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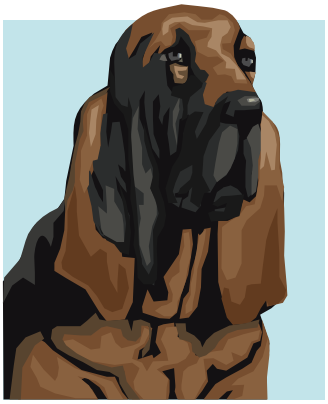
KENTUCKY INNOCENCE PROJECT: ADVANCING JUSTICE IN KENTUCKY

WHY KENTUCKY HAS GONE TO THE DOGS: A CLOSER LOOK AT *KUMHO TIRE* AND "EXPERIENCE-BASED" EXPERTS



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FROM THE EDITOR...

Jeff Sherr

In November of 2007, the Department of Public Advocacy participated in The Advancing Justice Conference at the Brandies School of Law in Louisville. This conference included participants from throughout Kentucky's criminal justice system in a discussion of improvements to the system to insure the innocent are not wrongfully convicted. In this edition, Gordon Rahn of the Kentucky Innocence Project, provides a summary of this event which featured Gary Wells, Jennifer Thompson-Cannino, Herman May, Kevin Wittman, and Keith Findley.

DPA Appeals Attorney, Susan Balliet continues her series examining admissibility of "scientific" evidence in Kentucky in **Why Kentucky has Gone to the Dogs: A Closer Look at *Kumho Tire* and 'Experience-Based' Experts.** This article examines two recent Kentucky Supreme Court opinions involving arson sniffer dogs and the admission of their "experience-based" evidence.

Due the publishing of the Trial Law Notebook as the last edition of **The Advocate**, the length of our regular columns fills the rest of our space this issue. Columnist Roy A. Durham, David Harshaw, Ernie Lewis, and David M. Barron bring us up to speed on important rulings in the last few months.■

ADVANCING JUSTICE IN KENTUCKY

By Gordon Rahn, Kentucky Innocence Project

There is an old adage that says "if it ain't broken, don't fix it." But we all know that everything can be improved upon, and that was the underlying theme of the Advancing Justice Conference held November 16, 2007 at the Brandeis School of Law on the campus of the University of Louisville. Hosted by U of L's law school and sponsored by Chase College of Law at Northern Kentucky University, the University of Kentucky College of Law, the Masters Program in Criminal Justice at Eastern Kentucky University's College of Justice and Safety, and DNA Diagnostics Center of Fairfield, Ohio, the conference brought together stakeholders in the criminal justice system in Kentucky to discuss ways to improve the system to insure innocent Kentucky citizens are not sent to prisons for crimes they did not commit and to increase the chances of putting the guilty person behind bars.

As of this writing, 208 men and women have been exonerated in the United States by post-conviction DNA testing.[1] Two Kentucky men have been released from incarceration and their charges dismissed due to DNA testing: William Gregory of Jefferson County and Herman May of Franklin County.[2] May, a client of the Kentucky Innocence Project, was immediately released from prison on September 18, 2002, when the trial court entered its order saying, "This Court also finds that results of the tests are of 'such decisive value or force…that it would probably change the result if a new trial should be granted.'"[3]

The key to insuring that more men and women like William Gregory and Herman May do not get sent to prison for something they did not do, as was emphasized at the conference, is to learn from "The Innocents". Learning those lessons does not mean pointing fingers but identifying the areas where mistakes are being made and then doing everything possible, as a criminal justice system and as a society, to make sure those mistakes do not repeat themselves and, at the very least, minimize the opportunity for mistakes to happen.

So, what kind of lessons can we learn from The Innocents? First and foremost, besides the human tragedy that occurs in every such case (more on that later), is the fact that almost 80% of the 208 DNA exonerations have involved mistaken eyewitness identification.[4] In both the Gregory case and the May case, eyewitness identification was a major factor in their convictions.

Gary Wells, a professor of psychology at Iowa State University, spoke to the approximately 75 people who attended the conference about the many factors that can lead to mistaken eyewitness identification.[5] Wells discussed the many problems associated with the most common identification process used by law enforcement across the country today: the photo lineup. In a photo lineup, a witness is shown 6-8 photos. The lineup may or may not include the suspect; it is suggested that the individual showing the lineup explain that to the witness. The witness looks at all of the photographs and then, more often than not, points out an individual that he identifies as the person he saw commit the crime. Seems simple enough.

That is, until you review the empirical data Wells and his colleagues have collected over the years. Professor Wells, who has studied the issue for more than 25 years, has developed a theory he calls "relative judgment" based upon the data. The theory is relatively simple: eyewitnesses tend to identify the person from the lineup who, in the opinion of the eyewitness, looks most like the culprit *relative to the other members of the lineup*.[6] An example of relative judgment may have come into play in Herman May's case when the investigating detective flew to California to show the vacationing victim a photo lineup. The young woman first picked out three pictures from the lineup saying they resembled her attacker, and after studying all three for some time, she finally picked Herman.

In Wells' studies, if the suspect was removed from a photo lineup, a large percentage of the witnesses selected another photo rather than making no choice at all.[7] Witnesses want to do the right thing and often think that a suspect must be in the lineup, despite warnings that he might not be.

And that is another problematic area identified by Wells: the unintentional, or sometimes intentional, suggestive support often given to the witness by the officer conducting the lineup. Through questions or phrases such as "Are you sure?," "Take another look just to make sure," or "Great job! You got him!" the witness can be led to identify the suspect not through confidence but through suggestiveness. Or, as in the last phrase, the witness' confidence in the identification is bolstered and has a carry over affect to the courtroom.

Professor Wells has become one of the nation's leading experts supporting eyewitness identification procedural reform. His recommendations, accepted and adopted by many jurisdictions in the country, include:

1) Use a double blind procedure, meaning that the individual conducting or administering the photo, or even live, lineup has no idea as to who the suspect is;

2) Have the administrator of the lineup advise the witness that the suspect may not be in the lineup and have the witness sign an acknowledgement of being so advised;
3) Use a sequential photo pack, rather than a simultaneous photo lineup, where the witness looks at the photos one at a time and gives either a yes or a no to that individual, thus avoiding the relative judgment quandary.[8]
4) Get a statement of confidence from the eyewitness at the time of identification and prior to any feedback.

Another recommendation that Wells made was to utilize modern technology to avoid the highly suggestive "show up". He suggested that police officers could utilize the laptop computers that many already carry in their police cruisers by sending a description given by a witness to police headquarters who would then, in turn, put together a proper photo lineup based upon that description. That lineup could be transmitted back to the officer who could immediately show it to the witness at the scene, thus avoiding the live show up of a suspect.

Are such reforms really necessary? The gripping stories of two of the speakers at the conference readily provide answers to that question. They spoke from two completely different perspectives about their experiences.

Jennifer Thompson-Cannino is from North Carolina and while she was speaking the large classroom in which the conference was held was completely silent. It was silent not because the attendees had a hard time hearing this soft-spoken woman; it was because her story is one that grabs your heart.

Jennifer was a college student in North Carolina when a man entered her apartment and brutally raped her. Jennifer used her intellect not only to survive the attack but as a means of finding a way to identify her attacker, because she was determined that IF she survived she was going to make sure he never did this to anyone else ever again. She talked her attacker into turning on some lights and she focused all of her attention on his face rather than the knife that he held on her. When she was finally able to escape from him and the police were called, she gave a very detailed description of her attacker.

Not long after her attack, Jennifer was asked to look at a photo lineup. She quickly picked a man by the name of Ronald Cotton. "Good job, Jennifer," the police officer told her when she picked his picture from the lineup. She was proud; she was doing the right thing. She later picked Cotton out again in a live lineup, again with the pat on the back from the police.

A few months later, sitting at the witness stand, Jennifer pointed at Ronald Cotton as the man who raped her. Ronald Cotton was sentenced to life in prison.[9] Jennifer was happy; she had persevered and sent the man who attacked her to prison. Life went on for her.

Cotton's conviction was reversed by the appellate courts in North Carolina after another man in prison had allegedly confessed to other inmates that he had raped Thompson, and Cotton was tried again for Thompson-Cannino's rape. Before the second trial, the second man was brought before Jennifer and she told police he was not her attacker. In the second trial Cotton was also tried for the rape of the second woman, who now identified Cotton as her attacker. At trial, Jennifer again pointed at Cotton and confidently declared that he was the man who broke into her apartment, held a knife to her throat and brutally raped her. Cotton was convicted of both rapes and received two life sentences.

Jennifer went on with her life. She married, she had triplets, and she became a soccer mom. After a few years, the investigating detective knocked on her door and told her that Cotton wanted the physical evidence from her case tested for DNA profiles. Jennifer told him she had no problem with that since she was positive about what the results would be.

Months later, the detective was again at her door and this time he told her they had made a mistake-the DNA testing had excluded Ronald Cotton and had conclusively shown that the second man was indeed the man who had raped her. Thompson-Cannino thought she had been safe from Ronald Cotton all those years he was in prison but now she saw his face again in her dreams and had new fears. Would the man she had put in prison now want to harm her?

Jennifer met Ronald Cotton several months after he was released from prison. Facing her fears and through tears, she apologized to him. His immediate response was to hug her. Now, they are friends, they often appear together at different events and are collaborating on a book.

Today, Jennifer travels the country telling her story with the hope that her story will help in improving the criminal justice system so that no one has to spend years in prison for something they did not do—men like Ronald Cotton, or like Herman May.

Herman May answered questions during the conference lunch session about his ordeal and the 13 years he spent in prison. Often emotional, Herman talked about his case, the time he lost away from his parents and family, and the difficulties he faced when released from prison. When asked if he had received any compensation from the state, or anyone, for his lost time in prison, Herman quietly answered no. Marguerite Thomas, one of Herman's lawyers who moderated the question and answer session, reminded the conference attendees later that Herman did receive a $25 check when he was released from the Kentucky State Penitentiary, but he could not immediately cash it because he did not have a driver's license or other form of identification.

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Herman told the group, in answer to a question, that he wouldn't want anyone to have to go through what he did but he personally would not change a thing. According to Herman, if things had been different, he would not have met his wife and he would not be the father of two children.

After Herman spoke, Jennifer Thompson-Cannino immediately sought Herman out and talked with him, and gave him a hug as Ronald Cotton had done for her years ago. She, a rape victim, was trying to help Herman May, wrongfully convicted of rape.

Having heard how mistakes can happen and seeing how those mistakes affect the lives of all involved, the conference attendees heard about how improvements can be made in the system to minimize the chances of innocent men and women being convicted and incarcerated while the guilty individual(s) continue to wreak havoc on society.

The cases of Herman May, Ronald Cotton and William Gregory all involved DNA testing so preservation of the evidence was a major factor in their ultimate release. Major Kevin Wittman talked with the group about improvements the Charlotte/Mecklenberg County (North Carolina) police department had made in their evidence storage procedures. Held out as a model for storage of evidence, the department bar codes their evidence and logs the location and other information about the evidence into the department's computer system. In large part due to the improvements, the department has cleared numerous cold cases, including several murders.

The Kentucky Innocence Project, through its investigations of innocence claims throughout the Commonwealth, has seen the worst in storage systems and procedures. Cluttered evidence rooms behind locked doors, loose and exposed slides with key physical evidence found in the bottom of a box from a **different** case, evidence that could be tested for DNA stored in a plastic bag (absolute worst environment possible). Or, the evidence that cannot be found, such as in one jurisdiction where the court reporter a few years ago was responsible for storing the physical evidence entered at trial. She kept it in the storage area above her garage. And when she passed away, her children destroyed everything, completely unaware of the importance of what was there.

Keith Findley, a professor of law at the Wisconsin College of Law and co-director of the Wisconsin Innocence Project, shared examples of other states creating justice and innocence commissions to study the issues discussed at the conference as well as other factors in the wrongful conviction of innocent people.[10] As Findley noted, the purpose of the commissions was not to accuse certain parties or agencies of wrongdoing but to study the issues, make recommendations and even draft model legislation or policy for consideration by the appropriate governing authority. Commissions, according to Findley, come in many shapes and sizes. Some are independently created by interested bodies,[11] others by the legislature,[12] one by a governor,[13] and another by the highest court of the state.[14] The common factor in all of them, in order for them to meet their mission, is a broad representation on the commission. The mission statement from the North Carolina Actual Innocence Commission succinctly summarizes the need for justice commissions in every state or commonwealth:

> "The North Carolina Actual Innocence Commission is established to provide a forum for education and dialog among prosecutors, defense attorneys, judges, law enforcement personnel, legal scholars, legislative representatives, and victim advocates regarding the common causes of wrongful conviction of the innocent and to develop potential procedures to decrease the possibility of conviction of the innocent in North Carolina, thereby increasing conviction of the guilty."

