the toxicology report did not confirm the presence of cocaine …and therefore, the evidence of cocaine was without probative value. …the expert could not testify that it would have had any effect on [the victim's] ability to feel pain. As a result, the trial court found that the oxycodone evidence was of little probative value and that its admission would be highly prejudicial….[10]

Kentucky courts also routinely exclude results of another preliminary test, called the Preliminary Breath Test, or PBT. After the enactment of KRS 189A.104 in 2000, though mentioning a PBT at trial is allowed, any testimony regarding specific results of a PBT or any breathalyzer not specified in KRS 189A.104 as proven reliable is inadmissible.[11]

Presumptive and preliminary test results are admissible in pre-trial proceedings, like suppression hearings, where the rules of evidence –and *Daubert*— do not apply.[15] But they are not reliable enough to meet *Daubert* and should not be admitted at trial, not even to "counter *CSI.*"

Other courts have similarly concluded that presumptive tests are too unreliable to be relevant.[12] Connecticut has held that expert testimony based on a presumptive blood test lacks the scientific reliability required to be admissible, indeed, lacks all probative value, is irrelevant, and –when admitted— results in prejudice.[13] In addition, the Army Court of Criminal Appeals has ruled that even though presumptive luminol blood tests have been tested, peer reviewed, and generally accepted as an investigative tool, they are nevertheless *per se* too unreliable to be admissible under *Daubert*. The Army Court reasoned that a luminol test is reliable only to show "a presumptive positive presence for blood and not to confirm the presence of blood."[14]

Indeed, the problem with all preliminary, presumptive test results is that they are reliable only for preliminary use, to eliminate forensic samples with low probability of yielding probative results, and select more likely samples for further, definitive testing. Presumptive and preliminary test results are admissible in pre-trial proceedings, like suppression hearings, where the rules of evidence –and *Daubert*— do not apply.[15] But they are not reliable enough to meet *Daubert* and should not be admitted at trial, not even to "counter *CSI*."

Microscopic hair analysis and sniffer dog alerts do not come labeled as "preliminary" tests. They are nonetheless preliminary in nature, because they are mere preludes to the real, definitive tests that follow, like DNA testing for hair, and lab testing to confirm whether a dog is correct. Any test that is preliminary in nature –*i.e.*, which by definition cannot reliably pin-point-identify the substance or person it is designed to identify— should be challenged and excluded at trial.

Despite *Johnson v Commonwealth*,[16] which held microscopic hair analysis presumptively reliable and admissible at trial under *Daubert*, in the eight years following *Johnson*, microscopic hair analysis has proved unreliable.[17] Microscopic hair analysis should be excluded from trials, because –as the forensics community recognizes— microscopic hair analysis is not reliable, and is purely preliminary. Hairs collected at a crime scene are preliminarily examined under a microscope to determine which hairs to send for the real testing, the DNA testing, which is the only testing that can reliably pin-point-identify whose hair it is. *Johnson* should be challenged and overruled.

Dog alerts also fall into the category of preliminary test results, because sniffer dogs are used to identify items for the real testing, not for pin-point-proving that a suspected substance is actually present. When a sniffer dog "alerts," or "hits," the subject item is collected and then lab tested. If the lab test proves positive for the substance, only then should the test results be admitted at trial. Unconfirmed sniffer dog results are like presumptive blood tests. While admissible at preliminary, suppression hearings—as acknowledged by *Baldwin*— they should be inadmissible at trial.

As yet, there is no Kentucky case addressing the admissibility of unconfirmed dog alerts at trial,[18] and no case post-*Johnson* re-assessing Kentucky's position regarding microscopic hair analysis.[19] For now, defenders are left to argue against these, and similar, unaddressed preliminary tests, under the general principles in KRE §§ 401, 403, 702, *Daubert*, *Kumho Tire*, and the 5th, 6th, and 14th Amendments to the United States Constitution, as well as §§2, 3, 10 and 11 of the Kentucky Constitution.

Daubert review can be short and sweet.

Discovery should reveal what the Commonwealth might raise that is subject to *Daubert*, allowing time for full-blown pretrial hearings.[20] But the Commonwealth rarely gives notice that it intends to raise the *CSI* effect. If *CSI* or any other *Daubert* issue arises suddenly mid-trial, defenders should approach the bench and ask for a full *Daubert* hearing, or at least an abbreviated hearing. In an emergency, a *Daubert* objection can be preserved in a bench conference, with no experts. This is true because a KRE §702 *Daubert* assessment does not require a formal hearing:

> The assessment does not require a trial court to hold a hearing on the admissibility of the expert's testimony.

> [Although] a trial court should only rule on the admissibility of expert testimony without first holding a hearing "when the record [before it] is complete enough to measure the proffered testimony against the proper standards of reliability and relevance."[21]

Once an objection is raised,[22] the trial court has an obligation as gatekeeper to research the issue legally and factually in order to have some basis for allowing the evidence.[23]

If the court is unwilling to stop and conduct a full *Daubert* hearing, under *Christie* and *Simpson* the court should at least take a short break to identify and consult all the appropriate scientific treatises, case law, and other legitimate sources that counsel will rush out, collect, and provide.

Trial courts can consider almost anything.

In determining *Daubert* admissibility, under KRE § 104(a) the trial court "is not bound by the rules of evidence except those with respect to privileges." This means that in a *Daubert* review, full-blown or otherwise, a trial court can consider textbooks, learned treatises, scientific articles, law review articles, or internet materials without worrying whether they are hearsay, best evidence, sworn, certified, or whatever.[24] Get certified copies or sworn affidavits if possible. And for internet materials, be sure to identify the source of the information and provide an accurate uniform resource locator (URL) website address.[25] But keep in mind that under KRE § 104(a) (which governs *Daubert* hearings) these "extras" are not required. In making a *Daubert* determination, a trial court can consider just about anything.[26] Make sure to place all matters the court considers or relies on in the record.

Don't Blow it.

If you succeed in keeping evidence out under §§ 401, 403, and *Daubert*, be careful not to open the door and let it in through careless cross-examination. Don't ask the police officer, "Why did you send this off to the lab to be tested," because the answer will be, "The dog hit on it." Don't ask the lab tech, "Why did you wait four days before testing this item for DNA," because the answer will be "We had to wait for confirmation on the microscopic hair analysis." Don't fish for information and end up eliciting the response you just succeeded in suppressing, or preserving for appeal.
And watch what you give your experts. The prosecutor will almost surely ask the expert, "What did you review in preparation for your testimony today?" You don't want your expert to answer, "All the preliminary tests given to me by counsel."

We should be leading this fight.

In criminal cases, the overwhelming bulk of expert evidence is offered by the government against our clients. Yet, while the civil bar has been vigorous in mounting *Daubert* challenges, by comparison criminal defense lawyers have been standing by and failing to raise any objection to evidence that would be fought tooth and nail in a civil case.[27] The true "*CSI* effect" is an ever-increasing avalanche of irrelevant, junk science raining on our clients' heads. The stakes are higher for our clients. *Daubert* is our battle. We need to step up and lead the *Daubert* fight.

Endnotes:

1. Thanks to DPA's Bluegrass Regional Manager Brian Scott West for contributions to this article.
2. "Crime Scene Investigation."
3. N. J. Schweitzer and Michael J. Saks, The CSI Effect: Popular Fiction About Forensic Science Affects Public Expectations About Real Forensic Science. Jurimetrics, Spring 2007; see also, J. Herbie DiFonzo, Ruth C. Stern, Devil in a White Coat: the Temptation of Forensic Evidence in the Age of CSI, New England Law Review, Spring 2007.
4. Donald E. Sheldon, Young S. Kim and Gregg Barak, *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the 'CSI Effect' Exist?* Vanderbilt Journal of Entertainment & Technology Law, and Kimberlianne Podlas, *The C.S.I. Effect: Exposing the Media Myth* Fordham Intellectual Property, Media and Entertainment Law Journal, 2006.
5. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
6. At Google, type in blood spatter string analysis, and hit "I'm feeling lucky" for a quick course.
7. *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999) (extending *Daubert* to cover not just scientific opinion, but all expert opinion).
8. *Cf., Bratcher v. Commonwealth*, 151 S.W.3d 332 (Ky. 2004) (expert testimony was helpful to inform jury how and why a specific type of garrote was used).
9. *Rodgers v. Commonwealth*, 2006 WL 2455973 (Ky. 2006) (Unreported), at pages 3-4.
10. *Thacker v. Commonwealth*, 2003 WL 22227194 (Ky. 2003) (Unreported) (upholding the trial court's decision to exclude presumptive test results that favored a defendant)
11. *Williams v. Commonwealth*, 2003 WL 1403336 (Ky.App. 2003) (Unreported)
12. There are numerous contrary cases where preliminary blood results have been allowed. Many pre-date *Daubert* [e.g., *United States v. Sheard*, 473 F.2d 139 (D.C. Cir. 1972)]. The others are contrary to the trend —represented by Kentucky's *Thacker* case and Kentucky's handling of PBT tests— recognizing that neither presumptive nor unconfirmed results meet *Daubert*. This article focuses on the more enlightened, emerging approach.
13. *State v. Kelly*, 770 A.2d 908 (Conn. 2001); *State v, Moody*, 573 A.2d 716, 722-723 (Conn. 1990).
14. *United States v. Hill*, 41 M.J. 596 (Army Ct.Crim.App. 1994).

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15. *Commonwealth v Baldwin*, 199 S.W.3d 765 (Ky.App. 2006) (reversing trial court that excluded bloodhound alerts, because it was a suppression hearing); see also KRE 104(a).
16. 12 S.W.3d 258 (Ky. 1999).
17. *See Gregory v. City of Louisville*, 444 F.3d 725, 730 (6th Cir 2006) (Gregory's conviction was vacated in 2000 after DNA tests established that microscopic hair analysis "identifying" him as a rapist could not have come from him. All charges against Gregory were dismissed on August 25, 2000, after more than seven years in custody).
18. The issue is pending before the Kentucky Supreme Court in *Yell v. Commonwealth*, 2006-SC-327.
19. This issue is pending before the Kentucky Supreme Court in *Murphy v. Commonwealth*, 2007-SC-176.
20. *Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (Ky. 1997) (issues suitable for exploration in a pre-trial *Daubert* hearing include whether (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of *Daubert*, (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702). All these issues are also suitable for determination at a short bench conference.
21. *Commonwealth v. Christie*, 98 S.W.3d 485 (Ky. 2002).
22. Arguably, under *Daubert* no objection is required, and courts are required to conduct *sua sponte* review prior to allowing any scientific, specialized, or technical opinion evidence at trial. *Hoult v. Hoult*, 57 F.3d 1, 4 (1st Cir. 1995) (*Daubert* instructs courts to assess reliability of expert testimony absent objection); *Loeffel Steel Products, Inc. v. Delta Brands, Inc.*, 387 F.Supp.2d 794 (N.D.Ill.E.Div. 2005) (Judges can act sua sponte to prohibit testimony that does not pass muster under *Daubert*). The Kentucky Supreme Court has rejected this argument. *Mondie v. Commonwealth*, 158 S.W.3d 203 (Ky. 2005) (trial court not required to make *Daubert* determination *sua sponte*).
23. *Simpson v. Commonwealth*, 2003 WL 21418313 (Ky.App. 2003).
24. Cheng, Edward K., *Independent Judicial Research in the Daubert Age*, 56 Duke Law Journal 1263, at 1289 (March 2007).
25. *Polley v. Allen*, 132 S.W.3d 223 (Ky.App. 2004).
26. By contrast, an appellate court can initiate a *Daubert* review only under the more restrictive KRE § 201 rules regarding judicial notice. *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999).
27. Feigman, Kaye, Saks, Sanders, & Cheng, *Modern Scientific Evidence, The Law and Science of Expert Testimony*, Vol. 1, §1.34, Thomson West, 2006. ■

KENTUCKY'S PUBLIC ADVOCATE, ERNIE W. LEWIS, RECIPIENT OF NACDL "CHAMPION OF INDIGENT DEFENSE" AWARD

The National Association of Criminal Defense Lawyers (NACDL), the largest US advocacy organization promoting quality legal representation for persons accused of a crime and the fair administration of the criminal justice system, is awarding Ernie W. Lewis the "Champion of Indigent Defense" Award during their 2007 Annual Meeting in San Francisco, California next week.

The Champion of Indigent Defense Award recognizes an individual for outstanding efforts in making positive changes to a local, county, state, or national indigent defense system through legislation, litigation, or other methods.
Mr. Lewis is being honored for his exceptional work as the chief defender in Kentucky. Erwin Lewis has served as the Kentucky Public Advocate, the state's chief defender, for over ten years, since 1996. Mr. Lewis has been an attorney for the Department of Public Advocacy since he was admitted to the Kentucky bar in 1977. Mr. Lewis has taken extraordinary steps to improve public defense services – creating a full-time, statewide defender system in Kentucky, improving training, increasing funding for public defender services, and decreasing the caseloads of public defenders in Kentucky.

"For more than 30 years, Mr. Lewis has worked to ensure that the criminal justice system is fair for all," said NACDL Indigent Defense Counsel Malia Brink. "We are thrilled to recognize Mr. Lewis for his exemplary leadership as chief public defender, with our Champion of Indigent Defense Award."

Prior recipients of the award include Gary Parker (2003), for his efforts in reforming Georgia's indigent defense system; Patricia Purtiz (2004), for her efforts in ensuring quality representation for juveniles; and Norman Lefstein (2005), for his work with the American Bar Association to push for public defense reform across the country. ■

JUVENILE TRANSFER ISSUES: RECENT RESEARCH AND COMMENTARY

By Eric Y. Drogin, J.D., Ph.D., ABPP

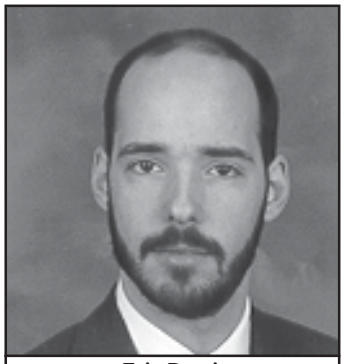
Public defenders who face the daunting—some would say "Sysiphean"—task of representing a juvenile client in a preliminary transfer hearing[1] may find themselves hamstrung from the beginning by some combination of the following circumstances:

(1) the judge denies funding and/or sufficient time for a properly conducted evaluation[2];
(2) the judge grants funding for an evaluation, but *not* for an evaluation by a defense-retained expert, leaving counsel concerned about such issues as knowledge, skill, training, education, experience, bias, and privity;
(3) the evaluator comes back with an opinion that contains inculpatory, inflammatory, or other negative conclusions that confirm counsel's worst fears about the client's suitability for transfer; or
(4) the evaluator comes back with a generally supportive opinion, but one that fails to address key issues regarding the client's suitability for transfer.[3]

For these reasons, and bearing in mind that "there will *never* be enough money to run every mental health aspect of each case by a mental health expert or consultant,"[4] public defenders are likely to be addressing fundamental transfer considerations, including "the best interest of the child and the community" and "the prospects of adequate protection of the public,"[5] virtually without assistance. In recent months, however, a number of research articles and editorials have materialized that may make this job a little easier.

The most up-to-date and arguably relevant of these resources were published earlier this year in the *American Journal of Preventive Medicine*. The Task Force on Community Preventive Services, "an independent, nonfederal group" currently developing a "Guide to Community Preventive Services" with the support of the U.S. Department of Health and Human Services, offers a "Recommendation Against Policies Facilitating the Transfer of Juveniles from Juvenile to Adult Justice Systems for the Purpose of Reducing Violence," and concludes that:

The Task Force evaluated the evidence on effectiveness of policies facilitating the transfer of juveniles from juvenile to adult systems to reduce violence. The Task Force found evidence of harm associated with strengthened juvenile transfer policies. Available evidence indicates that juveniles who experience the adult system, on average, commit more subsequent violent following release than juveniles retained in the juvenile justice system. Further, evidence that juveniles in the general population are deterred from violent crime by strengthened juvenile transfer policies is insufficient. As a means of reducing juvenile violence, strengthened juvenile transfer policies are counterproductive. The Task Force, therefore, recommends against policies facilitating the transfer of juvenile from juvenile to adult criminal justice systems for the purpose of reducing violence.[6]



Eric Drogin

The same journal issue includes a 22-page "Systematic Review" by this Task Force of the "Effects on Violence of Law and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System," including an expansive array of statistical data, and stating that:

On the basis of strong evidence that juveniles transferred to the adult justice system have greater rates of subsequent violence than juveniles retained in the juvenile justice system, the Task Force on Community Preventive Services concludes that strengthened transfer policies are harmful for those juveniles who experience transfer. Transferring juveniles to the adult justice system is counterproductive as a strategy for deterring subsequent violence.[7]

Also published in this journal issue is an article by Michael Tonry of the Institute on Crime and Public Policy at the University of Minnesota, entitled "Treating Juveniles as Adult Criminals: An Iatrogenic Violence Prevention Strategy if Ever There Was One," and determining on the basis of a review of Task Force data that "transfer of juveniles does harm to them, through reduction of their life chances, and to society generally, through elevated rates of future violence."[8]

Moving from research and commentary to statements of institutional policy, this journal issue also contains a commentary by American Bar Association President Karen J. Mathis, claiming that the "Adult Justice System is the Wrong Answer for Most Juveniles," and tying the assertion that "underage defendants generally should not be placed in the adult system" to the following "seven pillars" of existing ABA policy:

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(1) that youth are developmentally different from adults, and these differences should be taken into account;
(2) that pretrial release or detention decisions regarding youth awaiting trial should reflect their special characteristics;
(3) that those young people who are detained or incarcerated should be housed in institutions or facilities separate from adult institutions or facilities at least until they reach the age of 18;
(4) that detained or incarcerated youths should be provided programs that address their educational, treatment, health, mental, and vocational needs;
(5) that underage defendants should not be allowed to waive right to counsel without consulting a lawyer and without full inquiry into the youth's capacity to make the choice intelligently, voluntarily, and understandingly;
(6) that judges should consider the individual characteristics of the youth during sentencing; and
(7) collateral consequences normally attendant to the justice process should not necessarily apply to all youth arrested for crimes committed before age 18.[9]

Disaffection with the notion of juvenile transfer is also apparent in recent popular press editorials, most notably this year's "Juvenile Injustice" and "Juvenile Justice," both featured in the *New York Times*, with the former observing that "the United States made a disastrous miscalculation when it started automatically trying youthful offenders as adults instead of handling them through the juvenile courts,"[10] and the latter concluding that "trying children as adults, except in isolated cases involving extreme violence, is both inhumane and counterproductive."[11]

Finally, a report published this spring by the Campaign for Youth Justice, entitled "The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform," includes among its many critical findings that "youth of color are disproportionately affected," that "these laws ignore the latest scientific evidence on the adolescent brain," and that "the research shows that these laws to not promote public safety."[12]

Public defenders may be denied funding and continuances for retained transfer evaluations from time to time, and may have scant practical use for the results of such evaluations when they do obtain them. With or without desired and desirable expert assistance, defense counsel may benefit from the increasingly anti-transfer drift of recent professional and lay publications.

Notes

1. *See* KRS 640.010 *et seq*. ("Preliminary hearing—Proof required to try child as youthful offender in Circuit Court").
2. Key to these evaluations may be such scheduling factors as the location and record-based review of existing data on cognitive, educational, vocational, and social development needs. The examination itself may have further scheduling implications in this context, as "the expert may have to spend substantially more time educating the juvenile about the nature of the evaluation and the limits of confidentiality." John Parry & Eric Y. Drogin, *Mental Disability Law, Evidence and Testimony* §3.03(d) ("Juveniles Tried as Adults") (2007). *See also* John H. Porerelli et al., "Defense Mechanisms Development in Children, Adolescents, and Late Adolescents," 71 J. *Personality Assessment* 411 (1998).
3. Of the nine key factors elucidated in *Kent v. United States*, 383 U.S. 541 (1966), it is generally acknowledged that "only three factors involved matters in which psychiatric and psychological evidence and testimony are clearly relevant: the juvenile's developmental maturity, public safety, and the likelihood of rehabilitation." John Parry & Eric Y. Drogin, *Criminal Law Handbook on Psychiatric and Psychological Evidence* §3.04 ("Juvenile Transfers to Adult Criminal Court") (2000). *See also* Thomas Grisso, "Forensic Evaluation in Delinquency Cases," in 11 *Comprehensive Handbook of Psychology* 315 (Alan M. Goldstein ed., 2003).
4. Eric Y. Drogin, *Breaking Through: Communicating and Collaborating with the Mentally Ill Defendant*, ADVOC., July 2000, at 27.
5. *See* KRS 640.010(2)(b).
6. Task Force on Community Preventive Services, *Recommendation against Policies Facilitating the Transfer of Juveniles from Juvenile to Adult Justice Systems for the Purpose of Reducing Violence*, 32 *Am. J. Preventive Med.* S5, at S5 (2007).
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10. *Juvenile Injustice*, *N.Y. Times*, May 11, 2007, at A26.
11. *Juvenile Justice*, *N.Y. Times*, July 12, 2007, at A22.
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BUILDING A BETTER BOMBSHELL: CONSIDERATIONS FOR MIXING THE INGREDIENTS OF YOUR STORY CORRECTLY

By Mark J. Stanziano, Attorney, Cloquet, Minnesota

Missourians take pride in being from the "Show Me State." Stalwart, conservative, non-credulous Missourians, unimpressed by simple platitudes and fancy language, they want to be shown that what is being spoken of can actually be done and, more importantly, really works. "Show us, don't tell us," in its own way, warns of the difference between narrative talk (showing us) and notional talk (telling us).

The slogan reminds us, as trial lawyers and criminal defense advocates, to fight the temptation to "talk about" what is happening, or what has already happened. Rather, the Missouri example reminds us that we should rely on the action itself to carry our message. But, in storytelling, the truth is always slightly more complicated. To tell your client's story of innocence or reduced culpability effectively, a story needs to contain both narrative and notion, presented in the right combination. Still, before a bartender can create the perfect martini, she must first understand not only the essence of the gin and vermouth, but the appeal of the olive.

Notions vs. Narratives

At the very center of every ***Narrative*** is a unique action, or set of actions, taken by one or more actors in the story. The action or set of actions taken need not necessarily be taken by the accused. Depending upon the viewpoint of the story, the actor, or actors, at the heart of the tale can be, and can interact with, virtually, anyone. However, in the center of the narrative, the unique action taken happens in a particular moment in time; either being the culmination of a set of facts leading up to the action, or being the spark that sets off a chain of events which follow. And in that singular moment, the character whose actions are driving the telling of the narrative takes this unique action.

In contrast, ***Notions*** are about the panoptic. A simple concept like "orangeness," for instance, is not only the set of qualities that are found in the citrus fruit, but within all objects which reflect light in such a way that people who see the objects would say that the object's color is **orange**. It's not about any one of them; it's about their commonality as a group. Notions are all-embracing, across-the-board, generalizations.

Notions and Narratives are different in half a dozen other ways, some of which will be discussed below. The interesting news, however, is that both concepts can be blended together, as much like gin and vermouth, or, when the particular case calls for it, they can be kept separate–like oil and water. More simply stated they are merely the end points on a long continuum. And in between these end points lie an infinite number of points all of which share qualities with, and combinations of both Notion and Narrative.

Five Divisions on the Inside of the Continuum

As is shown above, there are seven subdominant divisions of the Notion-Narrative Continuum, ranging from the most crystallized and pure forms of both Notion–on the left–and Narrative–on the right. At the epicenter of the Continuum is a combination of Notion and Narrative called the Narrative Synopsis. To both the left (Notion) and right (Narrative) sides of the center, there are two key divisions, all of which will be discussed below. The questions for the storyteller to answer before beginning the telling of the client's story are, *"How might each of these devices be utilized by the storyteller to advance the client's story or innocence or reduced culpability, and where in the story should the storyteller use each of the devices chosen?*"

Step 1: The Conclusory Thematic Notion

Moving one step away from the end of the Continuum dealing with *Pure Notions*, toward the end of the Continuum dealing with *Pure Narratives*, is the first stepping stone in the Continuum: The Conclusory Thematic Notion.

Suppose I want to convey a concept about my moral upbringing at the direction of my father. A Conclusory Thematic Notion might well be: ***"Honesty is the best policy."*** No other explanation is necessary. The statement itself is

THE NOTION-NARRATIVE CONTINUUM

Pure Notion	Conclusory Thematic Notion	Narrative Conclusion	Narrative Synopsis	Compressed Narrative	Elongated Narrative	Pure Narrative

crystalline and, regardless of whether the hearer agrees with it, the statement is uncluttered and immediately understandable. Unfortunately, like all purely notional statements, (*e.g., honesty is a virtue)*, found one step to the left on the Continuum, Conclusory Thematic Notions are devoid of everything which would bring them to life in the mind of the hearer.

One of the dangers of using Conclusory Thematic Notions is in their overuse. Generally, Conclusory Thematic Notions are in the nature of moral platitudes, maxims and clichés. They can be commonplace expressions or stereotyped sayings, but without something more, they are what older southerners might call "warmed-over cabbage."

