The Advocate

Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

Volume 29, Issue No. 5 November 2007

Restoring Hope
Using Social Workers with Public Defenders

Creating Communities of Justice and Hope through Social Work Interns

• Drug court can change lives - Program being prepared for Boone and Gallatin 07

• States Seek Alternatives To More Prisons

DPA ON THE WEB

DPA Home Page http://dpa.ky.gov/default.php

DPA Education http://dpa.ky.gov/education.php

DPA Employment Opportunities:
http://dpa.ky.gov/eo.php

***The Advocate* (1978 - Present)**:
http://dpa.ky.gov/library/advocate.php

Legislative Update:
http://dpa.ky.gov/library/LegUpdate.php

Defender Annual Caseload Report:
http://dpa.ky.gov/library/caseload.php

Please send suggestions or comments to DPA Webmaster
100 Fair Oaks Lane, Frankfort, 40601

****

DPA'S PHONE EXTENSIONS

During normal business hours (8:30a.m. - 5:00p.m.) DPA's Central Office telephones are answered by our receptionist, Alice Hudson, with callers directed to individuals or their voicemail boxes. Outside normal business hours, an automated phone attendant directs calls made to the primary number, (502) 564-8006. For calls answered by the automated attendant, to access the employee directory, callers may press "9." Listed below are extension numbers and names for the major sections of DPA. Make note of the extension number(s) you frequently call — this will aid our receptionist's routing of calls and expedite your process through the automated attendant.

Appeals - Peggy Shull	#162
Capital Trials - Connie Holland	#220
Computers - Ann Harris	#130
Contract Payments - Beth Webb	#403
Education - Lisa Blevins	#236
Frankfort Trial Office	(502) 564-7204
General Counsel - Tracy Hughes	#108
Human Resource Manager -Georgieanne Reynolds	#139
LOPS Director - Al Adams	#116
Post-Trial Division - Jennifer Withrow	#201
Juvenile Dispositional Branch - Hope Stinson	#106
Law Operations - Carol Hope	#110
Library - Will Coy-Geeslin	#119
Payroll/Benefits - Chuck Curd	#136
Personnel - Cheree Goodrich	#114
Post Conviction	(502) 564-3948
Properties - Kay Stivers	#218
Protection & Advocacy	(502) 564-2967 or #276
Public Advocate - Tracy Hughes	#108
Recruiting - Patti Heying	#186
Travel Vouchers	#118
Trial Division - Sherri Johnson	#165

Table of Contents

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.

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

The Advocate strives to present current and accurate information. However, no representation or warranty is made concerning the application of the legal or other principles communicated here to any particular fact situation. The proper interpretation or application of information offered in *The Advocate* is within the sound discretion and the considered, individual judgment of each reader, who has a duty to research original and current authorities when dealing with a specific legal matter. *The Advocate*'s editors and authors specifically disclaim liability for the use to which others put the information and principles offered through this publication.

Department of Public Advocacy
Education & Development
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006, ext. 236
Fax: (502) 564-7890
E-mail: Lisa.Blevins@ky.gov

Paid for by State Funds. KRS 57.375

FROM THE EDITOR...

Jeff Sherr

Last year's General Assembly funded a Social Worker Pilot providing the DPA with 4 social worker positions. The Urban Studies Department of the University of Louisville is currently analyzing this pilot to determine the impact on our clients, their families and the budgetary savings for the Commonwealth in providing appropriate treatment and rehabilitation rather than incarceration. In **Restoring Hope: Using Social Workers with Public Defenders** and **Creating Communities of Justice And Hope Through Social Work Interns,** Dawn Jenkins and Jennifer Withrow describe the history Social Worker Pilot Project and another effort to provide social work interns for DPA offices.

Kevin Kelly, of the *Kentucky Enquirer*, reports on the difference that Drug Court can make in the lives of clients ready to make a change in their lifestyle in **Drug Court Can Change Lives -Program Being Prepared For Boone And Gallatin 07**.

John Gramlich, of *Stateline.org*, reviews the continuing need to find constructive and effective alternatives to incarceration in **States Seek Alternatives to More Prisons.**

In **Any Place Where a Person Sleeps**, Samuel N. Potter concludes his review of the 2006 sex offender registry requirements. The article examines a case from Kenton District Court that ruled the new law violated the Ex Post Facto Clause of the Constitutions of the United States and Kentucky.

In **Just Like Humpty Dumpty, Shaken Baby Syndrome Has Fallen Down,** Susan Jackson Balliet and Erin Hoffman Yang discuss some of the important developments in scientific and medical thinking on the subject of shaken baby syndrome and a Greenup County case in which the judge found that this syndrome passes muster under *Daubert.* ■

RESTORING HOPE
USING SOCIAL WORKERS WITH PUBLIC DEFENDERS

By Dawn Jenkins, MSW, and Jennifer G. Withrow, MSW

"My client was looking for just one person to believe in him. Even his parents had turned their backs on him. I was that one person."

— Jacque Joiner, MSW,
Covington Public Defender's Office

"The primary mission of the social work profession is to enhance human well-being and help meet the basic human needs of all people, with particular attention to the needs and empowerment of people who are vulnerable, oppressed, and living in poverty…social workers promote social justice and social change with and on behalf of clients," according to the National Association of Social workers Preamble.

Public Defenders are advocates for needy or indigent juveniles and adults who are accused of "serious crimes" or those whose legal action could result in detainment and the loss of liberty. (KRS Chapter 31)

Together, social workers and public defenders are able to successfully:

- Divert persons with significant social and economic barriers to services and treatment so that they can successfully transition into their communities and become productive citizens;
- Provide judges with relevant mitigating information on their clients' health, mental health, and social history, as well as viable alternatives to incarceration;
- Save Kentucky money in incarceration costs by diverting persons with addiction and mental illness to community-based treatment; and
- Impact the overall rate of persons likely to re-enter the criminal justice system.

I support using social workers in defender offices. The more information I have about a client - - - whether before trial or at sentencing - - - the better off I am. I find myself doing social work because neither our court nor our local public defender currently has a social worker on staff.

— Oldham County Circuit Judge

National View on Whole Client Defending

"Holistic law is predicated on the belief that nothing happens out of context. Falling ill or becoming involved in a legal matter does not happen in a vacuum. Rather, a process or series of events is required to bring the person to the point where he develops cancer or she finds herself enveloped in a nasty divorce," according *to* Bill van Zyverden, Founder, The International Alliance of Holistic Lawyers.

Since the early 1990's DPA has had as one of its core values and long term goals, holistic client representation. One of DPA's long term goals is service to The Whole Client. This goal states, "The Department will develop the capacity to represent the whole client, working with their families and developing disciplines such as social workers, alternative sentencing advocates, mental health specialists, drug treatment providers, community defending, specialty courts, and team child."

The agency began to work to implement this goal using alternative sentencing workers in the 1990s funded initially by a grant from the Sentencing Project. Mitigation specialists, many with social work degrees, were hired to assist in capital cases. Then in 2002, DPA received a federal grant to partner with colleges of social work and place social work interns in trial offices. These experiences helped prepare the agency for the current opportunity to integrate social workers into DPA as part of the defense team.

Using social workers as an integral part of a Public Defender team is not a new concept. Several states are using social workers to great success for individuals and the criminal justice system.

"My 47 year old client had been in and out of jail at least 5 prior times, but never once treated for his addiction. As a result of my intervention, he is clean and is a graduate of the *Healing Place Silver Chip Program*. He will soon complete Mortuary School."

— Jacque Joiner, MSW
DPA Covington

The Bronx Public Defenders, Baltimore Public Defenders, Maricopa County Public Defenders, Colorado Public Defenders, and Rhode Island Public Defenders are using a holistic approach to serving individuals with significant economic and social barriers. Social workers have the training and ethical and professional standards that make them appropriate members of a successful defense team. They are trained to assess health and mental health problems, find needed treatment and resources appropriate for each individual, and have the skill and will to assist in a client's successful transition from jail to their families and communities.

The social service workers in Rhode Island, while affecting thousands of lives, also saved the state $15 million dollars. Colorado realized a savings of $4.5 million, in one county alone. Their success includes diverting chronically mentally ill adults from jails to community case management and treatment. Through social worker intervention, jail confinement between arrest and sentencing was shortened, thus saving their state money.

Kentucky's View: The Social Worker Pilot Project

In some regards, the Department Of Public Advocacy is the largest law firm in Kentucky. Unlike other law firms, their clients are needy juveniles and adults who enter the criminal justice system with very complex economic and social ills. By serving only the criminal complaint of individuals, and not addressing the root cause of criminal activity, defenders do a disservice to them and to the criminal justice system. The bottom line***, by serving the whole client, defenders can reduce the number of persons re-entering the justice system and save taxpayer's money.***

After receiving necessary legislative funding to create the Social Worker Pilot Project, a core group of committed individuals, including educators from the Kentucky schools of Social Work, advocates, public defenders, and social work professionals designed the Pilot. They created data collection tools to measure successful outcomes including cost savings and program effectiveness.

In September 2006, DPA hired the first staff social worker. Three of the four social workers have master's degrees in social work. Each has bachelor's degrees in social work. DPA conducted office orientations and held a week-long certified training for the new social workers and attorneys. The Pilot began in October 2006 and was completed this month, October 2007. Pilot offices include the Owensboro, Morehead, Covington, and Bowling Green Trial Offices. Combined the Pilot covers 17 counties.

DPA social workers begin working with clients from the time each is appointed by the court, and conclude only after six months following the disposition of that client's case or until the client is stable. DPA's social workers have been 100% successful in finding available beds and outpatient treatment, although it has required going to other states or adjacent counties.

DPA social workers are responsible for a variety of services from conducting mental health and substance abuse assessments to locating treatment. ***"When I call a treatment provider for a client, the facility responds more quickly than if the attorney calls. Facilities want to know we have already made an assessment," says Rachel Pate, BSW, Owensboro, "Building sustainable relationships with service providers is also important."*** DPA social workers also work with attorneys to create alternative sentencing plans for judicial review, and assist in the client's transition from jail to treatment and from treatment into the community. During the course of the pilot, the typical person assigned a social worker has been someone with a history of alcohol or drug dependency or a person with signs or symptoms of mental health problems.

"One of the major challenges for persons who are dually diagnosed with addiction and mental illness and seeking recovery is the lack of services in jails and prisons and in the community. Drug Court won't take them and community programs are limited. I believe without my advocacy, my most recent 21-year-old client would be untreated in our local jail versus receiving the treatment he needs at Georgetown Treatment Program, where I was able to get him in."

— Sarah Grimes, MSW
DPA Morehead

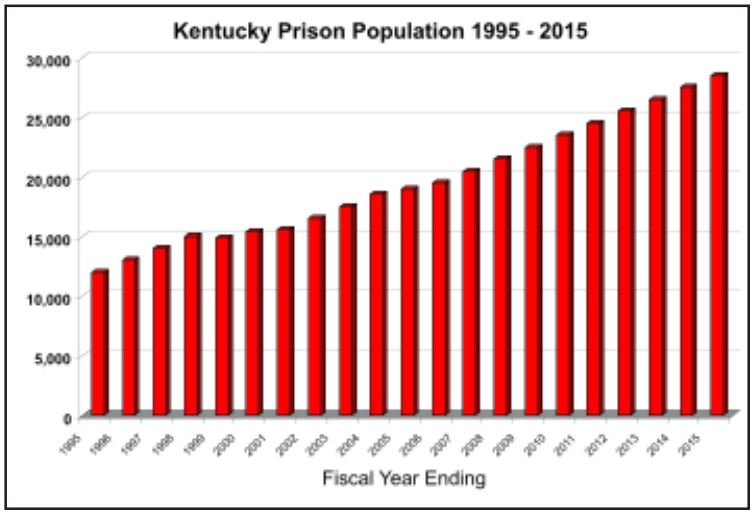
Measuring Success

The Urban Studies Department, University of Louisville is currently analyzing the data collected from the over 321 people served during the one year Pilot. This analysis will be presented in the form of an objective report due on December 1, and presented to the 2008 Kentucky Legislature. Report findings will include an evaluation of the economic and social problems facing DPA clients. The report will present numbers for referrals to treatment and successful completion of treatment. It will present successful alternative sentencing options such as employment and education.

DPA implemented the pilot at a time when Kentucky's prison population is over 22,000. Jails are 22% over capacity, and prisons are full. 1000 to 2000 new inmates are being added to the prison population each year, and no new prisons are being built.

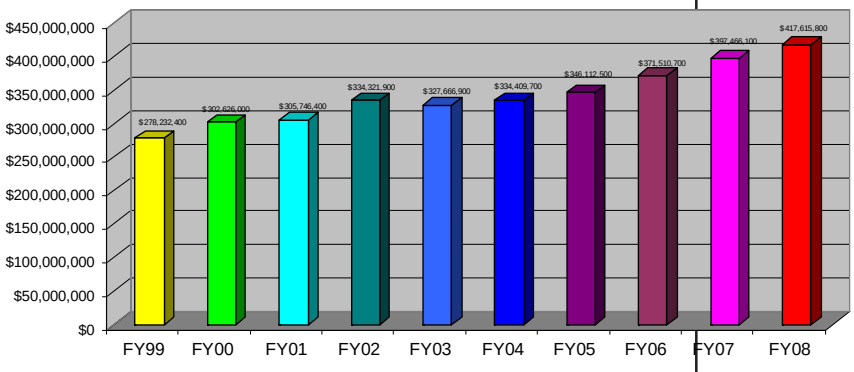
Continued on page 6

Continued from page 5



The Pilot report will determine the savings to the Commonwealth when using a social worker to divert needy persons to treatment versus incarcerating them in jail, prison or a juvenile treatment facility. Daily incarceration costs add up: $36 average per day for and adult in a county jail, $68.00 average per day for prison, and $200 to $422 per day for juvenile treatment. **The Department of Correction's Budget is higher than it has ever been at $417 million in 2008.** These costs do not include collateral costs of incarceration such as foster care for children, which is $22 per day for each child, and the Kentucky Transitional Assistance Program, which is $186 per month for one child. ***Yet, by diverting just three clients from jail, prison or detention to treatment, the Commonwealth can pay the salary, benefits, and operating expenses for one social worker, $42,000.***

The Cost of Incarceration



Turning Lives Around

What is the value to Kentucky when someone successfully reintegrates into the community, works again, becomes a mother again? DPA clients report that following intervention from their DPA social worker, they were able to regain custody of their children. Others report completing substance abuse treatment and staying clean. Still others have obtained job training, maintained employment, and paid victim restitution and fines.