Following the presentations by the speakers, roundtable discussions were available for the conference attendees to participate in so they could voice their concerns and ideas. One of the recommendations that came out of the roundtable discussions was that Kentucky should join the ranks of states that have established commissions and create its own justice commission to study and make recommendations for reforms.

Interestingly, in a pre-conference survey created by the Kentucky Innocence Project that was included with the invitations to the conference, a large percentage of respondents agreed that such a commission should be created. One hundred percent of the respondents agreed that improvements can be made in Kentucky's criminal justice system and 61% felt that the issues addressed at the conference (eyewitness identification, evidence preservation, DNA testing) were key areas demanding improvement.[15] Respondents thought that legislation is the best way to put reforms into place, but 72% thought a commission should study the issues and make recommendations to the Kentucky General Assembly (only 8% of the respondents thought the commission should be appointed by the legislature).

Clearly, the respondents to the survey and the Advancing Justice Conference participants agree that improvements can be made to the Kentucky criminal justice system and that a criminal justice commission, regardless of the format or who appoints it, is one means of making sure the right improvements are made.

Unfortunately, there will be more rape victims like Jennifer Thompson-Cannino. But as stakeholders in the criminal justice system and as a society, we owe it to her and to men like Herman May, William Gregory, Ronald Cotton and the other Innocents to do everything within our power to insure

their stories are not repeated in the future by other victims or wrongfully convicted men. We must learn the lessons from the Innocents and people like Jennifer Thompson-Cannino or we, not the system, will have failed them.

Endnotes:

1. The Innocence Project, www.innocenceproject.org
2. Two other Kentucky citizens have been released from prisons who were clients of the Kentucky Innocence Project. Ben Kiper's case was dismissed in 2007 by Butler Circuit Court and Tim Smith received relief from the Kenton Circuit Court. The Commonwealth appealed the court's decision in the Smith case and the Court of Appeals affirmed. Smith remains free on bond as the Commonwealth decides what its next step will be.
3. *Commonwealth v Herman Douglas May*, Franklin Circuit Court, Division I, Case No. 88-CR-00098, ORDER, pg. 1.
4. The Innocence Project, *supra*.
5. See *The Advocate*, Journal *of Criminal Justice Education & Research*. Department of Public Advocacy, Volume 29, Issue No. 1. January 2007. What Went Wrong? (Part III): Eyewitness Memory and Misidentification.
6. Wells, G.L. (1984). The psychology of lineup identifications. *Journal of Applied Social Psychology*, 14, 89-103.
7. Wells, G.L. (1993). What do we know about eyewitness identification? *American Psychologist*, 48, 553-571.
8. A report known as the Mecklenberg Report claims that a pilot program utilizing the sequential lineup casts doubt on recent reform of eyewitness identification procedures. Mecklenberg, S.H. *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures.* March 17, 2006. The claim is based upon data that indicates that while fewer innocent people were identified in the process, witnesses also failed to identify as many suspects as before. Professor Wells and other professionals argue that the data actually supports the reform as it shows the witnesses are not "guessing" in making the identifications.
9. Another woman who lived in the same area had been raped the same night as Jennifer Thompson. Cotton was a suspect in that rape but the woman could not identify him so he was tried only for the rape of Thompson.
10. Other states that have in recent years formed justice commissions to study wrongful convictions include:
11. Wisconsin Criminal Justice Study Commission, Virginia Innocence Commission
12 California Commission on the Fair Administration of Justice, Pennsylvania Innocence Commission Act, Connecticut Innocence Commission
13. Illinois Governor's Commission on Capital Punishment (issued a report in 2002 with 85 reform recommendations.
14. North Carolina Actual Innocence Commission
15. 23% believe the recording procedures of interviews to be an area that must be improved. ■

Independent Panel Issues Report on Transfer of Youth from Juvenile to Adult Justice System

A new report - "Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services,? was published as part of the Morbidity and Mortality Weekly Report (MMWR) Recommendations and Reports series.

The recommendations from a team of researchers led by scientists at the Guide to Community Preventive Services (Community Guide) are based on a systematic review of studies that examined the effectiveness of strengthened laws and policies for transferring youth under age 18 to the adult justice system.

The report from the Task Force on Community Preventive Services - an independent, nonfederal panel of community health experts - recommends against laws or policies that facilitate the transfer of juveniles to the adult justice system.

The full report is available at http://www.cdc.gov/mmwr/mmwr_rr.html.

WHY KENTUCKY HAS GONE TO THE DOGS:

A CLOSER LOOK AT *KUMHO TIRE* AND 'EXPERIENCE-BASED' EXPERTS

By Susan Jackson Balliet

Maybe it's because Kentucky is an ancient Indian hunting ground. Maybe Kentuckians revere their hunting dogs more than other folk do. Or maybe *Kumho Tire*[1] didn't provide firm enough guidance on how to evaluate the reliability of "experience-based" expertise. Whatever the reason, two recent Kentucky Supreme Court opinions, *DeBruler*[2] and *Yell*,[3] uphold long prison sentences by largely exempting tracker dogs, arson sniffer dogs, and their handlers, from the rigor of scientific scrutiny.[4] *DeBruler* holds that a dog's opinion (regarding the trail of the owner of certain clothes) is not subject to *Daubert*,[5] and comes in at trial regardless whether it is "scientifically" reliable. *Yell* goes further by allowing juries to hear a dog's opinion that accelerants were present (and a fire was arson) despite 100% negative scientific lab results debunking the dog. With these two opinions, Kentucky has –at a minimum—violated Janeane Garofalo's famous advice, roughly paraphrased: "It's okay to trust your dog, but just don't *over-trust* your dog."[6]

Unfortunately, in addition, *DeBruler* and *Yell* also violate *Kumho Tire*. Almost a decade ago, Kentucky adopted *Kumho Tire*, acknowledging that KRE §702 requires *Daubert* gatekeeper scrutiny for **all** expert testimony, including non-scientific, "experience-based" expertise like that of dog handlers.[7] This article argues that while the *Kumho Tire* standard for evaluating non-scientific, and "skill or experience-based" expertise may not be crystal clear, Kentucky has gone off-track by failing to apply it at all. Taking a close look at *Kumho Tire* and how our courts ignore and dodge it in *DeBruler* and *Yell* will help us understand how to deal with **all** non-scientific "experience-based" experts. *Daubert* and *Kumho Tire* are our friends in any fight to keep "experience-based" expertise from coming in and prejudicing our clients. We need to keep these two cases close at hand.

Ignoring *Kumho Tire* by Sticking to an Ancient "Foundation" Test

The strongest evidence tying DeBruler to a kidnap and robbery was the fact that two German Shepherds sniffed some of his clothes, then ran around the crime scene in a way their handlers interpreted to mean, "The owner of the clothes was here!"[8] There was no other evidence tying DeBruler to the crime. The expertise of a dog handler working with a trained dog qualifies as non-scientific "skill or experience-based" expertise that *Kumho Tire* says must comply with *Daubert*. But the Kentucky Supreme Court held that in order to determine the reliability of the dogs, no *Daubert* hearing or inquiry was necessary. All that was necessary was to comply with Kentucky's 109-year-old procedure of putting the dog-handler on the stand to establish a few bare foundational facts:

> "that the dog [was] of pure blood, and of a stock characterized by acuteness of scent and power of discrimination, …that the dog in question [was] possessed of these qualities, and [had] been trained or tested in their exercise in the tracking of human beings…"[9]

Henceforth, under *DeBruler*, once the foundational facts are established, a dog handler can –supposedly reliably—tell a jury what he thinks his dog thought. In *DeBruler*, the dog handlers' testimony that their dogs thought DeBruler had been at the kidnap crime scene was devastating. Based on the dog evidence alone, DeBruler got a life sentence.

Similarly, when Robert Yell was accused of intentionally burning down his home, killing one child, and severely burning another, probably the most damaging, prejudicial evidence was that PJ, a sniffer dog, "alerted" at six locations in Yell's burned-out trailer. According to PJ's handler, this behavior meant PJ had detected accelerant at each and every one of the six locations. Using state-of-the-art science, the lab was unable to confirm PJ's opinion, and the six samples all came back "negative" for accelerant. Despite this, the Court in *Yell* found there was a sufficient showing of reliability for PJ the dog.[10] PJ's opinion that accelerants **were** present, and the fire was no accident, was presented to Yell's jury. The jury convicted Yell of intentional arson, and gave him 52 years.

Dodging *Kumho Tire* by Improvising a Loose "totality" Test

The underlying problem in both *DeBruler* and *Yell* is that the Kentucky Supreme Court pretty much ignored the *Daubert* factors that *Kumho Tire* said "should" be considered.[11] Instead of the *Daubert* factors, the *DeBruler* court stubbornly applied an ancient foundational formula, ignoring the fact that it requires less reliability than *Daubert* and *Kumho Tire*. In *Yell* the Court articulated no standard, and simply listed everything that tended to support PJ's reliability. In effect, the *Yell* Court dodged *Kumho Tire* by inventing its own, easier, totality-of-circumstances-we-know-reliable-when-we-see-it standard. As in *DeBruler*, the Court in *Yell* made no effort to determine whether their totality-of-circumstances standard insured the high level of reliability required by *Kumho Tire* and *Daubert*. Indeed, as recognized by two dissenting Kentucky Supreme

Court justices, the improvised *Yell* standard failed to establish PJ's reliability.[12]

Yell*'s "totality" Test Does Not Satisfy *Kumho Tire

The factors that supposedly added up to reliability in *Yell* included: 1) in training PJ had "proved" ability to identify as little as one-half eye-dropper of accelerant in control samples;[13] 2) in two prior cases where PJ's samples tested negative in the lab, the defendants later confessed they had used accelerants where PJ alerted;[14] and 3) two methods used by PJ's handler –including, a) "calibration" —i.e., getting PJ to alert prior to entering the scene on a known sample of accelerant, and b) having PJ re-identify her alerted-on trailer samples, plus a non-accelerant control sample, away from the crime scene, helped to insure PJ's reliability.[15] *Yell* contains no discussion why it chose the factors it chose, and no claim that these factors add up to *Kumho Tire* reliability.

In fact, the *Yell* factors add up to less than *Kumho Tire* reliability. When you add up the fact that in training PJ identified a small quantity of accelerant (not necessarily less than 15-20 parts per million), that twice PJ's unconfirmed alerts coincided with defendant confessions, and whatever it was that PJ identified in Yell's trailer, she identified it again outside, this is not good enough to meet the reliability standard of *Kumho Tire*. With the lab results failing to confirm accelerants, and no documentation showing PJ's error rate, or the error rate in general of dogs trained in her program, the court was forced to rely on the say-so of PJ's handler that PJ was reliable. And relying on the bare say-so, or "*ipse dixit*" of an expert is expressly forbidden by *Goodyear Tire and Rubber Co. v. Thompson*, Kentucky's version of *Kumho Tire*.[16]

***DeBruler* and *Yell* fail to Assess Underlying Methodology**

Neither *DeBruler* nor *Yell* mention anything about the reliability of the underlying methodology, *i.e.*, the system of training that produced PJ or the German Shepherds. Yet, *Daubert* and *Kumho Tire* require a great deal more than just establishing the reliability of specific dogs, or specific experts. These cases interpret Rule 702 as requiring the qualification of the entire underlying field of knowledge or expertise as reliable. The dog handlers in *DeBruler* and *Yell* had no expertise in designing or evaluating the soundness of the entire underlying training programs that produced their dogs. Even had they been asked, arguably they were not qualified to establish over-all reliability of the methodology that produced their dogs.[17]

Qualifying a field of knowledge takes more than a lab tech, or a dog handler.

Unfortunately, in *Fugate*, the Kentucky Supreme Court held that a mere lab tech was qualified to testify that DNA testing in general was reliable. But it's important to note that the Court carefully bolstered the lab tech's opinion by taking judicial notice that many courts had already found DNA reliable. If the Court in *Fugate* felt the lab tech was qualified **on her own** to establish the bone fides of the entire field of DNA, it would not have painstakingly listed other cases and taken judicial notice.

By contrast, no judicial notice of the reliability of sniffer dogs, for instance, was or is possible because so many states reject the reliability of uncorroborated sniffer alerts.18 In any case, like this one, where judicial notice is not feasible, we should argue that a mere lab tech, or individual dog handler, is incompetent, and unqualified to establish the bona fides of the entire underlying field of knowledge. It took more than a lab tech in *Fugate*. It should take more than a lab tech in any case.