"Honesty is the best policy" is a "cool" statement. *"Cool"* not referring, of course, to its "hipness" but, instead, to the statement's emotional appeal; or, as in the case of most Conclusory Thematic Notions, the lack thereof. Conclusory Thematic Notions do not evoke any emotional response in the hearers. Such a statement may, however, unlike the *Pure Notion*, evoke some memory in the mind or the imagination of the hearer. But the chance that a Conclusory Thematic Notion will elicit in the hearer something which relates to the personal experiences of the speaker is virtually nonexistent. Certainly such statements evoke nothing with regard to the client and do little, in and of themselves to further the listeners' understanding and acceptance of the client's story. Nor can the hearer understand in the broad generalization of the Conclusory Thematic Notion any implied referent to the personal experiences of any third party being talked about by the speaker. This would include the actor or actors in the center of the story being told on behalf of the client. The Conclusory Thematic Notion may cause the hearer's head to nod in affirmation, but it does not make the hearer stand up and applaud and it certainly does not drive her to pick up a sign and march in the street.

However, the Conclusory Thematic Notion has three virtues that commend it to the storyteller's repertoire of magical storytelling devices. First, it mixes easily and completely with every other device on the Continuum. So, it can readily be used in conjunction with other devices chosen by the storyteller. Second, a Conclusory Thematic Notion conveys information quickly. Third, and most important, its shortness allows for it to be memorable and, thereby, makes it capable of being repeated. When the Conclusory Thematic Notion is repeated throughout the trial, it can be picked up on by the listeners who recognize a broader meaning within the context of the entire story being told each time they hear it. It can serve as a "tag" line, a mantra, or the moral of the story being told.

Step 2: The Narrative Conclusion

If our goal in the telling of our client's story, or any part of that story, is to bring our client's story more fully to life, and to make the story resonate as "the truth" for the listeners, we can improve our chances for success by taking another step along the Continuum toward Pure Narrative. This next step allows the speaker to revise the Conclusory Thematic Notion in such a way as to make the thematic concept more personal by painting a narrative for the hearer with a very broad brush. This is the point on the Continuum where we first begin to see a true blending of both Notion and Narrative. An example of this would be a Narrative Conclusion such as**: *"My father taught me to be honest by explaining to me the importance of honesty."***

There are those who might say such a statement has nothing to do with, and is in fact not, a narrative. Those naysayers would be wrong. When compared to the Conclusory Thematic Notion above, the statement is most assuredly a narrative. However, and this is what confuses people, it is an abstract form of narrative. It is an underdeveloped narrative which does not contain the weight or substance of a fully developed narrative. Though, the phrase "narrative-light" does not describe this concept as well as the phrase "narrative-transparent." In modern terms, it is akin to the difference between Cameron Diaz and Mary Kate Olson.

The Narrative Conclusion has no specifics about time or place. If we look to the statement again–***my father taught me to be honest by explaining to me the importance of honesty***–we do not know when my father taught me these things, nor where these lessons took place. We do not have any idea of exactly how these life's lessons were conveyed. The statement may well be "most assuredly a narrative," but it is a narrative that is almost totally conceptual and, being nearly devoid of detail, is also "most assuredly" conclusory in nature. Therefore, its place near the Notion end of the Continuum should be easily understood.

However, unlike the Conclusory Thematic Notion, the Narrative Conclusion begins to bring out emotion in the listener. By invoking my father in the statement above, I have touched on that most sacred of relationships, the one between a parent and their child. By casting my father in the light of teacher, and moral teacher at that, I have conveyed to the listener a universally accepted, and acceptable, archetype. The hearers are drawn to their own, more deeply personal experiences either as parent, as child, or both. Like the Conclusory Thematic Notions, I have only touched on some of those experiences but, because I have not developed any facts which are likely to move the listener to accept my position in the case, I have only stroked the surface of the listeners' psyches.

Step 3: The Narrative Synopsis

If we walk along the Continuum a short distance, the next signpost, and the mid-point, on the way toward a Pure Narrative is that of the Narrative Synopsis. The next step toward narrative dispenses with the abstract concepts (*"taught me"* and *"explaining to me"*) and replaces them

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with actions. But, the specific actions described are only described in a very general way. For example: *"**My father taught me about honesty by being honest himself and showing me how his honesty was, consistently, the right course to take."***

By this time in our journey, we are a considerable way from the endnote of a Pure Notion. But we are not nearly as close as we might be toward the endnote, on the other end of the Continuum, of a Pure Narrative. A Narrative Synopsis is not entirely frothy like a Conclusory Thematic Notion and, does contain significantly more in the way of substance than the Narrative Conclusion. But, lacking details and only talking about the specifics of the story in a broad-brush way, it does not allow the hearer to bring the narrative to life in his or her imagination or to see the story unfolding or developing in his or her mind's eye. The hearer has some idea that my father was honest and took time with me to encourage and explain honesty, but cannot know in what form this honesty manifested itself nor how the rightness of these manifestations was demonstrated to me.

The Narrative Synopsis still allows the hearer to picture whatever might come to the hearer's mind based upon the experiences of the hearer. This phenomenon is caused by the lack of specifics and facts. Using a broad brush to paint this part of the client's story precludes a commonality of picture in the collective mind's eye of the jury, or other hearer of the story. However, if used after a more substantial narrative recitation of the facts, the Narrative Synopsis can serve as a wonderful summary of the point made by the more involved and detailed narrative and allows the common vision of the jury to be brought back to their collective mind's eye without having to repeat the entirety of the story.

An interesting characteristic of the Narrative Synopsis is that it does not mesh seamlessly with the other points on the Continuum. Why this incongruence should exist is not exactly clear. Though, it may just be that the Narrative Synopsis has too much narrative for the notion side of the Continuum and too much notion for the narrative side. However, that explanation is not very helpful for those seeking to understand and use this system to enhance their storytelling abilities.

To illustrate the problem, if I were use the Narrative Synopsis above, ***"My father taught me about honesty by being honest himself and showing me how his honesty was, consistently, the right course to take"*** after having already used the Conclusory Thematic Notion I started this discussion with, ***"Honesty is the best policy,"*** the Narrative Synopsis seems like too much information without making a point; as if I have gone from a focused message to one that is pointlessly general. If, on the other hand, I flip the statements around and state the Conclusory Thematic Notion following the statement of the Narrative Synopsis, the Conclusory Thematic Notion now seems too broad and pointless in light of my whetting of the jurors' appetites for more details of a narrative only just begun.

Other examples of the problems with using Narrative Synopses in conjunction with the other devices found on the Continuum could be given but, it may be better for the reader to work through some of these situations himself or herself and to get a feel for how the various devices work, and do not work, together. There is some benefit in sitting down and playing around with the various combinations of devices and any good storyteller will do that as part and parcel of his or her pretrial routine.

Step 4: The Compressed Narrative

The next stone on which we land as we work our way across the Continuum toward its narrative side, calls upon us to create a "compressed" scene which fleshes out specific actions in support of our narrative, but which are still somewhat general and nonspecific in nature; though far less general and much more specific than in the case of a Narrative Synopsis, the Narrative Conclusion and the Conclusory Thematic Notion. The Compressed Narrative might summarize one long event, or many separate, though factually similar, events.

In staying with our discussion of honesty, a Compressed Narrative might describe the event(s) in the following form:

"There were many times when I would accompany my father to the store, and my father, after paying for the items he purchased, would receive too much change from the cashier. He would return the excess change to her, saying she'd given him too much change. When I asked why he didn't just keep the extra money, he told me how it was important for the cashier to have the correct amount of money in her register drawer at all times and important for the store to not lose money through the mistakes of its employees."

The Compressed Narrative, as shown above, though still general in the telling and disclosure of facts, is far more specific than the Narrative Synopsis, discussed in Step 3. In addition, when the Compressed Narrative is compared to the Narrative Conclusion, it erroneously leads to an

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Pure Notion	Conclusory Thematic Notion	Narrative Conclusion	Narrative Synopsis	Compressed Narrative	Elongated Narrative	Pure Narrative

assessment of Narrative Conclusions as being utterly devoid of any value whatsoever as a narrative. The Compressed Narrative also highlights the starkly different nature of a Conclusory Thematic Notion by drawing the listener into the narrative as a witness to the event. The listener can, in his or her own mind's eye, actually see some event happening and can begin to appreciate the factual and foundational underpinnings of the speaker's positions and views.

The Compressed Narrative has more detail, to be sure. This is its overriding weakness when compared to the next step on the Continuum, the device known as the Elongated Narrative, which will be discussed in a few moments. For instance, the Compressed Narrative statement, above, lacks specificity with regard to time and place, the age of the cashier, the reasons underlying the importance of the cashier's drawer being "correct" and the store's "not losing money, " and words like *"important"* and *"told me."* Collectively, the listeners begin to see a story unfolding and do so as a group seeing the same events unfolding. But the Compressed Narrative persists in describing portions of the events in generalities and does not answer many, if any, "why questions" which the listeners would certainly have. Motivations, as well as cause and effect, are left to the imagination of the hearers.

Yet, even having said that, one can see that with a Compressed Narrative the actions and words of the figure central to the telling of the story begin to carry the message of the story. In the example used for discussion of the Compressed Narrative, we have found Demosthenes' "honest man." And, when we have found him, we also see that he is a good father who is concerned with the moral upbringing and growth of his son. The storyteller has done more than just raise the specter of an archetype. The storyteller has begun to blend the archetype (father/son relationship) with the notion to be conveyed (honesty is always the best course) into the colors with which to paint the word pictures which his listeners will all begin to see in their minds' eyes. And, within the courtroom a transformation takes place with the storyteller becoming a modern day alchemist.

Step 5: The Elongated Narrative

As our journey from one end of the Notion/Narrative Continuum to the other is nearly complete, we are finally able to leave all abstractions behind, and begin a blow-by-blow account of my father's honesty and my lessons in honesty by looking at an Elongated Narrative.

"After lunch on Saturday mornings, when I was 10 years old, my father would take me to the B and B Grocery which was located just two short blocks from our home, on the corner of Baker Street and Broadway. He would buy a pack of Viceroy cigarettes and we would each get an ice cream cone. His would be maple walnut and mine would be chocolate almond. He would pay for the cigarettes and ice cream by giving the cashier, Diane, the owner's daughter, a five-dollar bill. For her part, Diane would almost always make a mistake in giving change to my father, who would count back the change and return any overage to her with a smile. When we would leave, I would ask why he didn't just keep the extra quarter or fifty cents, he would explain that if he did that, Diane might lose her job or that the store might have to start charging all of us in the neighborhood more for ice cream in order to make up for the money it lost due to an honest mistake by one of our neighbors. . . ."

In this example, the storyteller has not only brought the hearers to understand the universal truth of the Pure Notion: **"Honesty is a virtue,"** but he or she has also led the listeners to understand that dishonesty is not a virtue. Therein lies the truth about narratives: If told correctly they not only accomplish what they can be expected to achieve (convincing the jurors that honesty is a virtue) but spill over to accomplish that which could not be achieved any other way (proving a negative). Moreover, once the storyteller has the listeners at this point the storyteller can move the jurors to accept the truth of his or her client's position with regard to the facts of the controversy which is being tried, debated, or simply discussed.

Naturally, the exact parameters of Elongated Narratives depend upon the context in which they are utilized and the point(s) to be made. Elongated Narratives can be momentary, wide-ranging, or very lengthy indeed. What distinguishes them is that they are composed of marked and concrete actions by particular characters in precise places and times. Very little is required from the imagination of the listener as the events are described in such a way that all listeners can see the events described in the same way in each of their individual mind's eyes.

The down side of the Elongated Narrative is that it takes a while to tell. Depending upon the point in the client's story where the storyteller decides to use the Elongated Narrative, attention spans may have waned, or minds may have wandered. There is also the possibility that in a factually intense scenario, the insertion of a number of new facts may serve to confuse the jurors. Additionally, the Elongated Narrative does not lend itself to quick "sound bites" which can be remembered easily and taken back to the jury room with the individual jurors.

Is There One Way That Works Best?

Despite the above discussion, which might seem to favor either Elongated Narratives, or Pure Narratives, the simple answer is "no." There is no silver bullet, no panacea here. The nature of the Continuum is that many options exist, and an infinite number of points or, in this case, methods, are able to be accessed and utilized. No step, or point, along the

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Continuum is better than any other step - except in the context of a particular event and purpose.

By way of example, if the storyteller wants to include a little story as part of a brief presentation on a minor point, any Elongated Narrative description would almost certainly seem inappropriate. It would tend to bog the jury down in the detail of events not central to their deciding the case. After all, the advocate would not want the jury to become confused about which are the facts of the case and which are the facts of the short narrative. So, the advocate might use a Compressed Narrative or perhaps a Narrative Synopsis, but that would be as much "story-ness" as the context of the moment–otherwise defined as the point to be made, in conjunction with the time of the making–would endure. If the storyteller needs the jurors to hear a slogan or theme line which then will be carried back to the jury room with them, any sort of narrative may be far too much. In that eventuality, the answer lies in devising a memorable Conclusory Thematic Notion and passing that on within the context of the story being told.

Choosing The Correct Point On The Continuum

It should be obvious, but it bears repeating, each point along the Continuum has strengths and weaknesses which must be evaluated by the storyteller before the storyteller embarks on his or her telling of the client's story. Important to the advocate's choice of which point along the Continuum at which to stop in the telling of the client's story of innocence or reduced culpability, is the teller's cognizance of a dynamic which is at work in the area between speaker and listener.

The dynamic is best remembered by the line from *Mary Poppins*, where the nanny is talking to Michael after he and his sister, Jane, have just finished a rather spirited "tidying up the nursery." When told that it was now time for an outing in the park, Michael states that he does not want to go to the park, but wants to tidy up the nursery again. Mary Poppins tells him, *"Enough is as good as a feast."* The lesson has equal application to our discussion about where on the Continuum the advocate should plant his or her feet in the telling of the client's story. In order to benefit from the full range of choices along the Continuum, the storyteller must be continually cognizant of the dynamic of "enough being as good as a feast" because this dynamic can–and should, in the appropriate circumstances–limit the availability of some choices on the Continuum to the advocate.

To explain: There can be little argument that the most potent parts of a story, in terms of emotional impact and mental imagery, at least in the mind of the listener, are those that are presented as Elongated Narratives. However, if the advocate tells the jury <u>everything</u> as Elongated Narratives, it is difficult, if not impossible for a jury to tell what is most important in the story from what is of marginal importance or, in some cases, of no importance. For example, after I've told the Elongated Narrative concerning my father and I going to the store and him returning excess change to Diane, it would be reasonable to say, ***"This happened every few Saturdays for a number of months."*** Naturally, within the courtroom and trial setting there is just no room in one story for all the concrete scenes about all the different times Diane messed-up in counting change and the honesty of my father in returning the overpayment to her. So, those could be shortened and moved quickly over through the use of a Narrative Synopsis. And, toward the end of the advocate's storytelling time, switching to the Conclusory Thematic Notion device of ***"Honesty is the best policy"*** may be the tag line for the jurors to take back to the jury room to use in their deliberations. Ultimately, for the storyteller which device(s) to make use of is a matter of timing, purpose and importance.

Moments of Significance

Along these same lines, if the advocate has a "moment of significance" in the client's story–where an event of some importance, consequence or salience–either occurs or fails to occur, an Elongated Narrative will most likely be necessary in order to enhance the listening and visualizing experience of the listeners. By a "moment of significance" I am referring to an event so central to:

(A) The telling of the story by the advocate;
(B) The understanding of the story by the listener; or,
(C) The acceptance of the story by the listener,

that without the full explanation afforded by choice of an Elongated Narrative, the advocate will either fail to convey his or her client's story fully or persuasively; or, the listeners will fail to comprehend the story to such a degree that they either misunderstand the facts or reject the story entirely.

Using an Elongated Narrative in "moments of significance" is critically important because a factually strong and emotionally heavy scene sets an internal story-boat in motion for the listeners. For example, once I have explained in an Elongated Narrative my father's honesty and how that virtue was transmitted to me in a way that made practical sense and moral rightness, I can keep those images afloat all through the story by simply making passing references to the events already described. I can use Narrative Conclusions and Narrative Synopses to push that ship along the water throughout the trial.

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Pure Notion	Conclusory Thematic Notion	Narrative Conclusion	Narrative Synopsis	Compressed Narrative	Elongated Narrative	Pure Narrative

However, if that first story is contrasted with trying to explain why my father is now charged with theft the first story will not resonate with the jury unless they have also experienced my father's metamorphosis through the vehicle of another Elongated Narrative. And, what's more, in order to shift away from the second Elongated Narrative, I will most likely need a third Elongated Narrative to bring the jury back to the conclusion that my father is an honest man and, hence, would not do the sorts of things he is accused of having done. That is because the changes in the story from honest man to accused thief to honest man again are moments of significance which require the strong force of a concrete scene to cause the vessel to change course inside my listeners' minds and hearts.

Finding the Proper Mix

As a rule of thumb, if the listeners need uncomplicated or basic information, or if the teller wants the listeners to remember a slogan, tag line, label, motto, moral or any other sort of theme, the Notion end of the Continuum is abundantly more useful. The advocate can make use of any number of rhetorical devices in order to speak in broad generalizations. In contrast, when the advocate reaches a moment of significance, or when a decision is made that the jury needs to feel, smell, touch, taste, see, or otherwise experience something, the Narrative end of the Continuum, with its heavy reliance of specific facts to move the client's story, is invaluable and must be accessed.

Outside of the moments of significance in a story, how can the advocate know when the listeners will need the specificity of the Narrative as opposed to the generality of the Notion? The answer depends upon a number of factors:

(1) Who the listeners are and what they bring to the decision-making process;

(2) Where the jurors, individually and collectively, are starting from on this journey you want them to take with you;

(3) In what context you will be advancing your client's theory of defense through the storytelling experience;

(4) From what, or who's, perspective you will be advancing the theory and telling the story;

(5) What the listeners' expectations of you as a guide are; and,

(6) Your purposes in telling your client's story as those purposes reveal where you hope the journey will lead the jury.

Brainstorm what your listeners will both want and need to experience, in order to follow and accept the factual and emotional logic of your story. In addition, given the context in which you will tell the client's story, how concrete can you make the moments of significance? Given the relevant characteristics of your jurors, how direct do your conceptual conclusions need to be? Answer those questions and you are well on your way to conjuring the sort of alchemical story, one that blends both the abstractions of Notion with the concreteness of Narrative that will weigh heavily in favor of a response from the jury which supports your ultimate request to them.

Nowhere is the cooperation between concept and story more important than in the context of speaking to a jury, where stories are generally told to make points, and points need to come alive in order to move the listeners to decisions which favor the client. As it turns out, most lawyers who speak to juries have been trained in conceptual thinking and have missed out on the benefits of story thinking. It is the confluence of the two that can save lives and the confluence comes to life on the Notion-Narrative Continuum.

* * *

Persuasion Consultants is here to assist the criminal defense advocate in telling the story of their client's innocence or reduced culpability to the jury. We use the storytelling/ persuasion method of trial advocacy and can help you utilize this powerful tool in any, or all, aspects of your case. For more information, call (218) 522-0235 or contact us through our web site at http://www.persuasionthroughmagic.com.■

THE NOTION-NARRATIVE CONTINUUM

Pure Notion	Conclusory Thematic Notion	Narrative Conclusion	Narrative Synopsis	Compressed Narrative	Elongated Narrative	Pure Narrative

Any Place Where a Person Sleeps: Some Courts Declare the Sex Offender Registry Statute Unconstitutional

By Samuel N. Potter, Appeals Branch

Kentucky's General Assembly session of 2006 proved to be rather contentious, as many political events tend to be. Weighty issues burdened the halls of the state capital. A divided General Assembly had to agree on a budget. The 2006 session was the last extended meeting of the General Assembly before the next gubernatorial election. Also on the legislators' agenda was a matter simply known as House Bill Three (HB3). HB3, among many other things, substantially revised the Sex Offender Registration Law.

Part of those revisions involved expanding the restrictions applicable to where registered sex offenders were allowed to live. Now more than a year after the new law became effective, several courts have determined these expansions are unconstitutional. District judges in Kenton County and Jefferson County have found that portions of the new residency restrictions violate the ex post facto clause of both the United States and Kentucky Constitutions because the new restrictions are punitive in nature rather than remedial. Before examining these decisions in detail, the changes made by HB3 must be understood first.

Prior to the changes made in 2006, the residency restrictions for sex offenders were located in KRS 17.495. That provision prohibited a registered sex offender who was on probation, parole, or any form of supervised release from residing within 1,000 feet of a high school, middle school, elementary school, preschool, or licensed day care facility. KRS 17.495 did not contain a subsection that authorized a new criminal action with a corresponding punishment against a person who violated the residency restriction. Presumably, such a punishment was not needed because the people subject to KRS 17.495 were already under some form of supervised release, and this statute was a part of their terms and conditions for release. If people subject to this residency restriction violated it, their release—whether it was probation, parole, conditional discharge, or pretrial diversion—was revoked.

HB3 repealed KRS 17.495 and created KRS 17.545. This new section still restricts where a convicted sex offender may live. However, KRS 17.545 expanded the residency restrictions in two significant ways. The first expansion involves the scope of the statute. The new statute removes the language limiting application of the residency restrictions to registered sex offenders on probation, parole, or any form of pretrial release. The residency restrictions now apply to all people that have to register as sex offenders. KRS 17.545(1). Further, HB3 expands the scope of residency restrictions by adding "publicly owned playground" to the list of places close to which registered sex offenders may not live. KRS 17.545(1). While the buffer zone remains nominally the same, 1,000 feet, the way in which this distance is measured changed with the new law. The old law measured the 1,000 feet from the wall of the sex offender's residence closest to the school or daycare to the wall of the school or daycare closest to the residence. The expanded law now measures the 1,000 feet distance from the property line of the registered sex offender to the property line of the school, playground, or daycare. KRS 17.545(1).

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The second expansion of the residency restriction statute involves the consequences of violating the law. KRS 17.495 provided no punishment for violating the law. Instead, a violation of the residency restrictions could have led to the revocation of the violator's supervised release. Under the expanded law, the first violation of KRS 17.545(1) is a Class A misdemeanor. KRS 17.545(3)(a). Each subsequent violation is a Class D felony. KRS 17.545(3)(b). Of course nothing in the expanded law prohibits a registered sex offender who happened to be on supervised release from having the registrant's release revoked for failing to comply with the statute in addition to facing a criminal charge for violating the statute.

Now that the change in the law is clear, we can focus our attention on the recent decisions that found the expanded law violated the ex post facto clauses of the U.S. and Ky. Constitutions.

In the next edition of the Advocate, this article will examine the reasoning of the courts that have ruled the expanded law violates the ex post facto clause. The author welcomes any comments, questions, and/or advice you might have. Please contact me at sam.potter@ky.gov or (502)564-8006. ■

The Due Process Requirements for Revocation Hearings

By J. Brandon Pigg and Samuel N. Potter, Appeals Branch

The specific procedures for revocation hearings vary greatly across the Commonwealth. In some circuits, the court schedules a hearing after a violation of probation or parole has been reported. The court swears in the defendant at the hearing and then asks the defendant if the violation did, in fact, occur. If the defendant admits the violation, the court revokes the defendant's probation or parole. The hearing may last five minutes or less.

In other circuits, the probation and parole officer reports violations to the Commonwealth's Attorney, who then decides whether to seek revocation. The court holds a full evidentiary hearing that involves the direct and cross examination of witnesses, including experts, if appropriate, followed by closing arguments. The hearing may last up to two hours.

Recently, it appears that the number of revocation hearing appeals have increased. Further, some trial attorneys have asked for guidance on how to handle revocation hearings. In response to those concerns, this article will explain the law governing revocation hearings. First, this article will explore the two controlling United States Supreme Court cases which establish the broad parameters of the process due to people facing revocation of probation or parole. Second, this article will detail three cases, two from Kentucky and one from the 6th Circuit, that reversed a trial court's revocation of probation because the revocation did not satisfy the minimum due process standards established by the U.S. Supreme Court. Third, this article will survey three Kentucky cases that affirmed a trial court's revocation of probation.

The Minimum Due Process Requirements for Revocation Hearings

It has long since been established that defendants are not entitled to probation or parole. Yet KRS 533.010(2) mandates that trial courts "shall consider" probation and that the probation "shall be granted" unless the defendant meets certain criteria or the trial court believes that imprisonment is necessary for the protection of the public under specific circumstances. Kentucky appellate courts have vacated sentences solely on the ground that the trial court failed to properly consider probation. *See Patterson v. Commonwealth*, 555 S.W.2d 607 (Ky. App. 1977).

More importantly, once granted, due process entitles defendants to retain their status as a probationer or parolee so long as they do not violate the terms and conditions of their release. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. 1986); *Dunson v. Commonwealth*, 57 S.W.3d 847, 848 (Ky. App. 2001). Due process requires that a defendant's parole or probation can only be revoked after the defendant has been afforded a preliminary hearing to determine probable cause and a second hearing to actually determine whether probation or parole should be revoked. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

The process that resulted in these principles began with *Morrissey*, which dealt with parole. Parole places conditions that restrict a parolee's activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. If a parolee violates these conditions, he or she may be required to serve out the remainder of the sentence. "In practice, not every violation of parole conditions automatically leads to revocation. . . . [T]he parole officer ordinarily does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity." *Id.* at 479. Parolees are entitled to retain their liberty as long as they substantially abide by the conditions of their release. *Id.* If a violation does occur, the factfinder must ask whether " the parolee [should] be recommitted to prison or [if] other steps be taken to protect society and improve chances of rehabilitation…" *Id.* at 480.

Parole is not part of the criminal prosecution. Thus, parolees are not due the full panoply of rights that accompany such prosecutions. However, some minimum due process rights do apply to revocation hearings. In *Morrissey*, the United States Supreme Court noted that constitutional rights do not turn upon whether a government granted benefit is a right or a privilege, but upon whether the individual will be "condemned to suffer grievous loss." 408 U.S. at 481. Thus, "[t]he question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment. *Id*, at 481. The liberty interest of a parolee, "although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often others. . . . By

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whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process." *Id*, at 482.