We know from a recent University of Kentucky study that treatment works and treatment saves money.

- **45.3% increase in full-time employment 12 months after treatment**
- **63.9% of follow-up clients reported alcohol abstinence 12 months after treatment**
- **Drug related arrests were reported by 73.3% fewer clients 12 months after treatment**
- **the state gained about $100 million by spending about $25 million on treatment instead of prosecuting and jailing offenders.**

Yet, only 18% of people who need treatment are receiving it. (President Bush, 2003 National Drug Control Strategy)

University of Kentucky
Center on Drug and Alcohol Research

Rachel Pate

Owensboro Social Worker, Rachel Pate, BSW graduate of Brescia University, helped her 42 year old client turn his life around. He had been arrested 32 times on drug charges, fleeing and evading, and alcohol charges. His criminal activity began when he was a child. Yet, no one had ever successfully explained chemical dependency and his options for recovery. Rachel gave him the hope he needed through alternatives to incarceration. The client has remained in treatment and recovery. The inpatient treatment program reported he is on the road to recovery.

DPA social workers are providing a missing link between the criminal justice system and the treatment community. DPA social workers are providing a missing link between the criminal justice system and the treatment community. Rachel worked with the River Valley Case Management providers to help change their policy and procedures regarding the incarcerated population. "As part of Rachel's advocacy, River Valley Comprehensive Care Center developed a policy that our case managers would provide services to mentally ill inmates prior to their being released from jail, thereby, assuring that mentally ill clients receive the seamless services," said Karen Thompson, Director of Case Management, River Valley Comp. Care.

DPA social workers work closely with drug court officials. Morehead Social Worker, Sarah Grimes, MSW and graduate of the University of Kentucky, worked with a client facing 1-5 years in prison. Sarah composed a treatment recommendation plan including a drug court referral. The client was granted a 3 year diversion, contingent on her successful completion of Rowan County Drug Court. Since entering drug court the client has had all negative urine drug screens and met all requirements of drug court.

DPA social workers are experts in working with juvenile offenders, who without early intervention, are at risk of becoming adult offenders. "I worked with a 15 year old juvenile who was to be charged as an adult on two charges including burglary 1st and robbery 1st. He was also suspended from school for two years. After her intervention, the client returned all the stolen items and made restitution. He was deeply remorseful for his actions. He came to understand his addiction to marijuana. He entered substance abuse recovery and individual counseling, for family problems. He was admitted back into high school. Today, he plays football for Warren County High School. The judge gave him a second chance and now he has the tools to succeed," described Kita Clement, MSW, a graduate of Western University School of Social Work.

Kita Clement

DPA's Budget Request

DPA is requesting $2.3 million in FY09 and $2.4 million in FY10 to expand this social worker program to every field office and to post-trials. This will be an investment that will pay off in real dollars by reducing incarceration levels. In addition, lives will be repaired and restored and communities will be healed.

Through the combined effort of the Social Worker Pilot Project, DPA is better able to address the complex economic and social needs of our most troubled clients. Our social workers clearly made a difference in the lives of the 361 clients served during the Pilot. DPA's client's success can be counted as a success for the criminal justice system. **"Every client whose life is restored today is less likely to re-enter the criminal justice system tomorrow," says Ernie Lewis, "I am hopeful the 2008 Kentucky legislature will find value in the Social Worker Pilot and fully fund social worker in the 26 remaining defender offices in 2009-10.** ■

PUBLIC ADVOCACY RECRUITMENT

The Kentucky Department of Public Advocacy seeks compassionate, dedicated lawyers with excellent litigation and counseling skills who are committed to clients, their communities, and social justice. If you are interested in applying for a position please contact:

Patti Heying
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
Tel:(502) 564-8006; Fax:(502) 564-7890
E-Mail: Patti.Heying@ky.gov

Patti Heying

Further information about Kentucky public defenders is found at: http://dpa.ky.gov/

Information about the Louisville-Jefferson County Public Defender's Office is found at: http://www.louisvillemetropublicdefender.com/ ■

Creating Communities of Justice and Hope through Social Work Interns

By Jennifer G. Withrow, MSW

Social Work Internship Requirements

Students working towards a degree in Social Work are required to complete internships within an approved agency. The purpose of an internship is to provide the student guided experiences to practice the skills they learn though classes. While there are some variations, students are typically required to complete 16 hours a week in the placement, which can range from 1 semester to a 2 year placement. Social Work interns are required to be supervised by a MSW (or in a few circumstances a BSW) while the they complete their internships. The minimum amount of time the student must spend in structured supervised time with his or her MSW supervisor is one hour a week. MSW supervisors must also be available for additional questions and guidance as needed by each individual student.

Expansion of DPA's Internship Program

DPA's social work intern program has rapidly expanded over the past two years. Not only has DPA witnessed an expansion in the number of social work interns completing internships with DPA, but also the number of offices that are being served. DPA has secured approved practicum placement agreements with 10 additional schools of social work, from Kentucky, Ohio, and Indiana, bringing the number of social work schools DPA works with to 15. This has allowed us to holistically serve more of our clients all across Kentucky.

With a federal grant from OJJDP, DPA had social work internships in Morehead, Boone County, Covington, Bowling Green, Owensboro, Fayette County Legal Aide and the Juvenile Post Disposition Branch for four years. That grant was taken by DJJ in 2006.

DPA currently has 8 social work interns serving the agency. Interns are placed with the Boyd Trial Office, Boone County Trial Office, Bowling Green Trial Office, Covington Trial Office, Hopkinsville Trial Office, Madisonville Trial Office, Owensboro Trial Office, and the Post Trial Division Director's office. Previous interns have also been placed with the Frankfort Trial Office, the Kentucky Innocence Project, the Juvenile Post Disposition Branch and the Office of the Public Advocate.

What Can a Social Work Intern Do To Help Your Office?

Just like our staff Social Workers, the interns are assigned cases by the attorneys. Social Work interns can prepare alternative sentencing plans, complete social histories on clients, assist clients in establishing positive support systems, request and obtain records, and assist the client in entering substance abuse or mental health treatment. Social Workers are experts in human development and behavior, as well as knowledge of social, economic and cultural institutions, and display an understanding of the interaction of these areas. The interns are able to assist the attorney by focusing on the underlying issues of the case, so that the attorney is able to focus on the legal aspect of the case.

DPA's current social work interns have already demonstrated success in working with clients in a variety of circumstances throughout the agency. The interns are responsible for tracking confidential information including demographic information, issues present with the client, the reason for referral for social work intervention, underlying issues involved in the case, drug and alcohol screening needs, mental health issues, circumstances surrounding truancy charges, circumstances surrounding sexual offender charges and the possibilities for disposition should the child ultimately be adjudicated and committed.

An analysis of data collected from current interns revealed that the majority of referrals this semester have involved adult clients. Interns are being asked to complete assessments, prepare alternative sentencing recommendations, attend trial to provide support to the family and client, coordinate treatment services and referrals, coordinate medical treatment and assist the clients in finding employment, housing, and basic needs.

Of the youth served by our interns, the majority are status offenders. The social work interns are being referred clients that had charges of beyond control, habitual truancy or public offenses, while social work cases that included probation violations, transfer cases and youthful offenders, cases involving placement in the community and mental health issues were the most prevalent. Issues surround drugs and alcohols were also noted as significant in social work case referrals. In both adult and youth cases, the highest percentage of referrals to social work interns involved white males.

Previous interns have also demonstrated success:

This has been an enjoyable experience…Being a Social Worker is about the enrichment of lives. I would encourage any student to consider a placement with DPA". *JPDB KSU intern Diava Carter.*

A Social Work Intern in the Juvenile Post Disposition Branch worked with juveniles aging out of the system. The intern was able to secure independent living placements for clients, and assisted clients in securing employment, housing, and reconnecting with family thus decreasing the likelihood that juvenile would re-offend and enter into the adult criminal justice system.

A social work intern in the Post Trial Division put together a plan of recommendation for the parole board for a client that would be released from a California prison that wanted to return to Covington to be near his family.

A social work intern in the Frankfort Trial Office assisted a client with schizophrenia who was displaying negative behaviors due to not receiving his prescribed medication. By working with the judge and jail, the intern was able to work out a plan to allow for the client to receive his prescribed medication.

A social work intern in the Boyd Trial Office put together a successful alternative sentencing plan for a client charged with a drug offense so that the client received drug and alcohol treatment as an alternative to incarceration with no treatment.

I have had a wonderful internship. It was exactly what I had wanted to experience. I was able to work in the court system as well as in the office. This was a hands on internship and I think I was appropriately exposed to the clients and the field, and was able to get a feel of what to expect from a social worker position. I have also had the opportunity to see the necessity of having a social worker working along side of the attorneys in order to better assist the clients. I have had so many wonderful experiences with the DPA and would recommend any social work major interested in helping the community definetly to do an internship with this agency and the people in it.

– UK BSW intern Stacy Bargo

Through the effort of the Social Work intern Program, DPA is continuing to address the specific needs of our clients and helping them achieve success in multiple areas of their lives. The social work interns are helping our clients break the cycle of criminal behavior. Madisonville Social Work Intern, Laura Young stated about her internship "*My internship has been the most rewarding experience. I really feel like I have been given the opportunity and have helped so many people, not just children, but families. I feel like I made a positive contribution to the team.. This experience solidified my desire to pursue forensic social work. I know where I want to focus my career pursuits, and look forward to doing this work in a professional capacity.*" ■

DRUG COURT CAN CHANGE LIVES - PROGRAM BEING PREPARED FOR BOONE AND GALLATIN 07

By Kevin Kelly, *Kentucky Enquirer*

One man and his transformation portray for Rhonda Lause the opportunity Kentucky's drug court program offers somebody willing to make a lifestyle change.

The public defender is part of a team organizing the new drug court for Boone and Gallatin counties.

"Even after he graduated from drug court he would come by the office every couple of months to update me and show me pictures of his kids," Lause said. "He had opened his own business and was just all excited. It was very rewarding to see him continuously coming back and being very thankful for the opportunity and being excited about his life."

While not every nonviolent drug offender picked for the program will graduate - or stay out of trouble even if they do graduate - research has shown that drug courts make a measurable impact.

Circuit Judge Tony Frohlich, who will preside over the new drug court when it starts later this month, has wanted to bring the program to Boone County since his appointment a few years ago.

"Most of the cases that come in front of us have a history of drug or alcohol problems," Frohlich said. "That's the basis of most of the people that are committing crimes in this county. To help people get the life skills, which is what this program is designed to do, I think it's the most permanent way to bring these people back into society as productive citizens. And that's our goal."

Kenton County has operated a drug court since 1998, and Campbell County since 1999.

By the end of November, the program will blanket almost all of Kentucky's 120 counties. The five counties without drug courts will be Carroll, Grant and Owen along with Mercer and Boyle.

"The nonviolent, addictive drug offenders are our target population," said Connie Neal, assistant manager for the Administrative Office of the Court's drug court department. "Who does it help the most? Society. It helps our communities. It helps break the cycle of addiction. How can we say that everybody doesn't benefit from a program that takes convicted felons and gives them drug treatment and puts them back in the community as productive tax-paying citizens?"

The program, which the state began implementing in 1996, provides ultra-intense supervision and mandatory treatment.

Participants work through three phases of an individualized treatment program that demands regular court status sessions, random drug tests, curfews, enrollment in a self-help program such as Alcoholics Anonymous as well as stable employment and housing. Successful completion takes between one and two years.

"It's a multidisciplinary type of approach," Frohlich said. "You're working with counselors for alcohol abuse. You're working with treatment. You're giving them vocational training. It makes them accountable on a daily basis.

"It's much more intense than probation is. It's probably the most intense supervision that's out there - other than being in jail."

More than 5,700 people were accepted into Kentucky's drug court program from its inception in 1996 to June 2006 and 1,989 of those graduated.

A 2004 study by the University of Kentucky Center on Drug and Alcohol Research found the recidivism rate for Kentucky drug court graduates two years after completing the program was 20 percent compared with 57.3 percent for people on probation who did not participate in drug court.

Part of the drug court's aim is to reduce jail costs by freeing space for more serious offenders and easing the crush of drug-related cases in the courts. According to the Administrative Office of the Courts, for every dollar spent on a drug court graduate, the state saved $2.72 on what it would have spent keeping that person in jail.

"Obviously there are people who don't make it," Lause said. "Even outside of drug court there are people that don't make it. Sometimes that's very disheartening. But the ones that do make it and the ones you see change, it's very rewarding."

Reprinted with permission of The Kentucky Enquirer/ NKY.com ■

States Seek Alternatives To More Prisons

By John Gramlich, Stateline.org Staff Writer

With swelling prison populations cutting into state budgets, lawmakers are exploring ways to ease overcrowding beyond building expensive new correctional facilities.

Though the construction of prisons continues as states struggle to provide enough beds for those behind bars, legislators increasingly are looking at other ways to free up space and save money, including expanded programs to help prevent offenders from being incarcerated again, earlier release dates for low-risk inmates and sentencing revisions.

Criminal justice analysts point to Kansas and Texas as recent innovators. Both states are putting off building new prisons, focusing instead on rehabilitation and recidivism. At the same time, a new $7.7 billion prison spending plan in California – where overcrowding last year forced Gov. Arnold Schwarzenegger (R) to declare a state of emergency – has met with skepticism. Critics call the plan "prison expansion, not prison reform" and say the initiative relies on impractical fixes such as shipping inmates out of state.