Our clients are entitled to *Daubert* hearings on *all* experts, including dogs.

Kumho Tire made clear that *Daubert* applies to **all** expert testimony, specifically including "experience-based" expert testimony.[19] And *Goodyear Tire* confirmed that to establish the reliability of "other specialized knowledge" as well as scientific knowledge, **a hearing is mandatory**.[20] *DeBruler*'s holding that no *Daubert* hearing is required in a tracker dog case is contrary to *Goodyear Tire*, and should be challenged. Any client facing a dog handler is entitled to a hearing to determine whether or not **this dog**, **this dog handler**, and the **underlying methodology** used to train and score this dog and its handler, are reliable enough to meet the admissibility standard of Rule 702, *Daubert* and *Kumho Tire*. Under *Fugate* and *Johnson*, our clients are entitled to challenge any expertise, no matter how non-scientific and no matter how time-honored as reliable.

After a prima facie showing of unreliability –before the hearing, or at the hearing—the burden shifts to the Commonwealth[21] to prove by a preponderance that both the underlying methodology **and** this particular dog and handler satisfy **not** some 109-year-old foundational rule, **not** some ad hoc "totality" test, but the standard established in *Kumho Tire* for non-scientific experts.

What IS the *Kumho Tire* Standard for Non-scientific Experts?

Kumho Tire said that when dealing with non-scientific experience-based expertise, courts **"may"** consider *Daubert*'s "factors" (testing, peer review/ publication, known or potential error rate, existence of standards, and general acceptance). The Court emphasized that its use of the word "may" reflects that the Rule 702 inquiry is "flexible,"[22] *i.e.*, that the *Daubert* factors apply more loosely to non-scientific "skill or experience-based" expertise.[23] But here's the part that everyone keeps forgetting. *Kumho Tire* also said that "a trial court **should** consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony."[24]

Continued on page 10

Continued from page 9

By saying that the *Daubert* factors for evaluating the reliability of **scientific** expertise **should be considered whenever they reasonably can be applied to non-scientific** expertise, *Kumho Tire* arguably created a mandate that whenever a *Daubert* factor reasonably can apply, it must be applied. *Kumho Tire* opened the door wide for argument regarding which specific *Daubert* factors are "reasonable measures" of the reliability of whatever area of knowledge we are dealing with.

For instance, in *Yell*, PJ's skills had not been recertified for four months before the fire (lack of testing), she had never been trained on lighter fluid (lack of testing), no one — including her handler— had any record of where, or how, or with what encouragement she alerted in Yell's trailer, or in any of her other crime scenes (failure to establish error rate), there was no record of PJ's accuracy rate, no log on her field work, and no data regarding how many times the lab had failed to confirm her opinion (failure re: error rate). All these deficiencies and failures are readily measurable under the *Daubert* factors of testing, known or potential error rate, and compliance with existing standards. It is possible to test dogs and their handlers, and to establish error rates. These *Daubert* factors could have reasonably, **easily**, been applied to measure PJ and her field of knowledge to find them both lacking. It was a violation of *Kumho Tire* not to consider and apply them.

DeBruler's* Old "foundation" Test Does Not Satisfy *Kumho Tire

Instead of *Kumho Tire*, the *DeBruler* Court applied a 109-year-old rule calling merely for "foundational evidence of the canine's scent tracking record; the qualifications of its handler, [and] its training and history." This violates *Kumho Tire* and *Goodyear Tire* because it allows reliability to be proved up by the "ipse dixit" of the handlers. The *DeBruler* Court admitted that the handlers' testimony was limited to "their personal observations of the dogs' actions, and their interpretation of these actions based on experience and training."[25] By finding that was enough, the Court violated *Kumho Tire* and *Goodyear Tire*.

The *DeBruler* Court understood that *Kumho Tire* is permissive, but misunderstood what *Kumho Tire* is permissive **about.** Neither *Kumho Tire* nor *Goodyear Tire* are permissive about *Daubert*. Both expressly make a *Daubert* inquiry **mandatory** for **all** expert testimony. The only thing *Kumho Tire* makes permissive is which *Daubert* factors apply to any given non-scientific knowledge. Even that permissiveness is limited, and whenever a *Daubert* factor **can reasonably be applied**, *Kumho Tire* says it **should** be applied. By creating an "investigative technique" exception to *Kumho Tire* and requiring evidence of "training" or "testing" without setting any standard, or acceptable error rate for either, the *DeBruler* Court has missed the point of *Kumho Tire*. *Kumho Tire* requires that insofar as they apply, the *Daubert* factors must be satisfied. Only insofar as they do not apply, other **presumably equivalent** tests for reliability "**may"** be identified and satisfied.

So, what do we do?

Based on the four cases cited in *DeBruler* in support of its decision not to apply *Daubert*,[26] it is safe to say that Kentucky is not the only state that's confused regarding the applicability of *Kumho Tire* and the *Daubert* factors to non-scientific, "experience-based" expertise. Apparently the United States Supreme Court needs to clarify that *Kumho Tire* renders the *Daubert* factors applicable in every case they can reasonably apply to. In anticipation of the day our highest court so rules, we must continue to challenge and preserve reliability issues in all cases involving dogs, and other non-scientific experts.

If tracker dog, or arson dog, or other non-scientific expert evidence is set to come in against your client, challenge the dog, its handler, the expert. Demand a *Daubert* hearing regardless of what it says in *DeBruler* or *Yell*. Demand discovery of all records from the dog's, the handler's, or the other expert's training, including all records (including lab results) from past cases the dog has worked on, and all records related to the design and reliability of the training programs and certification the dog, the handler, or other expert attended. Object if the court tries to apply any standard but *Daubert* and *Kumho Tire.*

Figure out which of the *Daubert* factors **could reasonably apply** to help evaluate the reliability of the expertise you are dealing with. Argue that *Kumho Tire* says the court "should" consider any and all *Daubert* factors "where they are reasonable measures of the reliability of expert testimony." If your court insists that *Daubert* does not apply, put on evidence and argue that whatever factor or standard the court proposes to consider instead of (or in addition to) the *Daubert* factors is **not** as reliable as the *Daubert* factors.

For tracker dog cases, if you fail to convince the trial court to apply *Daubert*, and *Kumho Tire*, then argue that in **this** case the dog's scent tracking record, the qualifications of the handler, and the dog's training and history are insufficient to establish the dog's reliability even under the "foundation" requirements of *DeBruler* and *Pedigo*. For arson cases, given *Yell*'s loose totality approach, you will need to be prepared to attack each factor the Commonwealth might point to in support of reliability, and to argue that the factors pointing to reliability are not strong enough, not supported by enough data.

Remember to say "14th Amendment due process," "fundamental fairness," and "*Chambers v. Mississippi*."

Be sure you also mention "14th Amendment due process" and "fundamental fairness" when you make a *Daubert* objection. Both *Daubert* and *Kumho Tire* are based on Federal Rule of Evidence §702, and **not** on the federal Constitution. States are **not required** to follow federal court interpretations of federal evidence rules when applying their own rules of

evidence.[27] So if you don't say "14th Amendment due process" in addition to "*Daubert*," your client will have a hard row to hoe in federal court. Your client will have to prove not only that the expert evidence was totally unreliable, but also that **you** performed deficiently by failing to preserve a federal challenge.

Sixth Circuit overturns admission of "bite mark" evidence.

And there is hope for overturning bad *Daubert* rulings in federal court. In 2007, the 6th Circuit granted habeas relief when a trial court admitted "bite mark" evidence that was so unreliable, and so prejudicial that the court 6th Circuit found it had deprived the defendant of due process.[28] The *Ege* court found that the state court's admission of bite mark evidence was an unreasonable application of *Chambers v. Mississippi*, which held that "trial court errors cannot be allowed to defeat the ends of justice" or otherwise deprive a defendant of a fair trial.[29] The *Ege* case confirms that the federal courts, at least, will protect our clients when expert opinion is **so unreliable** and **so prejudicial** that the 14th Amendment due process clause has been violated.

And remember, it's *still* okay to love your pets….

Endnotes:

1. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).
2. *DeBruler v Commonwealth*, 231 S.W.3d 752 (Ky. 2007)
3. *Yell v. Commonwealth*, 2007 WL 4462367 (Ky. 2007) (Not Yet Final)
4. DeBruler got life, Yell got 52 years.
5. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)
6. The actual quote is "It's okay to love your pets, but just don't *looove* your pets," —from the movie, "The Truth about Cats and Dogs," in which Garofalo plays a talk-radio pet vet.
7. *Goodyear Tire and Rubber Co., v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)
8. Whether the clothes were sufficiently established as DeBruler's was strongly disputed. See Emily Holt Rhorer, Brief for Appellant, 2006 WL 4803108.
9. *DeBruler*, 231 S.W.3d at 758, quoting from *Pedigo v. Commonwealth*, 44 S.W. 143 (1898).
10. With Justice Noble joining, Justice Scott dissented that there is a difference between arson sniffer dogs and tracker or narcotic dogs, because with arson dogs, the thing they are seeking—accelerant— always remains invisible. According to Justice Scott, arson sniffer alerts should not be admitted at trial unless they have been confirmed by lab results.
11. *Kumho Tire*, 526 U.S. at 152.
12. As noted by Justice Scott, joined by Justice Noble, dissenting in *Yell*, the handler "had no documentation of PJ's accuracy rate, because he kept no log on PJ's field work. He had rarely, if ever, received any follow-up information that would inform him whether PJ was right or wrong in any cases PJ had worked. In fact, he admitted that, for all he knew, PJ could be 'all wrong.'"
13. No success rate was given, and no evidence that this was less than the lab could detect.
14. No numbers were offered on the cases where PJ had simply been wrong.
15. No data was offered measuring PJ's or any other dog's reliability with, or without, either of these measures.
16. *Goodyear Tire and Rubber Co., v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)
17. *Cf., Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999) (discussing the issue, and finally relying on judicial notice **in addition to** a lab technician for reliability of the field of DNA testing); *Commonwealth v. Petrey*, 945 S.W.2d 417 (Ky. 1997) (due only to lack of preservation, reversing Court of Appeals holding that lab tech could not provide a sufficient basis to validate a new form of scientific evidence as a general principle).
18. *See, e.g., Farm Bureau Mut. Ins. Co. v. Foote*, 14 S.W.3d 512 (Ark. 2000) (testimony that accelerant detection canine is more reliable than laboratory equipment is without scientific validity, adopting *Daubert*); *Carr v. State*, 482 S.E.2d 314 (Ga. 1997), *overruled on other grounds by, Clark v. State*, 515 S.E.2d 155 (Ga. 1999) (reliability of uncorroborated canine alerts is questionable); *People v. Acri*, 662 N.E.2d 115 (III.App. 1996) (uncorroborated alerts are "not generally accepted"); *State v. Webber*, 716 A.2d 738, 741-742 (R.I.1998) (reversing conviction under §403 where lab tests of alert areas were negative for accelerants); *State v. Shultz*, 58 P.3d 879, 885 (Utah App.2002) (uncorroborated alert is "novel scientific evidence"):
19. *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137, 149-150 (1999)
20. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 583 (Ky. 2000) (trial court "must determine" at a preliminary hearing whether the expert is proposing to testify to … other specialized knowledge)
21. *Daubert*, 509 U.S., 591, fn. 10 ("These matters should be established by a preponderance of proof." —*citing Bourjaily v. United States*, 483 U.S. 171, 175-176 (1987)).
22. *Kumho Tire*, 526 U.S. at 150.
23. *Kumho Tire*, 526 U.S. at 146.
24. *Kumho Tire*, 526 U.S. at 152. (emphasis added)
25. *DeBruler*, 231 S.W.3d at 757.
26. *DeBruler*, 231 S.W.3d at 757.
27. *Estelle v.* McGuire, 502 U.S. 62 (1991) (it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions); *Marshall v. Lonberger*, 459 U.S. 422 (1983) (due process clause "does not permit the federal courts to engage in a finely-tuned review of the wisdom of state evidentiary rules."); *Spencer v. Texas*, 385 U.S. 554, 564 (1967)("It has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.").
28. *Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007). The court also found that Ege's trial lawyer was guilty of deficient performance by failing to object to the bite mark evidence.
29. *Chambers v. Mississippi*, 410 U.S. 284 (1973) ■

KENTUCKY CASE REVIEW

By Roy A. Durham, Appeals Branch

Commonwealth v. Anthony Wayne Swift
Rendered 11/01/07
237 S.W.3d 193
Affirming
Opinion by J. Minton

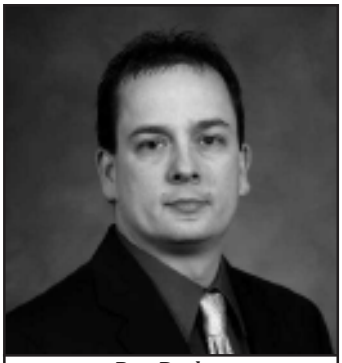
The Supreme Court granted discretionary review and affirmed the Court of Appeals' decision that Anthony Swift's cultivation of marijuana conviction must be reversed because the trial court failed to give an instruction on the lesser-included offense of possession of marijuana.