More specifically, in *Morrissey*, the United States Supreme Court held that the minimum requirements for due process necessary to revoke an individual's parole included (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. *Id* at 489.

The following year, 1973, the Supreme Court further held that the above described requirements for due process for parole revocations applied equally to probation revocations. In *Gagnon*, the Court stated "[p]robation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty. Accordingly, we hold that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer*." *Gagnon*, 411 U.S. at 782. Therefore, the Court applied the same six due process requirements to probation revocation hearings that it applied to parole revocation hearings. *Id*. at 786. Kentucky subsequently adopted the same six minimum due process requirements for revocation hearings. *Murphy v. Commonwealth*, 551 S.W.2d 838, 840 (Ky. App. 1977).

Cases Reversing Revocation Hearings

Diminished due process rights yield a more informal hearing in a variety of ways. While recognizing the informality of revocation hearings, Kentucky courts have also recognized that when a probationer makes every reasonable effort to comply with the conditions of probation, it is an abuse of discretion to revoke that probation. In *Keith v. Commonwealth*, the Kentucky Court of Appeals recognized that the decision to revoke an individual's probation or parole was within a trial court's discretion but noted "when there is no evidence to support the court's decision to revoke, the court's revocation of that probation is totally arbitrary." 689 S.W.2d 613, 625 (Ky. App. 1985).

In the *Keith* case, Keith was granted probation on the condition that he admit himself to Eastern State Hospital. *Id*, at 614. However, the admitting psychiatrist at Eastern State Hospital, determined that hospitalization was not appropriate for Keith and recommended that he continue outpatient psychiatric treatment at his local comprehensive care center. *Id*. For his failure to be "admitted" to Eastern State Hospital, the Commonwealth sought to revoke Keith's probation. The Court found it was "clear that Keith did everything he possibly could to comply with the requirement that he admit himself to the mental hospital." *Id*, at 615. After finding that the record clearly indicated that he "made every reasonable effort to comply with the conditions imposed upon him," the Court ordered that the order revoking Keith's probation be vacated and the trial court was ordered to enter an order to secure his release from custody and to reinstate him to his probationary status. *Id*. This error violated the sixth minimum due process requirement of *Gagnon* and *Morrissey*, which requires a written statement by the factfinder as to the evidence relied on and reasons for revoking release. In *Keith*, the court found that the reasons for revoking his probation were irrational.

In *Rasdon v. Commonwealth*, 701 S.W.2d 716 (Ky. App. 1986), Rasdon pled guilty to sexual misconduct and received a 12 month jail sentence, conditionally discharged for two years. Nine months later, he was indicted for first degree sodomy and first degree robbery. The Commonwealth filed notice to revoke his conditional discharge on the grounds of his rearrest. The Commonwealth called two witnesses at Rasdon's revocation hearing. The first was the arresting officer from the sexual misconduct case, but the court halted this testimony because of its irrelevance to the revocation proceeding. The second witness was the investigating officer in Mr. Rasdon's new case. He testified that the district court found probable cause and a grand jury indicted Mr. Rasdon. The court said it would take judicial notice of the terms and conditions of his release. However, those terms and conditions were never introduced in the record. The defense called three police officers who testified that the prosecuting witness was a streetwise Louisville prostitute. Mr. Rasdon testified and denied the allegations, but was never asked if he knew her. The court revoked Mr. Rasdon's probation because he failed to avoid persons or places of disreputable or harmful character. *Id.* at 717-718.

The Court of Appeals reversed the circuit court's revocation. The Court found that the Commonwealth had only filed notice that Mr. Rasdon violated his conditional discharge by rearrest and probable cause, not that it would seek revocation because Mr. Rasdon had associated with disreputable people. Since he was not provided notice that he would have to defend against this allegation, the Court of Appeals reversed. *Id.* at 717. This error violated the first minimum due process requirement of *Gagnon* and *Morrissey*, which requires written notice of the claimed violations.

The Court went on to suggest that even if notice had been proper, it would have reversed the revocation due to insufficient evidence. Revocation hearings "do not require proof beyond a reasonable doubt but merely proof of an occurrence by a preponderance of the evidence." *Id.* at 719.

Because the precise terms and conditions of Rasdon's release were never introduced into evidence, the Commonwealth did not prove that one of those conditions was to avoid people of disreputable character.. *Id.* This violated the sixth minimum due process requirement of *Gagnon* and *Morrissey*, which requires a written statement by the factfinders as to the evidence relied on and reasons for revoking release.

The 6th Circuit has reversed revocation hearings that did not meet the requirements established by *Morrissey* and *Gagnon*. In *U.S. v. Dodson*, the 6th Circuit reversed a district court's revocation of probation because Dodson was not allowed to call and question his witness. 25 F.3d 385 (6th Cir. 1994). Dodson was found guilty of embezzlement and granted probation in federal court. He was required to submit a written monthly report, perform community service and report to a halfway house for treatment. When he failed to meet all of these requirements, his probation officer sought to have his probation revoked. *Id.* at 386. A magistrate judge found probable cause that Dodson violated his probation by not reporting to the halfway house.

At a final revocation hearing before a district judge, the judge asked Dodson if he wanted to make a statement. Defense counsel said it "would be more appropriate in the line of testimony." *Id.* at 387. The judge declined, saying "I don't need testimony." *Id.* Dodson then explained his conduct in narrative form without the aid of counsel. The judge revoked his probation. *Id.*

The 6th Circuit reversed Dodson's case because the judge's refusal to allow him to testify violated his right to due process under the fifth amendment. *Id.* at 388 (*citing, Gagnon*, 411 U.S. at 782). Even at revocation hearings, "[i]n order to ensure a constitutionally sufficient opportunity to contest the allegations and provide *evidence in mitigation, a defendant must also be afforded as a matter of due process the opportunity to be heard in person and to present witnesses and documentary evidence. Id.*(emphasis original).

In addition, these rights belong to the defendants. Only the defendants may waive their right to present evidence. The 6th Circuit wrote that on remand that "defendant's counsel may call other witnesses in addition to defendant in order to present defendant's explanations and to present evidence in mitigation because there is no indication in the record that defendant was informed of his right 'to present witnesses and documentary evidence,' or his right to 'confront and cross-examine adverse witnesses.'" *Id.* at 390 (*quoting, Morrissey*, 408 U.S. at 489). The 6th Circuit explained that nothing suggested that Dodson himself waived his right to present witnesses. *Id.* A waiver of a constitutional right that involves individual liberty must be knowingly and intelligently made. *Id.* (*citing, Preston v. Piggman*, 496 F.2d 270, 274 (6th Cir. 1974)).

Cases Affirming Revocation Hearings

If the informal revocation hearing satisfies the six minimum due process requirements, an appeal of that revocation hearing will be affirmed. In *Robinson v. Commonwealth*, 86 S.W.3d 54 (Ky. App. 2002), Robinson was convicted of two counts of first degree trafficking in a controlled substance and sentenced to 12 years in prison. He was later released on probation. Commonwealth filed notice to revoke Robinson's probation because he tested positive for marijuana and had not attended counseling appointments. In response to several supplemental filings by the Commonwealth regarding the revocation hearing, Robinson filed a motion for discovery. Robinson's motion was denied and his probation was revoked following a hearing. *Id.* at 55-56.

The Court of Appeals affirmed the circuit court's decisions. The court noted that the revocation hearing is not a second criminal prosecution. Because the plain language of RCr 7.24 reveals that it was designed to govern pretrial discovery in criminal trials, RCr 7.24 is not applicable to revocation hearings. The Commonwealth satisfied the minimum due process requirements by notifying Robinson of the evidence to be presented against him, namely that he tested positive for marijuana. The tests used, the standards of the lab and the precise amount found in Robinson's system were not necessary for Robinson to challenge the Commonwealth's proof. The Court concluded that revocation was proper because Robinson in fact tested positive for marijuana. *Id.* at 56-57.

In *Marshall v. Commonwealth*, 638 S.W.2d 288 (Ky. App. 1982), Marshall pled guilty to felony theft and received a two year sentence that was probated. Marshall's probation required her to complete a drug abuse program and a teen challenge program. Several months later, her probation was revoked because she failed to participate in and complete the program. Marshall's probation officer testified at the revocation hearing and offered a letter written by the director of the teen challenge program which indicated that Marshall refused to participate in the program and was released without completing it. The probation officer also testified about a conversation with a staff member of the teen challenge program who indicated that Marshall had not completed the program. *Id.*

Marshall argued on appeal that the probation officer's testimony regarding the employees of the teen choice program violated her rights to confront the witnesses against her. The Court of Appeals disagreed and affirmed the revocation of her probation. While the fourth minimum due process requirement of *Gagnon* and *Morrissey* guarantees people the right to confront and cross examine witnesses, it specifically makes an exception that permits the hearing officer to disallow confrontation if good cause exists. The

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Court relied on language in *Gagnon* and *Morrissey* that approved "where appropriate . . . the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence." *Id.* at 289. No error occurred in admitting this hearsay testimony because Marshall made no attempt to dispute it and offered no evidence that she completed the program. Thus, hearsay evidence may be admissible at revocation hearings. *Id*

In *Tiryung v. Commonwealth*, 717 S.W.2d 503 (Ky. App. 1986), Tiryung pled guilty to first degree wanton endangerment along with several misdemeanors and received a one year sentence that was probated. His probation was revoked following his arrest for possession of a controlled substance but before he had been convicted of the charge. The circuit court did not abuse its discretion. The Court of Appeals found that a conviction is not required to revoke probation, "[i]t is not necessary that the Commonwealth obtain a conviction in order to accomplish revocation of probation." *Id*. at 504.

Further, illegally seized evidence is admissible in revocation hearings. The police searched Tiryung's motel room without a warrant and without his consent. The drugs found during the search were introduced at his revocation hearing. The court held that Tiryung was not entitled to object to the admission of evidence that might have been seized illegally at his revocation hearing due to the informal nature of the hearing. *Id.* (*citing*, *Childers v. Commonwealth*, 593 S.W.2d 80, 81 (Ky. App. 1980), which upheld revocation of probation based on statements obtained from the defendant who had not received *Miranda* warnings).

Conclusion

Hearings regarding the revocation of probation or parole are not designed to be second criminal trials. While revocation hearings are more informal, people facing revocation of probation or parole are guaranteed six minimum due process protections. *Morrissey*, 408 U.S. at 489; *Gagnon v. Scarpelli*, 411 U.S. at 786; *Murphy*, 551 S.W.2d at 840. Appellate courts will reverse revocation hearings that violate these minimum due process requirements. To assist trial attorneys who handle revocation hearings, the authors of this article have produced a one page summary of the law discussed in this article that trial attorneys can take to court with them. If you have questions about this article or upcoming cases involving revocation hearings, please feel free to contact us at brandon.pigg@ky.gov and sam.potter@ky.gov or (502) 564-8006. ■

Summary of the Law Governing Revocation Hearings

Every revocation hearing must satisfy the following six minimum due process requirements:

1. written notice of the claimed violations of parole;
2. disclosure to the parolee of evidence against him;
3. opportunity to be heard in person and to present witnesses and documentary evidence;
4. the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
5. a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
6. a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Morrissey v. Brewer, 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *Murphy v. Commonwealth*, 551 S.W.2d 838, 840 (Ky. App. 1977).

Application of the six minimum due process requirements:

- A defendant who has had "made every reasonable effort to comply with the conditions imposed upon him" should not have his probation revoked. *Keith v. Commonwealth*, 689 S.W.2d 613, 615; 625 (Ky. App. 1985).
- Revocation hearings "do not require proof beyond a reasonable doubt but merely proof of an occurrence by a preponderance of the evidence." *Rasdon v. Commonwealth*, 701 S.W.2d 716, 719 (Ky. App. 1986).
- A revocation order based on insufficient evidence is an abuse of discretion. *Rasdon*, 701 S.W.2d at 719.
- Defendants have the right to testify at revocation hearing, and only defendants may waive their minimum due process rights. *U.S. v. Dodson*, 25 F.3d 385 (6th Cir. 1994).
- A defendant is not entitled to discovery prior to a revocation hearing. *Robinson v. Commonwealth*, 86 S.W.3d 54, 57 (Ky. App. 2002).
- Testing positive for marijuana is sufficient evidence to revoke probation. *Robinson*, 86 S.W.3d at 57.
- Hearsay evidence is admissible at these hearings. *Marshall v. Commonwealth*, 638 S.W.2d 288, 289 (Ky. App. 1982).
- Illegally seized evidence is admissible in revocation hearings. *Tiryung v. Commonwealth*, 717 S.W.2d 503, 504 (Ky. App. 1986).

WHY ARE SO MANY AMERICANS IN PRISON? RACE AND THE TRANSFORMATION OF CRIMINAL JUSTICE

By Glenn C. Loury, Brown University

The early 1990s were the age of drive-by shootings, drug deals gone bad, crack cocaine, and gangsta rap. Between 1960 and 1990, the annual number of murders in New Haven rose from six to 31, the number of rapes from four to 168, the number of robberies from 16 to 1,784—all this while the city's population declined by 14 percent. Crime was concentrated in central cities: in 1990, two fifths of Pennsylvania's violent crimes were committed in Philadelphia, home to one seventh of the state's population. The subject of crime dominated American domestic-policy debates.

Most observers at the time expected things to get worse. Consulting demographic tables and extrapolating trends, scholars and pundits warned the public to prepare for an onslaught, and for a new kind of criminal—the anomic, vicious, irreligious, amoral juvenile "super-predator." In 1996, one academic commentator predicted a "bloodbath" of juvenile homicides in 2005.

Even as crime rates fell, however, imprisonment rates remained high and continued their upward march. The result, the current American prison system, is a leviathan unmatched in human history.

And so we prepared. Stoked by fear and political opportunism, but also by the need to address a very real social problem, we threw lots of people in jail, and when the old prisons were filled we built new ones.

But the onslaught never came. Crime rates peaked in 1992 and have dropped sharply since. Even as crime rates fell, however, imprisonment rates remained high and continued their upward march. The result, the current American prison system, is a leviathan unmatched in human history.

According to a 2005 report of the International Centre for Prison Studies in London, the United States—with five percent of the world's population—houses 25 percent of the world's inmates. Our incarceration rate (714 per 100,000 residents) is almost 40 percent greater than those of our nearest competitors (the Bahamas, Belarus, and Russia). Other industrial democracies, even those with significant crime problems of their own, are much less punitive: our incarceration rate is 6.2 times that of Canada, 7.8 times that of France, and 12.3 times that of Japan. We have a corrections sector that employs more Americans than the combined work forces of General Motors, Ford, and Wal-Mart, the three largest corporate employers in the country, and we are spending some $200 billion annually on law enforcement and corrections at all levels of government, a fourfold increase (in constant dollars) over the past quarter century. Never before has a supposedly free country denied basic liberty to so many of its citizens. In December 2006, some 2.25 million persons were being held in the nearly 5,000 prisons and jails that are scattered across America's urban and rural landscapes. One third of inmates in state prisons are violent criminals, convicted of homicide, rape, or robbery. But the other two thirds consist mainly of property and drug offenders. Inmates are disproportionately drawn from the most disadvantaged parts of society. On average, state inmates have fewer than 11 years of schooling. They are also vastly disproportionately black and brown.

How did it come to this? One argument is that the massive increase in incarceration reflects the success of a rational public policy: faced with a compelling social problem, we responded by imprisoning people and succeeded in lowering crime rates. This argument is not entirely misguided. Increased incarceration does appear to have reduced crime somewhat. But by how much? Estimates of the share of the 1990s reduction in violent crime that can be attributed to the prison boom range from five percent to 25 percent. Whatever the number, analysts of all political stripes now agree that we have long ago entered the zone of diminishing returns. The conservative scholar John DiIulio, who coined the term "super-predator" in the early 1990s, was by the end of that decade declaring in *The Wall Street Journal* that "Two Million Prisoners Are Enough." But there was no political movement for getting America out of the mass-incarceration business. The throttle was stuck.

A more convincing argument is that imprisonment rates have continued to rise while crime rates have fallen because *we have become progressively more punitive*: not because crime has continued to explode (it hasn't), not because we made a smart policy choice, but because we have made a collective decision to increase the rate of punishment.

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One simple measure of punitiveness is the likelihood that a person who is arrested will be subsequently incarcerated. Between 1980 and 2001, there was no real change in the chances of being arrested in response to a complaint: the rate was just under 50 percent. But the likelihood that an arrest would result in imprisonment more than doubled, from 13 to 28 percent. And because the amount of time served and the rate of prison admission both increased, the incarceration rate for violent crime almost tripled, despite the decline in the level of violence. The incarceration rate for nonviolent and drug offenses increased at an even faster pace: between 1980 and 1997 the number of people incarcerated for nonviolent offenses tripled, and the number of people incarcerated for drug offenses increased by a factor of 11. Indeed, the criminal-justice researcher Alfred Blumstein has argued that *none* of the growth in incarceration between 1980 and 1996 can be attributed to more crime:

The growth was entirely attributable to a growth in punitiveness, about equally to growth in prison commitments per arrest (an indication of tougher prosecution or judicial sentencing) and to longer time served (an indication of longer sentences, elimination of parole or later parole release, or greater readiness to recommit parolees to prison for either technical violations or new crimes).

This growth in punitiveness was accompanied by a shift in thinking about the basic purpose of criminal justice. In the 1970s, the sociologist David Garland argues, the corrections system was commonly seen as a way to prepare offenders to rejoin society. Since then, the focus has shifted from rehabilitation to punishment and stayed there. Felons are no longer *persons* to be supported, but *risks* to be dealt with. And the way to deal with the risks is to keep them locked up. As of 2000, 33 states had abolished limited parole (up from 17 in 1980); 24 states had introduced three-strikes laws (up from zero); and 40 states had introduced truth-in-sentencing laws (up from three). The vast majority of these changes occurred in the 1990s, as crime rates fell.

This new system of punitive ideas is aided by a new relationship between the media, the politicians, and the public. A handful of cases—in which a predator does an awful thing to an innocent—get excessive media attention and engender public outrage. This attention typically bears no relation to the frequency of the particular type of crime, and yet laws—such as three-strikes laws that give mandatory life sentences to nonviolent drug offenders—and political careers are made on the basis of the public's reaction to the media coverage of such crimes.

* * *

Despite a sharp national decline in crime, American criminal justice has become crueler and less caring than it has been at any other time in our modern history. Why?

The question has no simple answer, but the racial composition of prisons is a good place to start. The punitive turn in the nation's social policy—intimately connected with public rhetoric about responsibility, dependency, social hygiene, and the reclamation of public order—can be fully grasped only when viewed against the backdrop of America's often ugly and violent racial history: there is a reason why our inclination toward forgiveness and the extension of a second chance to those who have violated our behavioral strictures is so stunted, and why our mainstream political discourses are so bereft of self-examination and searching social criticism. This historical resonance between the stigma of race and the stigma of imprisonment serves to keep alive in our public culture the subordinating social meanings that have always been associated with blackness. Race helps to explain why the United States is exceptional among the democratic industrial societies in the severity and extent of its punitive policy and in the paucity of its social-welfare institutions.

Slavery ended a long time ago, but the institution of chattel slavery and the ideology of racial subordination that accompanied it have cast a long shadow. I speak here of the history of lynching throughout the country; the racially biased policing and judging in the South under Jim Crow and in the cities of the Northeast, Midwest, and West to which blacks migrated after the First and Second World Wars; and the history of racial apartheid that ended only as a matter of law with the civil-rights movement. It should come as no surprise that in the post–civil rights era, race, far from being peripheral, has been central to the evolution of American social policy.

The political scientist Vesla Mae Weaver, in a recently completed dissertation, examines policy history, public opinion, and media processes in an attempt to understand the role of race in this historic transformation of criminal justice. She argues—persuasively, I think—that the punitive turn represented a political response to the success of the civil-rights movement. Weaver describes a process of "frontlash" in which opponents of the civil-rights revolution sought to regain the upper hand by shifting to a new issue. Rather than reacting directly to civil-rights developments, and thus continuing to fight a battle they had lost, those opponents—consider George Wallace's campaigns for the presidency, which drew so much support in states like Michigan and Wisconsin—shifted attention to a seemingly race-neutral concern over crime:

Once the clutch of Jim Crow had loosened, opponents of civil rights shifted the "locus of attack" by injecting crime onto the agenda. Through the process of frontlash, rivals of civil rights progress defined racial discord as criminal and argued that crime legislation would be a panacea to racial unrest. This strategy both imbued crime with race and depoliticized racial struggle, a formula which foreclosed earlier

"root causes" alternatives. Fusing anxiety about crime to anxiety over racial change and riots, civil rights and racial disorder—initially defined as a problem of minority disenfranchisement—were defined as a crime problem, which helped shift debate from social reform to punishment.

Of course, this argument (for which Weaver adduces considerable circumstantial evidence) is speculative. But something interesting seems to have been going on in the late 1960s regarding the relationship between attitudes on race and social policy.

Before 1965, public attitudes on the welfare state and on race, as measured by the annually administered General Social Survey, varied year to year independently of one another: you could not predict much about a person's attitudes on welfare politics by knowing their attitudes about race. After 1965, the attitudes moved in tandem, as welfare came to be seen as a race issue. Indeed, the year-to-year correlation between an index measuring liberalism of racial attitudes and attitudes toward the welfare state over the interval 1950–1965 was .03. These same two series had a correlation of .68 over the period 1966–1996. The association in the American mind of race with welfare, and of race with crime, has been achieved at a common historical moment. Crime-control institutions are part of a larger social-policy complex—they relate to and interact with the labor market, family-welfare efforts, and health and social-work activities. Indeed, Garland argues that the ideological approaches to welfare and crime control have marched rightward to a common beat: "The institutional and cultural changes that have occurred in the crime control field are analogous to those that have occurred in the welfare state more generally." Just as the welfare state came to be seen as a race issue, so, too, crime came to be seen as a race issue, and policies have been shaped by this perception.

Consider the tortured racial history of the War on Drugs. Blacks were twice as likely as whites to be arrested for a drug offense in 1975 but four times as likely by 1989. Throughout the 1990s, drug-arrest rates remained at historically unprecedented levels. Yet according to the National Survey on Drug Abuse, drug use among adults fell from 20 percent in 1979 to 11 percent in 2000. A similar trend occurred among adolescents. In the age groups 12–17 and 18–25, use of marijuana, cocaine, and heroin all peaked in the late 1970s and began a steady decline thereafter. Thus, a decline in drug use across the board had begun a decade before the draconian anti-drug efforts of the 1990s were initiated.

Of course, most drug arrests are for trafficking, not possession, so usage rates and arrest rates needn't be expected to be identical. Still, we do well to bear in mind that the social problem of illicit drug use is endemic to our whole society. Significantly, throughout the period 1979–2000, white high-school seniors reported using drugs at a significantly higher rate than black high-school seniors. High drug-usage rates in white, middle-class American communities in the early 1980s accounts for the urgency many citizens felt to mount a national attack on the problem. But how successful has the effort been, and at what cost?

Think of the cost this way: to save middle-class kids from the threat of a drug epidemic that might not have even existed by the time that drug incarceration began its rapid increase in the 1980s, we criminalized underclass kids. Arrests went up, but drug prices have fallen sharply over the past 20 years—suggesting that the ratcheting up of enforcement has not made drugs harder to get on the street. The strategy clearly wasn't keeping drugs away from those who sought them. Not only are prices down, but the data show that drug-related visits to emergency rooms also rose steadily throughout the 1980s and 1990s.

An interesting case in point is New York City. Analyzing arrests by residential neighborhood and police precinct, the criminologist Jeffrey Fagan and his colleagues Valerie West and Jan Holland found that incarceration was highest in the city's poorest neighborhoods, though these were often not the neighborhoods in which crime rates were the highest. Moreover, they discovered a perverse effect of incarceration on crime: higher incarceration in a given neighborhood in one year seemed to predict higher crime rates in that same neighborhood one year later. This growth and persistence of incarceration over time, the authors concluded, was due primarily to the drug enforcement practices of police and to sentencing laws that require imprisonment for repeat felons. Police scrutiny was more intensive and less forgiving in high-incarceration neighborhoods, and parolees returning to such neighborhoods were more closely monitored. Thus, discretionary and spatially discriminatory police behavior led to a high and increasing rate of repeat prison admissions in the designated neighborhoods, even as crime rates fell.

Fagan, West, and Holland explain the effects of spatially concentrated urban anti-drug-law enforcement in the contemporary American metropolis. Buyers may come from any neighborhood and any social stratum. But the sellers—at least the ones who can be readily found hawking their wares on street corners and in public vestibules—come predominantly from the poorest, most non-white parts of the city. The police, with arrest quotas to meet, know precisely where to find them. The researchers conclude:

Incarceration begets more incarceration, and incarceration also begets more crime, which in turn invites more aggressive enforcement, which then re-supplies incarceration . . . three mechanisms . . . contribute to and reinforce incarceration in neighborhoods: the declining economic fortunes of former inmates and the effects on neighborhoods where they tend to reside, resource and relationship strains on families of prisoners that weaken the family's ability to supervise

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children, and voter disenfranchisement that weakens the political economy of neighborhoods.

The effects of imprisonment on life chances are profound. For incarcerated black men, hourly wages are ten percent lower after prison than before. For all incarcerated men, the number of weeks worked per year falls by at least a third after their release.