State spending on prisons surged 10 percent nationally last fiscal year (see graphic) and growing inmate populations played a lead role in those costs, according to an analysis by the National Conference of State Legislatures. Corrections trails only education and health care in swallowing state dollars, and experts say lawmakers are responding to the budgetary pressures by trying more cost-effective approaches.

"We're seeing more and more states in different regions and with different political leadership tackling this issue and recognizing that the more they spend on prisons, the less they have to spend on health, education and other priorities," said Adam Gelb, project director of the Public Safety Performance Project.

The project – which, like Stateline.org, is funded by the Pew Charitable Trusts – in February forecast steep increases in incarceration rates and state spending in the next five years unless legislatures enact policy changes.

Kansas Gov. Kathleen Sebelius (D) last month signed into law a prison plan that is winning accolades for its creativity. Among other measures, the $4.4 million package provides financial incentives to community correctional systems for reducing prisoner admissions and allows some low-risk inmates to reduce their sentences through education or counseling while behind bars.

Under the plan, the state offers grants to localities for preventing "conditions violations" such as parole or probation infractions – a leading cause of prison overcrowding in Kansas and nationwide. To qualify for the grants, communities must cut recidivism rates by at least 20 percent using a variety of support tactics.

The early-release provision would cut time served by 60 days for some offenders who successfully complete programs that decrease their chances of returning to prison. Several other states, including Michigan, Nevada and Washington, recently announced plans to release some low-risk offenders early through similar initiatives, including good-time credits and expanded work-release programs.

Expectations are high in Kansas. State Rep. Pat Colloton (R), who led the push for the legislation in the House of Representatives, said she expects the plan to allow the state to postpone new prison construction until 2016 – though officials had said expansion would be necessary starting in two years.

In Texas, which houses 153,000 prisoners, the Legislature recently approved a plan that lawmakers have characterized as one of the most significant changes in corrections in a decade. The package, part of the state budget awaiting Republican Gov. Rick Perry's approval, would divert thousands of inmates from prison to rehabilitation facilities, where beds would free up twice a year as offenders get help and re-enter society. Notably, the focus on rehabilitation would put off construction of costly new prisons.

The plan includes a new 500-bed treatment facility for those incarcerated for driving while intoxicated (DWI) – offenders who often have substance-abuse problems but receive no rehabilitation and face stiff sentences without the possibility of parole, according to one state Senate aide.

"We have changed the course of the ship substantially in the state of Texas," said state Rep. Jerry Madden (R), chairman of the House Corrections Committee and an engineer of the prison plan.

In California, the only state with a larger prison system than Texas, Schwarzenegger this month signed a plan that calls for the construction of 53,000 new beds, with rehabilitation services to accompany the expansion.

Continued on page 12

Continued from page 11

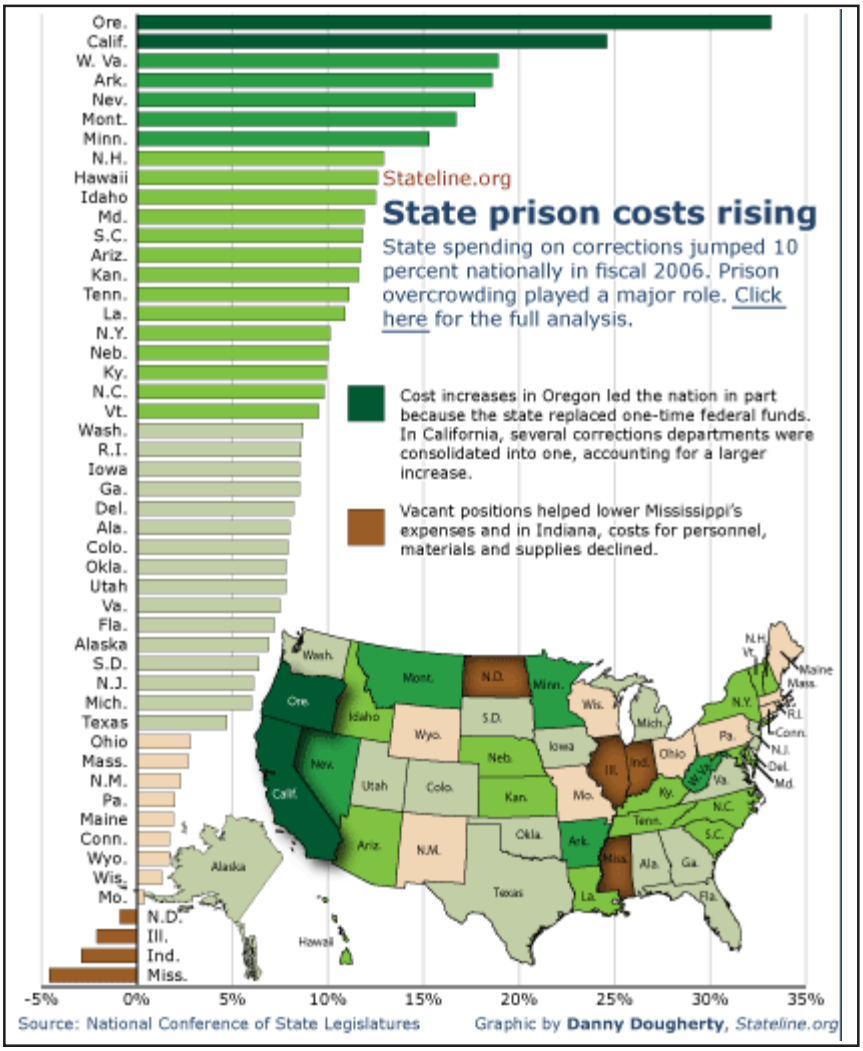
Analysts say the plan has the potential to overhaul the state's prison system by providing inmates new opportunities for education, job training and counseling. But they note that funding for the initiative's rehabilitation services is far from guaranteed because the state has not yet approved its budget, and many in the corrections community are skeptical that lawmakers will follow through on their promises.

"It's purely prison expansion. It's just more business as usual," said Joe Baumann, a state corrections officer who has worked for 20 years at the California Rehabilitation Center in Norco. "The thing that everybody misses is the incarceration rate per 100,000 people."

Meanwhile, other states are revisiting their sentencing policies. Nevada, facing an explosion in its prison population, recently reinstated a commission – dormant since 2000 – that will make recommendations on changing sentencing laws to help ease overcrowding.

At least 22 states revised their sentencing laws between 2004 and 2006 to ease prison overcrowding, according to a study by The Sentencing Project, a Washington., D.C.-based organization that advocates for policy changes.

Reprinted with Permission from Stateline.org. ■



FACTS ABOUT THE PRISON SYSTEM IN THE UNITED STATES

October 2007

- **The United States has the highest reported incarceration rate in the world**. While the United States currently incarcerates 750 inmates per 100,000 persons, the world average rate is 166 per 100,000 persons. Russia, the country with the second highest incarceration rate, imprisons 624 per 100,000 persons. Compared to its democratic, advanced market economy counterparts, the United States has more people in prison by several orders of magnitude. Although crime rates have decreased since 1990, the rate of imprisonment has continued to increase.

- **Growth in the prison population is due to changing policy, not increased crime**. Many criminal justice experts have found that the increase in the incarceration rate is the product of changes in penal policy and practice, not changes in crime rates. Changes in sentencing, both in terms of time served and the range of offenses meriting incarceration, underlie the growth in the prison population.

- **Changes in drug policy have had the single greatest impact on criminal justice policy**. The Anti-Drug Abuse Act of 1986 created mandatory minimum sentences for possession of specific amounts of cocaine. The Act instituted a **100-to-1 differential in the treatment of powder and crack cocaine**, treating possession of 5 grams of crack cocaine the same as possession of 500 grams of powder cocaine. Crack cocaine is typically consumed by the poor, while powder cocaine, a significantly more expensive drug, is consumed by wealthier users. Mandatory minimum sentences for low-level crack-cocaine users are comparable (and harsher in certain cases) to sentences for major drug dealers.

- **The composition of prison admissions has also shifted toward less serious offenses, characterized by parole violations and drug offenses**. In 2005, four out of five drug arrests were for possession and one out of five were for sales. The crime history for three-quarters of drug offenders in state prisons involved non-violent or drug offenses.

- **The prison system has a disproportionate impact on minority communities.** African Americans, who make-up 12.4 percent of the population, represent more than half of all prison inmates, compared to one-third twenty years ago. Although African Americans constitute 14 percent of regular drug users, they are 37 percent of those arrested for drug offenses, and 56 percent of persons in state prisons for drug crimes. African Americans serve nearly as much time in federal prisons for drug offenses as whites do for violent crimes.

- **The U.S. prison system has enormous economic costs associated with prison construction and operation, productivity losses, and wage effects.** In 2006, states spent an estimated $2 billion on prison construction, three times the amount they were spending fifteen years earlier. The combined expenditures of local governments, state governments, and the federal government for law enforcement and corrections total over $200 billion annually. In addition to these costs, the incarceration rate has significant costs associated with the productivity of both prisoners and ex-offenders. The economic output of prisoners is mostly lost to society while they are imprisoned. Negative productivity effects continue after release. This wage penalty grows with time, as previous imprisonment can reduce the wage growth of young men by some 30 percent.

- **Prisons are housing many of the nation's mentally ill.** Prisons are absorbing the cost of housing the nation's mentally ill. The number of mentally ill in prison is nearly five times the number in inpatient mental hospitals. Large numbers of mentally ill inmates, as well as inmates with HIV, tuberculosis, and hepatitis also raise serious questions regarding the costs and distribution of health care resources.

- **The United States faces enormous problems of offender reentry and recidivism**. The number of ex-offenders reentering their communities has increased fourfold in the past two decades. On average, however, two out of every three released prisoners will be rearrested and one in two will return to prison within three years of release.

Source - http://webb.senate.gov/pdf/prisonfactsheet4.html ■

ANY PLACE WHERE A PERSON SLEEPS: AN ANALYSIS OF A DISTRICT COURT'S RULING DECLARING THE SEX OFFENDER RESIDENCY REQUIREMENTS UNCONSTITUTIONAL

By Samuel N. Potter, Appeals Branch

In the last edition of the *Advocate*, part one of this article summarized the changes House Bill Three (HB3) made to the sex offender residency requirements (SORR). Part two of this article will examine a case from Kenton District Court that ruled the new SORR violated the Ex Post Facto Clause of the Constitutions of the United States and Kentucky. Copies of the motion and order can be downloaded from the 2007 annual conference materials from the session on sex offender registration on DPA's intranet. If you do not have access to DPA's intranet, feel free to contact the author at sam.potter@ky.gov or 502 564-8006.

The Kenton District Court case involved more than 10 defendants and five defense lawyers, both private and public defenders. All the defendants became sex offender registrants (registrants) before HB3 took effect. The defendants challenged the constitutionality of HB3 as applied to them on multiple grounds: Equal Protection violation; Substantive Due Process violation; Ex Post Facto violation; and Inalienable Property Rights violation. The first three grounds involved both the Kentucky and United States Constitutions, while the last ground relied solely on the Kentucky Constitution. The Kenton District Court based its dismissal ruling only on the Ex Post Facto Clause, though it intimated that the remaining grounds raised substantive issues that will have to be resolved in the future. The Court's observation is sound. The implication of this statement is significant for criminal defense attorneys. Ex Post Facto challenges will not succeed in each case. Thus, it is worth the time and effort to challenge the SORR on multiple grounds, not knowing which Constitutional provision may warrant relief in any given situation.

The Court spent about eight pages of its 36 page opinion on the historical background of the sex offender registration system (SORS). This included a detailed retelling of the facts of the crime committed against Megan Kanka in New Jersey. This horrible incident provided the political motivation to pass SORS across the nation, which are commonly referred to as Megan's Law. The SORS attempted to provide a quick solution to the problem that communities face of not knowing where sexual offenders live. Over time, however, the registration requirements and restrictions have grown more burdensome, and the punishments for violations have grown more harsh. The defendants challenged the premises upon which the SORR are founded. The first premise assumed that many sexual offenders target unknown children at a high rate. The second premise assumed that sex offenders re-offend at a high rate after being released. The Court examined some scientific studies that supported the defendants' challenges of these two premises. The findings are striking and are worth repeating here.

Sam Potter

- Many studies show that sexual abuse most often occurs in a preexisting relationship. For example, 80% of girls and 60% of boys are abused by someone they know.[1]
- No more than 10% of child sexual abuse cases involve strangers to the victim.[2]
- In 1997, only 7% of child molesters in prison committed their offense against a stranger.[3]
- More specifically, 3% of children under 12 were abused by strangers, and 11% of children 13 to 17 were abused by strangers.[4]

The Court stated: "The implication of these and countless other studies is that laws designed to protect our children, to be effective, should focus on preventing sex offenders from harming children whom they know, not fixated on preventing the rare attacks by strangers. Legislators however, continue to focus on high profile, emotionally charged cases like that of Megan Kanka, and craft measures designed to combat the predator lurking in the bushes." Opinion, p.10.

A causal connection has not been discovered that links an increased re-offense rate to the offenders residence near a school or playground. Of 500 sex offenders who legally lived close to schools, only one was rearrested, and the arrest did not involve another sexual assault.[5] The Minnesota Department of Corrections concluded that residency restrictions were not effective in deterring the offender from re-offending because only two re-offending acts were committed on unknown victims in parks, but those parks were several miles from the re-offenders' homes.[6]

Studies refute the premise that sex offenders re-offend at a high rate.