A juror could have found that Swift possessed the marijuana plants and potted seeds under a theory of constructive possession. Swift testified that he knew about the marijuana plants and potted seeds growing on his property. However, Swift further testified that the plants and seeds were not his and that he was indifferent to their existence. So under the constructive possession theory, there was evidence from which a juror could have had a reasonable doubt that Swift "knowingly and unlawfully plant[ed], cultivate[ed], or harvest[ed] marijuana with the intent to sell or transfer it, as required to commit the offense of marijuana cultivation, while simultaneously believing beyond a reasonable doubt that Swift "knowingly and unlawfully possesse[d] marijuana" because it was growing on his property with his knowledge, as required to commit the offense of possession of marijuana.

Since Swift openly admitted knowing about the marijuana plants and potted seeds, under the evidence, a juror could have reasonably concluded that Swift did not cultivate the marijuana plants and potted seeds but did possess those items under the constructive possession doctrine. Even though Swift's stepson testified that he had no knowledge of the marijuana, this other evidence submitted to the jury did not eliminate the need for a jury instruction on possession as a lesser-included offense of cultivation because it is the jury's sole province and duty as the finder of fact to sift through the conflicting evidence and to determine what evidence to believe and what evidence to disbelieve.

Commonwealth v. Thomas Berryman
Rendered 11/01/07
237 S.W.3d 175
Affirming
Opinion by J. Minton; Dissent by J. Schroder

Berryman and a friend, Michael Dunn, retrieved a package from a UPS hub in Stanton, Kentucky which contained Lortab pills, which his friend admitted purchasing on the internet without a prescription. Berryman struck a vehicle, seriously injuring one occupant and killing the other. The evidence presented was that Berryman was driving his vehicle at approximately ninety-eight miles per hour and was preoccupied with something in the center or passenger area of the car. Dunn was counting the pills in the front seat while simultaneously conversing with Berryman about a future package just prior to the accident. The trial court severed the possession of a controlled substance in the third degree charge and Berryman was tried and found guilty for wanton murder and assault in the first degree and sentenced to forty-five years.


Roy Durham

The Court held that it was not error for the trial court to permit the Commonwealth to introduce evidence regarding the Lortab pills. The drug-related charges against Berryman had been severed, however the evidence about the drugs was still relevant to prove that Berryman's conduct rose to the level of wantonness necessary for murder and assault in the first-degree convictions. The Court held that although testimony that Berryman, apparently, was engrossed by Dunn's counting of illicit pills surely was prejudicial, the jury was entitled to be aware of the full spectrum of Berryman's misconduct so that it could make the difficult determination of whether Berryman's misconduct constituted wanton murder and/or first-degree assault or whether that misconduct constituted a lesser-included offense, such as reckless homicide or fourth-degree assault. Only a juror possessed with full knowledge of the circumstances surrounding the tragic collision could have made the requisite determinations as to the proper degree of culpability for Berryman's misconduct.

Floyd Mike Jones III v. Commonwealth
Rendered 11/01/07
237 S.W.3d 153
Affirming in Part and Reversing and Remanding in Part
Opinion by J. Minton; Dissent in Part by J. Lambert

Jones was convicted of incest, thirteen counts of sodomy third degree, eight counts of rape third degree, and bribing a witness. The alleged victim was his teenage stepdaughter, M.G. The Supreme Court granted discretionary review to

consider the propriety of the trial court's decisions to (1) limit the testimony of Jones' DNA expert; and (2) permit the Commonwealth to introduce pornographic images into evidence, despite the lack of a nexus between those images and the testimony of M.G.

It was error for the trial court to refuse to permit an expert to testify as to anything outside the parameters of his report, as RCr 7.24(3)(A)(i) does not require parties to provide in discovery the theories underlying their expert's opinions. The trial court allowed the expert to testify about the contents of his report but barred him from testifying about any perceived shortcomings in the Commonwealth's DNA expert's report or methodology because Jones had not informed the Commonwealth during discovery that he intended for the expert to criticize the Commonwealth's expert's methodologies. In other word's the trial court essentially confined Jones' expert to the four corners of his report.

RCr 7.24(3)(A)(i), which requires a defendant to "permit the Commonwealth to inspect, copy, or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case", applies only to results or reports of scientific tests or experiments. The Commonwealth's argument that Jones committed a discovery violation when he did not provide the Commonwealth with the entire underlying bases for his expert's testimony is premised upon an impermissibly broad interpretation of RCr 7.24 therefore Jones provided the Commonwealth all that was required in discovery concerning the expert's report.

It should not have come as a surprise to the Commonwealth that the expert would disagree with the conclusion and/or analytical process used by the Commonwealth's DNA expert in light of the conclusions contained in Jones' expert's report. Therefore permitting that expert to explain why he found fault with the Commonwealth's DNA expert's conclusion and/or methodology can not be perceived as impermissible sandbagging. However, the Court rejected Jones's contention that the Commonwealth's burden in a reciprocal discovery case is somewhat greater than that borne by the defendant.

Pornographic images may not be introduced and shown to the jury unless a nexus is shown between the images and the witness's testimony. The witness testified that Jones frequently showed her pornographic images of young women engaged in sexual activity before his sexual encounters with her. The witness did not testify that the pornographic images introduced by the Commonwealth, which were copied form computers in Jones's home, were the actual images shown her by Jones. Rather, the images were shown via the testimony of a state police computer forensics expert who had copied the hard drives from Jones's home computers onto a compact disc.

The Commonwealth made no effort to link these sexually explicit images to any sexual contact Jones allegedly had with M.G. therefore the introduction of the contents of his home computer was highly improper.

Commonwealth v. Edward T. Bowles
Rendered 11/01/07
237 S.W.3d 137
Reversing
Opinion by J. Cunningham

The Supreme Court reversed the opinion of the Court of Appeals which reversed and remanded the trial court's denial of a motion under RCr 11.42 filed by Bowles. The Supreme Court found that the Court of Appeals misapplied the standard set in *Strickland v. Washington* in addressing Bowles' ineffective assistance of counsel claim.

It is not unreasonable for a defense counsel to fail to object to the introduction of evidence which had already been objected to by motion *in limine* and denied in the first trial of this matter, which ended in a mistrial. The court found that it was reasonable to assume that defense counsel thought the question was reserved due to the ruling on his motion *in limine* which was denied before the first trial began. This Court was not prepared to say that the trial court erred, nor counsel's failure to object to its admission established proof of deficient counsel. Additionally, counsel's performance did not affect the outcome of the trial.

Terry Rankins v. Commonwealth
Rendered 11/01/07
237 S.W.3d 128
Reversing
Opinion by J. Schroder; concurring Opinion by J. Cunningham

Statements to an officer from an alleged assault victim who is not able to testify at trial are not "excited utterances" and not admissible if the statements are testimonial. *Crawford v. Washington* requires exclusion of the statements regardless of whether they fall under the "excited utterance", or any other, hearsay exception. Where statements recount potentially criminal past events, the declarant is, for Confrontation Clause purposes, acting as a witness against the accused. Statements that tell "what is happening' are non-testimonial, while statements that tell "what happened" are testimonial.

In the case at bar, the officer responded to a call, and discovered the alleged victim. She proceeded to tell the officer "what happened," recounting the assault by Rankin. Under *Davis* and *Crawford*, the witness's statements are testimonial. The Sixth Amendment prescribes that the only method for testing their reliability is through cross-examination. To consider whether they fit into the "excited utterance", or any other hearsay exception could perpetuate what the Sixth Amendment condemns. *Continued on page 14*

Continued from page 13

Thomas Wright v. Commonwealth
Rendered 11/21/07
239 S.W.3d 63
Affirming
Opinion by J. Scott

Wright was convicted of first-degree robbery and criminal attempt to commit murder when he walked into a gas station and fired three shots, one hitting the victim, and left with the money out of the register. Wright was sentenced to two consecutive twenty-year terms.

It is harmless error for a trial court to determine as a matter of law that a pistol is a deadly weapon. Wright argued that the jury instruction given on first-degree robbery determined as a matter of law that Wright was armed with a deadly error by carrying a pistol. The jury instructions did provide a definition for "deadly weapon" but did not tie it into the instruction for first-degree robbery. Hence, since the jury instruction indicated that Wright carried a pistol, the deadly weapon requirement would be satisfied. Based on the structure of the jury instruction in this case, it appears that the jury was only allowed to make a determination on whether Appellant was carrying the object in question and that the judge presupposed that the object was a deadly weapon. The court has previously found this to be error.

The instructions should have included "a deadly weapon is defined as including any weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged." However, an error regarding an erroneous jury instruction that omits an essential element of the offense is subject to harmless-error analysis. As long as it is "clear beyond a reasonable dout that a rational jury would have found the defendant guilty" an actual jury finding on that element is not mandated and an appellate court can find the error harmless. In this matter, it is beyond question that the jury would have found the pistol to be a deadly weapon as the pistol was fired, seriously injuring the victim.

Commonwealth v. Amanda R. Gaddie
Rendered 11/21/07
239 S.W.3d 59
Affirming
Opinion by J. Minton

Gaddie entered a guilty plea in the district court to the charges of prescription drugs not in original container and possession of marijuana, for which she received 180 days in jail, probated for two years. Two months later, she tested positive for marijuana and the Commonwealth moved to revoke her probation. In lieu of revocation, Gaddie agreed to an increase in her term of imprisonment from 180 days to twelve months in jail, probated for two years on condition of successful completion of drug court. After Gaddie failed to appear for drug court, a bench warrant was issued for her arrest. Gaddie was not arrested until over one year after it was issued. In the interim, the court issued an order terminating Gaddie from the drug court program and requiring her to serve the twelve-month term of imprisonment upon her arrest.

After serving six months, Gaddie filed a petition for writ of habeas corpus under KRS 419.020 in circuit court. The circuit court concluded that being allowed to participate in the drug court program was an extraordinary circumstance justifying relief under CR 60.02(f), especially when Gaddie requested and agreed to the relief. The circuit court reasoned that although constitutional rights were at issue, such rights could be waived, as Gaddie had done when she agreed to an amendment of the original judgment to provide for a longer jail term is she did not complete the drug court program.

More than ten days after the imposition of sentence, the district court may not, even with the defendant's consent, increase the defendant's underlying term of imprisonment in conjunction with a referral to drug court. The attempt was beyond its power because a trial court loses jurisdiction to amend a judgment in a criminal case ten days after its entry. The district court entered its amended judgment in this case eight months after entry of the original judgment. When one is tried for an offense, upon a finding of guilt, he is entitled to have his sentence fixed with certainty and finality and constitutional restraints prevent subsequent enhancement.

Participation in a drug court program is not a reason of extraordinary nature justifying relief under CR 60.02(f). The extraordinary nature clause must be invoked only with extreme caution, and only under most unusual circumstances. A term of imprisonment shall be fixed and a term of imprisonment is not a term or condition of a sentence of probation subject to modification and therefore can not be waived. At the point Gaddie agreed to referral to the drug court program, the district court no longer had the power to amend her final judgment to increase the term of imprisonment. Gaddie could not, by consent, give the court the power to revisit the original sentence.

W.D.B. v. Commonwealth
Rendered 11/21/07
2007 WL 4139484
Affirming
Opinion by J. Minton; Dissenting in part by J. Schroder

The juvenile session of the district court determined after an adjudication hearing that W.D.B. had committed the offense of first-degree sexual abuse, an act that if committed by an adult would be a felony. At the time W.D.B. committed the act against the then three-year-old victim, W.D.B. was twelve years old. The district court held as a matter of law that the common law presumption that a child is without criminal capacity was not applicable in proceedings under the juvenile code.

The enactment of the Kentucky Unified Juvenile Code, KRS Chapters 600 to 645, extinguished the infancy defense in proceedings under the juvenile code. Nowhere in comprehensive legislation is a presumption that a child lacks criminal capacity. Since the enactment of the Kentucky Unified Juvenile Code, the common law presumption that a child lacks criminal capacity is no longer necessary because delinquency adjudication in juvenile court is not a criminal conviction and allowing the presumption would frustrate the clinical and rehabilitative purposes of the juvenile code.