So consider the nearly 60 percent of black male high-school dropouts born in the late 1960s who are imprisoned before their 40th year. While locked up, these felons are stigmatized—they are regarded as fit subjects for shaming. Their links to family are disrupted; their opportunities for work are diminished; their voting rights may be permanently revoked. They suffer civic excommunication. Our zeal for social discipline consigns these men to a permanent nether caste. And yet, since these men—whatever their shortcomings—have emotional and sexual and family needs, including the need to be fathers and lovers and husbands, we are creating a situation where the children of this nether caste are likely to join a new generation of untouchables. This cycle will continue so long as incarceration is viewed as the primary path to social hygiene.

We have created scapegoats, indulged our need to feel virtuous, and assuaged our fears. We have met the enemy, and the enemy is *them*.

* * *

I have been exploring the issue of causes: of why we took the punitive turn that has resulted in mass incarceration. But even if the racial argument about causes is inconclusive, the racial consequences are clear. To be sure, in the United States, as in any society, public order is maintained by the threat and use of force. We enjoy our good lives only because we are shielded by the forces of law and order, which keep the unruly at bay. Yet in this society, to a degree virtually unmatched in any other, those bearing the brunt of order enforcement belong in vastly disproportionate numbers to historically marginalized racial groups. Crime and punishment in America has a color.

In his fine study *Punishment and Inequality in America* (2006), the Princeton University sociologist Bruce Western powerfully describes the scope, nature, and consequences of contemporary imprisonment. He finds that the extent of racial disparity in imprisonment rates is greater than in any other major arena of American social life: at eight to one, the black–white ratio of incarceration rates dwarfs the two-to-one ratio of unemployment rates, the three-to-one ration of non-marital childbearing, the two-to-one ratio of infant-mortality rates and one-to-five ratio of net worth. While three out of 200 young whites were incarcerated in 2000, the rate for young blacks was one in nine. A black male resident of the state of California is more likely to go to a state prison than a state college.

The scandalous truth is that the police and penal apparatus are now the primary contact between adult black American men and the American state. Among black male high-school dropouts aged 20 to 40, a third were locked up on any given day in 2000, fewer than three percent belonged to a union, and less than one quarter were enrolled in any kind of social program. Coercion is the most salient meaning of government for these young men. Western estimates that nearly 60 percent of black male dropouts born between 1965 and 1969 were sent to prison on a felony conviction at least once before they reached the age of 35.

One cannot reckon the world-historic American prison build-up over the past 35 years without calculating the enormous costs imposed upon the persons imprisoned, their families, and their communities. (Of course, this has not stopped many social scientists from pronouncing on the net benefits of incarceration without doing so.) Deciding on the weight to give to a "thug's" well-being—or to that of his wife or daughter or son—is a question of social morality, not social science. Nor can social science tell us how much additional cost borne by the offending class is justified in order to obtain a given increment of security or property or peace of mind for the rest of us. These are questions about the nature of the American state and its relationship to its people that transcend the categories of benefits and costs.

Yet the discourse surrounding punishment policy invariably discounts the humanity of the thieves, drug sellers, prostitutes, rapists, and, yes, those whom we put to death. It gives insufficient weight to the welfare, to the humanity, of those who are knitted together with offenders in webs of social and psychic affiliation. What is more, institutional arrangements for dealing with criminal offenders in the United States have evolved to serve expressive as well as instrumental ends. We have wanted to "send a message," and we have done so with a vengeance. In the process, we have created facts. We have answered the question, who is to blame for the domestic maladies that beset us? We have constructed a national narrative. We have created scapegoats, indulged our need to feel virtuous, and assuaged our fears. We have met the enemy, and the enemy is *them*.

Incarceration keeps *them* away from *us*. Thus Garland: "The prison is used today as a kind of reservation, a quarantine zone in which purportedly dangerous individuals are segregated in the name of public safety." The boundary between prison and community, Garland continues, is "heavily patrolled and carefully monitored to prevent risks

leaking out from one to the other. Those offenders who are released 'into the community' are subject to much tighter control than previously, and frequently find themselves returned to custody for failure to comply with the conditions that continue to restrict their freedom. For many of these parolees and ex-convicts, the 'community' into which they are released is actually a closely monitored terrain, a supervised space, lacking much of the liberty that one associates with 'normal life'."

Deciding how citizens of varied social rank within a common polity ought to relate to one another is a more fundamental consideration than deciding which crime-control policy is most efficient. The question of relationship, of solidarity, of who belongs to the body politic and who deserves exclusion—these are philosophical concerns of the highest order. A decent society will on occasion resist the efficient course of action, for the simple reason that to follow it would be to act as though we were not the people we have determined ourselves to be: a people conceived in liberty and dedicated to the proposition that we all are created equal. Assessing the propriety of creating a racially defined pariah class in the middle of our great cities at the start of the 21st century presents us with just such a case.

My recitation of the brutal facts about punishment in today's America may sound to some like a primal scream at this monstrous social machine that is grinding poor black communities to dust. And I confess that these brutal facts do at times incline me to cry out in despair. But my argument is analytical, not existential. Its principal thesis is this: we law-abiding, middle-class Americans have made decisions about social policy and incarceration, and we benefit from those decisions, and that means from a system of suffering, rooted in state violence, meted out at our request. We had choices and we decided to be more punitive. Our society—the society we have made—creates criminogenic conditions in our sprawling urban ghettos, and then acts out rituals of punishment against them as some awful form of human sacrifice.

This situation raises a moral problem that we cannot avoid. We cannot pretend that there are more important problems in our society, or that this circumstance is the necessary solution to other, more pressing problems—unless we are also prepared to say that we have turned our backs on the ideal of equality for all citizens and abandoned the principles of justice. We ought to ask ourselves two questions: *Just what manner of people are we Americans? And in light of this, what are our obligations to our fellow citizens—even those who break our laws?*

* * *

To address these questions, we need to think about the evaluation of our prison system as a problem in the theory of distributive justice—not the purely procedural idea of ensuring equal treatment before the law and thereafter letting the chips fall where they may, but the rather more demanding ideal of *substantive racial justice*. The goal is to bring about through conventional social policy and far-reaching institutional reforms a situation in which the history of racial oppression is no longer so evident in the disparate life experiences of those who descend from slaves.

And I suggest we approach that problem from the perspective of John Rawls's theory of justice: first, that we think about justice from an "original position" behind a "veil of ignorance" that obstructs from view our own situation, including our class, race, gender, and talents. We need to ask what rules we would pick if we seriously imagined that we could turn out to be anyone in the society. Second, following Rawls's "difference principle," we should permit inequalities only if they work to improve the circumstances of the least advantaged members of society. But here, the object of moral inquiry is not the distribution among individuals of wealth and income, but instead the distribution of a negative good, punishment, among individuals and, importantly, racial groups.

So put yourself in John Rawls's original position and imagine that *you* could occupy any rank in the social hierarchy. Let me be more concrete: imagine that *you* could be born a black American male outcast shuffling between prison and the labor market on his way to an early death to the chorus of *nigger* or *criminal* or *dummy*.

Suppose we had to stop thinking of *us* and *them*. What social rules would we pick if we actually thought that *they* could be *us*? I expect that we would still pick some set of punishment institutions to contain bad behavior and protect society. But wouldn't we pick arrangements that respected the humanity of each individual and of those they are connected to through bonds of social and psychic affiliation? If any one of us had a real chance of being one of those faces looking up from the bottom of the well — of being the least among us — then how would we talk publicly about those who break our laws? What would we do with juveniles who go awry, who roam the streets with guns and sometimes commit acts of violence? What weight would we give to various elements in the deterrence-retribution-incapacitation-rehabilitation calculus, if we thought that calculus could end up being applied to our own children, or to us? How would we apportion blame and affix responsibility for the cultural and social pathologies evident in some quarters of our society if we envisioned that we ourselves might well have been born into the social margins where such pathology flourishes?

If we take these questions as seriously as we should, then we would, I expect, reject a pure ethic of personal responsibility as the basis for distributing punishment. Issues about responsibility are complex, and involve a kind of division of labor—what John Rawls called a "social division

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of responsibility" between "citizens as a collective body" and individuals: when we hold a person responsible for his or her conduct—by establishing laws, investing in their enforcement, and consigning some persons to prisons—we need also to think about whether we have done our share in ensuring that each person faces a decent set of opportunities for a good life. We need to ask whether we as a society have fulfilled our collective responsibility to ensure fair conditions for each person—for each life that might turn out to be our life.

We would, in short, recognize a kind of social responsibility, even for the wrongful acts freely chosen by individual persons. I am not arguing that people commit crimes because they have no choices, and that in this sense the "root causes" of crime are social; individuals always have choices. My point is that responsibility is a matter of ethics, not social science. Society at large is implicated in an individual person's choices because we have acquiesced in—perhaps actively supported, through our taxes and votes, words and deeds—social arrangements that work to our benefit and his detriment, and which shape his consciousness and sense of identity in such a way that the choices he makes, which we may condemn, are nevertheless compelling to him—an entirely understandable response to circumstance. Closed and bounded social structures—like racially homogeneous urban ghettos—create contexts where "pathological" and "dysfunctional" cultural forms emerge; but these forms are neither intrinsic to the people caught in these structures nor independent of the behavior of people who stand outside them.

We need to ask whether we as a society have fulfilled our collective responsibility to ensure fair conditions for each person—for each life that might turn out to be our life.

Thus, a central reality of our time is the fact that there has opened a wide racial gap in the acquisition of cognitive skills, the extent of law-abidingness, the stability of family relations, the attachment to the work force, and the like. This disparity in human development is, as a historical matter, rooted in political, economic, social, and cultural factors peculiar to this society and reflective of its unlovely racial history: it is a societal, not communal or personal, achievement. At the level of the individual case we must, of course, act as if this were not so. There could be no law, no civilization, without the imputation to particular persons of responsibility for their wrongful acts. But the sum of a million cases, each one rightly judged on its merits to be individually fair, may nevertheless constitute a great historic wrong. The state does not only deal with individual cases. It also makes policies in the aggregate, and the consequences of these policies are more or less knowable. And who can honestly say—who can look in the mirror and say with a straight face—that we now have laws and policies that we would endorse if we did not know our own situation and genuinely considered the possibility that we might be the least advantaged?

Even if the current racial disparity in punishment in our country gave evidence of no overt racial discrimination—and, perhaps needless to say, I view that as a wildly optimistic supposition—it would still be true that powerful forces are at work to perpetuate the consequences of a universally acknowledged wrongful past. This is in the first instance a matter of interpretation—of the narrative overlay that we impose upon the facts.

The tacit association in the American public's imagination of "blackness" with "unworthiness" or "dangerousness" has obscured a fundamental ethical point about responsibility, both collective and individual, and promoted essentialist causal misattributions: when confronted by the facts of racially disparate achievement, racially disproportionate crime rates, and racially unequal school achievement, observers will have difficulty identifying with the plight of a group of people whom they (mistakenly) think are simply "reaping what they have sown." Thus, the enormous racial disparity in the imposition of social exclusion, civic ex-communication, and lifelong disgrace has come to seem legitimate, even necessary: we fail to see how our failures as a collective body are implicated in this disparity. We shift all the responsibility onto *their* shoulders, only by irresponsibly—indeed, immorally—denying our own. And yet, this entire dynamic has its roots in past unjust acts that were perpetrated on the basis of race.

Given our history, producing a racially defined nether caste through the ostensibly neutral application of law should be profoundly offensive to our ethical sensibilities—to the principles we proudly assert as our own. Mass incarceration has now become a principal vehicle for the reproduction of racial hierarchy in our society. Our country's policymakers need to do something about it. And all of us are ultimately responsible for making sure that they do. ■

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PLAIN VIEW . . .

Ernie Lewis, Public Advocate

Brendlin v. California
127 S.Ct. 2400, 168 L.Ed.2d 132 (2007)

This is an important unanimous decision of the United States Supreme Court written by Justice Souter establishing that passengers in vehicles that have been stopped have been seized for Fourth Amendment purposes.

The case began in 2001 when a California Deputy Sheriff saw a car with expired registration tags. After learning that the renewal of the tags was being processed, the Deputy again saw the car and decided to stop it to verify that the temporary operating permit matched the car. The Deputy discovered nothing unusual about the permit. He recognized that a front seat passenger was "'one of the Brendlin brothers,'" one of whom he believed had dropped out of parole supervision. The Deputy asked Bruce Brendlin to identify himself, which he did. The Deputy called for backup and found that Brendlin was a parole violator with an outstanding arrest warrant. After backup appeared, the Deputy demanded at gunpoint that Brendlin get out of the car. They searched him and found syringes and items used to manufacture methamphetamine. Brendlin was arrested and charged with possession and manufacture of meth. Brendlin's motion to suppress was denied. The California Court of Appeals later reversed, holding that Brendlin had been seized illegally. This decision was reversed by the California Supreme Court, which held that Brendlin as a passenger had not been seized. The US Supreme Court granted *cert* to decide the question "whether a traffic stop subjects a passenger, as well as the driver, to Fourth Amendment seizure…"

The Court vacated the decision of the California Supreme Court in a decision written by Justice Souter. The Court looked first at the question of when a seizure occurs. The Court held that under *Florida v. Bostick*, 501 U.S. 429 (1991) and *United States v. Mendenhall*, 446 U.S. 544 (1980) that a person is seized when a police officer "terminates or retrains his freedom of movement" by means of physical force or show of authority, which can be determined by deciding whether "'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" The Court acknowledged that under this standard the driver of a vehicle has been seized for Fourth Amendment purposes.

The Court then held that a passenger of a vehicle has been seized for Fourth Amendment purposes. "A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on 'privacy and personal security' does not normally …distinguish between passenger and driver." The Court noted that a passenger would reasonably believe that she was not permitted to move around during the traffic stop.

All nine of the circuits had previously agreed with the decision of the Court. The Court rejected the positions taken by the California Supreme Court. First, the Court disagreed with the California court that the Deputy had seized only the driver, saying that the *Mendenhall* test looks at what the reasonable passenger would have thought. The Court also rejected California's position that only the driver could submit to a show of authority. "Brendlin had no effective way to signal submission while the car was still moving on the roadway, but once it came to a stop he could, and apparently did, submit by staying inside." Finally, the Court rejected California's position that others in addition to passengers might come within the parameters of the Court's rule. "[A]n occupant of a car who knows that he is stuck in traffic because another car has been pulled over…would not perceive a show of authority as directed at him or his car."

Crum v. Commonwealth
223 S.W.3d 109 (Ky. 2007)

Here's the question I'd like to ask about this case: if you are estranged from your wife, would you keep 2-3 pounds of marijuana at your house while the divorce is pending?

But, that's a question for another day. Here Kentucky State Police Officer Bradley Cure was approached by Dora Crum who told him that her estranged husband had 2-3 pounds of marijuana at his house in Pike County. Cure had also been told of James Crum's marijuana dealings by the Pike County Sheriff. Trooper Cure prepared an affidavit in support of his petition for a search warrant. The affidavit described the property to be searched, but said only that the thing to be seized was "illegal contraband." The informant (Dora Crum) was not named, nor was the informant's credibility established. While the affidavit stated that independent investigation of the informant's information was done, the affidavit does not detail the independent investigation. The affidavit was presented to a trial commissioner, who issued

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the search warrant. Trooper Cure executed the warrant, finding two pounds of marijuana and drug paraphernalia. Crum was charged with second degree trafficking in a controlled substance, trafficking in marijuana over 8 ounces, possession of drug paraphernalia, and first-degree possession of a controlled substance. Crum moved to suppress the search, with that motion being overruled based upon the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984). Crum then entered a conditional guilty plea and was sentenced to two years in prison. The Court of Appeals affirmed as well.

The Supreme Court of Kentucky, in an opinion written by Justice Noble, reversed. The Court assumed that the affidavit did not support a finding of probable cause and immediately went to the question of whether the good faith exception should save the search. In doing so, the Court reviewed the good faith exception, and emphasized the following from *Crayton v. Commonwealth*, 846 S.W. 2d 684 (Ky. 1992): "There is a popular but erroneous belief that the *Leon* Court eviscerated the exclusionary rule when the evidence is obtained pursuant to a search warrant. In fact, the Court held that the officer must have an objectively reasonable belief in the sufficiency of the warrant and the probable cause determination. If the affidavit contains false or misleading information, the officer's reliance cannot be reasonable. Likewise, the Court retained the exclusionary rule and applied no presumption of validity in cases of abandonment by the judge of a detached and neutral role, and in cases where the officer's belief in the existence of probable cause is entirely unreasonable. Finally, suppression was retained as a remedy where the warrant is facially deficient by failing to describe the place to be searched or the thing to be seized."

The Court held that the good faith exception should not apply to this case. "[T]he thing to be seized is described only as 'illegal contraband,' the informant is not named, and the officer's reason for believing the informant to be reliable is not stated. The affidavit states that the officer's independent investigation consists of 'information' that was received from a deputy sheriff without stating the nature of that information. On the whole, it is impossible to tell the basis of the officer's knowledge or exactly what he is looking for. The affidavit is thus so lacking in indicia of probable cause that any warrant issued on it must likewise be lacking…Such an affidavit is so lacking in indicia of reliability that the officer's good faith reliance cannot be deemed reasonable." The Court further demonstrated the reasoning behind the requirement that a warrant and the affidavit upon which it is based be specific. "Failing to state what the object of the search is amounts to requesting permission to go on a fishing expedition."

Washington v. Commonwealth
2007 WL 2319117, 2007 Ky. App. LEXIS 249 (Ky. Ct. App 2007)

Members of the Lexington Police Department were conducting a buy-bust operation at an apartment complex in Lexington on October 13, 2005. Officer Givens radioed three other officers that he had witnessed a drug transaction being completed, that the suspect was a "black male, wearing jeans, tennis shoes, and a red shirt" and that he had entered the hallway of apartment building #1317. Officer Cobb got out of his car and did not hear Givens state that the suspect was entering the back right apartment. Cobb and other officers entered building #1317 and smelled marijuana in the hallway. The officers picked an apartment from which they believed the smell to be coming from, and knocked on the door. When no one answered and they heard movement from inside the apartment, the police kicked in the door and conducted a "protective sweep." Officer Cobb found narcotics on the coffee table and money. Jamela Washington along with Johnson and King were arrested. Thereafter, another apartment was searched and the original suspect was discovered and arrested. Washington was indicted for trafficking in a controlled substance and trafficking in marijuana over 8 ounces. She moved to suppress, that motion being denied. Washington then entered a conditional plea of guilty to facilitation to trafficking in a controlled substance and was sentenced to twelve months' imprisonment. She was also placed on probation.

In an opinion by the Court of Appeals written by Judge Thompson joined by Judges Wine and Henry, the judgment was affirmed. The opinion simply states that there was probable cause based upon the officers smelling marijuana outside the apartment where the door was kicked in, and there were exigent circumstances because the officers could have suspected that evidence was being destroyed inside the apartment, again justifying the warrantless kicking in of the door of a private residence. "In this case, officers were pursuing a suspected felony drug dealer into an apartment building when they heard a door slam in the direction that he had been running. Upon approaching the vicinity of where they believed the door had been slammed, they believed they smelled a strong odor of burnt marijuana emanating underneath 'Washington's door. They announced that they were police and requested that the door be opened. Receiving no response and hearing movement within the apartment, Cobb believed that the destruction of evidence of a felony might be imminent and decided to make a warrantless entry into the apartment to prevent the possible destruction of such evidence." One wonders whether the police could have kicked in the door of any apartment in the hallway where the marijuana smoke was smelled.

The Court denies that smelling marijuana alone allows the police to kick in doors without a warrant. "While we conclude that an odor of burnt marijuana emanating from a residence standing alone does not justify the warrantless entry of that residence, Cobb's entry into Washington's residence under the facts of this case was justified as an exigent circumstance…Because these officers were in a situation where they reasonably believed that evidence of a serious crime might be destroyed, they properly disregarded the warrant requirement to prevent the possible destruction of evidence."

Ritchie v. Commonwealth
2007 WL 1378148,
2007 Ky. App. LEXIS 142 (Ky. Ct. App. 2007)

See if you think this constitutes probable cause: An anonymous tip that says Aubrey Ritchie is selling drugs, followed by several unsuccessful "trash pulls", and followed by one trash pull 3 months after the anonymous tip that reveals a marijuana stem and a part of a plastic baggie. The Court of Appeals held in this case that this did constitute probable cause.

Based upon the tip and the trash pull, the Paducah Police Department obtained a warrant to search Ritchie's home. There they found methamphetamine and drug paraphernalia. The motion to suppress was denied, and Ritchie entered a conditional plea of guilty.

In an opinion by Judge Buckingham and joined by Judge Lambert, the Court of Appeals affirmed. The Court found that the tip was not "stale" by the time the affidavit was prepared, despite the existence of several unsuccessful trash pulls. The Court further held that one single trash pull sufficiently corroborated the anonymous tip.

Judge Stumbo dissented. She believed that "three months of finding nothing renders a tip, without other corroborating evidence, inherently unreliable." "Given 1) the lack of temporal certainty in the anonymous tip, 2) the lapse of time between the tip and the trash pull … 3) the minimal nature of the evidence found, 4) the lack of information about when the trash was placed outside the home to be picked up, and 5) the dearth of other corroborating evidence, I cannot agree that the affidavit was in any way sufficient to support the issuance of a search warrant."

Wilson v. Commonwealth
2007 WL 1954023,
2007 Ky. App. LEXIS 201 (Ky, Ct. App. 2007)

August Wilson owned Heartland Wood Products, Inc. in Henderson, Kentucky. He had divorced his wife and was living in an upstairs apartment located at his business. He went out of town on June 13, 2005 to meet a client. On that day, Det. Matt Conley of the Kentucky State Police investigated an anonymous letter indicating that Wilson and others in the business were manufacturing meth. The letter, as it turns out, had been written by a disgruntled employee and ex-police officer who had a pay dispute with Wilson. Janice Breedlove called Wilson and gave the phone to Conley. Wilson would later agree that he had given consent to search the business but not his private residence. Conley would later contend that he had consent to search the entire building. Conley went to the upstairs area, scaled an 8 foot wall, and went into Wilson's apartment without a warrant. Drugs and weapons were found. Wilson was arrested and charged with a variety of crimes. After his motion to suppress was denied, he went to trial where he was convicted and sentenced to 1 year in prison.

In an opinion by Judge Keller joined by Judge Combs, the Court of Appeals reversed. The Court found that the trial court erred when it found that Wilson had consented to a search of the entire building. This was based upon the fact that there were no exigent circumstances requiring the scaling of the wall, no proof regarding the scope of the consent, and the fact that after allegedly obtaining consent the police then secured a warrant.

Judge Buckingham dissented, stating that the majority had given insufficient deference to the fact finding of the trial court. "In my view, the fact that there is conflicting evidence does not mean that the evidence is not substantial enough to support a fact finding being held to be conclusive upon the appellate court." He also disagreed with the reasoning of the majority regarding the obtaining of a warrant. "In my opinion, it is just as logical to conclude that the officers obtained a warrant out of an abundance of caution. Police officers, although trained in law enforcement, should not be expected to have the knowledge or expertise of an attorney or judge on difficult issues of search and seizure."

United States v. Graham
483 F. 3d 431, 2007 U.S. App. LEXIS 8368 (6th Cir. 2007)

On September 13, 2003, Dayton Police Officer Stivers put out information that Anthony Graham was planning to shoot someone at 1701 West Grand Avenue. Apparently independently of that information, Officers Halburnt and Malson were at that address and noticed a Pontiac Grand Am "parked illegally" with the door open and Graham sitting in the driver's seat speaking with a passenger. As they approached the car, Graham "dipped" his shoulder. He told the police his name, and they remembered Stivers' information from earlier in the day. The police asked Graham to get out of the car and then attempted to pat him down, which he resisted. He was arrested and put into the back seat of the cruiser. A firearm was found underneath the seat of Graham's car. Graham's motion to suppress was denied. Graham pled guilty to violating 18 U.S.C. 933 (g)(1) and was

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sentenced to 48 months' imprisonment. He appealed the denial of the motion to suppress.

The Sixth Circuit, in an opinion written by Judge Martin and joined by Judges Clay and Polster, affirmed the decision of the district judge. The Court noted that the protective search done in this case was not done based upon the illegal parking, but rather based upon the Stivers' information. "The Supreme Court has *never* authorized a protective search on anything less than reasonable suspicion that a suspect was armed and dangerous."

The Court held that there was probable cause to seize Graham for committing a parking violation. Graham's car was stopped some 10-15 feet "in front of a sign indicating that parking was not allowed." Because there was a Dayton ordinance applicable to these facts, probable cause to stop and seize the car for a traffic violation was found.

The Court next found that frisking Graham under *Terry* was justified under the reasonable suspicion standard. This was supported by the anonymous tip and the "shoulder dip." The Court stated that the tip that Graham was armed and planning to shoot someone at 1701 West Grand was "corroborated once Halburnt approached the vehicle parked at that address and learned that the occupant's name was Tony Graham." "In addition to the tip, the district court credited Halburnt's testimony that before he approached the vehicle, he observed Graham dip with his right shoulder toward the floor as if he was placing something under his seat. This type of furtive movement is consistent with an attempt to conceal a firearm…We find that Halburnt's observation of Graham reaching under the seat, when considered in conjunction with the tip that Graham would be at that location and armed, created the requisite reasonable suspicion to justify the *Terry* frisk."

The Court next found that the search of the car was legal as a protective search under *Michigan v. Long*, 463 U.S. 1032 (1983). "Even if Graham did not have the gun on his person, it was reasonable for the officers to believe that upon reentering the vehicle, Graham would have had immediate access to a gun." The Court rejected Graham's contention that because he had been placed in the cruiser, that *Long* was not applicable. "Had the officers not searched the car and simply let him go, Graham would immediately have had access to the weapon once he reentered the car."