- After five years, the re-offense rate for child molesters was 12.7% in a study of 29,000 sex offenders.[7]
- Only 14% of sex offenders released from prison in 1994 re-offended.[8]
- Of child molesters released in 1994, 3% were rearrested for a sexual assault, 14% were rearrested for a violent offense, and 39% were rearrested for any offense including parole violations and traffic offenses. *Id.*
- Of all prisoners released in 1994, 68% were rearrested for any offense in three years. *Id.*

The Court concluded this section by quoting another article: "Residency restrictions suffer from several practical problems that call into question their basis, efficacy, and fairness. Their scientific premise is spurious and only leads to over-inclusive and ineffective restrictions that will do nothing to stop the small fraction of sex offenders who will harm unknown children again." Opinion, p. 11-12.[9] With this background information providing context, the Kenton District Court proceeded to its Ex Post Facto analysis.

The Court's Ex Post Facto analysis consisted of over 20 pages. "No state shall . . . pass any . . . ex post facto law." U.S. Const., Art. I, §10. "No ex post facto law . . . shall be encacted." Ky. Const., §19(1). The Court found no U.S. Supreme Court case directly on point regarding whether the SORR violates the Ex Post Facto Clause. However, the case of *Smith v. Doe*, 538 U.S. 84, 105-106 (2003), upheld the constitutionality of the SORS, ruling that it "is nonpunitive and its retroactive application does not violate the Ex Post Facto Clause." Opinion, p. 13. Based on *Smith v. Doe*, the Eighth Circuit has upheld the constitutionality of SORR. *Doe v. Miller*, 405 F.3rd 700 (8th Cir. 2005). The Kenton District Court disagreed with the conclusion of *Doe v. Miller* because of the plain language found in *Smith v. Doe*: "offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, ***with no supervision***." Opinion, p.14 (*quoting, Smith v. Doe*, 538 U.S. at 101; emphasis mine.)

Determining whether a statute violates the Ex Post Facto Clause consists of a two step analysis. Step one requires the court considering the issue to ascertain whether the legislature intended the statute to impose punishment or establish civil proceedings. *Id.* at 92. The inquiry ends if the legislature intended to impose punishment, and the statute violates the Ex Post Facto Clause. If the legislature intended a regulatory scheme that is civil and non-punitive, then the court proceeds to the second step. Step two has the court determine whether the purpose or effect of the statutory scheme is so punitive that it negates the legislature's intent to deem it civil. *Id.* Five factors that are not exhaustive or dispositive serve as useful guideposts for evaluating step two: 1) has the regulatory scheme been regarded as punishment in our history and tradition; 2) does it impose an affirmative restraint or disability; 3) does it promote the traditional aims of punishment, 4) does it have a rational connection to a non-punitive purpose, and 5) is it excessive with respect to that purpose. *Id.* at 97 (*citing, Hudson v. United States*, 522 U.S. 93, 99 (1997)).

The Court began with step one and asked whether the legislature expressly or implicitly intended the SORR to impose a criminal punishment or a civil regulation. "Considerable deference must be accorded to the intent as the legislature has stated it." Opinion, p. 15 (*quoting, Smith v. Doe*, 538 U.S. at 93). The Court found that the following facts supported a finding that legislature intended the SORR to be punishment.

- The title of HB3 was "An act related sex offenses and the punishment therefore." (Court's emphassis.)
- Both the House and the Senate required official cost estimates from the Department of Corrections and local governments. The estimates focused on increased costs due to more people being incarcerated and more probation and parole officers.
- The sole enforcement procedure the legislature authorized with the SORR were criminal sanctions of a Class A misdemeanor for the first offense and a Class D felony for subsequent offenses.

Based on these facts, the Court believed the legislature intended the law to be punitive and violated the Ex Post Facto Clause. Even though this resolved the question, the Court in an effort to be thorough proceeded to step two.

The Court moved on to step two, which is essentially a balancing test to see if the punitive purpose and/or effect of the SORR negates its civil regulation. The five factors listed above provide guidance, and courts are free to weigh the factors as they see fit. Factor one examines the historical tradition of the regulatory scheme, namely residency restrictions. The defendants argued the SORR are equivalent with the punishment of banishment. Banishment is "punishment inflicted on criminals by compelling them to quit a city, place, or county for a specified period of time, or for life." Opinion, p. 19 (*quoting, United States v. Ju Toy*, 198 U.S. 253, 269-270 (1905). The Court agreed with the defendants' argument.

Factor two considers whether the SORR imposes an affirmative duty or restraint. Because the SORR restricts where a registrant can live, the SORR is inherently an affirmative restraint. This factor distinguishes the residency restrictions from the registration system. The Kentucky Supreme Court upheld the SORS because the mere act of registering did not limit the activities of the registrant. *Hyatt v. Commonwealth*, 72 S.W.3d 566, 572 (Ky. 2002). The Court reasoned that unlike "registration requirements, residency restrictions do in fact impose an affirmative disability and do place limitations on the activities of the offender. . . . The punishment imposed by these statutes, banishment, is not prospective in nature." Opinion, p. 25. That the SORR imposes an affirmative restraint on registrants cannot be denied.

Factor three addresses whether the SORR promotes the traditional aims of punishment—deterrence and retribution.

Continued on page 16

Continued from page 15

Smith v. Doe found that the SORS was not retributive because it was reasonably related to sex offenders high re-offense rate, though the U.S. Supreme Court did not cite any data to support this proposition. *Smith v. Doe*, 538 U.S. at 102. The Kenton District Court referred to the studies it cited early to rebut that proposition and show that sex offenders are less likely to re-offend than the average person. Further evidence of the retribution nature of the SORR was the idea that a registrant could visit "his mother's home near an elementary school all day long, each and every day, while school was in session and he allegedly posed the greatest risk to children – but he could not spend the night there after school was dismissed and the children returned to their various homes." Opinion, 21 (*citing, People v. Leroy*, 828 N.E. 2d 769, 793 (Il. App. 2005(dissent))). The absence of individualized risk assessment of sex offenders bothered Justice Souter significantly enough that he concurred in *Smith v. Doe* and caused Justice Ginsburg to dissent. *Smith v. Doe*, 538 U.S. at 108-109; 116-117. The Court concluded that the SORR promoted retribution, a traditional aim of punishment.

Factors four and five are connected. The issue they seek to resolve is whether a rational connection exists between the restriction and its purpose. Factor four inquires whether the SORR has a rational connection to a non-punitive purpose. The SORR are designed to protect children from sex offenders. The Court observed that the "protection, however, is minimal at best and completely illusory at worst." Opinion, p. 26. Registrants can still frequent schools, daycares, and playgrounds as often as they want without violating the SORR. The SORR do not prevent a registrant from living with the prior victim as long as the residence is not close to a school, daycare, or playground. The Court concluded that the "residency restrictions appear to be little more than a political placebo, offering false comfort to pacify the public's fear of sex offenders." Opinion, p. 27. No rational connection exists between the non-punitive purpose of protecting children and the SORR.

Factor five addresses whether SORR is excessive with respect to protecting children. The complete lack of individualized risk assessment lumps all offenders together without any consideration of the likelihood that a given person will re-offend. Justice Souter wrote in his concurring opinion that the SORS "uses past crimes as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on." *Smith v. Doe*, 538 U.S. at 109. The SORR potentially subjects non-sex offenders to its jurisdiction. A defendant who car jacks a vehicle with a passenger who is 17 and is convicted of kidnapping or unlawful imprisonment would have to register as sex offender and comply with residency restrictions even though no sexual assault occurred. KRS 17.500(3)(a)(1); KRS 17.520(2)(a); KRS 17.545(1). The fluidity of the SORR contributes to its excessive nature. Where a registrant can live is subject to constant change as new schools, daycares, and playgrounds are opened. A city that desires to do so can open enough playgrounds to render all residences within its limits illegal to the registrant, effectively banishing the sex offender. Therefore, the Court concluded that the impact of the SORR is excessively punitive.

Based on this analysis, the Kenton District Court declared the SORR unconstitutional as it applied to these defendants because it violated the Ex Post Facto Clause because the scheme is punitive and not regulatory. The Court succinctly and persuasively articulated the problem with the SORR: not "only do they [SORR] dictate where an offender may or may not reside, but collaterally, they could impact where an offender's children attend school, access to public transportation for employment purposes, access to employment opportunities, access to residential alcohol and drug abuse rehabilitation programs and even access to medical care and residential nursing home facilities for the aging offender." Opinion, p. 30.

The constitutionality of the SORR remains an open question. Other courts in Jefferson County and Madison County have joined the Kenton District Court in declaring the SORR unconstitutional. However, the appellate courts of Kentucky have not yet addressed the issue, though cases are starting to work their way up. Until then, challenges to the constitutionality of the SORR should continue to be raised.

Endnotes:

1. Michael Duster, Note, *Out of Sight, Out of Mind: State Attempts to Ban Sex Offenders*, 53 Drake L. Rev. 711, 717 (2005). This note and all of the following works cited were referenced by the Kenton District Court in its ruling.
2. Luis Rosell, *Sex Offenders: Pariahs of the 21st Century?*, 32 Wm. Mitchell L. Rev. at 420 (2005).
3. Patrick A. Langan, Erica L. Schmitt, and Matthew R. Duros, Department of Justice, *Recidivism of Sex Offenders Released From Prison in 1994*, 36 (2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf.
4. David Finkelhor and Richard Ormrod , Department of Justice, Office of Juvenile Justice and Delinquency Programs, *Offenders Incarcerated for Crimes Against Juveniles*, December, 2001.
5. Leslie Henderson, Comment, *Sex Offenders: You Are Now Free to Move About the Country, An Analysis of Doe v. Miller's Effects on Sex Offender Residency Restrictions*, 73 UMKC L. Rev. 797, 804 (2004).
6. Duster, *supra* note 1 at 753.
7. LeRoy Kondo, *The Tangled Web—Complexities, Fallacies, and Misconceptions Regarding the Decision to Release Treated Sex Offenders from Civil Commitment to Society*, 23 N. Ill. U. L. Rev. 195, 199 (2002).
8. Langan, Schmitt, and Durose, *supra* note 3.
9. *Quoting*, Caleb Durling, *Never Going Home: Does It Make Us Safer? Does It Make Sense? Sex Offenders Restrictions, and Reforming Risk Management Law*, Northwestern School of Law, J. of Law and Criminology (Fall 2006).■

JUST LIKE HUMPTY DUMPTY, SHAKEN BABY SYNDROME HAS FALLEN DOWN

by Susan Jackson Balliet and Erin Hoffman Yang, Appeals Branch

From depositions and *Daubert*[1] hearings in a Kentucky case out of Greenup County,[2] it has emerged that Shaken Baby Syndrome (SBS) has disintegrated into three separate theories, and two out of three are no good. **First**, there is the old SBS theory, that **shaking alone** can cause subdural hematoma and retinal hemorrhaging. This old SBS theory has fallen from favor and is no longer accepted as valid within the scientific community. There is no reported case rejecting the theory, but the Commonwealth's experts in the Greenup case admitted the theory is no longer considered valid and declined to rely on it. **Second**, there is a newer, emerging SBS theory that the injuries are caused by **shaking plus hard impact**. This second theory has some case support and stronger science behind it, as acknowledged in the Greenup case. Finally, **third**, there is the most recent, least tested, least litigated theory, that subdural hematoma and retinal bleeding can be caused by **shaking plus impact with a soft surface leaving no visible injuries.** The Greenup court rejected this third theory, and ruled that because there were no visible external injuries in the two cases presented, no SBS opinion evidence would be allowed. The Commonwealth's appeal of the ruling is pending.

The good news out of Greenup County is that the vast majority of reported SBS cases deal with the old, discredited shaking alone theory,[3] and are now completely irrelevant. Only a few cases address the new, shaking plus hard impact theory, which applies only to cases involving obvious, severe injuries.[4] And there is not a single reported case that deals with the Commonwealth's latest, emerging SBS theory, that shaking plus impact with a soft surface leaving no significant visible injuries can cause subdural hematoma or retinal hemorrhaging.

In the Greenup cases, there was **only a hint** of evidence that shaking plus impact with a soft surface –like a mattress—could possibly cause SBS injuries. One expert, Dr. Ann-Christine Duhaime, opined that shaking together with impact with a soft surface leaving no visible injuries **might** cause SBS, and the treating physician, Dr. Phillip Scribano, testified that evidence of impact **might** show up later in an autopsy. There were a few case studies that were "suggestive." But the scant evidence supporting the Commonwealth's SBS soft impact theory was overshadowed by emerging studies indicating that it is **impossible** to generate sufficient velocity by shaking alone to cause SBS,[5] and the new Japanese studies that indicate retinal bleeding can be caused by bleed-through from an earlier hematoma. In published studies, the Commonwealth's own expert opined that there are critical gaps in the medical community's understanding of traumatic brain injury.[6] According to the Commonwealth's own witness, Scribano, "The problem in 2006 is that we don't have enough science…."

Shaken Baby Syndrome is a *Daubert* question, and Not a Matter of Simple Medical "Causation"

The Commonwealth argued in Greenup that SBS wasn't a *Daubert* issue because any doctor can get on the stand and diagnose Shaken Baby Syndrome as a simple matter of "medical causation." But the Kentucky Supreme Court has held that when the substance of testimony is "beyond the mere observational or perceptional capability of any mere lay witness," and where the "substance" of testimony requires "considerable knowledge, training, and experience," under KRE §702 the Commonwealth must qualify both the subject area (*i.e.*, the "substance") and the witness under *Daubert*:

> … the Commonwealth asserted [Maiden] was a lay witness. The substance of his testimony, however, is contrary to this assertion and beyond the mere observational or perceptional capability of any mere lay witness. The substance of Maiden's testimony clearly required considerable knowledge, training, and experience, and thus, the Commonwealth was required to first qualify him as an expert witness.[7]

In *Dougherty,* the subject was blood spatter, *i.e.*, a relatively simple matter of the physics of dispersing liquids. And the proposed witness was a sheriff, who had probably seen a lot of crime scenes, and a lot of blood. Yet our high Court reversed in *Daugherty*, because it found that even the relatively simple topic of blood spatter was beyond a lay witness's expertise. SBS is far more complex than blood spatter, *i.e.*, an evolving medical sub-speciality, in the over-lapping fields of medical diagnosis and biomechanics. Understanding SBS requires expertise in medicine, pediatric biology, biomechanics, and physics, *i.e.*, a comparison of an infant's symptoms with the effects of various rotational velocities, accelerations, and varieties of impact. SBS is no topic for a lay witness.