Jermaine A. Chatman v. Commonwealth
Rendered 12/20/07
241 S.W.3d 799
Affirming
Opinion by J. Minton

The trial court did not err in failing to ask a so-called magic question with an eye toward rehabilitating an un-rehabilitable potential juror. Judges are not required to exhaust all possible questions to a potential juror in the vain hopes of keeping any particular juror on the panel. This Court strongly cautions the bench and bar of the Commonwealth to remove the term "magic question" from their lexicon. A trial court's job is to ensure that a defendant is tried by a fair and impartial jury, not to ensure that any particular juror tries a defendant.

Jerry L. Fredline v. Commonwealth
Rendered 12/20/07
241 S.W.3d 793
Affirming
Memorandum Opinion of the Court

Appellant cannot identify an undue prejudice by the trial courts refusal to continue the trial thus it cannot be deemed unfair, unreasonable, or arbitrary and, therefore, no abuse of discretion occurred. The reason given for the continuance was based upon the pre-trial motion by the Commonwealth to suppress the statement of Appellant that was given to police at the time of his arrest. The trial court harshly criticized the Commonwealth for filing substantive motions so close to the start of trial and deferred ruling on any of the motions until the day of trial. The court eventually denied the Commonwealth's motion. It is not error for a trial court to deny a motion for continuance as the defense counsel's stated purpose never came to fruition and despite the request for a continuance, counsel did not press the issue, in fact, announced ready for trial.

Appellant cannot claim, on appeal, that their expert's testimony was improperly limited. The Commonwealth filed a motion to exclude Appellant's expert from testifying that Appellant was acting under an EED. The trial court granted the motion however the expert was permitted to testify about EED in general, and about what happens to an individual under such circumstances. After the Commonwealth closed its case, Appellant decided that the expert would not be called because the testimony would "open the door' to cross-examination regarding Appellant's prior bad acts.

Appellant cannot now claim, on appeal, that the expert's testimony was improperly limited by the trial court's ruling on the motion in limine, forcing him to exclude the expert all together. It is plainly evidence from the record that the decision not to call the expert was based on the fact that his testimony would open the door to very damaging cross-examination concerning bad acts. This conclusion is highlighted by the fact that no attempt was made to introduce the experts' excluded testimony by way of avowal.

A competency hearing is required by KRS 504.100(3). Two physicians prepared competency reports for the court and found Appellant competent to stand trial. Defense counsel stipulated to the reports of both physicians. The trial court then determined that it would rely on the reports, and ultimately found Appellant competent to stand trial. Defense counsel expressly waived the opportunity to call either expert to the stand, noting that both physicians were "in total agreement." Defense counsel then stipulated to the accuracy of both reports. The Commonwealth likewise declined the opportunity to call witnesses. Under the circumstances of this case, the requirements of KRS 504.100(3) have been satisfied.

Commonwealth v. B.J., A Child Under Eighteen
Rendered 12/20/07
241 S.W.3d 324
Reversing
Opinion by J. Cunningham; Dissent by J. Minton

It is not fundamentally unfair to conduct a juvenile's adjudication and disposition hearing in the juvenile's absence. In light of the other constitutional rights that a juvenile may waive, there is no reason that a juvenile should not be permitted to waive his right to be present at a critical stage of the proceedings. Where a juvenile makes such a waiver knowingly, voluntarily and intelligently, the "basis requirements of due process and fairness" required of juvenile proceedings are satisfied.

Although the Commonwealth has the burden of proving that a defendant's absence from trial was intentional, knowing, and voluntary, it may be inferred that a defendant's absence met this standard where it is shown that such defendant had knowledge of the trial date and failed to appear. In the case at bar, no evidence was presented that B.J.'s absence was involuntary. While the trial court could have been more specific in its findings – a practice the court encourages – it is clear from the record that the trial court considered counsels' arguments concerning waiver, and concluded that Appellant had waived his right to be present at the hearings. ■

Sixth Circuit Case Review

By David Harshaw, Post-Conviction Branch

*There are four cases reviewed. First, the en banc Sixth Circuit reverses the 2-1 decision of a panel which granted a writ of habeas corpus on a **Brady** issue. The second case is a sufficiency of the evidence case involving the possession of a gun by a passenger in a car. The third case involves the Constitutionality of video-conferencing at a parole revocation hearing. The last case involves the Constitutionality of Tennessee's sex offender satellite tracking scheme.*

***Bell v. Bell*,**
___ F.3d ___, 2008 WL 50315 (Tenn.), before the *en banc* Court.

The Court rules that tacit agreements between the prosecution and witnesses are *Brady* material. However, in this case, the Petitioner was unable to prove that a tacit agreement was in place.

Columnists in this publication have thrice reviewed the original panel decision. (Vol. 28, Issue 6, pp. 14-17; Vol. 28, Issue 6, pp. 33-34; Vol. 29, Issue 1, pp. 26-27). The panel decision was noteworthy because of the quantum of proof required to establish a tacit agreement.

Additionally, the Court reaffirmed that a *Brady* violation cannot occur regarding exculpatory evidence available to a defendant from other than the state source. The dissent asserts that this long-standing Sixth Circuit holding is contrary to Supreme Court precedent. Practitioners should be aware of the tension between these two points of view.

Stephen Bell, who was homeless, was convicted of the murders of two other homeless individuals. Ballistics tied spent bullet shells found at Bell's campsite to spent shells found at the victim's campsite. Another homeless man made a tentative identification of Bell.

This is a habeas case. Bell made two arguments in his appeal from the denial of the writ by the District Court. In addition to an ineffective assistance of counsel argument, he argued that Tennessee committed a *Brady* violation regarding a jailhouse informant. The following are some of the facts, as found by the full Sixth Circuit, related to this informant:

> Also among the state's witnesses at Bell's trial was William Davenport, a convicted felon held with Bell in the Nashville jail during the period prior to Bell's trial. In September 1986, Davenport contacted the Davidson County District Attorney General's Office by letter, indicating that he had information about the Bell case. On October 13, 1986, Ronald Miller, the prosecutor assigned to Bell's case, met with Davenport. Notes taken by Miller during that meeting document Davenport's report that Bell admitted murdering the Wallaces. They also suggest that Davenport desired a transfer into a different facility, the "Red Building," and movement into a work release program. The notes also seem to refer to Davenport's parole eligibility status. In November 1986, following Miller's meeting with Davenport, the district attorney's office, through a separate attorney, elected not to prosecute four criminal counts pending against Davenport. Davenport received concurrent sentences on two remaining charges.

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When called by the government at Bell's March 1987 trial, Davenport testified that Bell said that he shot Herman Wallace during the course of an argument in which Bell was inebriated or "messed up." According to Davenport, Bell said that he shot Jean Wallace because "she was there" and expressed no remorse for either killing. Bell's defense counsel, Ross Alderman, attacked Davenport's account on cross-examination, suggesting that Davenport was an incredible witness due to his criminal history and his prior Ku Klux Klan membership. During his closing argument, Alderman again challenged Davenport's veracity, emphasizing Davenport's criminal history and parole status. Miller attempted to undermine Alderman's implication that Davenport had an incentive to lie to the jury and denied that Davenport's decision to testify had anything to do with any promises from his office. He stated at closing, "Mr. Alderman would have you believe that [Davenport] wants an early parole through our office or through me. Well, I don't have any say-so with the Parole Board; they are going to let him go soon enough anyway. I have nothing to do with what they do in their own respective realms." Shortly after Bell's trial, however, Miller did send a letter to the Board of Pardons and Parole on

> Davenport's behalf requesting parole "at the earliest possible date." Davenport was granted early parole in June 1987.

The following are the facts, found by the full Sixth Circuit, that were adduced at the post-conviction hearing:

> Alderman testified that, although he submitted a discovery request to the government prior to trial, he received no information concerning Davenport's communications with the prosecution or his criminal background. Nevertheless, Alderman acknowledged that he knew that Davenport was seeking early parole and that he had been able to argue at closing that Davenport provided testimony in order to receive the benefit of early parole.
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> At the hearing's continuation on June 27, Miller testified. He conceded many of the facts related to his interactions with Davenport. However, Miller expressly denied promising Davenport anything in exchange for his testimony. In explaining his decision to submit a letter to the parole board on Davenport's behalf, Miller stated, "I didn't promise Davenport anything, and I didn't make any agreements with him, but he testified at trial against someone I thought was dangerous, and I felt that he would now be labeled as a snitch, and it might be best that I did whatever I could do to get him out of prison, whenever the parole board thought he would be eligible."

Bell argued that *Brady v. Maryland*, 373 U.S. 83 (1963) was violated in three instances: (i) by the prosecution not turning over the tacit agreement between Davenport and Miller, (ii) by the prosecution not turning over Miller's notes of his conversation with Davenport, and (iii) by the prosecution not disclosing the favorable dispositions of Davenport's pending cases.

The heart of the panel decision was its language regarding tacit agreements. The panel stated:

> Moreover, a tacit agreement in this context is based on the transparent incentives for both the witness and the prosecution. The fact is that a jailhouse informant is one of the least likely candidates for altruistic behavior; his offer to testify is almost always coupled with an expectation of some benefit in return. The prosecution is not naive as to this expectation, and the prosecution also knows that when the value of the informant's testimony reaches a sufficient level, it is in the prosecution's interest to fulfill this expectation. At the most fundamental level, the arrangement is a *quid pro quo;* the informant knows he is giving something of value and expects something in return; the prosecution knows it is receiving something of value, and gives something in return. No written or spoken word is required to understand the nature of this tacit agreement. This is not to say that "a nebulous expectation of help from the state" is sufficient evidence for such an agreement. *Goodwin v. Johnson*, 132 F.3d 162, 187 (5th Cir.1997). But if a petitioner proves that a witness approached the prosecution to testify with the expectation of some benefit, and that the prosecution understood this expectation and fulfilled the expectation by actually bestowing some benefit, the petitioner has sufficiently demonstrated a tacit agreement that must be disclosed under *Brady.*

Judge Gibbons wrote the opinion of the full Court. She was joined by Chief Judge Boggs and Judges Batchelder, Rogers, Sutton, Cook, McKeague, and Griffin. Judge Gibbons had dissented from the original panel decision.

The Court found that under the facts of the case that Bell had not proven that a tacit agreement was in place. The Court agreed with the panel that tacit agreements are *Brady* material. However, the Court wanted more tangible proof than had the panel majority. The Court stated:

> In sum, although we do not take issue with the principle that the prosecution must disclose a tacit agreement between the prosecution and a witness, it is not the case that, if the government chooses to provide assistance to a witness following a trial, a court must necessarily infer a preexisting deal subject to disclosure under *Brady.* "The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony." *Shabazz v. Artuz*, 336 F.3d 154, 165 (2d Cir.2003) (emphasis in original). To conclude otherwise would place prosecutors in the untenable position of being obligated to disclose information prior to trial that may not be available to them or to forgo the award of favorable treatment to a participating witness for fear that they will be accused of withholding evidence of an agreement.

Thus, while a prosecutor must turn over a tacit agreement with an informant, he will only be punished for not revealing the agreement if the convicted defendant somehow manages to discover some explicit proof of the wink and a nod.

Bell also lost on the other two aspects of his *Brady* claim – the prosecutor's notes and the settled charges. The Court did find that the prosecutor should have turned over his notes (wherein Davenport expressed a desire for leniency), but the Court found no violation of *Brady* occurred because

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Davenport had been otherwise adequately impeached. The Court also found that no *Brady* violation occurred regarding Davenport's settled criminal charges because this information was a public record. *Brady* violations cannot occur when the defense has access to the material from another source. The Court cited two of its own cases for this last proposition:

> *Matthews v. Ishee*, 486 F.3d 883, 891 (6th Cir.2007) ("Where, like here, 'the factual basis for a claim is 'reasonably available to' the petitioner or his counsel from another source, the government is under no duty to supply that information to the defense.") (citation omitted); *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir.1998) (There is no *Brady* violation where information is available to the defense "because in such cases there is really nothing for the government to disclose.").

Judge Clay, the author of the panel decision, filed a dissenting opinion in which Judges Martin, Moore, Cole and Gilman joined.

The dissent first asserted that *Matthews v. Ishee* and *Coe v. Bell* are wrongly decided in light of *Strickler v. Greene*, 527 U.S. 263 (1999) and *Banks v. Dretke*, 540 U.S. 668 (2004). The dissent found that a prosecutor's assurance that all relevant *Brady* material in its possession has been turned over (which happened in this case) removes from the defense any obligation to scour the public record for additional material. Apart from Supreme Court precedent, the dissent relied on authority from other Circuits.