United States v. Campbell
486 F.3d 949, 2007 U.S. App. LEXIS 12097, 2007 FED App. 0191P (6th Cir. 2007)

At 10:30 p.m. on July 22, 2005, Boardman Township, Ohio Police Officer Michael Salser was driving his car and pulled in behind a car driven by Steven Campbell, an African-American male. Salser, for an unexplained reason, began to follow Campbell's car, which pulled into a parking lot of American Church, Inc. Salser parked his car and walked up to Campbell, who was talking on his cell phone. Salser asked if everything was OK, and Campbell said he was lost and talking with his girlfriend on the phone. Salser asked Campbell for his ID after explaining to him that there had been recent burglaries in the area. Campbell said he had no ID, became nervous, said that he wanted no trouble, and eventually gave his name as Steven Morris and his birthday as May 17, 1981. When the dispatcher told Salser that the name and date of birth could not be verified, Salser confronted Campbell with this information. Salser asked if he could pat Campbell down, and Campbell agreed. A patdown revealed marijuana in one pocket and money in the area. Campbell was arrested for marijuana possession. A search of the car incident to arrest resulted in a seizure of a weapon, causing Campbell to be indicted for being a felon in possession of a firearm. Campbell's motion to suppress was granted, and the government appealed.

The Sixth Circuit reversed the district court's suppression in an opinion written by Judge Gilman and joined by Judge Clay. The Court held that the original encounter between Salser and Campbell was a consensual encounter requiring no level of suspicion whatsoever. The Court rejected the district judge's finding that Campbell had been seized when Salser asked Campbell for identification. The Court further found that after Campbell could produce no identification and the officer said that Campbell could be "on his way" once he showed an ID, then the encounter went beyond a consensual one. "In short, Campbell could have declined Officer Salser's initial request and left the scene of the encounter. The fact that he chose not to do so did not convert that request into a seizure within the meaning of the Fourth Amendment. *See Mendenhall*, 446 U.S. at 553 (holding that a 'person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained)."

The Court next held that probable cause for an arrest existed once Campbell stated that he had no identification, since driving without a license is a misdemeanor offense in Ohio. Once Campbell was arrested with probable cause, the police were "permitted to search the vehicle associated with a defendant's lawful arrest for the purpose of taking an inventory of its contents prior to impoundment, even if the police have no probable cause to otherwise search the vehicle." Thus, the gun was seized legally.

Judge Cole dissented. While he agreed that Campbell was not seized at the moment of Salser's request for identification, he disagreed with the majority's recitation of the facts. Judge Cole relied upon the fact that Salser had stated that before Campbell left he would like to see his identification. "By conditioning Campbell's ability to leave on his first

producing valid identification, Officer Salser transformed what could otherwise have been a simple request for identification into a command that Campbell would not have reasonably felt free to refuse. Such a command constituted a seizure of Campbell…Because Officer Salser lacked reasonable suspicion to seize Campbell, the seizure was unreasonable."

United States v. Ellis
2007 WL 2239196, 2007 U.S. App. LEXIS 18678, 2007 FED App. 0297P (6th Cir. 2007)

On Friday, April 16, 2004, Ohio State Highway Patrol Trooper Andrew Topp saw a white Ford truck weaving on the southbound lane of I-71. Topp pulled the truck over and obtained identification from the driver, a 70 year old white male who identified himself as Arthur Daugherty. No evidence of alcohol intoxication was observed. Topp asked the passenger, a 30 year old African-American male, for identification. The passenger had no identification, and said he didn't know his social security number. He identified himself as Wayne McCarthy. Trooper Topp then commanded the driver to get out of the truck and get into the police car. Trooper Topp began asking questions of Daugherty, most of them about the passenger. Trooper Topp asked for a drug dog. He went back to the stopped car and questioned the passenger some more. Topp could not get a positive identification on the passenger. Backup arrived. Topp then asked for consent to search the truck. During the search, an oil rag containing cocaine was found under the passenger seat. Topp arrested the passenger. Daugherty was never cited for anything, and was released. The passenger was identified as Ellis, and he was charged with a crime in federal court. Ellis' motion to suppress was granted, and the government appealed.

The Sixth Circuit reversed in a opinion written by Judge Griffin joined by Judges Rogers and Russell. The Court first rejected the government's contention that Ellis had no standing to challenge the search, citing *Brendlin v. California*, 127 S.Ct. 2400 (2007).

The Court defined the issue before them as "whether, under these circumstances, the scope and duration of the detention transformed this legal traffic stop into an unconstitutional seizure." (It is interesting to note the articulated question here. In most cases where the appellant is an accused, the question is phrased as whether deference should be given to the district judge or not.) The Court noted that they disagreed with the district court's ruling that "insufficient reasonable suspicion of criminal activity existed to justify the overall detention of twenty-two minutes." "In the present case, the seizure prior to the consent to search was not prolonged, but lasted only twenty-two minutes. A large portion of this detention was necessitated by the purpose of the initial stop and the need for the trooper to identify the occupants of the vehicle and determine the driver's ability to safely operate the vehicle. In obtaining the driver's driving license and vehicle registration, Trooper Topp was justified in asking the occupants general questions of who, what, where, and why regarding their 3:23 a.m. travel…Topp's inquiries and his actions necessitated by the suspected traffic violation lasted only thirteen minutes and thirty-nine seconds…During this time, defendant Ellis gave Trooper Topp a false alias that Topp was unable to confirm. Thereafter, reasonable suspicion existed for the further brief detention of an additional eight minutes and twenty-one seconds…"

THE SHORT VIEW

1. *Paulino v. State*, 924 A.2d 308, 2007 Md. LEXIS 337 (Md. 2007). The Maryland Supreme Court has decided the police went too far when they arrested Paulino based upon an informant's tip that he was carrying drugs between his buttocks, and thereafter searched that area. The police required Paulino to first lie on the ground; thereafter, the police lifted up his underwear and manipulated his buttocks. The Court found that this was an unreasonable strip search and body cavity search under the standards set out in *Bell v. Wolfish*,442 U.S. 520 (1979). "The police could have taken any number of steps, including patting Paulino down for weapons at the scene of the arrest and conducting the search inside the Jeep Cherokee vehicle in which Paulino was a passenger, or at the police station, to protect Paulino's privacy interest….Instead, they chose to search him in a public place in the view of others. Accordingly, we hold that the search of Paulino unreasonably infringed on his personal privacy interests when balanced against the legitimate needs of the police to seize the contraband that Paulino carried on his person."
2. *State v. Worwood*, 2007 WL 1791238, 2007 Utah LEXIS 111 (Utah 2007). Moving a suspect one mile in order to conduct field sobriety tests converted a detention into an arrest which required probable cause. "[T]ransporting a suspect can change the level of coercion involved in an investigative detention to the degree that it is no longer justified under reasonable suspicion. An investigatory detention can become so intrusive that it escalates into a de facto arrest."
3. *In re J.W.L.*, 732 N.W.2d 332, 2007 Minn. App. LEXIS 75 (Minn. Ct. App. 2007). The police who are inside a house as a result of an emergency entry may not photograph objects in the house that are not related to the emergency or evidence of a crime. Thus, graffiti discovered inside the house could not be used for prosecution of damage to property where the photograph was taken pursuant to the emergency-aid doctrine. "Any search of a residence following a warrantless entry must be 'limited by the type

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of emergency involved. It cannot be used as the occasion for a general voyage of discovery unrelated to the purpose of the entry.'"

4. *Longshore v.* State, 924 A.2d 1129, 2007 Md. LEXIS 344 (Md. 2007). Handcuffing a suspect who is being held on a reasonable suspicion is illegal in the absence of probable cause unless there is evidence that the suspect is dangerous or is going to flee.
5. *State v. McGrane*, 733 N.W.2d 671, 2007 Iowa Sup. LEXIS 78 (Iowa 2007). The police entered a house to execute an arrest warrant when the defendant appeared on the second floor. He was ordered downstairs, where the police handcuffed him and arrested him. The police then went up to the second floor and searched, finding evidence of drug dealing. The Iowa Supreme Court held that this violated the defendant's Fourth Amendment rights, rejecting both the search incident to arrest and the protective sweep exceptions. "Although it may be common for drug dealers to possess weapons, suspicion of drug dealing alone is not enough to justify a protective sweep." More is required, such as "specific facts and circumstances upon which reasonable inferences could be drawn to support a reasonable police officer's belief that weapons were on the premises and that someone else could have had access to those weapons and inflicted harm."
6. *Grandison v. Commonwealth*, 645 S.E.2d 298, 2007 Va. LEXIS 79 (Va. 2007). The police may not make a warrantless seizure of a dollar bill folded in an "apothecary fold", which has been associated with drug dealing. Because a dollar bill is not per se contraband, it may not be seized by the police without a warrant or other probable cause.
7. *United States v. Forrester*, 2007 WL 2120271, 2007 U.S. App. LEXIS 16147 (9th Cir. 2007). The government can look at e-mail headers and IP (internet protocol) addresses without a warrant according to the 9th Circuit. The Court analogized these matters to pen registers, which may also be searched without suspicion under *Smith v. Maryland*, 442 U.S. 735 (1979). The Court held that there is no reasonable expectation of privacy in e-mail headers or the IP. "[E]-mail and Internet users have no expectation of privacy in the to/from addresses of their messages or the IP addresses of the websites they visit because they should know that these messages are sent and these IP addresses are accessed through the equipment of their Internet service provider and other third parties."
8. *United States v. Washington*, 490 F.3d 765, 2007 U.S. App. LEXIS 14351 (9th Cir. 2007). African-Americans have a legitimate fear that the police will harm them when they are approached while in a car, and that may be taken into account in the calculus of whether they reasonably felt free to leave. Thus, the encounter was an investigation detention requiring a reasonable suspicion, rather than a consensual encounter. "In sum, under the totality of the circumstances—[Officer] Shaw's authoritative manner and direction of Washington away from Washington's car to another location, the publicized shootings by white Portland police officers of African-Americans, the widely distributed pamphlet with which Washington was familiar, instructing the public to comply with an officer's instructions, that [Officers] Sawh and Pahlke outnumbered Washington two to one, the time of night and lighting in the area, that Pahlke was blocking Washington's entrance back into his car, and that neither Pahlke, nor Shaw, informed Washington he could terminate the encounter and leave—we conclude that a reasonable person would not have felt free to disregard Shaw's directions, end the encounter with Shaw and Pahlke, and leave the scene." ■

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KENTUCKY CASE REVIEW

Roy A. Durham, Appeals Branch

Commonwealth v. Sheila Perry
Rendered 04/19/07
219 S.W.3d 720
Certifying the Law
Opinion by J. Schroder

Norma Taylor needed a new engine for her car, so she contacted Perry, who she had heard was a good mechanic. Perry examined the car and told Taylor that she could get an engine for it for $375 and that she would install it for an additional fee. Taylor gave Perry $375 to get the engine, however, Perry never obtained the engine. Taylor asked Perry to return the money. When Perry failed to return the money, Taylor filed a small claims action against Perry. At the close of the evidence at trial, the court granted a directed verdict, adjudging that the relationship between Perry and Taylor was that of a debtor and creditor, not a fiduciary relationship, thus the case was controlled by *Commonwealth v. Jeter*, 590 S.W.2d 346 (Ky.App.1979).

Theft by Failure to Make Required Disposition of Property (KRS 514.070) covers a situation in which the victim gives money to the defendant with the agreement that the defendant will purchase merchandise from a third party source and give it to the victim, and then the defendant fails to purchase the item or return the money. The Commentary to KRS 514.070 states in part: "it is not the purpose of this statute to impose a criminal sanction in the relationship of debtor and creditor. To constitute an offense there must be a breach of trust, growing out of a contract or confidential relation." In the present case, the fact pattern falls within the ambit of KRS 514.070. Perry took the $375 pursuant to an agreement to use the money specifically to buy an engine for Taylor from a junkyard, and then failed to buy the engine and kept the money. Unlike *Jeter*, where payment was directly made to the seller/retailer for purchase of the goods, Perry was acting as the agent for Taylor in the purchase of the engine from a third party. The decision is not meant to be read so as to require the existence of a third pary in all cases prosecuted under KRS 514.070.

Richard Woodard III and Lori M. Franklin v. Commonwealth
Rendered 04/19/07
219 S.W.3d 723
Affirming
Opinion by J. Noble

Richard Woodare, III was charged in two indictments with thirty-one sex crimes and four counts of Complicity to Use of a Minor in a Sexual Performance, involving four victims under the age of sixteen. His girlfriend and co-defendant, Lori Franklin, was charged in two indictments with twenty sex crimes and three counts of use of a minor in a Sexual Performance. Woodard was convicted of twenty-four sex crimes and four complicity crimes and Franklin was convicted of twenty sex offenses and three counts of Use of a Minor in a Sexual Performance.

The plain language of KRS 531.300(5) defines performance as not only a play, motion picture, photograph or dance, but also "any other visual representation" exhibited before an "audience." Each of the victims committed sex acts at the urging of Woodard or Franklin while one or the other, or other children, watched. The fact that each of them may also have participated throughout the acts in no way negates the voyeuristic aspect of watching when not actively engaged.

A party is not placed in double jeopardy when they are charged with Sodomy and Rape and with the Use of a Minor in a Sexual Performance. Defendants claimed the performances in question were the acts of rape or sodomy. Rape and Sodomy require direct participation in the act by a defendant while Use of a minor in a Sexual Performance requires passive observation. These are two distinct elements.

KRE 615 requires only the separation of witnesses so that they can not hear testimony in the courtroom. The rule makes separation in the courtroom mandatory, but makes no mention of witnesses interacting outside the courtroom. A party is not entitled to a mistrial because the complaining witnesses interacted with each other outside court and rode together to the trial. The witnesses claimed they had not discussed their testimony. After consideration, the trial court determined that the witnesses had not violated the admonition. The spirit of the Rule is not observed when witnesses coordinate their testimony against a party, however, there is no practical means to ensure that this does not happen.

James Lee Fields v. Commonwealth
Rendered 04/19/07, To Be Published
219 S.W.3d 742
Affirming
Opinion by J. Scott

Rogers was hitch-hiking when Coley Brown picked him up. Rogers offered Brown three dollars to give him a ride to Virginia to get some beer in which Brown agreed. On the way, Brown drove by and picked up Appellant. After they

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returned, Rogers got out of the car and started to leave. Appellant asked for a couple of beers and then requested a different kind. When Rogers ignored him and walked away, Appellant got out and started beating him. Rogers taunted Appellant by telling him that his daughter could hit harder than Appellant could. Appellant then yelled for Brown to come and help. Brown came over and hit Rogers with a lug wrench. Appellant then told Brown to get Roger's wallet. Appellant was found guilty of complicity to commit assault in the second degree and complicity to commit robbery in the first degree.

The assault charge did not merge into the robbery charge and thus no "double jeopardy" The actual infliction of physical injury to Rogers by a dangerous instrument was not required to convict Appellant of complicity to robbery in the first degree; nor was the theft required for conviction of complicity to assault second. Both of these statutes thus had different elements that had to be proved in finding guilt under the respective instructions. Each required proof of an element not contained within the other and thus the doctrine of merger was not applicable. There being no merger, the rule of "double jeopardy" was not violated.

Appellant's prior fourth degree assault can not be a "lesser-included charge" of the complicity to assault in the second degree. Appellant claimed that the fourth degree assault was established by proof of the same or less than all of the facts required to establish the commission of complicity to the second degree assault charge, and therefore, under KRS 505.020(2)(a), it was a "lesser-included offense" of the assault complicity charge. To find Appellant guilty of only the preceding fourth degree assault, the jury had to find that Appellant intentionally caused the physical injury to Rogers; all of which was before the occurrence of the complicit actions. The complicity charge requires proof that Brown caused the physical injury (albeit with a dangerous instrument), whereas the fourth degree assault instruction requires an inconsistent finding that Appellant caused the physical injury. Given that each had inconsistent elements, fourth degree assault can not be a "lesser-included charge" of the complicity to assault in the second degree in this case.

Dena Williams v. Commonwealth
Rendered 04/19/07, To Be Published
2007 WL 1159474
Affirming
Opinion by J. McAnulty

Dena Williams entered a plea of guilty to Complicity to Committ Murder and Complicity to Tampering with Physical Evidence. Eight days later, Williams filed a pro se motion to withdraw her guilty plea on the grounds that she had pled "involuntarily and unknowingly."

RCr 8.10 does not provide a presumption against withdrawal. It did not appear the trial court approached the issue with prejudgment in Williams' case. Moreover, nothing in RCr 8.10 prevents the trial court from also considering the effect withdrawal of a guilty plea will have on the court, the prosecution, and victims, if permitted. Counsel asserted at the hearing that in his experience courts generally permit defendants to withdraw their guilty pleas "as long as the motion is made before the sentencing." However, a practice of always granting of motions to withdraw would not reflect an exercise of discretion in ruling on RCr 8.10 motions. The facts and circumstances surrounding a motion to withdraw a guilty plea should be given individualized consideration. This Court does not agree that there is a need to provide criteria for lower courts to use in making these determinations and does not chose to set forth any rules that might have the result of limiting the trial court's consideration of all the circumstances of a particular case.

Annie Wyatt v. Commonwealth
Rendered 04/19/07, To Be Published
219 S.W.3d 751
Reversing and Remanding
Opinion by C.J. Lambert

Appellant was convicted of two counts of criminal solicitation to commit murder.

A defendant need not testify in order to avail himself of the defense of entrapment. If the evidence presented is sufficient to support an entrapment instruction, it is of no consequence that such evidence is introduced during the Commonwealth's case-in-chief, through direct or cross-examination.

Neither physical injury nor threat of physical injury is an element of criminal solicitation and therefore KRS 505.010(2)(b) does not disqualify Appellant from the defense of entrapment. KRS 505.010(2)(b) states that the defense is unavailable "when [t]he offense charged has physical injury or the threat of physical injury as one of its elements and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment." As with conspiracy, the essence of criminal solicitation is the demand or encouragement of another to engage in criminal conduct. Criminal solicitation is an inchoate crime that is a separate and distinct offense from the underlying substantive offense that is its object.

One act of solicitation to murder multiple victims does not permit multiple solicitation convictions based on the number of victims. Whether the object of a single act of encouragement is to commit one or many crimes, it is the act of encouragement which the solicitation statute punishes. As there was only one act of encouragement, Appellant may be convicted of only one act of solicitation.

Junie Holt v. Commonwealth
Rendered 04/19/07, To Be Published
219 S.W.3d 731
Reversing
Opinion by C.J. Lambert; Dissent by J. Scott

Appellant was convicted for first degree burglary and complicity to first degree robbery. During direct examination of one of the prosecution's witness, the witness denied the substance of statements attributed to Appellant. Although the witness denied that the Appellant admitted the crime, the prosecutor asserted on at least four occasions that the witness told her that Appellant had admitted the crime. Appellant appealed on the basis that he had suffered prejudicial error by means of improper questioning by the prosecutor of a prosecution witness.

Assertions of fact from counsel as to the content of prior conversations with witnesses have the effect of making a witness of the lawyer and allowing his or her credibility to be substituted for that of the witness in violation of KRE 603 and KRE 802. Such practice is improper and, subject to harmless error review, is an appropriate basis for reversal. From the tenor of her leading questions to the witness, there is no doubt that she put the very words the witness refused to say in his mouth. This placed the credibility of the prosecutor before the jury, and from the form of the questions, firmly represented to it that the witness told her that Appellant admitted the crime.

A significant flaw in this case was failure of the Commonwealth's Attorney to observed KRE 611(c). The witness was called by the Commonwealth during it's case in chief. As a witness for the Commonwealth, leading questions should not have been allowed.

With respect to harmless error, when the prosecutor effectively became a witness and confessed guilt for the defendant as if the confession came from his lips, the error was particularly egregious. A confession is devastating evidence of guilt, but, if possible, its effect is elevated when the prosecutor becomes the defendant's voice. When that happens, the defendant's bundle of constitutional rights evaporates.

Commonwealth v. Ashley M. Blakely*
Rendered 05/24/07, To Be Published
223 S.W.3d 107
Certifying the Law
Opinion by J. Scott

The 2005 amendments to Chapter 304 primarily affected the penalty provisions of the statute. These amendments included the addition of a new subsection, KRS 304.99-060(2), which set fort the penalty for a person who drives a motor vehicle without insurance. Another added subsection, KRS 304.99-060(3), stated that if the person operating the motor vehicle was also the owner, then he could be subject to the penalties outlined in both the first and second subsections. The only change to the substantive provision of Chapter 304, KRS 304.39-080, was to attach criminal liability to an owner of an uninsured vehicle who permits another person to drive the car.

A non-owner operator of a motor vehicle can not be assessed criminal penalties because the motor vehicle being driven is uninsured. *Estes v. Commonwealth*, 952 S.W.2d 701 (Ky. 1997) held that the General Assembly's 1994 revisions to KRS Chapter 304 were inadequate to create criminal liability for non-owner operators of uninsured motor vehicles. Important to this determination was the fact that the substantive provision of Subtitle 39, KRS 304.39-080, did not include language to indicate that the General Assembly intended to attach criminal liability upon a non-owner operator of an uninsured car.

Since *Estes* was decided, the General Assembly twice amended the substantive provision, KRS 304.39-080, without addressing the concerns expressed in *Estes*. Because the General Assembly was aware of the deficiencies of the statute and did not take action to solve them, the court must presume that *Estes* controls this case. Even more importantly, the General Assembly in 2007 passed revisions to KRS 304.39-080 that do comply with *Estes*. This revision adds the words "or operator" to KRS 304.39-080(5) and can only be considered an acknowledgement that the prior amendments did not satisfy *Estes*. Although *Estes* has sometimes been questioned, *stare decisis* is important and prior precedent will only be overturned if there are sound reasons to do so. Finding no such reasons, KRS Chapter 304 does not attach criminal liability upon a non-owner operator of an uninsured vehicle.

Daniel C. Clark v. Commonwealth
Rendered 05/24/07, To Be Published
223 S.W.3d 90
Reversing and Remanding
Opinion by J. Minton

Appellant's indictment charged him with committing two counts of first-degree sexual abuse of children less than twelve years of age and two counts of first-degree sodomy of children less than twelve years of age between 1998 and May 2002. During trial, the trial court allowed the Commonwealth to amend the indictment to accuse Appellant of committing the offenses between 1999 and May 2002.

Second-degree sexual abuse is not a classic lesser-included offense of first-degree sexual abuse because the age of the victim at the time of abuse is usually clear, however, in those rare instances where the age of the victim at the time of abuse is in question, sexual abuse in the second degree can be deemed a lesser-included offense of sexual abuse in the first-degree. In a situation where the date(s) of the abuse are not described with particularity in either the

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indictment or the testimony such that the victim was either eleven or twelve when the abuse occurred, a trial court errs by failing to instruct a jury on both first and second-degree sexual abuse. In these instances, the trial court must instruct on both offenses, thereby leaving it to the jury to decide which offense, if any, better fits the testimony.

Allowing evidence of Appellant's prior sexual misconduct to be introduced during the guilt phase was an abuse of discretion. In 1988, Appellant pleaded guilty to first-degree sexual abuse and second-degree sodomy. Over Appellant's objection, the Commonwealth was permitted to offer the testimony of one of the sex abuse victims in Appellant's 1998 conviction. The testimony did not fit into any of the exceptions enumerated in KRE 404(b)(1), however the trial court allowed the testimony to come in for the purpose of modus operandi.

Conduct that serves to satisfy the statutory elements of an offense will not suffice to meet the modus operandi exception. Instead, the modus operandi exception is met only if the conduct that meets the statutory elements evidences such a distinctive pattern as to rise to the level of a signature crime. In the present case, there were as many differences as similarities between Appellant's past and current alleged conduct. This state of relative equipoise is insufficient to meet the demanding modus operandi exception.

Even if the Commonwealth would have satisfied a minimal showing of a distinctive pattern of conduct, the pattern would have been destroyed by the fact that Appellant's prior abuse occurred over twenty years before the present case. Temporal remoteness goes to weight, not the admissibility, of the prior bad acts evidence. The temporal remoteness of the prior bad acts is of less concern when the evidence of the pattern of conduct falls within a clearly defined, distinctive pattern. However, Appellant's prior conduct does not bear the hallmarks of a signature crime, meaning that the vast time lapse is a significant counterweight when balancing the probative value of the testimony of the victim from the prior bad act and the undue prejudice it caused Appellant.

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

James A. Crum v. Commonwealth
Rendered 05/24/07, Modified 05/25/07, To Be Published
223 S.W.3d 109
Reversing and Remanding
Opinion by J. Noble

A Kentucky State Trooper was approached during a call to a scene by a bystander. The bystander decided to inform the Trooper that her estranged husband, Appellant, had two to three pounds of marijuana at his house. The Trooper prepared an affidavit for a warrant to search Appellant's house.

The affidavit was drafted on a form provided by the Administrative Office of the Courts and described the property to be searched with adequate particularity where it is located. However, this is where the particularity stopped.

After Appellant's motion to suppress based upon a deficient warrant was denied, he entered a conditional guilty plea to second-degree trafficking in a controlled substance, trafficking in marijuana over eight ounces, possession of drug paraphernalia, and first-degree possession of a controlled substance.

A search warrant is defective if it fails to state specifically the object of the search. The thing to be seized was only described as "illegal contraband." Testimony before the trial court indicated that the officer did know more, and could have put more information in the warrant. Nonetheless, the warrant was facially deficient because it does not adequately describe the thing to be seized. "Illegal contraband" can be any number of things.