There are cases that say doctors can testify to simple matters of medical causation. But these cases tend to deal with a far less complicated question.[8] It doesn't take much science to figure out that a vaginal tear could be caused by insertion of a foreign object, and it is no surprise that no one raised a *Daubert* challenge to the medical "causation" opinion in such cases. It is also no surprise that there was no *Daubert* challenge in another common-sense case, *Hicks' Adm'x,*[9] where a nurse who disobeyed orders to hold an unconscious

Continued on page 18

Continued from page 17

patient's chin up caused his strangulation. These cases stand for the limited proposition that when causation is obvious, and no one challenges opinion testimony, the courts tend to admit it without *Daubert* testing.

But when there is a challenge, expert opinion evidence (including medical "causation" evidence) is **only admissible if it meets relevancy requirements under KRE §401 and *Daubert*.** As stated in *Stringer*, medical causation opinion is admissible **only:**

> … so long as (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.[10]

Once you get the court to agree it's a *Daubert* issue, the next problem is convincing the court that the Commonwealth bears the ultimate burden of proving Shaken Baby Syndrome is relevant and reliable.

Placing the Burden on the Defendant Violates *Daubert*

According to Footnote 10 in *Daubert* the proponent of so-called scientific evidence must bear the burden of proof, and the level of proof is a preponderance.[11] Despite this clear directive, Kentucky has adopted an opposite rule, requiring the **opponent** of a long list of so-called "scientific" evidence to bear the burden of proof.[12] Kentucky's practice of grandfathering "presumptively valid" so-called scientific specialities by taking judicial notice that they are already considered valid under *Daubert* (often based on their previous acceptance under the old *Frye*[13] standard) and then shifting the burden to the opponent to prove unreliability violates footnote 10 in *Daubert*. Kentucky's burden-shifting rule should be vigorously challenged.

The burden shift should definitely be challenged when applied to any type of so-called science that is **not listed** in *Johnson*, and not otherwise accepted in Kentucky as reliable. SBS is not one of the "presumptively valid" scientific theories judicially noticed in *Johnson*. Kentucky's appellate courts have never ruled that any SBS theory, old or new, is valid science, and have never considered under *Daubert* a fact situation where there is no significant evidence of any injury or abuse apart from retinal hemorrhaging and subdural hematoma.

Arguably *Stringer* requires defendants to meet only an initial burden of coming forward with some evidence in order to show that an objection to SBS is not frivolous. After that initial burden is met, then, in accord with Footnote 10 in *Daubert*—the trial court must require the Commonwealth to bear the burden of establishing the admissibility of SBS evidence by a preponderance. According to the *Daubert* experts who wrote the encyclopedic reference, *Modern Scientific Evidence*, that is the "correct solution":

> The confusion in *Daubert* hearings is perhaps understandable, because the first voice heard is that of the opponent of proffered expert testimony. This has given some lawyers and judges the impression that the opponent has the burden of convincing the court that the witness does not meet *Daubert*'s requirements. This impression may be all the more compelling when the expertise being challenged is a type that has become familiar to the courts. But the correct procedure is the opposite of that.
>
> The opponent of expert evidence need only make a showing sufficient to convince a trial court that the objection to the evidence is not frivolous; this triggers a *Daubert* hearing under Rule 104(a). In a Rule 104(a) hearing on the question of the admissibility of expert evidence, 'These matters should be established by a preponderance of proof.'[cite to *Daubert* omitted] The proponent has the initial burden of production and the ultimate burden of persuading the court that the proffered expert evidence satisfies Rule 702.[14]

In the Greenup County cases, the circuit court ruled that it would **not** allow opinion on SBS except in a case where there was some actual, physical evidence of abusive impact. In other words, while rejecting SBS theories one and three, the court recognized that theory two, shaking plus impact (hard surface) meets *Daubert*. But since the doctors agreed there was **no significant evidence of hard impact,** SBS theory two (shaking plus hard impact) was irrelevant to the facts presented. In the end, the Greenup court excluded SBS (shaking plus hard impact) opinion evidence on relevance grounds.

The Kentucky Supreme Court is Moving Away From Judicial Notice and the Old *Frye* Case

A recent Westlaw search produced 982 cases containing the phrase "Shaken Baby Syndrome." But even though the Kentucky Supreme Court might once have relied on these (mostly) old *Frye* cases to support judicial notice of the reliability of SBS, since taking that approach in *Johnson*[15] our high Court has backed away from judicial notice as a proper method for recognizing a new "science." Indeed, reliance on old *Frye* cases proved risky. Just one year after *Johnson*, the national Innocence Project exonerated a Kentuckian by proving that microscopic hair analysis –judicially noticed in *Johnson* as reliable—is in fact unreliable:

> [Gregory's] conviction was vacated in 2000 after DNA tests established that the sole physical evidence linking [Gregory] to either of the crime scenes-several hairs-could not have come from [Gregory]. All charges against [Gregory] were dismissed on August 25, 2000, after [Gregory] had spent more than seven years in custody.[16]

DNA testing proved that the hair in Gregory's case was not Gregory's and –contrary to the old *Frye* cases the *Johnson* Court relied on— it turned out to be unreliable.

Given that the bulk of the reported cases deal with the now discredited "shaking alone" SBS theory, or the "shaking plus hard impact" theory, it seems unlikely that our high Court would judicially notice old, irrelevant cases in order to validate a newer, untested sub-theory of SBS. Indeed, in *Fugate*, while the Court approved RFLP and PCR methods of testing DNA, it did not use judicial notice to approve the relatively untested sub-method of mitochondrial DNA testing, and still has not approved this newer method.

The Court's more recent decision in *Ragland* embodies the Court's post-*Johnson* approach, which focuses not on judicial notice, and not on old outdated cases, but on **scientific data, research and testing.**[17] *Ragland* moves Kentucky beyond *Fugate* and *Johnson* by mandating consideration of underlying scientific reliability. Implicitly rejecting *Johnson*, the *Ragland* Court found lead bullet analysis was completely unreliable without citing *Johnson*, and without paying any attention to all the old *Frye* cases upholding ballistics.

Ragland represents a significant retreat from the judicial notice approach of *Fugate* and *Johnson* and a closer adherence to *Daubert*.[18] Contrary to *Johnson* (which found "ballistics" scientifically reliable based entirely on past *Frye* cases), the Court in *Ragland* specifically states that past cases admitting lead bullet analysis are "not the equivalent of scientific acceptance, owing to the paucity of published data, the lack of independent research, and the fact that defense lawyers have generally not challenged the technique."[19] In *Ragland*, the Kentucky Supreme Court noted that for lead bullet analysis "[a]dditional testing would be needed to fully satisfy the *Daubert/Kumho* testing requirement."[20]

Similarly, 982 Westlaw cases mentioning SBS "are not the equivalent of scientific acceptance, owing to the paucity of published data, [and] the lack of independent research." Additional testing is needed before the two Shaken Baby Syndrome theories rejected by the Greenup court (shaking alone, and shaking plus impact leaving no visible injuries) will satisfy KRE §401 and *Daubert*. We need to keep a careful watch on all "Shaken Baby" cases, to see which sub-theory the Commonwealth is advancing. Shaken Baby Syndrome, like Humpty Dumpty, has fallen down and broken into little pieces. We need to challenge the Commonwealth any time it attempts to introduce Shaken Baby Syndrome opinion evidence, keep an eye on which sub-theory is presented, and demand full *Daubert* hearings.

Endnotes:

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) ("general acceptance" is **not** a necessary precondition to admissibility; trial judge must ensure that any and all scientific evidence is both relevant and reliable.)

2. Kudos to Assistant Public Advocates Samuel Weaver and Amy Craft, who won the extensive *Daubert* proceedings on SBS in Greenup Circuit Court, relied on as the basis for this article.

3. *e.g., Johnson v. State*, 933 So.2d 568 (Fla. 2006), and *State v, McClary*, 541 A.2d 96 (Conn. 1988).

4. *See, Minor v. State*, 914 So.2d 372, 384 (Ala. 2004) (victim had skull fracture, organ damage and rib fracture); *Deese v. State*, 786 A2d 751 (Md. 2001) (victim had broken leg, bruises, old and new wounds, case decided under *Frye* standard); *State v. Carrilo*, 562 S.E.2d 47 (N.C. 2002); *Ray v. State*, 838 N.E.2d 480 (Ind. 2005) (victim had bruises and bone fractures); *Steggal v. State*, 8 S.W.3d 538 (Ark. 2000) (victim endured extensive skull fractures, rib fractures, and forearm fractures).

5. Faris A. Bandak, *Shaken Baby Syndrome: A biomechanics analysis of injury mechanisms*, Forensic Science International 151 (2005) 71-79; and Ann-Christine Duhaime, M.D., et al., *The Shaken Baby Syndrome; A clinical, pathological, and biomechanical study*, in J. Neurosurg 66:409-415 (1987), and *Head Injury in Very Young Chilrden: Mechanisms, Injury Types, and Ophthamologic Findings in 100 Hospitalized Patients Younger than 2 Years of Age*, in Pediatrics (1992).

6. Spivack,B.S., & Margulies,S.S. "Inflicted Childhood Neurotrauma" In: R. M. Reece & C. E. Nicholson (Eds.), *Pathobiology and Biomechanics of Inflicted Childhood Neurotrauma*. American Academy of Pediatrics (pp. 221-235) (2003).

7. *Dougherty v. Commonwealth*, 2006 WL 3386576. There is no published opinion on point.

8.*Richardson v. Commonwealth*, 161 S.W.3d 327 (Ky. 2005) (Spivack permitted to testify to hymenal injury); *Hellstrom v. Commonwealth*, 825 S.W.2d 612 (Ky. 1992) (vaginal tears); *Pevlor v. Commonwealth*, 638 S.W.2d 272 (Ky. 1982) (vaginal tears).

9. *Hicks' Adm'x v. Harlan Hospital*, 21 S.W.2d 125 (Ky.App. 1929) (nurse failed to follow orders)

10. *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997)(also a vaginal injury case).

11. *Daubert*, 509 U.S. at 591 n. 10.

12. *Florence v. Commonwealth*, 120 S.W.3d 699, 703 (Ky. 2003); *see also, Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999) (recognizing RLFP and PCR types of DNA testing); *and, Johnson v. Commonwealth*, 12 S.W.3d 258 (Ky. 1999) (recognizing hair analysis, breath testing to determine blood alcohol content, HLA blood typing to determine paternity, fiber analysis, ballistics analysis, and fingerprint analysis).

13. *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923).

14. David L. Faigman et al., Modern Scientific Evidence, Vol. 1, at 26 (2006-2007 Ed.).

15. Johnson v. Commonwealth, 12 S.W.3d 258 (Ky. 1999)

16. *Gregory v. City of Louisville*, 444 F.3d 725, 731 (6th Cir. 2006) (police officers and forensic experts not immune from §1983 actions by exonerated prisoners).

17. *Ragland v. Commonwealth*, 191 S.W.3d 569 (Ky. 2006)

18. *Cf., dissent in Johnson*, 12 S.W.3d at 267-268 (Justice Stumbo, joined by Justice Lambert)

19. *Ragland v. Commonwealth*, 191 S.W.3d at 579.

20. *Ragland v. Commonwealth*, 191 S.W.3d at 578. ■

Supreme Court to Review Kentucky Death Penalty Case

By Glenn S. McClister, Education Branch

On September 25, 2007 the United States Supreme Court granted certiorari in a Kentucky death penalty case challenging the constitutionality of Kentucky's lethal injection procedures. Assistant Public Advocates David Barron and John Palombi had filed the petition on behalf of death row inmates Ralph Baze and Thomas Bowling, arguing that the current procedure is "cruel and unusual punishment" under the Eighth Amendment.

The case has national import because three-drug cocktails are used in 36 other states that have lethal injection. This case is the first to be accepted by the United States Supreme Court on certiorari review where a full trial on the merits, subjecting this procedure of execution to challenge, occurred at the state level.

As of the date of writing, 11 executions have been stayed throughout the country since the grant of certiorari, including a stay issued by the Nevada Supreme Court in a case in which the inmate had volunteered for the death penalty. In addition, the Attorney General of Oklahoma has asked the Oklahoma Court of Criminal Appeals not to sign any death warrants until the Kentucky case is decided.

Barron and Palombi argued that the drugs used in the procedures allow the condemned to remain conscious even if immobilized. Pancuronium bromide paralyses the muscles and the condemned begins to suffocate, but at the same time the drug also prevents any "outward signs of pain or consciousness." The condemned then suffers severe pain as potassium chloride, administered to stop the heart, enters the veins and produces cardiac arrest. The attorneys noted that potassium chloride is actually the "road salt used to melt ice."

The attorneys also pointed out that the American Veterinary Medical Association has prohibited the use of the same chemical combination in euthanizing family pets such as cats and dogs. It is also a misdemeanor in Kentucky. (See 201 KAR 16:090, KRS 321.207 and KRS 321.990.) But the most important point, they argued, is that "All of the current lethal injection chemicals could be replaced with other chemicals that would pose less risk of pain."

Since the Supreme Court's calendar is full through December, oral arguments could not be heard earlier than next January. ■

A new report entitled, "Beyond Detention: System Transformation through Juvenile Detention Reform," documents the reforms inspired by the Juvenile Detention Alternatives Initiative (JDAI), a nationally-renowned data driven and outcome-based collaborative effort aimed at ensuring that detention is used only when appropriate. This report associates juvenile detention reform strategies with overall improvements to juvenile justices systems: more youth safely kept at home and in the community, increased focus on youth and families, and reduced racial disparities.