The dissent also asserted that two prophylactics should be in place to combat the mischief attendant to tacit agreements. The dissent would have *Brady* encompass "any evidence that reasonably suggests that the prosecutor conveyed an expectation of favorable treatment to the testifying witness." The dissent would also have *Brady* encompass "any evidence in its possession that suggests that the witness actually harbors an expectation of favorable treatment, regardless of whether the prosecution created such an expectation." The dissent stated:

> Construing "promises of reward" or "inducements" to include these two types of evidence would promote the disclosure of evidence actually likely to bias prosecution witnesses. In contrast to the rule proposed by the majority, which would require something akin to a formal agreement before any evidence was subject to disclosure, this rule would foreclose a crafty prosecutor's strategy of eschewing a formal agreement, only to achieve the same result through innuendo or implication. Additionally, it would resolve the nebulous issue of determining whether subjective expectations had given rise to a mutual understanding between the prosecution and the witness by making that issue one for the jury. If the prosecution made statements implicitly offering leniency in exchange for testimony, or if the witness made statements implying that he possessed such an expectation, the jury could consider whether an agreement existed, and weigh the witness's testimony accordingly. (Internal citations omitted).

Judge Moore also dissented, joined by Judges Martin, Cole and Clay. She found that there was no reason for an en banc decision in this case. Judge Moore found that the case hinged on a factual disagreement (as opposed to one of law) regarding whether or not a tacit agreement was in place. Federal Rule of Appellate Procedure 35(a) and Sixth Circuit Rule 35(c) do not permit review on mere disagreements of fact.

Judge Daughtrey dissented in part and concurred in part. She, like Judge Moore, found no reason for en banc review. However, on the merits, she found with the majority.

***Parker v. Renico*,**
506 F.3d 444 (C.A.6 (Mich.) 2007), before Cole and Cook, Circuit Judges and Mills, District Judge.

In this habeas case, the Court finds that Michigan unreasonably applied *Jackson v. Virginia*, 443 U.S. 307 (1979), which requires sufficient evidence for a conviction.

Saejar Parker was the rear driver's side passenger in a car involved in a high speed chase with the police. One of the other three men in the car had just attempted a murder. The chase ended in a crash. Three guns were found. One was on the front passenger seat floorboard. One was on the rear passenger side seat. One was found along the chase route on the passenger side of the car.

At trial, no evidence linked Parker to the attempted murder, and a directed verdict motion on the charge was sustained. However, directed verdict motions on (i) a felon in possession of a handgun charge and (ii) a possession of a gun in the course of a felony charge were overruled. The jury convicted Parker of both of these charges.

In the Michigan courts, Parker found no relief. However, the federal district court found that under *Jackson v. Virginia*, 443 U.S. 307 (1979) that Michigan had carried its factual burden of proof in regards to the possession element of both charges.

Judge Cook wrote the opinion of the unanimous Court. Judge Cook laid out the standard of review as follows:

> As framed by AEDPA, the issue is whether the district court erred in concluding that the Michigan Court of Appeals unreasonably applied

> *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Under *Jackson*, habeas corpus relief is appropriate based on insufficient evidence only where the court finds, after viewing the evidence in the light most favorable to the prosecution, that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 319, 99 S.Ct. 2781. The law therefore commands deference at two levels in this case-first, to the jury's verdict as contemplated by *Jackson*, and, second, to the state court's consideration of the jury's verdict as dictated by AEDPA.

This case (like the typical gun in a car case) involved the concept of constructive possession. Under Michigan law, proximity to a firearm is not enough to establish constructive possession. There must be an "indicia of control." This is the same test to which Kentucky Courts adhere. *See Johnson v. Commonwealth*, 90 S.W.3d 39, 42 (Ky. 2002); *Commonwealth v. Montaque*, 23 S.W.3d 629, 633 (Ky. 2000).

Important to the Court's decision was that Parker was granted a directed verdict on the attempted murder. The Court stated:

> The state attempts to buttress its argument by pointing out that constructive possession can be joint-that is, both men could possess the weapon. In support, it quotes *Hill* for the proposition that Michigan "recognize[s] the theory of joint firearm possession if the evidence suggests two or more defendants acting in concert." 446 N.W.2d at 143. The state then asserts, with no additional support, that "the evidence presented in this case suggests that the men acted in concert." But, as Parker's directed-verdict motion prevailed, the trial court judge obviously found *nothing* to suggest this. Instead, the evidence suggested only that Parker was in a car with men who together planned a murder and that guns were in the car. No evidence linked Parker and Williams to common possession of the gun other than their presence in the Grand Am's backseat.

***Wilkins v. Timmerman-Cooper*,**
___ F.3d ___, 2008 WL 114851 (Ohio), before Boggs, Chief Circuit Judge, Gibbons, Circuit Judge, and Bell, Chief District Judge.

The Court finds that the Confrontation Clause is not violated when a witness at a parole revocation hearing appears via video-conferencing.

Randolph Wilkins was alleged to have violated his parole by, among other things, having contact with underage females. The state of Ohio wanted to revoke his parole by having the young women testify at a remote location by video-conferencing. The conference was in real time and allowed for cross-examination. Wilkins complained that this violated his confrontation rights under *Morrissey v. Brewer*, 408 U.S. 471 (1972). He filed a writ of habeas corpus.

Judge Gibbons wrote for the unanimous Court:

> Wilkins argues that the state court of appeals unreasonably applied *Morrissey* in determining that videoconferencing did not violate the Confrontation Clause or Wilkins's due process rights. However, given that defendants have fewer rights in parole revocation hearings than in criminal trials, the state court of appeals did not unreasonably apply *Morrissey*, and its decision is not "objectively unreasonable." *See Williams v. Taylor*, 529 U.S. 362, 409 (2000). The Supreme Court specified there is no "inflexible structure" for a parole revocation hearing. *Morrissey*, 408 U.S. at 490. Moreover, the Court also encouraged "creative solutions" to avoid Confrontation Clause violations. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n. 5 (1973). Therefore, it was not objectively unreasonable for the state court of appeals to hold that videoconferencing, when used in a manner that allows the defendant to confront and hear his accusers in real time, presents no Confrontation Clause violation.

***Doe v. Bredesen*,**
507 F.3d 998 (C.A.6 (Tenn.) 2007), before Griffin and Keith, Circuit Judges, and Van Tatenhove, District Judge.

Requiring convicted sex offenders to wear global positioning devices is Constitutional.

When I was standing in line waiting to see the lethal injection case at the United States Supreme Court, I chatted with an Assistant Attorney General from North Carolina who was very interested in this case because it was the first in which a Circuit Court had addressed this big-brother way of tracking sex offenders. Apparently, this type of intrusion is the wave of the future.

In Tennessee, the Probation and Parole Board is allowed to require a convicted sex offender to wear a global positioning device (GPS) for the duration of his/her probation. John Doe was convicted before this scheme came into being. He challenged the application of this plan to him. He also challenged a lifetime registration scheme that post-dated his conviction. Doe invoked the ex post facto clause of the Constitution.

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The Court wrote:

> Doe alleges that the GPS tracking device is not realistically concealable, and he contends that it has a marked effect on his lifestyle and freedom of movement and action. In Doe's words, he is required to carry with him at all times when not at his residence a relatively large box which contains the electronics necessary for the monitoring to take place. This box must be worn on one's person outside any coat or other outer garment and therefore is obvious to any onlooker. Upon going into a building, [he] must wait several minutes before entering, presumably to allow the device to reset. When inside a building, [he] must go outside at least once every hour so that monitoring can take place. The device is not waterproof, and [he] is not allowed to swim or participate in any other water activity. Baths at home are impossible.
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> Furthermore, the device has caused [him] added stress and many inconveniences as it does not always work properly. While on vacation, for which [he] obtained prior permission from his probation officer and a judge, [he] received at least six telephone messages from someone at the probation office threatening him with immediate arrest if he did not return a telephone call to the probation office at once. This entire event was because the Global Positioning System monitoring system could not locate him. At other times the [GPS] monitoring system either does not receive or transmit information correctly. When this happens [he] has spent up to an hour on the telephone with someone in the probation office to correct the problem. On one occasion [he] had to stand in the rain, for over thirty minutes, for all his neighbors to see, while the probation office attempted to fix the problem. Appellant is required to purchase the device at a cost of $50.00.

Judge Griffin delivered the opinion of the Court in which Judge Van Tatenhove joined. Judge Griffin wrote:

> When evaluating an ex post facto claim, our first task is to "ascertain whether the legislature meant to establish 'civil' proceedings." *Smith v. Doe*, 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).) If the intent of the legislature was to impose punishment, that ends the inquiry. If, however, " 'the intention was to enact a regulatory scheme that is civil and nonpunitive, we further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' " *Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072 (quoting *United States v. Ward*, 448 U.S. 242, 248-49, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)). Because we "ordinarily defer to the legislature's stated intent, ... only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,...."*Smith*, 538 U.S. at 92, 123 S.Ct. 1140 (internal citations and quotations omitted).

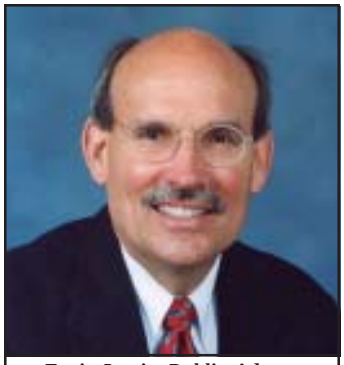
The Court went on to find that Tennessee had enacted a civil scheme whose purpose was to protect the public from the high risk of recidivism among sex offenders. The Court also found that the intrusion of the monitoring was not excessive in relation to its purpose. The Court stated:

> The dissent argues the Monitoring Act is unreasonable and excessive because it cannot "prevent offenders, like Doe, from committing a new crime." This supposition is faulty for two reasons. First, as even the dissent itself recognizes, the monitoring system has a deterrent effect on would-be re-offenders. Second, the ability to constantly monitor an offender's location allows law enforcement to ensure that the offender does not enter a school zone, playground, or similar prohibited locale. In any event, our role is not to invalidate the program if the Tennessee Legislature has not struck the perfect balance between the regulatory purpose of the program and its burdens on Tennessee citizens, but rather to determine whether the means chosen are reasonable. *Smith*, 538 U.S. at 105, 123 S.Ct. 1140. We conclude that they are.
>
> The Court thus found that the GPS system did not violate the ex post facto clause.

Judge Keith dissented, in part. He concurred with the majority that Tennessee's registration scheme was Constitutional. However, he found the tracking scheme to be deeply objectionable:

> [A]s to the Surveillance Act, I strongly disagree with the majority's decision to affirm the district court's dismissal of this claim. I cannot, in good conscience, join my colleagues' opinion which finds no constitutional violation in requiring Doe to wear a relatively large box as a symbol of his crime for all to see. The Surveillance Act, particularly the satellite-based monitoring program, as applied to Doe, is punishment, excessive, and indeed, the modern day "scarlet letter." I vigorously dissent. ■

PLAIN VIEW . . .



Ernie Lewis, Public Advocate

Morgan v. Commonwealth
— S.W.3d ——, 2008 WL 199714,
2008 Ky. LEXIS 13 (Ky. 2008)

This is a case about anonymous tips. Hart County Sheriff Jeff Staples was familiar with the reputation for drug trafficking and drug manufacturing that Christy Morgan, Guy Evans, and Dale Mansfield had. He received a call from an anonymous person on December 17, 2002, that her 16 year old son had returned home high from a night of partying at Morgan's trailer. The caller said that the three were manufacturing methamphetamine that was still in the trailer and that the materials to make it were outside in a trash can. Sheriff Staples contacted KSP trooper Shannon West and the two of them drove past Morgan's trailer, where they saw Evans on the porch. They turned their car around, and as they drove back toward the trailer, they saw Morgan and Evans in a car. Sheriff Staples stopped Evans and Morgan, and when he patted down Evans he found meth. He then obtained consent to search the trailer from Morgan, a search that resulted in more evidence found. Morgan was indicted for first-degree trafficking and other charges. She lost her motion to suppress, and entered a conditional plea of guilty to a 5 year sentence. However, the Court of Appeals reversed the trial court decision, holding that because the anonymous tip had not been sufficiently corroborated that the stopping of Morgan's car had been illegal.