In fact, this term is so broad that the Trooper actually checked every box on the affidavit form, including one which indicated he was looking for stolen property. Failing to state what the object of the search is amounts to requesting permission to go on a fishing expedition. While the requesting officer may indeed be acting in good faith, no one's home should be searched without a specific object of the search being stated.

Editor's Note:
Blakley is a published opinion saying people cannot be charged with a crime just a couple of months before they could be charged with the crime. So it can be confusing. As noted in the opinion, SB 68 altered the language in KRS 304.39-080(5) to include mere operators as well as actual owners. SB 68 was signed by the Governor on March 21, 2007 and became effective June 26. So, in spite of the opinion, as of June 26, 2007 non-owner operators of an uninsured vehicle can be charged under KRS 304.39-080(5). The opinion only applies to persons charged before June 26, 2007. ■

SIXTH CIRCUIT CASE REVIEW

By Dennis J. Burke, Post-Conviction Branch

Discussed below are three cases. The first, stemming from a habeas petition brought pursuant to 28 U.S.C. Section 2254, addresses at length the limitations to the presumption of reasonable trial strategy in the context of alleged ineffective assistance of counsel. The Court also provides important analysis regarding Section 2254(e)(1), which requires the federal courts to presume that state court fact determinations are correct. Specifically, the Court addresses what is and is not a fact determination subject to Section 2254(e)(1). The second, addresses a district court's decision to increase a defendant's sentence based upon confidential information never fully disclosed to the criminal defendant. *The third and final opinion, another federal habeas case, examines whether a second trial following a sua sponte declaration of a mistrial, violates the petitioner's right not to be placed in double jeopardy.*

Ramonez v. Berghuis,
—F.3d —, 2007 WL 1730096 before Daughtry, Moore and Shadur, District Judge

The Court rules that the federal district court gave undue deference to the state court, which unreasonably applied the holding in *Strickland v. Washington*, 466 U.S. 668 (1984). The state court ignored the "central teaching" of *Strickland*, that a strategic decision is not objectively reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.

Ramonez argued that his trial counsel failed to investigate and call three witnesses at his trial. Consequently, his trial counsel's performance was deficient which prejudiced his defense in violation of the Sixth Amendment (as applied to the states through the Fourteenth Amendment).

In 2001, a Michigan state jury convicted Ramonez of home invasion, assault with intent to do great bodily harm and aggravated stalking. The convictions arose from a complaint made by Christina Fox, Ramonez's ex-girlfriend, and the mother of two of his children.

The Court provided the necessary details of the prosecution's case:

> Fox testified at trial that at 4:30 or 5 a.m. April 21, 2000 she and the two children were asleep in the living room of her house when she heard a knock on the door. After cracking the front door, Fox saw that it was Ramonez knocking. As her relationship with Ramonez had been violent and they had separated some years earlier, Fox became frightened upon seeing Ramonez and attempted to slam the door shut. Ramonez, however, forced the door open, knocking Fox to the ground in the process.
>
> According to Fox, she then found herself lying on the floor between the foyer and the living room, where Ramonez pinned her down, began to strangle her and threatened her life. By kicking Ramonez, Fox was able to free herself and take off running for the front door before he punched her again, knocking her over. Fox was nonetheless able to make it out to her front porch. Once outside she encountered Charles, Rene and Hackett at the bottom of the stairs to her porch. Attempting to flee, Fox lost her footing and fell on the stairs. Ramonez again pinned her to the ground, while one of the other three covered her mouth to muffle her screaming. Finally the altercation ended after Fox saw lights go on nearby, and the four men let her go and drove away.

After the prosecution rested Ramonez informed the judge that he wanted to call Charles, Rene and Hackett to testify in his defense. He complained to the judge that he told his attorney of the three witnesses months before trial but his attorney never contacted them. His attorney stated that it was his strategic decision not to call any witnesses. The judge refused to interfere with "counsel's judgment". Without any other witnesses, Ramonez felt compelled to testify. The 6th Circuit Court summarized:

> Ramonez testified that on the day in question he did go to Fox's house to check on his children. He claimed that Fox voluntarily invited him into her house, but once inside Ramonez did not see his kids and, believing that Fox appeared to be high, he became angry. Ramonez then pushed her against a wall-but he denied choking her-and Fox took off running out the front door. She then fell on the front steps, where Rene attempted to help her to her feet. Fox then ran off.

Following Ramonez's conviction he appealed on ineffective assistance of counsel grounds. The Michigan Court of Appeals remanded for an evidentiary hearing. The 6th Circuit summed up the testimony at the hearing:

> [Trial counsel] Moore testified that he was aware of Rene, Charles and Hackett prior to trial, but he never made contact with them. Moore defended his decision

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not to call them based on what he characterized as his trial strategy to focus on the action inside Fox's home. He believed that the three witnesses could not testify to that action because they were never inside the house. Moore's plan had been to rely on cross-examination to point out discrepancies in Fox's story and discredit her testimony. Even so, Moore did attempt to reach Charles (but only Charles) just three or four days before trial, but he did not succeed in speaking with him-the two simply exchanged phone messages.

Each of Charles, Rene and Hackett testified at that hearing. Charles is Ramonez's son, Rene his stepson and Hackett an acquaintance of the three other men from work. Each testified that the three were driving in a car with Ramonez on the night in question, ultimately arriving at Fox's house. There was some inconsistency in their testimony: Rene remembered stopping at a bar first, while Charles did not remember if they made any other stops and Hackett's recollection was that they did not make any other stops. Each then testified that he observed Ramonez go up to Fox's front door, where Fox then invited him inside (each affirmatively stated that Ramonez did not force his way into the house).

All three witnesses testified that even from their vantage point in the car they could see the interaction between Ramonez and Fox inside the house through the doorway-only Hackett allowed that he may have lost sight of them for some two minutes. Each said that he witnessed yelling and a physical altercation between Fox and Ramonez, but that Ramonez did not choke or punch Fox. All testified that the three men got out of the car and went up to Fox's porch where the altercation was continuing outside the house. Their stories differed somewhat as to what then occurred outside the house, with Hackett simply saying that Fox ran off, Rene remembering Fox falling and one of them helping her up and Charles remembering having words with Fox and attempting to help her off the ground before she fled. All three affirmed that they would have been willing to testify even if the prosecutor had threatened to charge them as accessories to the crime.

The trial court denied Ramonez a new trial. It found trial counsel's decision not to call witnesses reasonable and as to possible prejudice, the court found that Hackett "was not a particularly helpful witness" and that Rene was an "incredible witness." On appeal, the Michigan Court of Appeals affirmed, based on "essentially the same reasoning."

The federal district court denied Ramonez's petition for a writ of habeas corpus finding that the state court decision was at least a reasonable application of *Strickland*. District Judge Shadur sitting by designation, found that the state court decision was an unreasonable application of the Supreme Court's holding in *Strickland*. Initially, the court set forth the limitations imposed upon federal court when reviewing state court decisions:

Federal court examination of a habeas petition by a prisoner in custody pursuant to a state court judgment is circumscribed by AEDPA, in this instance more specifically under this part of Section 2254(d):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
(1) 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....

Under that first "contrary to" clause of Section 2254(d)(1), we may grant the writ only if the state court decision was based on a conclusion of law opposite to that reached in Supreme Court precedent (citation omitted). And as to the other alternative, *Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) teaches: Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

To issue a writ on that ground, the federal court must find the state court's application of Supreme Court precedent "objectively unreasonable," not merely "incorrect or erroneous" *(Wiggins v. Smith*, 539 U.S. 510, 520-21, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

Finally, Section 2254(e)(1) requires us to presume that state court fact determinations are correct. To overcome that presumption, the statute requires the petitioner to demonstrate any state court error by clear and convincing evidence.

The Court then describes the test for ineffective assistance of counsel first set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984):

To prevail the petitioner must establish both (1) that defense counsel's performance was constitutionally deficient and (2) that the deficient performance prejudiced the defense sufficiently to undermine the reliability of the trial *Id.* That first element requires the peti-

tioner to "show that counsel's representation fell below an objective standard of reasonableness" (*Strickland*, 466 U.S. at 688, 104 S.Ct. 2052), for which purpose we must (id. at 689, 104 S.Ct. 2052) (internal quotation marks omitted):

> indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.
>
> And as to the prejudice element, *Strickland, id.* at 694, 104 S.Ct. 2052 instructs: The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> For those purposes *Combs v. Coyle*, 205 F.3d 269, 278 (6th Cir.2000) has held that "[b]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." They are thus not findings of "historical facts" *(McGhee v. Yukins*, 229 F.3d 506, 513 (6th Cir.2000)) that are subject to the Section 2254(e)(1) presumption of correctness for state court factual findings.

In the present case, Ramonez does not argue that the Michigan Court of Appeals incorrectly stated the *Strickland* standard. The only question for the Court of Appeals then, is whether the Michigan Court of Appeals applied the *Strickland* standard in an objectively reasonable manner when it decided that trial counsel's investigation leading to his decision not to call the three witnesses at trial and the decision itself, were constitutionally sufficient The Court, quoting from *Strickland*, 466 U.S. at 69-91, sets forth defense counsel's duty to investigate:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

A defense attorney's *Strickland* duty to investigate includes the duty to investigate all witnesses who may have information concerning the client's guilt. *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005).

The government contended that defense counsel's decision not to contact and interview the witnesses was reasonable in light of Fox's testimony in a preliminary hearing that the assault took place inside her house. Therefore, the three witnesses would not have had anything to add to Ramonez's case. But as the Court said:

> [T]hat argument is at odds with other crucial parts of the record. Months before trial Ramonez began insisting to Moore that the three witnesses were present at the time and could tell him what really happened at Fox's house. At the same preliminary hearing on which Berghuis relies, Fox testified that Ramonez kicked in her door to gain entry to the house. Such asserted action was clearly not inside the house, such as to render the observers outside the house unable to verify or dispute the parties' divergent versions. Moreover, Fox also testified at that same hearing that three men witnessed the assault continue outside on her front porch (even stating that one of them assisted Ramonez by covering her mouth to keep her from yelling). If Moore was seeking to show that Fox was embellishing her story of the altercation with Ramonez, why would he not also have found it useful to look into this part of her tale? With such information available to him, how could he rationally have concluded that neither Charles nor Rene nor Hackett could possibly have anything to add to Ramonez's case?
>
> Of course the answer is he didn't-at least not entirely. Instead, believing that Charles (at least) might be able to "shed light on" some fact issues, Moore did attempt to reach him-but only a few days before trial. Despite months of lead time, Moore just put off the effort until he did not leave himself enough time to actually reach Charles. At trial Moore had to concede that Charles, Rene and Hackett could have had something to add:
>
> I'm not going to say the nature of their testimony would not add. Because that suggests they don't have anything at all to testify to. It's my opinion that they could potentially add some information which would contradict what the complainant has testified to.
>
> Having thus recognized the possibility that the three witnesses could provide testimony beneficial to Ramonez, it was objectively unreasonable for Moore not to interview them (or at least make reasonable efforts to interview them) before coming to his ultimate choice of trial conduct (*see Towns*, 395 F.3d at 259). In sum, the point is this: Constitutionally effective

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> counsel must develop trial strategy in the true sense-not what bears a false label of "strategy"-based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation. Moore's performance fell well on the wrong side of that line.

Next, the Court addressed the prejudice prong of *Strickland*. Ramonez must show a reasonable probability that but for his counsel's failure to investigate and call the three witnesses at trial, the result of the proceeding would have been different.

Before weighing prejudice the Court discussed in detail the state court factual determinations which fall within the bounds of Section 2254(e)(1).

> [A] state court's blanket assessment of the credibility of a potential witness-at least when made in the context of evaluating whether there is a reasonable probability that the witness's testimony, if heard by the jury, would have changed the outcome of the trial-is not a fact determination within the bounds of Section 2254(e)(1). After all, what the state court has really done is to state its view that there is not a reasonable probability that the jury would believe the testimony and thus change its verdict. And in that regard *Barker v. Yukins*, 199 F.3d 867, 874 (6th Cir.1999) has made it clear that our Constitution leaves it to the jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence. In the context of deciding whether a defective self-defense jury instruction was harmless error, *Barker, Id.*, held that the state court crossed that line when it found the defective instruction had no consequence because the jury would not have believed the self-defense testimony of the defendant anyway. Whether to believe the defendant's testimony on that score was an issue for the jury and not the judge.
>
> Our later decisions help demonstrate the difference between such credibility determinations that are for the jury and those appropriately made by state judges entitled to the Section 2254(e)(1) presumption. Examples of such deference to a judge's assessment of credibility of witnesses include instances where credibility determinations are within a judge's proper role, such as in assessing a juror's impartiality at voir dire *(Dennis v. Mitchell*, 354 F.3d 511, 520 (6th Cir.2003)) or in factual determinations at a *Miranda* suppression hearing *(Hill v. Brigano*, 199 F.3d 833, 840-41 (6th Cir.1999)). Or in the context of a *Strickland* evidentiary hearing, it is for the judge to evaluate the credibility of the criminal defendant and the former defense counsel in deciding what advice counsel had in fact given to the defendant during his trial, and such findings are entitled to the Section 2254(e)(1) presumption (see *Sophanthavong v. Palmateer*, 378 F.3d 859, 867 (9th Cir.2004)).
>
> Those examples, involving credibility determinations within the judge's province, are different in kind from a finding that a jury would not believe a witness's testimony-what the state court effectively did here. While there would have been plenty of grist for the cross-examination mill as to Ramonez's three witnesses, the question whether those witnesses were believable for purposes of evaluating Ramonez's guilt is properly a jury question. As *Matthews v. Abramajtys*, 319 F.3d 780, 790 (6th Cir.2003)(emphasis added) has stated:
>
> The actual resolution of the conflicting evidence, *the credibility of witnesses*, and the plausibility of competing explanations is exactly the task to be performed by a rational jury, considering a case presented by competent counsel on both sides.
>
> In the end, weighing the prosecution's case against the proposed witness testimony is at the heart of the ultimate question of the *Strickland* prejudice prong, and thus it is a mixed question of law and fact not within the Section 2254(e)(1) presumption.

Finally, turning to prejudice, the Court acknowledged that the jury could have "discredited the potential witnesses based on factors such as bias and inconsistencies in their respective stories." The Court concluded that "there remained a reasonable probability that the jury would not have….All it would have taken is 'for one juror [to] have struck a different balance' between the competing stories." (Citing to Wiggins 529 U.S. at 537).

United States v. Hamad,
—F.3d—, 2007 WL 2049867 before Gillman, Sutton and Tarnow, District Judge

The Court rules that the district court violated Hamad's right to due process when in applying the federal sentencing guidelines, the district court not only increased a sentence based on its own fact findings but also did so on the basis of evidence never fully disclosed to the defendant, including a letter from the town Mayor declaring Hamad a "menace" and requesting that Hamad be sentenced to a lengthy prison term.

Police officers responded to a fight. They met a man who claimed that he was stabbed by his neighbor, Mr. Hamad. At Hamad's residence they recovered firearms. Hamad pled guilty to (1) violating the felon-in-possession statute (he previously had been convicted of distributing cocaine), *see* 18 U.S.C. § 922(g)(1), and (2) failing to register a shotgun with a barrel shorter than 18 inches, *see* 26 U.S.C. § 5861(d).

A day before the sentencing hearing the court postponed it because in the 6th Circuit's words:

> [T]he court had received "in chambers a number of documents that reflect poorly on the defendant." The documents, the court noted, "were submitted with a request that the information be kept confidential." In an effort to comply with Criminal Rule 32, which permits the submission of confidential information at sentencing as long as the court provides a summary of the information to the defendant and gives him a reasonable opportunity to respond, *see* Fed.R.Crim.P. 32(d)(3)(B) & 32(i)(1)(B), the district court provided the following summary of the documents:
>
> In a general sense, the documents describe a man who has been violent with his own wife and children, threatens harm to other persons, treats his wife as an inferior person because of her gender and should be considered a dangerous man. The information supplied predicts that when the defendant is released from confinement and rejoins society he will continue to be abusive to his family and will come to a new neighborhood with no warning signs.
>
> Also attached to the court's order was a public letter jointly written by Warren's Mayor and its Director of Public Service and Safety. The letter described Hamad as "a menace and a threat to the lives of the many good and law-abiding citizens in [their] community," noted that "[t]here ha[d] been several incidents where Hatem Hamad [had] demonstrated his abusive and violent temperament by inflicting harm to others without remorse" and requested that the court sentence him "to a lengthy and extended incarceration."

Hamad's attorney moved for full disclosure asserting that if the district court relied on the documents to increase his sentence it would violate Criminal Rule 32 and the federal constitution. The district court stated that the summary of evidence provided adequate notice but offered to disclose the documents to Hamad's counsel on condition that he agree to "not reveal the particulars of the accusations in such a manner as to identify the person or persons supplying [the] information." Hamad's counsel declined the district court's offer because he could not adequately rebut the evidence without disclosing it to Hamad. As the Court wrote:

> The district court sentenced Hamad to 48 months' imprisonment. "[T]o be very clear," the [district] court acknowledged, it had "taken into consideration materials that [were] under seal, and ha[d] relied upon them in the exercise of [its] discretion within the advisory guideline range." JA 97. The district court denied Hamad's motion to unseal the confidential documents during appeal and ordered the clerk to send the sealed documents to the Sixth Circuit.

The Court considered the district court's actions, analyzed the relevant portions of the sentencing guidelines and the Criminal Rules and explained its reason for reversing the district court ruling:

> [T]he district court's sentencing procedure raises serious constitutional concerns-even if the required summary was as accurate and as specific as it could be without disclosing its sources and even if the defendant was given as much time as he wished and as many witnesses as he needed to respond to the summary. The fact remains that the court did not-and could not-disclose sufficient information to allow the defendant to counter or test the reliability of this evidence that he was a dangerous person and a blight on the community, and the fact remains that the court relied on this information in increasing his sentence…. The upshot is this: while a defendant may not have the constitutional right to *confront* the witnesses against him at sentencing, it remains unclear under modern sentencing practices what due process right he has to *know* who these witnesses are and what they have said, to *respond* meaningfully to the accusations or otherwise to *ensure* that the accusations are accurate. … In assessing our resolution of this appeal, the reader no doubt wonders what these letters said. How else to know whether we have handled the case correctly? That curiosity, however, only begins to approach what must have been Hamad's feeling about the matter-how can I argue for a shorter sentence when I cannot know why unidentified members of the community think I deserve a longer sentence? If nothing else, reading an opinion premised on letters that the court has seen but the public has not ought to give the reader a sense of what it was like to be in Hamad's shoes. For these reasons, we vacate Hamad's sentence and remand the case to the district court to resentence Hamad without relying on the sealed documents.

***Walls v. Konteh*,**
—F.3d—, 2007 WL 1713320 before Norris, Gillman and McKeague.

In an unusual federal habeas case, the Court rules that a second trial following a *sua sponte* mistrial does not violate the prohibition against double jeopardy.

The state prosecutor had just rested its case a day earlier when on the morning of September 11, 2001, over defense counsel's objection, the trial court sua sponte declared a mistrial. The judge's extraordinary action was prompted by the attacks upon the Pentagon and the World Trade Center. The jurors were not aware of the attacks at the time that the

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court declared a mistrial but the court was concerned about the effects of the attacks would have upon the jury. He chose not to merely recess until the next day because he was concerned about the effect upon the jurors and unsure if the courthouse would be open the next day.

The 6th Circuit reviewed the applicable law pertaining to the so-called Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). "[A] writ may issue only if we conclude that the state-court decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" 28 U.S.C. § 2254(d)(1). A state-court decision is considered "contrary to ... clearly established Federal law" if it is "diametrically different, opposite in character or nature, or mutually opposed." *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (quotation marks omitted). Alternatively, to be found an "unreasonable application of ... clearly established Federal law," the state-court decision must be "objectively unreasonable" and not simply erroneous or incorrect. *Id.* at 409-11, 120 S.Ct. 1495.

Judge Norris wrote the opinion for the court and in so doing he discussed the law as it pertains to the Double Jeopardy Clause of the Fifth Amendment:

> The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subjected for the same offense to be twice put in jeopardy of life or limb." *U.S. Const. amend. V*. This provision "represents a fundamental ideal in our constitutional heritage, and it ... appl[ies] to the States through the Fourteenth Amendment." *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). As the Ohio Court of Appeals recognized, for our purposes the most instructive United States Supreme Court case on the subject is *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). In *Washington*, …the Court explained that a retrial is permissible when "manifest necessity" requires it. *Id.* at 505, 98 S.Ct. 824. That concept was originally defined by Justice Story as follows:
>
> > We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.... But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824). While adopting Justice Story's "classic formulation," the Court in *Washington* emphasized that it required flexibility in its application: [T]hose words do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge. Indeed, it is manifest that the key word "necessity" cannot be interpreted literally; instead ... we assume that there are degrees of necessity and we require a "high degree" before concluding that a mistrial was appropriate.

The Court acknowledged that consideration of *Washington* made the decision a close call and that other trial judges would have proceeded to trial. Nevertheless, the majority held that the trial judge considered the alternative before declaring a mistrial and that the judge was rational in his conclusion that the jury might not be able to devote its full attention to the evidence. "Given the lack of holdings from this court regarding ... conduct of the kind involved it cannot be said that the state court 'unreasonably applied clearly established Federal law" (citation omitted).

In dissent, Judge Gillman writes that the majority gave short shrift to one overriding fact. Specifically, the trial judge "possessed no knowledge concerning the potential effects that the events of September 11 attacks would have on the abilities of the jurors to fulfill their civic duties in Walls' case". Judge Gillman believes that the trial court's decision to declare a mistrial despite the "lack of familiarity with events totally extraneous to Walls' trial" was an abuse of sound discretion that materially distinguishes it from the clearly established law cited by the majority. ■

It would be a terrible message if I didn't take this case. There was never any hesitation in my mind about taking it. As a lawyer, I would always rather be on the side that's advocating for someone's life rather than planning, plotting, strategizing and intending to kill someone.

— Thomas J. Ullmann, a New Haven public defender

CAPITAL CASE REVIEW

By David M. Barron, Capital Post Conviction

Supreme Court of the United States

***Panetti v. Quarterman*, 127 S.Ct. 2842 (2007)** (*Kennedy, J., joined by, Stevens, Souter, Ginsburg, and Breyer, JJ.); Thomas, J., dissenting, joined by, Roberts, C.J., Scalia and Alito, JJ.)*

The Eighth Amendment prohibits carrying out a death sentence upon a person who is insane. This prohibition applies even if the inmate was competent to be held responsible for the crime and competent to stand trial. Prior findings of competency do not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition. Once a prisoner makes the requisite preliminary showing that his current mental state would bar his execution, the Eighth Amendment entitles the inmate to an adjudication of his or her current competency. This determination is governed by the federal due process clause and *Ford v. Wainwright*, 477 U.S. 399 (1986). The Court granted certiorari to determine if a competency to be executed claim raised for the first time in a habeas petition filed after a previous habeas petition has been denied is a successive habeas petition, to determine if the state court's procedures for determining competency to be executed comported with due process and *Ford*, and to determine if the United States Court of Appeals for the Fifth Circuit applied too restrictive a definition of competency to be executed.

A competency to be executed claim is not subject to the requirements for filing a successive habeas petition: The phrase "second or successive" is not self-defining in that it does not refer to all habeas petitions filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior habeas petition. The limitations on filing successive habeas petitions is intended to further comity, finality, and federalism. Because requiring prisoners to file an unripe and sometimes factually unsupported competency to be executed claim in a first-in-time habeas petition in order to preserve it for review when it becomes ripe by an approaching execution date does not conserve judicial resources, reduce piecemeal litigation, or streamline federal habeas proceedings, the court held that requiring competency to be executed claims to be raised in a first-in-time habeas petition does not support the purposes of the AEDPA and thus is not required. Rather, "the statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe."

David M. Barron

Note: The language in Panetti should be construed liberally to argue that many other types of claims are not subject to the stringent requirements for filing successive petitions either because of when the claim became ripe or because of when the right came into existence in relation to when the first-in-time habeas petition was decided. When determining whether a habeas petition is to be construed as successive, courts still apply the abuse of the writ doctrine.

Concurring opinions are clearly established law when the case is decided by a plurality: Because *Ford* was a plurality opinion and *Panetti* is an AEDPA case, the Court had to first decide what is the applicable clearly established law. According to the Court, "when there is no majority opinion, the narrower holding controls." This means that here, Justice Powell's concurring opinion in *Ford* is the clearly established law for purposes of the AEDPA.

Panetti did not receive the minimal procedural protections guaranteed by *Ford* and the due process clause: Once a prisoner has made a threshold showing of insanity, he or she is entitled to a "fair hearing in accord with fundamental fairness," which includes the opportunity to be heard, and adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court. Here, the Court held that this threshold showing was established by observations from two experts (one of whom was a law professor), but that the these fundamental procedural protections did not take place because the state court failed to provide Panetti with an adequate opportunity to submit expert evidence in response to the report filed by the court-appointed experts, and that "the determination of sanity appeared to have been made solely on the basis of the examinations performed by state-appointed psychiatrists, which according to the Court, "is a procedure [that] invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examination."

Note: Counsel should argue that the procedural due process requirements articulated in Panetti should apply to all evidentiary hearings.

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Note: Panetti strongly supports the argument that examinations by state facilities (KCPC) is not sufficient to comport with due process.

Note: Panetti suggests that expert assistance is necessary for any state evidentiary hearing to comport with due process.