The full report is available on the JDAI Help Desk website at: http://www.jdaihelpdesk.org

KENTUCKY CASE REVIEW

By Erin Hoffman Yang, Appeals Branch

B.B. v. Commonwealth
Rendered June 21, 2007
226 S.W.3d 47 (Ky. 2007)
Reversing
Opinion by J. Schroeder

B.B. was adjudicated guilty of first degree sodomy based on the testimony and hearsay statements of C.Y., the four year old complaining witness.

The trial court abused it discretion by finding C.Y. competent to testify. Based on C.Y.'s performance at the competency hearing, the trial court should have found her incompetent under KRE 601(b)(4). C.Y. failed to demonstrate any understanding whatsoever of the obligation of a witness to tell the truth, or the consequences of lying. C.Y. gave nonsensical and conflicting testimony at the adjudication hearing and generally agreed with anything that was suggested. The Court warned judges against the temptation "to let pity for small children who may have been victimized ... overcome their duty to enforce the rules of evidence....."

C.Y.'s incompetence extended to hearsay. Souder v. Commonwealth, 719 S.W.2d 730 (Ky.1986) and Edwards v. Commonwealth, 833 S.W.2d 842 (Ky.1992) are overruled to the extent they hold testimonial incompetence is not a consideration in determining the admissibility of out-of-court statements. Over Appellant's objection, the trial court admitted C.Y.'s statements to an emergency room nurse under KRE 803(4), the hearsay exception for statements made for the purpose of medical treatment or diagnosis.

The Court held that C.Y.'s incompetence would extend to the hearsay. Courts should be particularly cautious about admitting into evidence the out-of-court statements to a physician of any child who is not competent to testify in person A child whose understanding is not sufficient to allow him to testify at trial may also fail to understand that the recovery of his health is dependent upon the truth of his statements to a doctor.

Brown v. Commonwealth
Rendered June 21, 2007
226 S.W.3d 74 (Ky. 2007)
Reversing
Opinion by J. Noble, J. Scott and McAnulty Dissenting

Brown's trial progressed normally until defense counsel informed the court that after several discussions with his client, he had concluded that a conflict had arisen which he wanted to address to the court outside the presence of the prosecution. The court allowed the ex parte discussion, during which defense counsel informed the court that the Appellant wanted to present through his testimony a theory that was not consistent with counsel's investigation of the case. Counsel told the court that his client wanted to testify, and had the right to do so, but that counsel felt his ethical limitations created a conflict with the client. He stated that he did not believe he could deliver his planned opening statement or elicit the testimony Appellant now wanted to give. The trial court and defense counsel then took a break to consult the Rules of Professional Conduct, specifically Rule 3.3 and its commentary.

Brown was brought to the bench, and the trial court conducted a lengthy and thorough colloquy with him, setting forth the situation and presenting options, and directing him to consult further with his attorney before making a final decision on how he was going to proceed. The trial court told Brown that he could give a narrative statement and closing argument. Defense counsel offered to cross-examine the final two prosecution witnesses and informed the court that he would then be stepping out of the courtroom. Defense counsel indicated that he had told Brown that it might make things worse if he remained seated at counsel table while Brown proceeded. Specific statements as to the nature of the alleged perjury were never put on the record.

The trial court erred by allowing trial counsel to completely abandon defendant during his narrative statement, cross-examination and closing argument in the guilt phase of the trial. Allowing counsel to reappear for the penalty phase compounded the appearance of irregularity. Under Rule 3.3, a lawyer is prohibited from offering evidence known to be false, may refuse to offer evidence that she reasonably believes to be false, and shall inform the tribunal of all material facts known to her so that the tribunal can make an informed decision whether the facts are adverse. The plain language of this rule contemplates that a lawyer will not advance false testimony of any witness, and that she will inform the court if such testimony is imminent and what facts support that belief. However, Rule 1.6 creates a duty of confidentiality that prohibits a lawyer from revealing information related to the representation of a client. Moreover, the client has a right to testify in his own defense and a right to counsel. This creates an apparent conflict when an attorney knows that a client intends to offer false testimony.

In this case, given that no one other than counsel and Appellant knew the contested area of testimony allowing Brown to testify wholly on his own and without benefit of counsel's objections on cross examination (which would have been directed at evidentiary rules rather than content) unconstitutionally

Continued on page 22

Continued from page 21
deprived of him of his right to assistance of counsel. This was compounded by requiring him to make his own closing argument and allowing counsel to return to conduct the sentencing phase.

The dissent argued Brown's "limited forfeiture of counsel" was appropriate under the circumstances The right to counsel does not include a "right to have a lawyer who will cooperate with planned perjury." When a defendant wishes to resort to perjury or to produce false evidence, one consequence is the risk of withdrawal of counsel**.** A lawyer who cooperates with a defendant's perjurious testimony would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment.

Emerson v. Commonwealth
Rendered August 23, 2007, To Be Published
2007 WL 2403391
Affirming in part, Reversing in part
Opinion by J. Noble

Emerson and his mother were convicted of murder, robbery and tampering with physical evidence in the death of his stepfather. Both Emerson and the Commonwealth presented evidence at trial that he agreed to the murder because he believed his stepfather was abusing his mother.

It is error for the Commonwealth to refer or comment on parole in the penalty phase of a death penalty trial. During the penalty phase closing arguments, the prosecutor stated: "[n]ow let's talk about if you set the penalty at life without the possibility of parole for 25 years or any penalty less than that, he has the opportunity to be released from prison when he would be younger or right about the same age as Gerald Monroe." Defense counsel objected and moved for a mistrial, arguing that the prosecutor in effect told the jury that parole eligibility was 20 years because she revealed the opportunity for Emerson to be released while he was still younger than Monroe. In effect, the prosecutor told jurors that if Emerson received life without the possibility of parole he could be released in 20 years.

The Court stated that although parole eligibility information is fully admissible in a truth-in-sentencing hearing, it has no place in a death penalty hearing. It is well-established that "under no circumstances should parole eligibility enter into death penalty deliberations." *Id.*

Emerson was entitled to jury instructions on moral justification and extenuation as mitigating factors. Failure to instruct on these factors was error under KRS 532.025 (2) (b) (4). Under the statute, as long as there is "some evidence" to support a mitigating factor, it must be included. There was sufficient evidence presented by the defense and the Commonwealth that Emerson believed his mother was being abused by his stepfather. The trial court abused its discretion on omitting the instructions, although Emerson was spared the death penalty, he might have received a lesser sentence if the jury considered extenuation.

Coulthard v. Commonwealth
Rendered August 23, 2007, To Be Published
2007 WL 2403396
Affirming
Opinion by J. Scott

Coulthard was convicted of first degree manslaughter and tampering with physical evidence after shooting his 18 year old victim in the neck during a confrontation.

The was no error based on the behavior of the victim's family during the trial. The Court rejected Coulthard's claim that he was prejudiced when family members wore t-shirts and displayed license plates supporting the victim outside the courtroom. Coulthard had to prove that this propaganda was viewed by the jury inside the courtroom to show prejudice. Also, the trial court properly denied a mistrial based on the family's emotional outbursts at the trial. An admonition to jurors to disregard an emotional display would have been adequate to cure any possible prejudice that may have resulted. Although an admonition was warranted in this case, the defense did not ask for one.

The Commonwealth did not violate Coulthard's constitutional right to be free of warrantless searches by introducing evidence he refused to consent to fingerprint sampling. Coulthard took the stand and exposed himself to cross-examination. While it is generally unconstitutional to penalize a defendant for exercising his right to be free of warrantless searches, the Court held that his refusal to submit to fingerprint sampling was relevant for the legitimate purpose of rebuttal and impeachment of the self defense claim presented at trial.

Debruler v. Commonwealth
Rendered August 23, 2007, To Be Published
2007 WL 2403438
Affirming
Memorandum Opinion of the Court

Debruler was charged with kidnapping and robbery. He allegedly grabbed a ten year old and carried her to the backyard of a vacant house before she managed to escape. He was also charged with a robbery less than one mile away from the scene of the attempted abduction. Seven hours after the incidents two K9 unit dogs were brought to the scene of the alleged abduction. Both dogs were able to track Debruler's scent to the back of the vacant house.

Canine scent tracking is not scientific evidence subject to *Daubert.* Testimony from a trained dog handler concerning the use of canine scent concerned the results of an investigative technique, not a scientific procedure. The officers did not testify as to any technique, theory, or methodology. Rather, the testimony was limited to personal observations of the dog's actions and their interpretations of the tracking based on their experience and training. While *Daubert* may apply to technical or specialized knowledge as well, canine scent tracking is not amenable to peer review and testing.

Vaughn v. Commonwealth
Rendered August 23, 2007, To Be Published
2007 WL 2403353
Reversing
Opinion by J. Scott, Dissent by Cunningham and Minton, JJ.

David Vaughn appealed from a Court of Appeals decision upholding his conviction for first degree attempted sodomy. He was not allowed to present testimony the complaining witness, his stepdaughter, had a reputation for untruthfulness at her school, holding that her school was not a community. The Court of Appeals upheld the trial court's decision, holding that "[appellant] failed to lay a sufficient foundation to establish that the school from which the teacher drew her opinion of his stepdaughter's reputation was sufficiently large, with adequate contact with the child, to provide a trustworthy estimation of B.D.'s reputation in the community." The only issue on discretionary review was whether a grade school can satisfy the community requirement in the version of KRE 608 in effect prior to July 2003.

The law of evidence includes a child's school within the definition of community. Vaughn should have been permitted to offer evidence from two of his stepdaughter's teachers that the girl had a reputation for untruthfulness. A school is a substantial group that children are a part, and creates interpersonal relationships where people can develop opinions about others. Other than a child's family, it is likely that school is the largest community that a child belongs to.
The dissenters agreed that school could be a community for reputation purposes but believed excluding the testimony of the alleged victim's untruthfulness was harmless error.

Commonwealth v. Ronnie Lee Coker
Rendered 9/20/07, To Be Published
2007 WL 2736222
Reversing
Opinion by J. Minton

Ronnie Lee Coker was convicted of extortion and being a persistent felony offender in the second degree. A divided panel of the Court of Appeals reversed Coker's conviction on appeal, holding the trial court erred by denying Coker's *Batson* challenge to an African American veniremember against whom the Commonwealth had exercised one of its peremptory challenges.

The Court of Appeals did not show proper deference to the wide latitude given trial courts in ruling on *Batson* challenges. In response to questioning by defense counsel, the veniremember in question identified "due process" as a right protected under the Bill of Rights. When asked what verdict should be returned if the Commonwealth failed to prove the charges beyond a reasonable doubt, he answered, "not guilty." Defense counsel argued that the prosecution expressed surprise that there were two African Americans on the panel and had a history of Batson violations.

Nonetheless, the trial court accepted the Commonwealth's assertion that he had stricken the panel member because he had "aligned himself" with the defense by speaking up when questioned about constitutional issues. The Supreme Court agreed, reversing the Court of Appeals and holding that the trial court was entitled to accept the Commonwealth's reasoning as race-neutral. The majority noted that on review, the Court's role "is not to determine whether we find a proffered reason to be a mere pretext for discrimination; our job is to determine whether the trial court's acceptance of the validity of the race-neutral reason is clearly erroneous."

Rocky Gray v. Commonwealth
Rendered 9/20/07, To Be Published
2007 WL 2736217
Affirming
Opinion by J. Scott

Rocky Gray was pulled over for driving erratically in 2005. He consented to a search and the officer discovered marijuana, various items of drug paraphernalia including scales, individually wrapped bundles of methamphetamine, a pistol, and $1,527 in cash. Rocky Gray was convicted of several drug charges and being a persistent felony offender in the second degree and sentenced to a total of 58 years. The trial also forfeited the cash found during the search.

The forfeiture of the money did not violate Kentucky's forfeiture law or Gray's due process rights. Gray argued that the cash was improperly forfeited because the money was not shown to have been exchanged in the sale of drugs. Kentucky's forfeiture statute, KRS 218A.410, permits the forfeiture of "[e]verything of value furnished ... in exchange for a controlled substance in violation of this chapter, all proceeds ... traceable to the exchange, and all moneys ... used, or intended to be used to facilitate any violation of this chapter." The statute further provides that it shall be a rebuttable presumption "that all moneys, coin, and currency found in close proximity to controlled substances, to drug manufacturing or distributing paraphernalia ... are presumed to be forfeitable under this paragraph."

The Court held that the large amount of cash found in Gray's van coupled with the large amount of drugs led to a reasonable conclusion that Gray had used, or intended to use the cash in an illegal transaction. Thus, Gray had the burden to rebut the presumption that the money should be forfeited and he failed to do so.

The trial court did not err in failing to order a competency hearing prior to sentencing. Immediately before sentencing, trial counsel discovered that Gray was being treated for psychotic behavior and asked the court to grant a new trial or hold sentencing in abeyance pending a competency hearing.

The Court held the request was properly denied. Gary had been able to participate in his defense and the case had been ongoing for one year with no sign of incompetency from Gray. ■

SIXTH CIRCUIT REVIEW

By Meggan Smith, Post-Conviction Branch

***Eddleman v. McKee*, 471 F.3d 576 (C.A.6 (Mich.))**, discussed in the April 2007 issue of *The Advocate*, was overruled by ***Fry v. Pliler*, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007).** In *Fry*, the U.S. Supreme Court held that on collateral review, "a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht*, whether or not the state appellate court recognized the error and reviewed it for harmlessness" under the *Chapman* standard.

***Nichols v. United States*,**
— F.3d ——, 2007 WL 2326051, (C.A.6 (Tenn.))
Before Keith, Moore, and Cole, Circuit Judges

Even though United States v. Booker, 543 U.S. 220 (2005) had not yet been decided when the defendant was sentenced, defense counsel was ineffective for failing to preserve a Sixth Amendment challenge to the defendant's sentence because Apprendi v. New Jersey, 530 U.S. 466(2000), had cast the constitutionality of the Federal Sentencing Guidelines into considerable doubt and because the enhancements to the defendant's sentence directly presented circumstances that were called into question by Apprendi.