The Supreme Court reversed the Court of Appeals in a decision by Justice Abramson. In essence, the Court held that the Sheriff's prior knowledge of Morgan's reputation and Morgan and Evans' leaving the trailer after Staples drove by was sufficient corroboration to justify the stopping of the car. What was the nature and quality of Staples' prior knowledge? "Staples stated that he had arrested Morgan on at least one prior occasion for her involvement with drugs, Mansfield had been involved with Morgan for years and had a bad reputation for dealing drugs, and Evans had several charges pending against him for manufacturing drugs." "Staples could not have been expected to ignore his prior knowledge about their drug involvement and proceed as if the tip had identified three strangers. In short, because the tip identified three individuals as engaging in the same type of criminal activity for which they already had prior records, Sheriff Staples's knowledge about their prior records corroborated the tip, rendering it more reliable." Counsel should be alert to the Commonwealth's attempts to use "reputation" as corroboration of an anonymous tip, arguing that *Morgan* requires extensive knowledge of the individuals about whom the call is made.

The Court also found that Evans and Morgan's leaving the trailer corroborated the tip. This is more troublesome, as driving away from a residence is commonplace and in no sense "evasive." However, the Court found it to be corroboration of the tip. "Although two people leaving their residence on a weekday morning is certainly consistent with noncriminal activity, in light of the totality of the circumstances, Evans's and Morgan's leaving is a relevant factor that added to Sheriff Staples's reasonable suspicion and served to corroborate the anonymous tip."

Justice Noble concurred in the opinion but "would stress that merely leaving one's home after a police car drives by, would never, standing alone, constitute reasonable suspicion to make an investigatory stop." Justice Schroder dissented "because the anonymous tip was not sufficiently corroborated under *Florida v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000) to justify the stop."

Hampton v. Commonwealth
231 S.W.3d 740 (Ky. 2007)

Surely a person cannot go to prison for 20 years, at a cost of $400,000 to the taxpayers of Kentucky, for possessing cocaine residue, can he?

The answer is yes. Here's how. On April 30, 2005, the Bowling Green Police got an anonymous tip at 4:00 a.m. that possible drug activity was occurring at a house where the police had received previous reports regarding drug activity. Officers went to the house. They saw 8-10 people running away from the house, including Leroy Hampton. Hampton got into a car and closed the door. Officer Eversoll opened the door and saw Hampton put something in his shoe. Eversoll told Hampton to get out, and "[a}fter several minutes" Hampton "consented" to a search of his person, which revealed a pipe with cocaine residue on it. Another pipe was discovered during a search at the jail. Hampton was arrested, charged, and eventually found guilty of possession of a controlled substance (second offense), first-degree promoting contraband (for having the pipe on his person at the jail), possession of drug paraphernalia, and PFO1st.

This conviction was affirmed in a decision written by Justice Noble. The Court first held that the officers had a right to perform a *Terry* stop based upon a reasonable and articulable suspicion. The Court held that the tip received was from an

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unnamed person riding on a bike near the house. The police testified that the tipster had given "three to five tips that had proven reliable" in the past. No such tips had been followed up, however. Nor did the tipster name Hampton, nor did he describe any of the vehicles in the area. He did describe the house and its location. The tipster was not viewed by the Court as an anonymous tipster, but rather as a "citizen informant, whose tip inherently bears more indicia of reliability than that of a purely anonymous informant." While the tip in itself was viewed as insufficient to constitute a reasonable suspicion, under the totality of the circumstances the Court found the standard had been reached. "When the fleeing is combined with the somewhat reliable tip that drug activity was occurring at the house, along with previous reports of drug activity at the house and the fact that the fleeing occurred just as police began approaching, the situation takes on an entirely new—and suspicious—light. The convergence of those events gives rise to more than a nebulous and inchoate suspicion of criminal activity, and would lead a reasonable officer to conclude that the people had been involved in drug activity at the house and were then attempting to leave the scene of the crime. That Appellant was one of the fleeing people would justify the officers' belief that it was appropriate to investigate him, stopping him temporarily in the process."

Once the officer had reasonable suspicion justifying his stopping Hampton, the Court further held that it was legal to open the car door. They rejected Hampton's assertion that the police should first have asked him to leave the car under *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), a case allowing for the police to order drivers to get out of cars during investigatory stops. "[W]hile it may be that opening a car door without first asking the suspect to exit the car is inappropriate in some cases, it is not clear that such a wait-and-see approach is always the best method. That approach seems particularly ill-suited in a case like this one, where the suspect had just been seen running from a house suspected of accommodating drug sales and use and getting into the rear seat of a car whose door he now claims should have shielded him from the police."

The Court next rejected Hampton's allegation that his consent was involuntary because he was in pain from his handcuffs at the time. Hampton had been handcuffed by Officer Eversoll after refusing to give his name and becoming "belligerent" with the officer. Eversoll handcuffed him and then asked for consent several times before it was given. The Court held that the trial court's finding of voluntariness was "not clearly erroneous." The Court also found reasonable the trial court's finding that the search of Hampton was justified by concern over safety since the officer had seen Hampton place something in his shoe.

So there you have it—twenty years in prison for possession of cocaine residue. And you wonder why our prisons are overcrowded?

Owens v. Commonwealth
244 S.W.3d 83 (Ky. 2008)

This is an exceptionally important case of first impression in Kentucky, and one that cuts against Fourth Amendment rights. In essence, it states that the police may search without any level of suspicion a passenger of a car when the driver has been arrested and the search is incident to that lawful arrest. "[W]e conclude that officer safety and public safety demand that the police officer have discretion to frisk the passenger under these circumstances."

The police stopped Chris Thornton in Taylor County on suspicion that his license had been suspended. Keith Owens was a passenger in the car. Once it was confirmed that Thornton's license was suspended, Thornton was arrested and searched incident to the arrest. That search resulted in finding of a crack pipe on Thornton. Owens was asked to step outside the car, and was then asked if he had any weapons. Owens started pulling money from his pockets, and then pulled out a baggie which the officer suspected contained drugs. The baggie contained marijuana, pills, and methamphetamine. Owens testified that the officer had pulled the baggie out of his pocket. Owens was arrested and charged with drug offenses. His motion to suppress was denied. He went to trial where he was found guilty with a twenty year sentence being imposed due to his status as a PFO1st. Owens appealed to the Supreme Court.

Justice Minton wrote the opinion for the Court. The propriety of the stopping of the car was not at issue. The Court emphasized that under *Maryland v. Wilson*, 519 U.S. 408 (1997), when a car is legally stopped the police may order the passengers to get out of the car until the stop is over.

The Court described two schools of thought: the automatic companion rule in which a search may be done when a driver has been arrested, and the totality of circumstances rule. The Court quoted from *United States v. Berryhill*, 445 F. 2d 1189 (9th Cir. 1971) to describe the automatic companion rules: "[a]ll companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to give assurance that they are unarmed." The Court decided to adopt the automatic companion rule in Kentucky.

The Court based its decision to adopt the automatic companion rule primarily on officer safety. "Limiting the right to make a protective search would increase the chances that an officer could be harmed by a passenger who had been carrying a concealed weapon."

The Court cautioned law enforcement not to take this rule too far. "In no sense should our holding in this case be taken as a license for law enforcement officers to believe that all frisks of all persons are always proper. We also reject

any implication that our holding creates a 'guilt by association' mentality. To the contrary, our holding is simply an avenue to protect the officer working at the point of contact and the public. Toward that end, our holding is a limited and narrow exception to the exclusionary rule, designed to apply only in situations in which the driver of a vehicle has been lawfully arrested and the passengers of the vehicle have been lawfully expelled in preparation for a lawful search of the vehicle. Only in those limited circumstances, which are fraught with danger for officers and bystanders alike, may an officer conduct a brief pat-down for weapons (not a full-blown search) of the vehicle's passengers, regardless of whether those passengers' actions or appearance evidenced any independent indicia of dangerousness or suspicion."

Pate v. Commonwealth
243 S.W.3d 327 (Ky. 2007)

In September of 2002, KSP Sergeant Lilly went to execute a search warrant on Lawrence Pate. When he got to Pate's house, he saw a black pressure tank sitting outside, with "what appeared to be a green corroded fitting on the top and a section of pipe with a valve welded to the bottom." Pate recognized that the tank had been used to hold anhydrous ammonia. Lilly knocked on the door and when Pate's wife answered, he asked for and received consent. Once inside, he saw many items associated with the manufacturing of methamphetamine. Lilly asked Mrs. Pate what the items were, and she responded that the items were equipment for the manufacture of methamphetamine. Lilly seized the evidence. He then found Lawrence Pate in a nearby apartment. Pate was charged with complicity to manufacture methamphetamine. After his motion to suppress was denied, he was found guilty and sentenced to twenty years in prison.

Pate's appeal to the Kentucky Supreme Court was affirmed in an opinion by Justice Scott. Justice Scott first rejected Pate's contention that his wife's consent was flawed. The Court instead said that the consent was voluntary despite the fact that Lilly had told Mrs. Pate that he had an arrest warrant for her husband.

The Court held also that once Lilly saw contraband it was legal to seize it because it was in plain view. Several items not in plain view were legally seized under the exigent circumstances exception to the warrant requirement.

Greene v. Commonwealth
244 S.W.3d 128 (Ky. Ct. App. 2008)

Ten days before Mr. Hampton's unfortunate series of events, up 1-75 about 90 miles in Hardin County, one Donna Green called the Elizabethtown Police Department and said that Robert Greene was at a Dairy Queen on Highway 62 in a Mazda pickup truck, that he had been drinking, and that his license was suspended. Officer Cox went to the Dairy Queen and saw the Mazda pickup truck, and then verified that Greene's license was suspended. He then saw the pickup truck leave the parking lot, go on the street briefly, and then drive into the parking lot of a welding supply store, return to the street, and then onto highway 62. Officer Cox stopped Greene and asked him for his license. Greene, who smelled of alcohol, said that he had no license. Greene agreed that he had drunk two beers. He failed two field sobriety tests, and a PBT indicated the presence of alcohol. Greene was charged with DUI and driving on a suspended license. His BA level was later tested at .096%.

The Court of Appeals, in a decision written by Judge Wine and joined by Judges Stumbo and Guidugli, affirmed the decision of the trial court overruling Greene's motion to suppress. The Court found that there was a reasonable and articulable suspicion sufficient to justify the stopping of Greene. "First, Officer Cox received a credible report that Greene was operating his vehicle under the influence of alcohol. Second, Officer Cox observed the vehicle as described in the report. Third and most importantly, Officer Cox confirmed that Greene's license was suspended. Finally, Officer Cox saw Greene's truck miss the turn on Cardin Street and drive into an empty parking lot. Considering the totality of these circumstances, we agree with the trial court that Officer Cox had a reasonable and articulable suspicion that Greene was operating the vehicle under the influence of alcohol." As a result, all of the evidence that came in after the initial stopping was admissible and the motion to suppress was properly overruled.

Grigsby v. Commonwealth
— S.W.3d ——, 2007 WL 3313663,
2007 Ky. App. LEXIS 429 (Ky. Ct, App. 2007)

This case began with a call to the Campbell County police Department indicating that a domestic dispute had occurred. Officer Kunkel drove toward the scene when he saw Jermaine Grigsby and his girlfriend, Syneisha Mason, "engaged in what he believed to be an argument." Kunkel approached the couple, who he recognized from an allegation made by Mason's father that Grigsby was using Mason in his drug dealing business. Both Grigsby and Mason began to walk away when they saw Kunkel. Kunkel told Grigsby to sit down, and separated Mason from him. Neither agreed that they had been arguing, although they "appeared nervous." As he sat there, Grigsby began to choke. After an EMT was called, Grigsby said he did not want any assistance. Kunkel then received information that the couple he had stopped had not been the subjects of the original domestic violence call. Kunkel asked Mason to give him any drugs in her possession, and Mason gave him 3 bags of marijuana. A car that Grigsby had temporary possession of was also searched by consent of the owner. That search revealed counterfeit bills as well as a handgun. Grigsby was indicted on one count of first degree criminal possession of a forged

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instrument, possession of a handgun by a convicted felon, and PFO1st. Grigsby entered a conditional plea of guilty following a denial of his motion to suppress.

The Court of Appeals affirmed in an opinion written by Judge Thompson joined by Judges Wine and Henry. The Court found that Grigsby had been detained pursuant to a legal *Terry* stop. "[B]oth Grigsby and Mason engaged in evasive behavior. Although Grigsby's behavior may have been as consistent with innocent activity as with illegal activity, his presence in the area of a reported domestic dispute involved in what appeared to an argument with his girlfriend combined with his evasive behavior, justified the investigatory stop." The Court rejected Grigsby's contention that once Kunkel was informed that they were not involved in the domestic violence that any further detention became illegal. The Court held that because "Officer Kunkel reasonably believed that Grigsby was involved in drug-related activities" that further detention was justified. During that detention, the owner of a car gave consent to search the car which revealed a gun. The owner had authority to consent to a search of the car despite having given Grigsby temporary possession of it.