Note: Because the state court hearing on competency to be executed did not comport with the procedural requirements laid out in Ford, the Court held that the AEDPA did not apply, meaning that the competency to be executed claim had to be reviewed de novo. Where funding for expert assistance had been denied in state post conviction proceedings because state law does not authorize it, counsel should argue in habeas proceedings that Panetti requires the federal courts to review the legal claim for which expert assistance was not permitted de novo without applying AEDPA.

A person who does not have a rational understanding of the reason he or she is to be executed is not competent to be executed: The United States Court of Appeals for the Fifth Circuit held that *Ford* allowed a person to be executed as long as the person knows the fact of his or her impending execution and is aware of the reason the state has given for the execution. As a result, the federal court refused to consider the impact of Panetti's delusions on his ability to rationally understand the reason for his execution. Reviewing this in light of the principles underlying *Ford*, the Court held that the standard applied by the federal courts was too restrictive. Noting that "[a] prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it," the Court held that *Ford* does not foreclose inquiry into whether the inmate has a rational understanding of the basis for his or her execution. Rather, delusions are relevant when they "so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution," and a basis to prohibit an execution if the impairment is so severe that the purposes of the death penalty - - retribution and deterrence of prospective offenders - - is no longer served by carrying out the execution. Despite these strong statements, the Court refused to define "rational understanding" and refused to set down a rule governing all competency determinations. Instead, it remanded the case to the Fifth Circuit with instructions to remand it to the district court for further development of the evidentiary record where factual findings can be made on the impact Panetti's delusions have on his ability to rationally understand the basis for his execution.

Note: In determining that Paneitt satisfied the threshold showing of incompetency to be executed, the Court relied upon evidence that was previously presented along with new evidence. In litigating this type of case, counsel should include all evidence suggesting mental health/competency issues with their client even if the information has already been presented to and/or rejected previously by a court in the same or different capacity.

Dissent: The dissenters disagreed with the majority in all facets, and noted that no evidence was provided from other death-row inmates who see Panetti on a daily basis. This suggests that the Court would consider testimony from death row inmates to be credible.

***Beard v. Stevens*, 127 S.Ct. 2966 (2007)** Certiorari granted, lower court decision vacated and remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Uttecht v. Brown*.

***Uttecht v. Brown*, 127 S.Ct. 2218 (2007)** *(Kennedy, J., joined by, Roberts, C.J., Scalia, Thomas, Alito, JJ.; Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.); Breyer, J., dissenting, joined by Souter, J.)*

In this AEDPA case, the Court held that the federal court erred in rejecting the state court's conclusion that a juror's ability to impose a death sentence was substantially impaired, thereby requiring the juror's excusal for cause. The Court began by tracing its prior decisions on for-cause excusals in death penalty cases, which according to the Court establish four principles: 1) "a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause;" 2) "the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes;" 3) a juror who is substantially impaired in either his or her ability to impose the death penalty or to impose less than death under the state-law framework is to be excused for cause, but a juror who is not substantially impaired cannot be removed for cause based on his or her viewpoint on the death penalty; and, 4) "in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by the reviewing court. Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it. To apply these principles, a reviewing court should consider the entire voir dire."

Here, the state argued that the juror in question was substantially impaired "not by his general outlook on the death penalty but rather by his position regarding the specific circumstances in which the death penalty would be appropriate," even though the juror stated he could consider imposing the death penalty and would follow the law. The Court disregarded this statement, ruling that a juror's "assurances that he would consider imposing the death penalty and would follow the law do not overcome the

reasonable inference from his other statements that in fact he would be substantially impaired in this case." Reviewing the entire voir dire, the Court noted that questionnaires to jurors asking them to explain their attitudes toward the death penalty were distributed before individual voir dire, that the trial court conducted an extensive voir dire and allowed counsel to attempt to rehabilitate jurors who appeared to meet criteria for being excused for cause, and that defense counsel did not object to the juror being excused for cause. Based on these aspects of the record, the Court held that it was error for Ninth Circuit to rule that the juror was not substantially impaired.

Note: The outcome could have been different if an extensive voir dire had not been conducted or if numerous jurors were excused for cause that arguably should not have been. The Court noted the extensive voir dire that was conducted and that numerous jurors were excused for cause over the state's objection. If the rulings were mainly in favor of one party, reliance on the trial court's observations of the juror would be more suspect.

Note: The Court's ruling that "a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause" appears to be grounds to argue that disparate for-cause challenges are unconstitutional. If counsel can establish that similarly situated potential jurors are not challenged for cause by the prosecution, counsel should argue that even if grounds for excusing the juror exist, it should not be allowed because doing so will allow the jury to be drawn from a venire that has been tilted in favor of a death sentence by selective prosecutorial challenges for cause. In this regard, it would be similar to establishing that a prosecutor's race-neutral reasons for exercising a peremptory challenge are pretextual.

Note: The Court ruled that a juror's assurance that he or she could follow the law is not sufficient to overcome the reasonable inference from the juror's other statements that the juror is substantially impaired. Kentucky courts have regularly rejected claims that a juror should have been excused for cause by saying that the juror assured the court that he or she could follow the law. Such rulings should no longer take place and cannot withstand constitutional muster in light of Uttecht's ruling that a juror's assurance that he or she could follow the law is not enough to overcome other evidence that a juror should be excused for cause. The application of Uttecht in this regard should not be limited to excusing jurors because of their death penalty viewpoints, but should also apply to any form of juror bias and any other ground for excusing a juror for cause. The excusal for cause of a juror based on death penalty viewpoints who should not have been excused requires automatic reversal.

Note: The Court ruled that it was appropriate to excuse a juror for cause where the juror could impose the death penalty generally, but not under some of the circumstances which applied to the death penalty prosecution at hand. Counsel should argue that Uttecht requires jurors to be excused for cause if they cannot consider imposing less than death under the circumstances of the case (the facts of the crime and the aggravating circumstances) or cannot consider the particular mitigating circumstances that counsel intends to present. Counsel must be allowed to propound questions that would glean light on this, including questions about what circumstances the juror believes death should be imposed and what mitigators they will or will not consider. Kentucky law has routinely prohibited such questions on the ground that it would be "staking out" the jury or asking it to pre-decide the ultimate issue. Uttecht suggests that these types of questions are permissible, for Uttecht held that a juror who could not impose death unless the juror believed the defendant would pose a future danger should be excused for cause.

Note: Uttecht cites favorably the use of questionnaires asking jurors about their death penalty viewpoints and the use of extensive voir dire where the parties have the opportunity to rehabilitate the potential juror. Counsel should use Uttecht to argue that these procedures should be used in each capital case and to argue that where the opportunity to rehabilitate a juror was not permitted or extensive questioning did not take place, no "deference" to the trial court's ruling on substantial impairment should apply.

Note: Although state law did not require objecting to the excusal of a juror in order to preserve the issue, the Court ruled that defense counsel's failure to object to the juror's excusal was a factor to consider in determining whether the juror's ability to impose death was substantially impaired. In light of this, counsel should be certain to note an objection for the record to any potential trial error even if state law does not require an on-the-record objection to preserve the issue. This includes stating the basis for the ground for the objection as opposed to just generally lodging an objection, and when it comes to issues relating to jurors, objecting when the alleged error takes place rather than at the conclusion of jury selection.

***Fry v. Pliler*, 127 S.Ct. 2321 (2007)** (*Scalia, J., for a unanimous court with exception of footnote 1 and Part II-B; Roberts, C.J., Kennedy, Thomas, and Alito, JJ., joined Scalia's opinion in full; Stevens, Souter, and Ginsburg, JJ., joined as to all but footnote 1 and Part II-B; Stevens, J., concurring and dissenting in part, joined by Souter and Ginsburg, JJ.; Breyer, J., concurring and dissenting in part)*

In this non-capital case, the Court held that the "substantial and injurious effect" standard for assessing harmless error in habeas proceedings, set out in *Brecht v. Abrahamson*, 507

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U.S. 619 (1993), applies where the state appellate court failed to recognize the error and did not review it for harmlessness under the "harmless beyond a reasonable doubt" standard set forth in *Chapman v. California*, 386 U.S. 18 (1967). The question presented also asked whether it makes any difference whether the *Brecht* harmless error standard or the *Chapman* harmless error standard applied. Distinguishing this from asking whether *Brecht* was misapplied in this case, the Court refused to reach the issue of whether the error in this case was harmless, ruling that this issue was not raised in the question presented for review.

Stevens, joined by Souter, and Ginsburg, JJ. and Breyer in part: They believe the Court should have also answered the question whether the constitutional error in this case was harmless under *Brecht*. With the exception of Breyer, they would rule that the exclusion of the testimony of a witness about discussions that may have linked the murder to someone other than the defendant can never be harmless error.

Breyer: He would remand the case for a determination of whether the constitutional error was harmless because the question is not before the court and because the answer cannot be determined from the record.

Supreme Court Grants of Certiorari

Snyder v. Louisiana, No. 06-10119, decision below, 942 So.2d 484 (cert.granted, June 25, 2007)

Petitioner Allen Snyder, a black man, was convicted and sentenced to death by an all-white jury in Jefferson Parish, Louisiana, for the fatal stabbing of his wife's male companion. Prior to trial, the prosecutor reported to the media that this was his "O.J. Simpson case." At trial, the prosecutor peremptorily struck all five African Americans who had survived cause challenges and then, over objection, urged the resulting all-white jury to impose death because this case was like the O.J. Simpson case, where the defendant "got away with it." On initial review, a majority of the Louisiana Supreme Court ignored probative evidence of discriminatory intent, including the prosecutor's O.J. Simpson remarks and arguments, and denied Mr. Snyder's *Batson* claims by a 5-2 vote.

This Court directed the court below to reconsider Mr. Snyder's *Batson* claims in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005. *See Snyder v. Louisiana*, 545 U.S. 1137 (2005). On remand, a bare majority adhered to its prior holding, once again disregarding substantial evidence establishing discriminatory intent, including the prosecutor's references to the O.J. Simpson case, the totality of strikes against African-American jurors, and evidence showing a pattern of practice of race-based peremptory challenges by the prosecutor's office. In addition, the majority imposed a new and higher burden on Mr. Snyder, asserting that *Rice v. Collins*, 546 U.S. 333 (2006), permitted reversal only if "a reasonable factfinder [would] necessarily conclude the prosecutor lied" about the reasons for his strikes. Three justices, including the author of the original opinion, dissented, finding the prosecutor's reference to the O.J. Simpson case in argument to an all-white jury, made "against a backdrop of the issues of race and prejudice," supported the conclusion that the State improperly exercised peremptory strikes in a racially discriminatory fashion. The Louisiana Supreme Court's consideration of Mr. Snyder's *Batson* claims on remand from this Court raises the following important questions:

1. Did the majority below ignore the plain import of *Miller-El* by failing to consider highly probative evidence of discriminatory intent, including the prosecutor's repeated comparisons of this case to the O.J. Simpson case, the prosecutor's use of peremptory challenges to purge all African Americans from the jury, the prosecutor's disparate questioning of white and black prospective jurors, and documented evidence of a pattern of practice by the prosecutor's office to dilute minority presence in petit juries?

2. Did the majority err when, in order to shore up its holding that Mr. Snyder had failed to prove discriminatory intent, it imported into a direct appeal case the standard of review this Court applied in *Rice v. Collins*, an AEDPA habeas case?

3. Did the majority err in refusing to consider the prosecutor's first two suspicious strikes on the ground that defense counsel's failure to object could not constitute ineffective assistance of counsel because *Batson* error does not render the trial unfair or the verdict suspect - - i.e., that failure to raise a *Batson* objection never result in prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984) – a holding directly conflicting with decisions from inter alia the Third Circuit Court of Appeals and the Alabama and Mississippi Supreme Courts?

Stays of Execution

Troy Davis - - The Georgia Board of Pardons and Paroles granted a 90 day reprieve to further consider his clemency petition.

Clarence Carter - - Although the United States Court of Appeals for the Sixth Circuit ruled that the lethal injection case to which Carter intervened must be dismissed because it was not filed within the applicable statute of limitations, the federal district court stayed Carter's execution because the Sixth Circuit's mandate has not yet issued. The mandate was stayed pending the filing of a petition for a writ of certiorari in the United States Supreme Court. Ohio did not appeal the stay and the execution warrant has since expired.

Rolando Ruiz - - In an unpublished order, the United States Court of Appeals for the Fifth Circuit stayed Ruiz's execution to consider his appeal from the denial of a Fed.R.Civ.P. 60(b) motion. No reason for the stay was given. Ruiz was denied habeas relief because his claims were unexhausted and found to be defaulted on the basis that no state avenue existed to go back to state court and raise claims after having already gone through the state court process. Ruiz went back to state court and received a merits-based decision. Based on that, he filed a 60(b) motion arguing that the district court's ruling that claims were procedurally defaulted was in error and that the court should grant relief from the habeas judgment to address those claims on the merits. He also argued that the state court's recent statements that the state habeas system is a failure and the state's knowing and deliberate indifference to it constitutes grounds to excuse any procedural default.

Ex Parte Henderson,
2007 WL 1673130 (Tex.Crim.App.)

Cathy Henderson was sentenced to death for the murder of a baby. Her defense was that the baby hit his head on concrete when she dropped him as she was carrying him, and that she then freaked out and buried the baby. At trial, the state's expert testified that the head injuries to the baby could not have been caused by a fall, but instead had to be from an intentional blow to the head. Twelve years after her conviction, Henderson filed a successive state post conviction action, supported by affidavits and reports, alleging that recent scientific research shows that the type of head injuries the baby suffered could have been caused by an accidental short fall onto concrete. The trial court granted a reprieve to June 13, 2007, so additional evidence concerning this could be developed. Henderson then obtained an affidavit from the expert who testified for the state at trial. This affidavit agreed with the affidavits Henderson already submitted and stated that new scientific developments establish that his testimony at trial is no longer accurate, in that science now shows that the injuries could have been caused by a fall rather than a blow to the head. The Texas Court of Criminal Appeals considered this affidavit to be a "material exculpatory fact." Because of that, the court ruled that Henderson's claim satisfied the statutory requirement that the claim and issue have not been and could not have been presented earlier because the factual or legal basis for the claim was unavailable on the date of the previous petition and by a preponderance of the evidence, but for a violation of the United States Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt. Thus, the court stayed Henderson's execution and remanded the case to the trial court for further proceedings.

Christopher Emmett - - The United States Supreme Court denied a motion for a stay of execution by a five to four vote. By the time of the scheduled execution, the Supreme Court had not acted upon the petition for a writ of certiorari. Because only four votes are necessary to grant certiorari, if the four dissenting from the stay of execution vote in favor of granting certiorari, the case would be rendered moot unless the execution was first stayed. In light of this, the Governor of Virginia granted a reprieve until October 2007, so the United States Supreme Court would have time to act on the petition for a writ of certiorari.

United States Court of Appeals for the Sixth Circuit

***Getsy v. Mitchell*, 2007 WL 2118956 (en banc)** (*Gilman, J., for the court, joined by, Boggs, C.J., Batchelder, Gibbons, Rogers, Sutton, McKeague, and Griffin, JJ.; Merritt, J., dissenting, joined by, Martin, Daughtrey, Moore, Cole, and Clay, JJ.; Martin, J., dissenting; Moore, J., dissenting)*

In this AEDPA case, Getsy was sentenced to death for a murder that he was hired to commit. In a separate trial taking place after Getsy's trial, the person who hired Getsy to commit the murder received less than death and was acquitted of the capital specifications including hiring someone to commit murder. A panel of the United States Court of Appeals for the Sixth Circuit held that these inconsistent sentences violated the *Furman* principle that arbitrary and disproportionate death sentences violate the Eighth Amendment, and that the state court's decision to the contrary was both contrary to and an unreasonable application of clearly established Supreme Court law, namely *Furman* and *Enmund v. Florida*, 458 U.S. 782 (1982), which prohibited a death sentence on someone who did not kill, did not attempt to kill, and did not intend to kill. The panel also granted an evidentiary hearing on a judicial bias claim. Ohio's petition for rehearing en banc was granted, thereby vacating the panel decision. By a vote of 8-6, the en banc court affirmed the federal district court's denial of habeas relief.

No clearly established Supreme Court law prevents a death sentence when a codefendant receives less than death: The Sixth Circuit acknowledged that *Furman* "has come to stand for the general principle that the arbitrary and disproportion imposition of the death penalty violates the Eighth Amendment." But, they construed Getsy's claims to necessarily entail one of two additional premises: "1) that the Eighth Amendment requires a comparative proportionality; or, 2) that a rule of consistency applies regarding death-specification verdicts among separately tried coconspirators." Finding that proportionality review as defined by the United States Supreme Court evaluates a particular defendant's culpability for his crime in relationship to the punishment he received, the court ruled that no Supreme Court law requires the appropriateness of the death penalty to be considered in light of the sentence received by other individuals. In so ruling the court noted that *Enmund*, a case relied upon by Getsy and the panel majority, dealt with the inappropriateness of a death sentence in relation to

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the characteristics of the crime and the criminal without comparing the sentence to those received by similarly situated defendants. Likewise, the court held that the common-law rule of consistency has no application to conflicting verdicts returned by different juries in separate trials. Simply, the court held that "Getsy had no constitutional guarantee that his jury would reach the same results as prior or future juries dealing with similar facts irrespective of the offense with which he was charged. Criminal defendants are instead protected from irrational convictions by the due process requirement that a conviction must be supported by sufficient evidence." Noting that "a court's determination that there is insufficient evidence to convict cannot be equated with a jury's determination that a defendant, for whatever reason, should be acquitted," the court ruled that the man who hired Getsy to commit murder receiving less than death was not enough to establish that the evidence was insufficient to convict or to sentence Getsy to death.

Note: The Sixth Circuit pointed out that Getsy conceded that his death sentence was not arbitrary or disproportionate at the time it was imposed, but instead became unconstitutional when a different jury sentenced the man who hired Getsy to commit murder to less than death. This suggests that a different outcome may be required where the codefendant receiving a death sentence is tried ***after rather than before*** *the inmate who received less than death.*

Majority recognizes inequity of imposing death on killer when man who hired killer gets less than death: The majority recognized that "incongruous results from the separate trials of Getsy and [the man who hired Getsy to commit murder] are a matter of concern. We share that concern, recognizing at the same time that reasonable people can disagree over the relative moral turpitude of the instigator of an assassination on the one hand and the killer hired to carry out the violent act on the other. Nevertheless, we are not empowered to answer this philosophical question by bypassing the limitations that both Congress and the Supreme Court have placed upon our power to grant relief under the circumstances of this case. Perhaps some day the Supreme Court will hold that a comparison between the culpability of hired killer and that of his instigator is constitutionally required, and that inconsistent verdicts arising from their separate trials are unconstitutional."

Getsy is not entitled to an evidentiary hearing on his judicial bias claim: Just after Getsy's trial began, the judge presiding over the trial attended an annual picnic hosted by the county's judges. That year, the picnic was held at the house of a judge whose wife was prosecuting Getsy. The judge and prosecutor spoke at the picnic, and while driving home from the picnic, the trial judge was involved in a single-car accident and was ultimately charged with DUI. The judge did not disclose this to either the prosecution or defense, resulting in them finding out about it through the media. To avoid the appearance of impropriety, a special prosecutor from another county prosecuted Getsy's trial judge for DUI. In state court, Getsy sought an evidentiary hearing to support his judicial bias claim, which focused on two elements: 1) the allegedly improper ex parte contact between the judge and the prosecutor at the picnic; and, 2) the potential conflict of interest arising from the trial judge's own pending prosecution. Because Getsy sought to develop the claim in state court, section 2254(e)(2) of the AEDPA does not prohibit an evidentiary hearing. But, the United States Supreme court recently ruled in *Schriro v. Landrigan*, 127 S.Ct. 1933 (2007), that "in deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petitioner's factual allegations, which, if true, would entitle the applicant to federal habeas relief," and "because the deferential standards prescribed by §2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." Distinguishing Getsy's claim from those where a judge allegedly accepted bribes, the court ruled that Getsy pointed to no events that evidence corruption or actual bias by the trial judge, particularly in light of the fact that a special prosecutor tried the case against the trial judge. Thus, the court held that Getsy was not entitled to an evidentiary hearing on his judicial bias claim.

Trial counsel was not ineffective for failing to adequately prepare an expert witness for his testimony: Getsy argued that trial counsel was ineffective for failing to adequately prepare and present the testimony of his expert witness at the sentencing phase, relying on an affidavit from the expert saying "I do not believe that I was able to communicate the [mitigatory] information that I possessed to the jury due to the lack of time defense counsel spent with me regarding my testimony." The court denied this claim, concluding that the expert extensively discussed this information during his sentencing phase testimony.

Trial counsel was not ineffective for failing to prepare Getsy to give his unsworn statement before the jury: As mitigation, Getsy presented the testimony of fourteen witnesses, including relatives and a psychologist. These witnesses testified about Getsy's difficult upbringing and abusive family circumstances; the lesser sentences received by the two codefendants who pled guilty; Getsy's relationship with and fear of the man who hired him to commit murder; that, at age five, Getsy saw a window blown out by gunfire in the home of his stepfather; and, that Getsy's adoptive father was obsessed with guns and introduced Getsy to guns at a young age. Despite this, Getsy argued that a more thorough investigation and better legal guidance in relation to his unsworn statement to the jury would have permitted Getsy to corroborate the testimony presented by other witnesses.

Rejecting this claim, the Sixth Circuit held that Getsy's better prepared unsworn statement would have been cumulative of the evidence presented to the jury and fails to meet the high bar for demonstrating a constitutional violation as shown by a comparison to other cases granting habeas relief.

The evidence was sufficient to support a conviction on the murder-for-hire aggravator: The court held that Getsy's confession and a witness' testimony that compensation for the murder was discussed with Getsy was sufficient to establish that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, thereby meaning that the evidence was legally sufficient for the jury to convict on the murder-for-hire aggravator.

No cumulative error because no error took place: Although Getsy failed to raise a cumulative error claim in state court, because the Warden did not raise procedural default as a defense, the court held that the Warden waived the affirmative defense. But, after assuming without deciding that cumulative error can form the basis for relief in habeas proceedings, the court held that Getsy's cumulative error claim must fail because there are no errors to cumulate.

Merritt, J., dissenting, joined by, Martin, Daughtrey, Moore, Clay, and Cole, JJ.: They believe both the rule of consistency and the Eighth Amendment requires vacating Getsy's death sentence. In regard to the Eighth Amendment, the dissenters stated, "we simply adhere to the clearly established, common sense principle of *Enmund* that, in a capital case with respect to the *very same* crime stemming from the *very same* facts, the Eighth Amendment does not permit the codefendant with less culpability to receive the death penalty when the codefendant with greater culpability receives a lesser sentence."

Martin, J., dissenting: Martin was extremely troubled by the majority's conclusion that proportionality includes a consideration of the sentence imposed in other unrelated cases but not sentences imposed on coconspirators. In his words, "[t]hat Getsy will be put to death while Santine will be spared, and that the law (at least according to the majority) actually sanctions this result, makes it virtually impossible for me to answer in the affirmative what Justice Blackmun viewed as the fundamental question in *Callins v. Collins*, 510 U.S. 1141, 1145 (1984) - - namely, does our system of capital punishment 'accurately and consistently determine' which defendants 'deserve' to die and which do not?"

Moore, J., dissenting: Moore believes that evidence that the trial judge socialized with Getsy's prosecutor during the trial and that the trial judge was charged with drunk driving, raising the possibility that the judge curried favor with the prosecutor's office in order to garner favorable treatment during his criminal prosecution, was sufficient to warrant an evidentiary hearing on whether the judge was biased against Getsy. In support of this conclusion, Moore noted that whether Getsy's prosecutor could be a witness in the judge's trial and the circumstances in which a special prosecutor took over the prosecution of the judge can only be established and the juror bias claim only proven with further evidentiary development.

***Haliym v. Mitchell*, 2007 WL 2011268** (*Clay, J., joined by, Merritt, J.; Siler, J., dissenting)*
In this AEDPA case, the court noted that "to the extent that a district court bases its finding on a transcript, making no credibility determinations or other original findings of facts, its factual findings are reviewed de novo," and then granted relief on a sentencing phase IAC claim while denying relief on all other claims.

The law of procedural default: To determine if a claim is barred from review by a procedural default, a court must look to the last **explained** state court judgment. If the state court considered the petitioner's alleged error on the merits notwithstanding the fact that the claim was defaulted, then the state court's determination does not rest on a procedural ground that bars federal review. If this is not the case, a court must first determine whether the petitioner failed to comply with an applicable state procedural rule. If so, the court must then determine if the state court actually enforces that state procedural rule. If so, the court must then determine whether the state procedural rule constituted an independent and adequate state ground. If all of these requirements are satisfied, then the petitioner bears the burden of excusing the default by establishing cause for not following the state procedural rule and that he suffered prejudice. Cause requires a showing that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." IAC can constitute cause so long as the IAC claim is not itself procedurally defaulted. Prejudice requires a showing that the errors at trial "worked to the petitioner's actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."

Defaulted claims that are meritless: Applying the above stated law on procedural default, the court found that the claim that the trial court was without jurisdiction because the jury waiver form had not been filed in accordance with state law to have been defaulted and that petitioner's ineffective assistance of counsel claim, which was not defaulted, can serve as a basis to excuse the default because it fails on the merits. The court also found that petitioner's knowing, voluntary, and intelligent jury waiver claim was defaulted, and after undertaking a review of the law governing waiver of the right to a jury trial, ruled that petitioner had not established cause to excuse the default.