Thomas Albert Nichols was convicted in federal court of bank extortion involving the use of a dangerous weapon and bank extortion involving forcing a victim to accompany a robber. Under the then-mandatory Federal Sentencing Guidelines, Nichols' sentence was enhanced for taking the property of a financial institution, the amount of the loss involved, use of a firearm, abduction of a victim, the vulnerability of a victim, and the use of a child in the course of the offense. The court sentenced Nichols to 405 months in prison.

In his federal habeas action, Nichols claimed that his attorney had been ineffective in failing to object to the sentence enhancements on Sixth Amendment grounds. At the time of Nichols' sentencing, the U.S. Supreme Court had decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the subscribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id*. at 490. However, the Supreme Court did not hold that the mandatory Federal Sentencing Guidelines violated the principle announced in *Apprendi* until two years after Nichols had been sentenced. *See United States v. Booker*, 543 U.S. 220 (2005).

Although courts rarely find an attorney ineffective "based upon a trial attorney's failure to make an objection that would have been overruled under then-prevailing law," the Sixth Circuit recognized that this was a "rare case" where counsel "failed[ed] to raise an issue whose resolution [was] clearly foreshadowed by existing decisions." The Court noted that, after *Apprendi*, numerous commentators had questioned the continued validity of the Guidelines. Most importantly, the concurring and dissenting opinions in *Apprendi* suggested that the majority's reasoning would lead to the invalidation of the Guidelines.

As to the deficient performance prong of the *Strickland* test for ineffectiveness, the Court stated:

> With the future state of the law so uncertain post-*Apprendi*, we believe that any counsel whose performance satisfied an 'objective standard of reasonableness' would have at least been cognizant of possible extensions of *Apprendi* to challenge the Federal Sentencing Guidelines and the necessity of preserving those challenges in case the Supreme Court struck down the Guidelines while the defendant's case was pending on direct appeal.

The Court recognized that:

> [U]nder our decision today, the performance of many attorneys who represented criminal defendants after *Apprendi* but before *Blakely* and *Booker* will be deemed constitutionally deficient. The question before us, however, is not what some or most attorneys actually did, but whether the performance of Nichol's counsel 'fell below an objective standard of reasonableness.' Although we recognize that common practices may provide evidence of the objective standard by which we should measure the performance of individual attorneys, common practices can never be determinative lest we freeze our expectations of counsel at one moment in time, never to improve or change in response to developments in, for example, education, technology, and the law itself.

Having found that Nichols' attorney's performance was deficient, the Court turned to the question of prejudice. Because *Booker* does not apply retroactively, to establish

that there was a reasonable probability that the result of his sentencing would have been different, Nichols had to show that, but for counsel's deficient performance, he would have had a direct appeal pending when *Booker* was decided. While the Court recognized that it would be difficult for many defendants to establish this, in Nichols' case, his codefendant's Sixth Amendment challenge to his sentence *was* still pending on direct review when *Booker* was decided, and, therefore, his codefendant's case was remanded for reconsideration in light of *Booker*.

Although the specific issues surrounding the Federal Sentencing Guidelines are not pertinent to Kentucky state court proceedings, the Sixth Circuit's analysis of Nichols' ineffective assistance of counsel claim is particularly instructive, especially as to the issue of deficient performance. The Court's recognition that Nichols' attorney's performance "fell below an objective standard of reasonableness" even though his conduct was the common practice among many attorneys has significant implications for courts' future treatment of ineffectiveness claims.

***Vasquez v. Jones*,**
— F.3d ——, 2007 WL 2176985 (C.A.6 (Mich.))
Before Rogers and Cook, Circuit Judges, and Gwin, District Judge

The state court's holding that the exclusion of a witness's prior convictions, offered as impeachment, did not violate the Confrontation Clause was an unreasonable application of Supreme Court precedent.

Emilio Vasquez was convicted in connection with a shootout in which an innocent bystander was killed by a 9-millimeter handgun. Vasquez claimed that he shot a rifle, not a handgun, in self-defense. Demond Brown testified at the preliminary hearing that he saw Vasquez fire a handgun. Brown could not be located to testify at trial, but the court admitted his preliminary hearing testimony at Vasquez's trial. Defense counsel objected to the admission of the prior testimony, and attempted to admit evidence that Brown had been offered a deal by the prosecution to testify at the preliminary hearing and that Brown had a criminal record. Only the issue of the exclusion of Brown's prior convictions was preserved for federal habeas review.

Because the state court had found that any Confrontation Clause error was harmless but never decided whether there was any error, the Sixth Circuit applied "modified AEDPA deference." "Under this standard, the court conducts a 'careful' and 'independent' review of the record and applicable law, but cannot reverse 'unless the state court's decision is contrary to or an unreasonable application of federal law.'"

The Court held that the state court's rejection of Vasquez's Confrontation Clause claim was an unreasonable application of Supreme Court precedent, particularly *Davis v. Alaska*, 415 U.S. 308 (1974). *Davis* held that the state court violated the defendant's right to confrontation by preventing him from impeaching a witness with his prior criminal record.

The Sixth Circuit rejected the state's contention that "'[t]he Supreme Court has never held that cross-examination with regard to credibility, as opposed to bias, is constitutionally protected,'" finding that the cases "draw[] no meaningful distinction between the constitutional status of cross-examination as to bias and that of cross-examination as to credibility or character for truthfulness."

The Court went on to hold that the Confrontation Clause violation was not harmless. Recognizing that *Fry* had overruled *Eddleman* (discussed above), the Sixth Circuit applied the *Brecht* standard: whether the error had a substantial and injurious effect on the jury's verdict. Under this standard, the error was not harmless because Brown's testimony was important to the state's case, Brown's testimony was not cumulative, no physical evidence corroborated Brown's testimony, defense counsel could not be expected to have questioned Brown about his prior convictions at the preliminary hearing given the voluminous discovery involved in the case and the different motivations at preliminary hearings and at trial, and the state's case was not particularly strong without Brown's testimony.

***Girts v. Yanai*,**
— F.3d ——, 2007 WL 2481018, (C.A.6 (Ohio))
Before Martin, Batchelder, and Clay, Circuit Judges

The Prosecutor's comments on defendant's failure to testify or speak to the police violated the defendant's Fifth Amendment rights and were sufficiently flagrant to warrant the reversal of the defendant's conviction despite defense counsel's failure to object.

Robert Girts was convicted by a jury of aggravated murder. During the state's closing argument, the prosecutor commented on the defendant's failure to testify in his own defense or talk to the police, and defense counsel failed to object to such comments. Among the comments were:

> Again these are [the defendant's] words. And the words that you heard from these folks supplied by him are unrefuted, and they are uncontroverted. There has been no evidence offered to say that these people are incorrect. None at all.
>
> [W]ith respect to the source [of the cyanide], the defendant had no less than three occasions to tell the police that he had ordered cyanide.
>
> Ladies and gentlemen, we don't have to tell you how it was introduced into her system. We know that it was ingested. And there is

Continued on page 26

Continued from page 25

> only one person that can tell you how it was introduced, and that's the defendant.

On federal habeas review, the district court found that the prosecutor's comments were improper and that defense counsel was ineffective for failing to object, but that Girts had failed to show prejudice.

The Sixth Circuit first addressed whether the issue was procedurally defaulted in state court. Because the state court had reviewed the prosecutor's comments under a plain error standard, the Court found that the state had not waived its procedural default rules. However, the Court found that Girts overcame the procedural default: "[W]e find that [Girts] meets the cause and prejudice exception to the procedural default because his trial counsel was ineffective in failing to object to the prosecution's statements during closing argument."

Defense counsel's failure to object to the prosecutor's comments was deficient performance because "[t]here was no conceivable benefit to be derived from failing to challenge the prosecutor's improper statements." The Court found that the resulting prejudice was "patent:"

> If trial counsel had raised an objection, the trial court would have reprimanded the prosecutor and issued a prompt curative instruction to the jury. In turn, the jury would have heard from the judge that the prosecutor's comments called for an improper and impermissible negative inference for Petitioner's exercise of his Fifth Amendment rights. Certainly, if an objection had been raised to the prosecutor's first statement, the prosecutor would not have been permitted to continue to overstep with subsequent comments. Trial counsel's failure to object exacerbated the prejudicial effect of the prosecutor's statements. We find that there is a strong likelihood that at least one juror would have changed his mind if the improper and prejudicial statements would not have been made, especially because the prosecutor presented weak and limited evidence at trial.

In determining whether the prosecutor's comments were sufficiently flagrant to warrant a reversal of Girts' conviction, the Court "'first consider[ed] whether the prosecutor's comments were improper,' and 'then consider[ed] and weigh[ed] four factors:'"

> (1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong

As to the first factor, the Court found the comments to be prejudicial because they went to the central issues in dispute, namely, how Girts' wife ingested cyanide, how Girts obtained cyanide, and what Girts said about his wife's death. The general jury instruction on a defendant's Fifth Amendment right was not sufficient to cure the prejudice.

Next, the Court found that the comments were not isolated, but were in fact a "central theme" in the state's closing argument, and that the comments were deliberately placed before the jury. Lastly, the Court found that the strength of the evidence against Girts was not sufficient to overcome the prosecutor's improper comments: "Given the facts in this case, there is a strong likelihood that the prosecutor strategically made the prejudicial statements at the end of the trial to focus the jury's attention on [Girts'] silence, and away from the limited evidence presented at trial."

Justice Batchelder, in dissent, disagreed with the majority's application of the four factors, especially the strength of the evidence against Girts.

Ferensic v. Birkett,
— F.3d ——, 2007 WL 2471276, (C.A.6 (Mich.))
Before Clay, Gilman, and McKeague, Circuit Judges

Robert Ferensic was convicted of armed robbery, home invasion, and possession of a firearm during the commission of a felony. The evidence against Ferensic consisted solely of eyewitness identifications by the two victims. At trial, the defense was prevented from presenting two key witnesses, Dr. Harvey Shulman and Danny St. John. Dr. Shulman was an expert on eyewitness identification. The court excluded his testimony because defense counsel failed to comply with a pretrial discovery order which ordered counsel to provide the prosecutor with a copy of Dr. Shulman's report at least two months before trial. Instead, the report was provided eleven days before trial.

St. John had witnessed the robbers enter the victims' home and was prepared to undermine the victims' description of the robber offered at trial and to testify that he had never seen the defendant before. The court excluded his testimony because he was not present in the courtroom at the end of the defendant's case. The trial had proceeded faster than defense counsel anticipated, and he had instructed St. John to arrive later in the day. The court refused to adjourn to allow time for St. John to arrive.

The state court had held that the exclusion of Dr. Shulman's testimony, a "concededly severe sanction," did not prejudice Ferensic because defense counsel was able to effectively challenge inconsistencies in the victims' identifications through his cross-examination. As to St. John's testimony,

the state court found no prejudice is its exclusion because "[t]he purported testimony was not especially strong, . . . and inconsistency inherent in the victims' identification was otherwise shown."

In reviewing Ferensic's "right to present a defense" claim, the Court must determine whether the exclusion of evidence was "'arbitrary' or 'disproportionate to the purpose[] [it is] designed to serve.'" "[T]he exclusion of a defendant's evidence should be reserved for only those circumstances where 'a less severe penalty 'would perpetuate rather than limit the prejudice to the State and the harm to the adversary process.'" The Sixth Circuit found that the state court had acted contrary to Supreme Court precedent by failing to apply this proportionality-based analysis. Instead, the state court had applied a traditional prejudice-based analysis.

Under the correct standard, the Court found the trial court's exclusion of Dr. Shulman's testimony to be arbitrary and disproportionate:

> Such disregard for the substantial rights of one party in the absence of any prejudice to the other raises an inference of arbitrariness. (citations omitted). It is certainly proof of disproportionality, especially in light of the absence of harm to the prosecution [the prosecutor did not wish to consult a rebuttal expert and knew the identity of the defense's expert long before trial], the lack of willfulness on the part of Ferensic's counsel in violating the discovery order (he turned over Dr. Shulman's report as soon as he received it 11 days before trial), and the lack of any delay caused by counsel's misstep.
>
> ***
>
> The problem was exacerbated by the trial court's refusal to instruct the jury that the two defense witnesses in question were not permitted to testify. When defense counsel failed to present either witness as promised in his opening statement, the jury might have concluded that the witnesses were unable or unwilling to testify as expected and that defense counsel could not live up to the claims that he made in his opening statement.

As for the exclusion of St. John's testimony, the Court found that the state court had failed to apply the correct standard: a broad, totality of the circumstances analysis. Instead, the state court rested its decision on its determination that Ferensic was not prejudiced by the exclusion.

Turning to the totality of the circumstances analysis, the Court noted that the sole reason for the exclusion of St. John's testimony was that defense counsel had instructed him to arrive at the courthouse at 11:00 a.m., but defense counsel's prior witness concluded his testimony at 10:35 a.m. The trial court refused to grant the half-hour adjournment. "Granting Ferensic's motion would likely not have delayed the proceedings by more than half an hour. Even a longer delay would have been justifiable in light of the fact that, as Ferensic notes in his brief, 'the trial judge had scheduled three days for trial, and the case was proceeding to closing argument in less than a day and a half.'" Given these circumstances, the trial court's refusal to grant an adjournment was an abuse of discretion.

In determining that the exclusion of St. John and Dr. Shulman's testimony was not harmless, the Court emphasized the cumulative effect of their testimony. Additionally, the Court pointed to the fact that the jury had questions about the identifications:

> [T]he jury sent a note to the trial judge stating that "[w]e would like to see the police report," and asked "[w]hat are our options if we don't totally agree on a verdict?' The 'police report," of course, contained the police sketch as part of Ferensic's larger file. Thus the jury's own words imply not only that it had doubts about the strength of the case against Ferensic, but also that those doubts related at least in part to the contents of his police file. Although the jury did not explicitly question the "sufficiency" of the sketch-based identification vis-à-vis Ferensic's guilt, its note, especially when considered in the context of the erroneously excluded testimony from Dr. Shulman and St. John, precludes us from saying "with fair assurance . . . that the judgment was not substantially swayed by the error." (citations omitted) We wish to emphasize just how significant the jury's note is to our analysis, because it distinguishes the present case from many others in which the erroneous exclusion of an expert witness on eyewitness identification might well be harmless.

Having granted Ferensic relief based on his "right to present a defense" claim, the Court did not address his ineffective assistance of counsel claim, which was based on defense counsel's failure to provide Dr. Shulman's report to the prosecutor by the deadline and failure to ensure that St. John was at the courtroom ready to testify in time.

Justice McKeague, in dissent, would hold that the state court's decision was not contrary to nor an unreasonable application of federal law. McKeague would reach the ineffectiveness claim and hold that the state court was not unreasonable in finding that Ferensic was not prejudiced by the exclusion of Dr. Shulman and St. John's testimony.

Continued on page 28

Continued from page 27

McKeague also responded to the majority's reliance on the jury's note in determining whether any error was harmless:

> I do not agree with the majority that the note the jury sent out during deliberations asking to see the police report indicates that the jury "had doubts about the strength of the case against Ferensic." Although, as the majority observes, the police report contained the artist's sketch, it contained other information as well, and the record contains no indication that the jury was interested in the sketch particularly. In any case, the trial court refused to provide the jury with the report, as it had not been entered into evidence, and after further deliberations, the jury found Ferensic guilty.

***Varner v. Stovall*,**
— F.3d ——, 2007 WL 2593533, (C.A.6 (Mich.))
Before Gibbons and Sutton, Circuit Judges, and Beckwith, Chief District Judge

Admission of the defendant's prayers that she had recorded in her journal confessing that she tried to kill her boyfriend did not violate the Religion Clauses of the First and Fourteenth Amendments. Court's exclusion of evidence of Battered Women's Syndrome did not violate Sixth and Fourteenth Amendment right to present a defense.

Janniss Varner was convicted of assault with intent to commit murder after she hired someone to shoot her abusive boyfriend. At trial, the prosecutor introduced excerpts from Varner's journal where she admitted trying to kill her boyfriend and identifying the hired gunman. The journal entries were often addressed "Dear God," contained prayers of supplication and thanks, and expressed her disillusionment with organized religion and church services. The trial court excluded expert testimony on Battered Women's Syndrome and refused to instruct the jury on provocation, reasoning that self-defense and provocation defenses are not available in cases involving a hired hit man.

In the Sixth Circuit, Varner first argued that the admission of her journal entries violated the Religion Clauses:

> [S]he makes the following four-step argument. Step one: Michigan has created an evidentiary privilege for religious communications. Step two: the privilege applies only to religions that encourage their members to communicate with God through an intermediary. Step three: this limitation discriminates among religions because it disfavors belief systems in which individuals communicate directly with God. Step four: the solution to this First Amendment problem is not to strike the privilege (which would not benefit Varner) but to extend it to all religions, including those that do not use intermediaries, and thus to extend the privilege to any journal entry that might be construed as a prayer to God.

The Sixth Circuit held that the admission of Varner's journal entries did not violate the Religion Clauses because, "the clergy-penitent privilege was never designed to apply to private journal entries, and the confinement of the privilege to its historic purposes does not offend . . . [the] requirements of the Religion Clause of the First Amendment." The Court analogized the clergy-penitent privilege to the lawyer-client privilege and the doctor-patient privilege, noting that all three were intended to eliminate barriers to full disclosure in each setting.

> The privilege requires the communication to be directed to a member of the clergy – just as the other privileges require the communication to be directed to an attorney or doctor – because it is the clergy who may be subpoenaed to testify against the individual. The same possibility does not exist with private writings to God, who may be petitioned but never subpoenaed.

The confinement of the privilege to its traditional function does not favor some religions over others, because the privilege does not protect *anyone's* journal entries, whether addressed to God or not. Additionally, the admission of the entries does not restrict Varner's ability to practice her faith, because her journal entries were not the only way she could communicate directly with God.

The Court went on to hold that the state court's exclusion of expert testimony on Battered Women's Syndrome did not violate Varner's Sixth and Fourteenth Amendment right to present a defense. The state courts had determined that in cases involving a hired gunman, the evidence would not support a defendant's belief that she was "in imminent danger or that there is a threat of serious bodily harm." The Sixth Circuit stated, "Much as we sympathize with Varner's plight, we must conclude that the confinement of self-defense instructions to cases of 'imminent danger' does not unreasonably apply Supreme Court precedent [on the right to present a defense], and neither does the state courts' conclusion that a scheme to hire a contract killer does not involve such an imminent danger."

Likewise, Varner was not entitled to an instruction on provocation. "Whether it is a question of self-defense or a question of provocation, Varner fails to explain why an individual who faces a non-imminent threat is not just as capable of calling the authorities as of hiring a contract killer."■

CSG Justice Center Unveils New Reentry Policy Council Website

The Council of State Governments Justice Center today announced the launch of its new Reentry Policy Council (RPC) website at www.reentrypolicy.org. The redesigned site provides more resources and is easier to navigate, giving website visitors quick access to media coverage, announcements from the field, publications, and upgraded tools and materials on a range of reentry issues.

The website also continues to showcase the *Report of the Re-Entry Policy Council*, a comprehensive guide published in 2005 that contains hundreds of policy recommendations for legislators, service providers, researchers, criminal justice professionals, and others involved in creating and implementing effective reentry initiatives. Users will be able to access the full report, or can easily find relevant sections through links on the website that are dedicated to particular topics or project work.

"At a time when states are fighting high recidivism rates that compromise public safety and contribute to the unsustainable growth of prison populations, it's vital to ensure that state agencies and community organizations can easily access and put to use the practical, nonpartisan information that the Justice Center's Reentry Policy Council offers," said Florida State Senator Stephen Wise, Justice Center board member and Senate Criminal Justice Committee member. "The updated and redesigned RPC website does just that."

In addition, the revamped website will feature a suite of hands-on tools designed to help users apply policy recommendations and other information contained in the report to their own reentry programs and initiatives. For example, site visitors can use the Reentry Housing Options Comparison Chart to compare housing options available to people returning to the community from prison or jail. This chart presents extensive information on myriad topics including availability, duration, and funding sources for several housing types in an easy-to-read format.

The RPC plans to release several additional web-based tools later this fall that will address the following issues: assessing the risks and needs of people who are incarcerated or released from prison or jail, accessing federal benefits and cash assistance programs that can aid this population, and improving collaborations between community supervision agencies and children and family services.

"The Reentry Policy Council website is an invaluable resource for anyone involved in prisoner reentry issues, from policymakers to staff working to carry out those policies every day in their communities," said New York State Assemblyman Jeffrion Aubry, Justice Center board member and chair of the Assembly Committee on Correction. "The new website includes such features as interactive tools, which will allow people working on reentry issues across the country to evaluate and improve their programs, and the latest reentry news, funding opportunities, new research, and publications."

The launch of the improved RPC website is the first step in the Justice Center's plan to provide users with a comprehensive online database of reentry resources, including profiles of local programs, research studies, media articles, legislation, descriptions of local advocacy efforts, and examples of coordination by state agencies and community-based organizations to promote integrated reentry strategies. This database will complement the Justice Center's existing Criminal Justice / Mental Health Information Network, which provides expansive information on mental health issues as they relate to the criminal justice system.

The Fall 2007 Special Issue of Criminal Justice Magazine, "The Criminally Mentally Ill," is available online at http://www.abanet.org/crimjust/cjmag/22-3/home.html.

Improving Standards for Admissibility of Accomplice and Snitch Testimony

http://www.thejusticeproject.org/solution/snitch/

In Jailhouse Snitch Testimony: A Policy Review (pdf), The Justice Project offers recommendations and solutions for improving the standards of admissibility of in-custody informant or "snitch" testimony. The policy review includes information on snitch testimony policy and law, case studies, states and jurisdictions which have enacted successful methods for safeguarding against perjured testimony, voices of support, a model policy, and key statistics. Hardcopies of the policy review are available on request. If you are working directly on this issue in your state, or you would like additional information, please contact info@thejusticeproject.org.

The use of jailhouse snitch testimony has been widely used throughout the American criminal justice system. Unfortunately jailhouse snitches are often utilized by prosecutors despite their testimony being widely regarded as the least reliable form of evidence in the criminal justice system. A 2005 study of 111 death row exonerees found that 51 were wrongly sentenced to death in part due to testimony of witnesses with incentive to lie.

Fabricated snitch testimony that leads to wrongful convictions is expensive not only in financial costs, but in societal costs: an innocent person is punished while a guilty person remains at large.

The motive to fabricate testimony is inherent in a system that rewards snitching for personal gain. When the state offers a benefit in exchange for testimony, whether that benefit is explicitly stated or, as is often the case, implied, the incentive for an incarcerated person to fabricate evidence dramatically increases. With little to lose and much to gain, jailhouse snitches are often desperate to attain compensation – such as sentence reductions or even an agreement that they not be prosecuted at all – in exchange for testimony against another person.

Fabricated snitch testimony that leads to wrongful convictions is expensive not only in financial costs, but in societal costs: an innocent person is punished while a guilty person remains at large. The state is less credible in its pursuit of justice. And public frustration with delayed and unreliable justice grows.

By improving the standards for admissibility of jailhouse informant evidence at trial, states can help ensure that finders of fact are able to make more informed decisions when life and death are at stake. The Justice Project has identified a number of recommendations to help guard against perjured testimony including:

Written pretrial disclosures of witness compensation arrangements and other information bearing on witness credibility.
Pretrial hearings on the reliability of a particular informant's testimony.

A requirement that accomplice or in-custody informant testimony be corroborated.

Cautionary jury instructions alerting the jury to the reliability issues presented by snitch testimony.

These reforms increase the transparency and openness of the process and help ensure that the most reliable evidence is making it into the courtroom and before the jury.

With codified requirements for determining the reliability of jailhouse informant testimony, law enforcement, prosecutors, and the community all benefit from stronger prosecutions, more efficient proceedings, and more reliable outcomes in criminal cases. ■

Practice Corner
Litigation Tips & Comments

Make a good record on conditional guilty pleas

Recently, we've seen a number of final judgments which do not have the condition on which the plea is made reflected in the judgment or cases which say they are based on a conditional guilty plea, but do not specify the issue being appealed either in the judgment or on the videotape.

RCr 8.09 states that when a defendant enters a conditional plea, the conditions must be written. When entering a conditional guilty plea, PLEASE make sure to note **on the record** the condition(s) under which the plea is taken and make sure that the conditions are noted in the final judgment.

Defendant's testimony to develop standing at suppression hearings cannot be used against a defendant at a trial.

If the Commonwealth's Attorney in your area wants to use the defendant's testimony in this way, OBJECT and cite to *Simmons v. United States*, 390 U.S. 377, 393-394 (1968). In that case, the Supreme court said "a defendant is 'compelled' to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forego a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. **When this assumption is applied to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created.** . . . .We find it intolerable that one constitutional right should have to be surrendered in order to assert another."

The Kentucky case to cite is *Hayes v. Commonwealth*, 175 S.W.3d 574 (Ky. 2005). In that case, the Kentucky Supreme Court cited the "intolerability" language from Simmons. The court also noted that *Hayes* had not received a ruling on his suppression motion before announcing ready for trial.

In other words, make sure you get rulings on suppression motions, think about possibly doing a motion in limine based on *Simmons* and *Hayes* to prevent the prosecution from using your client's testimony to establish standing against him, OBJECT when he or she does it, and make sure you get a ruling on that objection.

Short reminders

Reyes v. Commonwealth, 764 S.W.2d 62 (Ky. 1989), holds that defendants can enforce specific performance of plea bargains against both prosecutors and judges.

Anderson v. Commonwealth, 864 S.W.2d 909 (Ky. 1993), holds that in a *Brady*/discovery situation, knowledge from records of other state agencies is imputed to the Commonwealth.

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

As of May 1, 2007, KRE 103(a)(1) now reads: "If the ruling is one admitting evidence, a timely objection or motion to strike appears of record, *stating the specific grounds of the objection,* if the specific ground was not apparent from the context"

PRESORTED STANDARD
U.S. POSTAGE PAID
LEXINGTON, KY
PERMIT # 1

THE ADVOCATE

Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

Upcoming DPA, NCDC, NLADA & KACDL Education

**** DPA ****

Train the Trainer/Nuts and Bolts
Radisson Plaza
Lexington, KY
March 24-28, 2008

Annual Conference
Radisson Plaza
Lexington, KY
June 16-18, 2008

Litigation Practice Institute
Kentucky Leadership Center
Faubush, KY
October 5-10, 2008

NOTE: DPA Education is open only to criminal defense advocates.

For more information:
http://dpa.ky.gov/education.php

For more information regarding KACDL programs:

Charolette Brooks, Executive Director
Tel: (606) 677-1687
Fax: (606) 679-3007
Web: kacdl2000@yahoo.com

****

For more information regarding NLADA programs:

NLADA
1625 K Street, N.W., Suite 800
Washington, D.C. 20006
Tel: (202) 452-0620
Fax: (202) 872-1031
Web: http://www.nlada.org

****

For more information regarding NCDC programs:

Rosie Flanagan
NCDC, c/o Mercer Law School
Macon, Georgia 31207
Tel: (478) 746-4151
Fax: (478) 743-0160
Web: http://www.ncdc.net/

**** KBA ****

Annual Seminar
Lexington, KY
June 18-20, 2008

**** NLADA ****

Life in the Balance
Atlanta, GA
March 8-11, 2008

**** NCDC ****

Theory and Themes
Atlanta, GA
March 28-30, 2008

A comprehensive listing of criminal defense related training events can be found at the NLADA Trainers Section online calendar at:
http://www.airset.com/Public/Calendars.jsp?id=_akEPTXAsBaUR