Petitioner's confrontation clause rights were not violated by the testimony of a seven year old: Petitioner argued that his right to confront witnesses against him were violated when a seven year old was allowed to testify despite not being able to respond to questions in any meaningful sense

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and not being able to understand an oath, which Petitioner argued deprived him of the right to cross the witness "under oath." In deciding this claim, the court recognized that the opportunity to ask questions that a witness must answer under oath is crucial to the right of cross examination because the oath awakens the conscience and implicates perjury statutes, but ruled that this requirement is satisfied if the witness is able to understand the concept of truth and the duty to present truthful information to the court. Reviewing the examination of the seven year old witness, the court held that the state court's ruling that he could exhibit an understanding of truth and falsity and appeared to appreciate his responsibility to be truthful not to be clearly erroneous.

The lineup was suggestive: "The admission of evidence derived from a suggestive identification procedure violates a defendant's right to due process if the confrontation leading to the identification was so unnecessarily suggesting and conducive to irreparable mistaken identification that the defendant was denied due process of law." In determining whether this is the case, the court first determines if the identification was unnecessarily suggestive and, if so, then determines whether the evidence was reliable despite the impermissible suggestiveness of the identification procedure. After ruling that the claim was not procedurally defaulted because it could not have been raised on direct appeal since it was based on evidence not apparent from the record, the court ruled that the lineup was suggestive because petitioner was the only person in the lineup who was bandaged or dressed in prison clothing.

The suggestive lineup does not require reversal: In determining whether a suggestive identification was reliable, the court considers: 1) the witness' opportunity to view the suspect; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description of the criminal; 4) the level of certainty demonstrated by the witness at the time of the identification; and, 5) the time between the crime and the identification. The court also considered the following factors that suggest against reliability: 1) the witness was acquainted with the victim from four previous encounters before the crime; 2) the witness was only seven years old; 3) the witness thought the suspect's name was Michael, which was the name of the suspect's brother who was also present at the scene of the crime. After noting that the "primary concern expressed in cases discussing the problem with eyewitness identification relates to a witness observing and subsequently identifying a stranger," and that "studies show that children are more likely to make mistaken identifications than are adults," the court ruled that it cannot conclude that the witness' identification was unreliable since the witness knew the difference between petitioner and petitioner's brother, he had a good opportunity to view the suspect during the crime, and had a reason to focus on the perpetrator of the crime that would not ordinarily exist for a mere casual observer.

The mitigating evidence presented at trial compared to that which went undiscovered: At the sentencing phase of his trial, Petitioner gave an unsworn statement and presented the testimony of three witnesses, including an employer who said Petitioner was a good employee and a psychologist who met with Petitioner for only one and one-half hours and who relied on a social history supplied by the court psychiatric clinic and a competency report prepared for trial. He testified that Petitioner suffered from anti-social personality disorder, had an inability to shift focus appropriately when aroused according to environmental demands, had illogical or poor judgment, suffered from an adjustment disorder, and had difficulty feeling emotion. Petitioner's grandmother testified that Petitioner was in a disturbed state of mind because of the loss of his parents and brother over a two-month period due to a heroin overdose, asthma, and a shooting. Petitioner then said he was raised by two beautiful parents, that he felt bad for the victims, and that he regretted his role in the crimes. In post conviction, Petitioner presented expert testimony on the insufficiency of the evaluations that formed the opinions of the expert who testified at trial. According to this expert, the report the trial expert relied upon showed a twenty-five point difference between performance and verbal IQ, which indicates functional brain impairment - - something that was never investigated or presented at trial, even though the report relied upon by the trial expert noted that Petitioner attempted suicide by shooting himself in the left temple of his head. The report also indicated that Petitioner was frequently beaten with a baseball bat and that he saw his father shoot at a motorist for cutting him off while driving. A complete social history investigation would have shown that, as a child, Petitioner was forced to stand naked in a bathtub while his father beat him with a baseball bat, that Petitioner was also beaten with sticks and extension cords, and that Petitioner's father broke Petitioner's mother's ribs. An expert who testified in post conviction also said that it was standard practice not to request a presentence investigation report.

The legal standard for determining IAC at the sentencing phase: Counsel has a duty to conduct a thorough investigation of the law and the facts. Under the ABA Guidelines, which have long been considered guides to the reasonableness of counsel's conduct, counsel has "an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty," which according to the commentary, includes "members of the client's immediate and extended family; medical history, which includes physical injury and neurological damage; and, family and social history, which includes physical abuse, domestic violence, exposure to criminal violence, and the loss of a loved one. In determining whether counsel's investigation in preparation for the mitigation proceeding was reasonable, the focus is on whether the investigation supporting counsel's decision not to introduce mitigating evidence of the type not produced was itself reasonable. In examining the investigation that counsel

made, a court must not consider only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. In assessing counsel's performance, a court must thus consider whether counsel adequately followed up on the leads that were available to them. To show prejudice, a petitioner must show that there is a reasonable probability that, but for the errors of counsel, his sentence would have been different. In assessing prejudice, a court reweighs the evidence in aggravation against the totality of the available mitigating evidence.

Trial counsel was ineffective in failing to investigate and present additional mitigating evidence: Noting that there is no evidence that Petitioner's trial attorneys conducted even the most basic interviews with Petitioner's siblings for the purpose of investigating Petitioner's family background and that counsel failed to discover highly relevant mitigating evidence of Petitioner's background, which was suggested by other evidence known to counsel, the court held that counsel's investigation was deficient. Specifically, the court noted that a report in trial counsel's possession saying that Petitioner's father died of a drug overdose and that Petitioner had shot himself in the head would have put competent counsel on notice that further investigation was required. The court also rejected the idea that the information uncovered in post conviction was presented to the jury during trial, noting that trial counsel did not highlight any of the mitigating evidence, failed to inform the jury of the impact that the loss of Petitioner's family had on him, and presented evidence inconsistent with the fact that Petitioner was abused throughout his childhood, including allowing Petitioner to tell the jury that he had "two of the most beautiful parents you could ever meet," and submitting a report that denied any physical abuse. In regard to prejudice, the court held that the mitigating evidence not presented to the jury at trial was powerful evidence for which, if presented to the jury, there is a reasonable probability that the jury would have returned a lesser sentence. Notably, the court recognized that the sentencing court's questions of witnesses who testified at the sentencing phase support the conclusion that there is a reasonable probability that the unpresented mitigating evidence would have made a difference.

Note: By using statements from the three judge panel that sentenced Petitioner as a basis to establish prejudice from counsel's deficient performance, in essence, the court recognized that statements from jurors on the impact something counsel did or did not do is both competent and weighty evidence in support of satisfying the prejudice prong of an ineffective assistance of counsel claim.

Siler, J., dissenting: Siler believes that counsel conducted a competent investigation and that prejudice cannot be established because the evidence uncovered in post conviction had been presented to the jury, albeit in a different form and in less detail.

***Abdur'Rahman v. Bell*, 2007 WL 2011267** *(Siler, J., joined by, Batchelder, J.; Cole, J., dissenting)*

The federal district court ruled that a claim in Abdur'Rahman's habeas position was unexhausted and procedurally defaulted because he did not seek discretionary review in the Tennessee Supreme Court. While Abdur'Rahman's habeas case was on appeal before the United States Court of Appeals for the Sixth Circuit, the Tennessee Supreme Court promulgated a rule saying that discretionary review need not be sought to exhaust a claim. Because of that, Abdur'Rahman filed a Fed.R.Civ.P. 60(b) motion for relief from judgment, arguing that the state court clarification in the law was an exceptional circumstance under 60(b)(6) that justified relief from judgment so the federal district court could address the merits of the claim that it incorrectly found to be unexhausted and thereby defaulted. The Sixth Circuit originally ruled that all 60(b) motions in a habeas case must be treated as a successive habeas petition. The en banc court reversed. Certiorari was granted and the case was remanded for further consideration in light of *Gonzalez v. Crosby*, 545 U.S. 524 (2005). The en banc court then remanded it to the panel, which, in this opinion held that Abdur'Rahman's purported 60(b) motion must be construed as a 60(b) motion, but that it falls within 60(b)(1) rather than 60(b)(6) making it untimely because it was filed more than one year after the federal district court rendered its judgment on Abdur'Rahman's habeas petition.

Abdur'Rahman's motion is a proper Rule 60(b) motion: In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the United States Supreme Court held that a motion which neither seeks to add a new ground for relief, nor attacks a federal court's previous resolution of a claim on the merits, but instead attacks some defect in the integrity of the federal proceedings, should be construed as a Rule 60(b) motion. *Gonzalez* held that this includes a motion that challenges only the district court's failure to reach the merits of a claim. Because Abdur'Rahman's motion asked the district court to reach the merits of a claim that it previously did not reach, the Sixth Circuit held that, under *Gonzalez*, the motion is properly construed as a 60(b) motion.

Abdur'Rahman's 60(b) motion must be construed as falling under 60(b)(1) not 60(b)(6): 60(b)(6) authorizes relief from judgment for "any other reason justifying relief from the operation of judgment." 60(b)(1) authorizes relief from a judgment based on "mistake, inadvertence, surprise, or excusable neglect." Being that the Tennessee court rule at issue here only "clarified" the law rather than "changed" the law, the Sixth Circuit held that the district court made a "mistake" by ruling that state law required Abdur'Rahman to seek discretionary review in order to exhaust his claims. Because 60(b)(6) cannot be used when the ground for relief falls within one of the narrow subsections of 60(b), this means that Abdur'Rahman's claim cannot fall within 60(b)(6).

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Note: The key here is determining whether the basis for the motion is a "clarification" in the law or a "change" in the law. If it is a change in the law, then it would fall within 60(b)(6).

Abdur'Rahman's 60(b) motion is untimely: Rule 60(b) says expressly that a motion under 60(b)(1) must be filed within one year after the judgment was entered. Because Abdur'Rahman's 60(b) motion was filed more than a year after judgment, the Sixth Circuit held that it was untimely and ordered the case be dismissed.

Note: The court assumed that the one-year statute of limitations begins to run from when the district court judgment is entered, without discussing whether "judgment" in Rule 60(b) should be interpreted to mean final judgment as is the case for determining whether a party receives the benefit of a new rule decided while a case is pending on direct appeal. In regarding to CR 60.02, Kentucky's equivalent of 60(b), it appears that the one year has to begin when the judgment is final. This is because, in Stopher, the Kentucky Supreme Court stated that a CR 60.02 motion is not appropriate until after 11.42 proceedings.

Cole's dissent: Judge Cole dissented on four grounds. First, he believed that proper procedure required the panel to remand the case to the district court for a determination of whether the 60(b) motion should granted. Second, the argument that the 60(b)(6) motion should be construed as a motion under 60(b)(1) was already rejected by the en banc court and thus could not be revisited by the panel. Third, he believed that the Abdur'Rahman's 60(b) motion was properly filed under 60(b)(6) and should not have been construed as a 60(b)(1) motion. This was because the federal district court did not make a "mistake," but instead had no reason to rule otherwise, until the state clarified the law, and because Sixth Circuit precedent says that even though legal errors are cognizable under the "mistake" provision of 60(b), it is also cognizable under 60(b)(6) when "exceptional circumstances" are present. Finally, he believed that Tennessee clarifying its law during the pendency of this case to make clear that seeking discretionary review is not required to exhaust a claim is an extraordinary circumstance justifying relief from judgment under 60(b)(6), particularly because ignoring Tennessee's procedural law would severely undermine the AEDPA's purpose of preserving comity between state and federal courts.

***Hartman v. Bagley*, 2007 WL 1976005** *(Gilman, J., joined by, Daughtrey, J.; Clay, J., dissenting)*

In this AEDPA case, the court addressed: 1) whether sufficient evidence supported Hartman's kidnapping capital specification and separate kidnapping conviction; 2) whether trial counsel was ineffective at the sentencing phase; 3) whether the trial court gave an improper "acquittal-first" jury instruction; and, 4) whether the prosecution's statements during the penalty phase amounted to prosecutorial misconduct. After noting that AEDPA only applies to "any claim that was adjudicated on the merits in State court proceedings," the court affirmed the district court's denial of relief on all grounds.

Hartman's IAC claim is not barred from review by the doctrine of procedural default but is meritless: In determining whether a claim is procedurally defaulted for purposes of federal habeas review, a four-part test is applied: 1) the court must determine that there is a state procedural rule with which the petitioner failed to comply; 2) the court must determine whether the state courts actually enforced the state procedural sanction; 3) the state procedural rule must have been an adequate and independent state procedural ground upon which the state could rely to foreclose review of a federal constitutional claim; and, 4) if the court has determined that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate that there was cause for his failure to follow the rule and that actual prejudice resulted from the alleged constitutional error. Hartman's IAC claim suffered from two potential defaults: 1) the state court ruled that res judicata barred the claim because Hartman failed to timely raise it on direct appeal; and, 2) he failed to timely appeal the state court's ruling. Because the IAC claim is primarily based on evidence outside the record, the court held that the state court's reliance on its own procedural rule requiring it to be raised on direct appeal because it was based on the record to be erroneous. As for the second form of default, the court held that neither Hartman nor his attorney receiving formal notice of the state trial court's order denying post conviction relief was sufficient to establish cause to excuse the default. As for prejudice, the court held that prejudice to overcome the default is intertwined with whether trial counsel's alleged failures prejudiced Hartman, so the court addressed this as one issue and denied relief because no evidence cited by Hartman "differs in a substantial way - - in strength and subject matter - - from the evidence actually presented at sentencing."

Hartman's jury was not given an "acquittal first" jury instruction: The court distinguished this case from cases where the jury was told that it must recommend death if all twelve members of the jury find that the aggravating circumstances outweigh the mitigating circumstances on the ground that Hartman's jury was also told that if you find that the state failed to prove that the aggravating circumstances outweigh the mitigating factors, you will then proceed to determine which of the possible life sentences to recommend. The court interpreted this second part of the instruction to unambiguously inform the jury that if it was not unanimous regarding whether the aggravating circumstances outweigh the mitigators, then a life sentences must be imposed.

Likewise, the verdict sheet was constitutional because it paralleled the instructions by providing on the life verdict form a finding regarding whether the aggravating circumstances outweighed the mitigating factors.

Prosecutor's sentencing phase comments were improper but do not require reversal: The court ruled that the prosecutor's statements to the jury encouraging it to consider the means of the killing and post-mortem mutilation of the body as aggravating circumstances even though state law did not provide that they were aggravators was improper but that the error was harmless in light of the fact that the jury convicted Hartman of kidnapping and the mitigating evidence was weak.

The evidence was sufficient to support the kidnapping aggravator: The court acknowledged that the Eighth Amendment requirement that an aggravating circumstance narrow the class of people eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder means that something above the requirements to convict for kidnapping must be found in order for kidnapping to be an aggravating circumstance. The court held that this requirement was satisfied here because the diminutive size of the victim compared with Hartman and the rapidity of her death following the slitting of her throat strongly suggest that the victim was restrained in order to inflict additional non-lethal harm.

Clay's dissent: Clay believed that trial counsel performed ineffectively at the sentencing phase and that an "acquittal-first" jury instruction was given to Hartman's jury. He would have reversed on both of these grounds.

Kentucky Supreme Court

***Commonwealth v. Bussell*, 2007 WL 1790691 (Ky.) (final, to be published) (unanimous unauthored opinion)**

The circuit court granted Bussell's RCr 11.42 motion on the basis of a *Brady* violation, and ineffective assistance of counsel at both the guilt or innocence and the sentencing phases of Bussell's capital trial. The Kentucky Supreme Court affirmed.

Standard of review: The court defers to findings of fact and determinations of witness credibility made by the trial judge and will not reverse on the basis of a finding of fact unless such finding is clearly erroneous.

The government's obligation to disclose evidence: The suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment. Under *Brady v. Maryland*, 373 U.S. 83, evidence is material if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. The duty to disclose exculpatory (material) evidence applies regardless of whether there has been a request by the accused, includes evidence known to others acting on the government's behalf in the case (i.e, police), and includes impeachment as well as other exculpatory evidence.

The undisclosed evidence was material: Whether the evidence at issue is material under *Brady* is reviewed de novo. Applying this standard, the court held that the failure to disclose police reports containing the following information was material: 1) there were new pry marks on the outside and inner portions of the door leading to screen portions of the victim's home as well as a broken lock on the door suggesting forced entry; 2) a plaster cast of a tire print found in the victim's yard; 3) the victim's gas bill was paid two days after she allegedly disappeared; 4) a statement from a confidential informant suggesting two other possible suspects in the victim's death; 5) a store owner's statement that the black man seen in the area of the victim's house on the day of her disappearance had just been in his store; 6) an employee of a local radio station had checked a transmitter daily near the place where the victim's body was found; 7) the victim had just had a new carpet installed, which prevented her front door from closing, suggesting easy entry to her house with minimal force; 8) a report stating that a local store owner saw a black man or someone other than Bussell walking up the victim's driveway or her neighbor's driveway at about 4 p.m. on or about the day the victim disappeared; and, 9) a statement from a confidential informant that he had seen a red GMC pickup backed up to the victim's home between 11 p.m and 11:30 p.m. on the night the victim disappeared. Although there was contrary testimony about whether these reports were turned over to counsel, the court found the circuit court's ruling that it was more likely than not that the evidence was not disclosed to be conclusive and then agreed with the circuit court that the evidence was material under the totality of the circumstances because "the cumulatively effect of the information contained in those reports certainly suggests a reasonable probability that had the information been disclosed, the outcome of Bussell's trial would have been different."

Note: By finding the circuit court's ruling that it was more likely than not that the evidence had not been disclosed to trial counsel to be a conclusive finding of fact, the court, in essence, ruled that the preponderance of the evidence standard applies to determining whether evidence was disclosed.

Alternative suspect evidence is exculpatory even if it does not eliminate the defendant as the culprit: The Commonwealth argued that the undisclosed evidence was not material because it did not eliminate Bussell as a suspect. Relying on Kentucky case law holding that "a defendant has the right to introduce evidence that another person committed the offense with which he is charged,' and that

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"this right may be infringed only where the defense theory is unsupported or far-fetched," and that *Brady* only requires the evidence to be material to guilt or punishment, the court rejected the Commonwealth's argument by holding that "exculpatory evidence must only meet the requirement established for materiality — that is, there must be a reasonable probability that had the evidence been disclosed to the defendant, the outcome of the trial would have been different.

Standard for determining ineffective assistance of counsel: It requires a showing that counsel's performance "fell below an objective standard of reasonableness and was so prejudicial that the defendant was deprived of a fair trial and reasonable result," which means a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability is a "probability sufficient to undermine confidence in the outcome."

Trial counsel was ineffective at the guilt phase: Bussell alleged that counsel was ineffective for failing to interview and investigate a state witness, which if done, would have shown that the witness was of limited mental ability, routinely taken advantage of by neighbors, told the police three different versions of his story, that he had a bad reputation for truthfulness, that he told someone the location of the victim's body before it was discovered, and that the witness' testimony directly contradicted his statements to the 911 operator. Counsel also failed to offer the statement of a witness, which was in his possession, suggesting that the item stolen from the victim during the murder may have disappeared well before the murder. Finally, Bussell argued that trial counsel failed to reasonably educate himself in the various forensic fields, making his future decision to retain experts in those fields unreasonable. If he had educated himself in the forensic fields, trial counsel would have been able to present expert testimony contradicting that presented at trial concerning paint samples from Bussell's car and hairs found in Bussell's car. Because there was no evidence in the record that trial counsel attempted to educate himself in these forensic fields, the court refused to consider his decision to not consult independent experts to be a tactical decision. Without explaining why, the Court held that the circuit court did not err in finding counsel's performance deficient and that Bussell was prejudiced by the deficient performance.

Standard for determining ineffective assistance of counsel at the sentencing phase: According to the court, "defense counsel has an affirmative duty to make reasonable investigation for mitigating evidence or to make a reasonable decision that particular investigation is not necessary. In evaluating whether defense counsel has discharged this duty, the court must determine whether a reasonable investigation should have uncovered such mitigating evidence. If so, then the court must determine if the failure to present this evidence to the jury was a tactical decision by defense counsel. If the decision was tactical, it is given a strong presumption of correctness and the inquiry is generally at an end. However, if the decision was not tactical, then the court must evaluate whether there was a reasonable probability that, but for the deficiency, the result would have been different."

Trial counsel was ineffective at the sentencing phase: In post conviction, trial counsel testified that he never sough medical, school, employment, or jail records, and that he was unable to locate mitigation witnesses to testify at trial. Yet, at the time of trial, defense counsel had in its possession a KCPC report listing all eleven of Bussell's siblings and the towns in which they lived. The Commonwealth attempted to defuse this by arguing that Bussell was uncooperative in assisting his defense team in mounting a proper mitigation case, leaving counsel with residual doubt as the only mitigating circumstance. Noting that residual doubt is not a mitigating factor and that Bussell's uncooperativeness did not relieve trial counsel of the duty to conduct a reasonable investigation for mitigating evidence, the court rejected the Commonwealth's argument. Further, the court held that trial counsel's failure to investigate cannot be considered tactical because the record does not support the conclusion that trial counsel even attempted to ascertain whether all possible mitigating evidence might assist his client. Thus, counsel was deficient. Merely by saying that trial counsel "failed to present a mitigation case," the court held that there is a reasonable probability that, if not for counsel's deficient performance, the outcome of the sentencing phase would have been different.

Note: In cases where residual doubt was presented as mitigation at the exclusion of other mitigating evidence or at the exclusion of conducting a full mitigation investigation, counsel should use Bussell to argue that trial counsel was ineffective because residual doubt is not a mitigating circumstance.

Note: On multiple occasions, the court assumed that trial counsel failed to do something because the record did not show that it had been done. Thus, counsel should argue that, under Bussell, there is a presumption that counsel did not do x when the record does not support that x was done.

Note: By finding that prejudice existed because counsel failed to present a mitigation case without explaining why this is so, Bussell, arguably, stands for the proposition that a presumption of prejudice exists where no mitigation case was presented or where the mitigation focused solely on residual doubt.

Note: The court noted that "the Brady violation in this case was compounded by the ineffective assistance of Bussell's trial counsel," and that the reasonable probability standard for establishing prejudice from

counsel's deficient performance is the same reasonable probability standard used to prove a Brady violation. In cases where a Brady violation and ineffective assistance of counsel has been alleged, counsel should argue that the prejudice from counsel's ineffectiveness and the materiality from the Brady violation should be analyzed collectively to determine whether together they create a reasonable probability of a different outcome.

***Bowling v. Commonwealth*, 224 S.W.3d 577 (Ky. 2006)** *(Johnstone, J., for unanimous court)*

Bowling, who claims to have the mental age of a eleven year-old, filed a CR 60.02 motion arguing that *Roper v. Simmons*, 543 U.S. 551 (2005), and the Eighth Amendment to the United States Constitution prohibit the execution of individuals with the mental age of a juvenile. Bowling argued, in the alternative, that the prohibition against executing chronological juveniles should be extended to the mental age juvenile and that the increased mitigating value of functioning at the level of a juvenile resulting from the recently recognized categorical prohibition against juveniles entitles him to a new sentencing hearing where the jury can give meaningful consideration to the increased mitigating value of suffering from a juvenile mental age. The Kentucky Supreme Court failed to address extending *Simmons* to the mental age juvenile, but denied relief on all other grounds.

Bowling's mental age claim and new sentencing hearing claim is procedurally defaulted: Relying on Bowling's mental retardation case, the court reiterated that "a decision recognizing a new constitutional right would not be retroactively applied if the state in which the conviction was obtained had in effect at the time of the condemned person's trial a statute affording the same right." Because, at the time of Bowling's trial, Kentucky law prohibited the execution of anyone under age sixteen, the court held that Bowling could have presented at trial his claim that his execution was barred because he had the mental age of an eleven year old. Likewise, the value of suffering from the mental age of an eleven year old was the same at trial as it is now since an eleven year could not have been executed at either point. Thus, the court held that Bowling procedurally defaulted both of these claims the claim.

***Roper v. Simmons* does not prohibit the execution of the mental age juvenile:** Bowling argued that the *Simmons* Court's failure to use the word "chronological" in reference to juvenile or youth, as it had done in previous decisions involving the death penalty for juveniles, meant that the Court intended *Simmons* to apply to anyone who functioned as a juvenile regardless of the person's chronological age. The court noted that it "do[es] not necessarily disagree that, in theory, the broad concepts espoused by the Supreme Court could pertain to those who function at the mental level of a juvenile," but denied Bowling's mental age claim on the ground that *Simmons* only applies to chronological juveniles. In so ruling, the court noted that Justice O'Connor rejected the concept of mental age as bar to execution in her concurring opinion in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and no justice explicitly disagreed with Justice O'Connor on the concept of mental age.

Note: Because Penry upheld the execution of chronological juveniles, whether Penry can be relied upon for its statements on mental age is arguable.

Note: Because no judge has an obligation to respond to a concurring or dissenting opinion, the fact that none of the Justices accepted or rejected Justice O'Connor's statements on mental age should have no bearing.

Note: The Kentucky Supreme Court never addressed whether Simmons should be extended to the mental age juvenile. As the Kentucky Supreme Court recognized, the mental age juvenile suffers from the same limitations that resulted in the United States Supreme Court outlawing the execution of chronological juveniles. Thus, the expansion of Simmons to mental age juveniles remains fertile ground in Kentucky.

Note: By recognizing that chronological juveniles and mentally retarded juveniles suffer from the same limitations, the door has been opened to file equal protection claims arguing that the equal protection clause of the state and federal constitutions require the mental age juvenile and the chronological juvenile to be treated the same in regard to execution. ■

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