Horn v. Commonwealth
240 S.W.3d 665 (Ky. Ct. App. 2007)

On October 4, 2005, officers of the Greater Hardin County Narcotics Task Force were contacted about two men who were buying lithium batteries and pseudoephedrine. Police approached the men, who said they were delivering the items to Nicholas Horn. The men agreed to cooperate with the police. The next day, the two were supplied with pseudoephedrine and batteries that had been treated with a traceable substance. The men went to Horn's garage and delivered the packages of pseudoephedrine and batteries. The men left the garage and told the police that they had seen anhydrous ammonia in the garage. The police then went to the garage and requested entry. When Horn declined, the police forced their way into the garage where they requested consent to search. Horn again declined. The police detained Horn and sought a search warrant. During its execution, the police found a firearm and additional evidence. Horn was arrested and charged with manufacturing methamphetamine enhanced by the possession of a firearm. His motion to suppress was denied, with the trial court finding that while the forced entry was not justified by exigent circumstances, that the taint had been removed by the obtaining of the search warrant. Horn entered a conditional plea of guilty and was given ten years in prison.

In an opinion written by Judge Thompson joined by Judges Stumbo and Nickell, the Court of Appeals affirmed. The Court specifically rejected Horn's position that the search of the garage pursuant to the search warrant was an illegal fruit of the illegal initial entry. Horn cited *United States v. Chambers*, 395 F. 3d 563 (6th Cir. 2005) for the proposition that the "evidence should be suppressed following an illegal entry of a residence despite the subsequent issuance of a search warrant which was based on information obtained prior to the illegal entry." The Court found *Chambers* inapplicable, stating that *Chambers* had been resolved on other grounds. The Court relied instead upon *Segura v. United States*, 468 U.S. 796 (1984), the seminal case establishing the independent source exception, for the proposition that "evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the taint of the illegal police conduct." "[W]e conclude that the issuance of the search warrant, which was based solely on information obtained from the two confidential informants prior to the forced entry of the garage, constituted an independent source that was sufficiently distinguishable from the illegal forced entry of the garage. Because the two informants provided the requisite information which would authorize the search warrant prior to the illegal forced entry, the forced entry was purged of its illegality because it was not responsible for the discovery and seizure of the contraband."

The Court also rejected Horn's contention that the warrant was invalid as based upon a defective affidavit. "[W]e conclude that the search warrant affidavit sufficiently stated grounds that warranted the issuing of the search warrant by the district court. The search warrant affidavit provided that: the two informants were provided with approximately thirty grams of pseudoephedrine and a package containing eight lithium batteries; police observed the informants enter and leave the garage after several minutes; and the two informants did not have the contraband in their possession when they met with police following the drug transaction."

Jones v. Commonwealth
239 S.W.3d 575 (Ky. Ct. App. 2007)

This case began early in the morning of June 5, 2005, with a Kentucky State Police roadblock in Muldraugh, Kentucky. Every vehicle was being stopped. When Calvin Jones was stopped, Trooper Woodside asked him for his license, which he could not produce. Woodside asked Jones to get out of his car, and seeing a "marijuana leaf embroidered on Jones' vest", asked Jones for consent to search him. A search revealed 9 grams of marijuana in Jones' front pocket. Jones then consented to a search of his car, which resulted in the finding of a loaded semi-automatic pistol, cocaine, marijuana, and paraphernalia. Jones was arrested and charged with trafficking in cocaine, second offense, enhanced by possession of a firearm, possession of marijuana, enhanced by the firearm, and possession of a handgun by a convicted felon, and PFO 1st. Jones filed a motion to suppress, alleging that the search had been beyond the scope of a *Terry* frisk, and that his consent to search had not been valid. Jones motion to suppress was denied, and Jones entered a conditional plea of guilty.

Jones filed an appeal based on the nature of the roadblock, an issue that had not been litigated in the trial court. The Court explained the reason for the preservation requirement. "At the hearing on the motion to suppress, the Commonwealth put on evidence to rebut Jones's argument that the search exceeded the scope of *Terry*. It did not, however, put on evidence about the nature of the checkpoint because that was not an issue. If Jones wanted to appeal this issue, it was incumbent upon him to have a hearing on the issue and secure a ruling from the trial court. Failure to get a ruling on this issue prior to pleading guilty precludes appellate review."

Boyle v. Commonwealth
245 S.W.3d 219 (Ky. Ct. App. 2007)

This is an interesting case. The police in Stanford saw Joshua Boyle with an orange road construction barrel in his truck, so they pulled him over. Their theory was that he must have stolen the barrel. Once they stopped him, because he smelled of alcohol, they began to investigate him for DUI. Eventually, he was arrested and charged with DUI. His motion to suppress was denied. Boyle entered a conditional plea of guilty. Boyle appealed to circuit court, which affirmed the district court decision. The Court of Appeals granted discretionary review, and in a decision by Judge Lambert, affirmed the decision. The decision is straight-forward: "Because we know 'as a matter of ordinary human experience' that the increasingly ubiquitous orange, road-construction barrel is ordinarily transported during daylight hours, in bunches, and by marked construction or government vehicles, we find that, at the time of the investigatory stop leading to Boyle's arrest and guilty plea, there was indeed a reasonable and articulable suspicion that Boyle was in possession of a stolen barrel…Thus, even though the barrel was later shown to have been borrowed, not stolen, the arresting officer's investigatory stop was not unconstitutional or improper."

Judge Nickell dissented. He revealed that Boyle was carrying the barrel for his employer for use in his landscaping business. Judge Nickell believed that the trooper acted on a hunch rather than a reasonable and articulable suspicion when he stopped Boyle. "The majority fails to note there is no legal proscription against private ownership or possession of a construction barrel, nor does the majority take into account the increasing amount of public and private construction work which occurs during the nighttime hours so as to not disturb traffic flow during the day. I believe the precedent the majority sets today takes a huge step down the wrong path. The slippery slope of the majority's reasoning might just as easily be applied to other items of legally owned or possessed property being hauled about in one's privately owned vehicle."

Simmons v. Commonwealth
— S.W.3d ——, 2007 WL 3037237,
2007 Ky. App. LEXIS 405 (Ky. Ct. App. 2007)

On April 26, 2003, Michaela Carmen Simmons ran a stop sign in Radcliff. When Sergeant McLeod stopped her, he was "aware that Simmons' address was associated with drug activity." As a result, he asked for backup, gave her a citation for running the stop sign, and asked to search her car. She asked what he was looking for, and he said that he was looking for guns and drugs. She replied that she had two guns in a gym bag in the backseat of the car. McLeod again asked for consent, and Simmons asked whether she had a choice, to which McLeod told her that she had little choice. A search then resulted in the finding of two guns, marijuana, and methamphetamine. Simmons was arrested and charged with possession of methamphetamine, marijuana, and drug paraphernalia. Her motions to suppress were denied, she went to trial, and was found guilty.

In a decision written by Judge Howard joined by Judges Wine and Guidugli, the Court of Appeals affirmed. The Court rejected the contention that Simmons had been illegally detained following her citation. The Court noted that Simmons had admitted to possessing guns in the gym bag without a permit, justifying further detention. The Court also rejected Simmons' contention that her consent to search was involuntarily given. The Court stated that the officer's statement that he would get a search warrant did not cause the consent to be involuntary. Nor did the fact that the officer asked several times for consent cause it to be involuntary.

Hensley v. Commonwealth
— S.W.3d ——, 2007 WL 2993900,
2007 Ky. App. LEXIS 397 (Ky. Ct. App. 2007)

On September 5, 2004, Officer Hodge of the Corbin Police Department went with an informant to Michael Hensley's residence that he shared with Shawna Wilson. Hodge spoke with Ms. Wilson while there. She denied his request to come in and search. Hodge left to get a search warrant while other officers remained behind and secured the house. He then filed an affidavit to search Hensley's house, stating that he had received complaints of possible production of methamphetamine at Hensley's house, and that when he had gone to the house and spoken with Wilson he had smelled ether. Because no judge was available, Hodge had to send the affidavit to a neighboring county. The warrant was executed and items used in the manufacture of meth were seized. Hensley was indicted on manufacturing meth and possession of a controlled substance. After Hensley's motion to suppress was denied, he entered a conditional plea of guilty to attempting to manufacture meth and received a 7 ½ year sentence.

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The Court of Appeals reversed in a decision written by Judge Nickell joined by Judges Combs and Wine. The Court found that the affidavit was not sufficient to justify a finding of probable cause. The Court found the affidavit similar to that of the famous case of *Aguilar v. Texas*, 378 U.S. 108 (1964). "In *Aguilar*, just as in the case at bar, no information was given to the magistrate identifying the source or the age of the information regarding illegal activity from which the issuing judge could determine the veracity or the basis of knowledge of the one offering the information to law enforcement. Additionally, the issuing judges had absolutely no information, other than conclusory remarks from the officer, about the reliability of the confidential informant." The Court cautioned trial judges that when they are asked to issue search warrants, they "may not simply act as rubber stamps for the police and merely ratify the bare conclusions of others, nor may they consider information outside the affidavit."

The Court rejected the trial court's decision that the search could be saved by the good faith exception to the warrant requirement. The Court said that "it is clear the magistrate was misled by false information provided by Officer Hodge, and the officer's later reliance on the resultant search warrant was wholly unreasonable." Officer Hodge had actually admitted at the suppression hearing that he had not received any complaints on September 5, 2004, regarding manufacturing meth, contrary to his affidavit. The Court was further troubled by the fact that while Hodge had stated that he had smelled the strong odor of ether when he visited Hensley's house earlier in the day, no ether or substances containing ether were found during the execution of the warrant.

The Court also cast serious doubt on the good faith exception itself, recalling Justice Stephens' dissent in *Crayton v. Commonwealth*, 846 S.W. 2d 684 (Ky. 1992). Stephens had predicted that *Crayton* would "'encourage representatives of the Commonwealth to become slovenly, less careful and less prepared in their work.'" Judge Nickell went on to state that if "the courts sanction such sub par performance by law enforcement officers of the Commonwealth, confidence in the judicial system will be lost and all citizens within our borders will suffer. The courts, as defenders of the Constitution and the rights afforded there under, should be loathe to accede to such lowered standards or knowingly participate in any harm to the Commonwealth, as those basic rights must be jealously guarded."

Hamilton v. Commonwealth
— S.W.3d ——, 2007 WL 2811836,
2007 Ky. App. LEXIS 362 (Ky. Ct. App. 2007)

On January 11, 2005, Officer Justice stopped Ryan Sloan on a traffic violation. Seeing a bulge in his pocket, Justice asked Sloan about it. Sloan pulled $2000 out of his pocket, and said he was going to Hamilton's house, and that he was going to buy a car. Sloan drove on. Shortly thereafter, Sloan was stopped again. He no longer had the $2000. He said that he had bought a car from Hamilton, but could not say what kind of car he had bought. Because the officer believed Hamilton to be involved in drug activity, Hamilton was contacted. He denied knowing about a car purchase. Several officers then went to Hamilton's house for a "knock and talk". When Hamilton answered the door, a woman ran through the house. Hamilton stated that there might be an outstanding arrest warrant for her, and that she might be heading out the back door. Justice entered the house based upon Hamilton's statement and upon his concern for his safety. Justice found Beverley Hamilton in the closet. Beverley said she would show the police where drugs and money were kept, resulting in a seizure of $12,000 in cash, a gun, oxycontin, xanax, and cocaine. Hamilton was charged and entered a conditional plea of guilty after having his motion to suppress denied.

The Court of Appeals affirmed in an opinion written by Judge Lambert joined by Judge Keller. The Court stated that "Justice had some information that Hamilton may have been involved in drug trafficking. On this particular occasion, with the questionable information given by Sloan concerning a 'car deal,' the officers would have reason to believe that a drug transaction had recently taken place. Moreover, when the officers arrived at Hamilton's residence, Beverly's erratic behavior…gave reason to the police to suspect she could be concealing or destroying evidence or worse taking actions that could bring the officers' safety into question." The Court also mentioned the protective sweep exception to the warrant requirement, stating that the "protective sweep concept has been acknowledged in several Kentucky and Sixth Circuit cases," but does not explicitly state that this search was based upon that. Similarly, the Court mentioned that exigent circumstances may have been present. The Court did not explicitly justify the entry of the police into Hamilton's house without a warrant.

Judge Stumbo wrote a dissenting opinion. She stated that the police observation of Beverly moving in the house did not establish an exigent circumstance sufficient to justify a warrantless entry. "Before law enforcement may invade the sanctity of the home, the burden is on the Commonwealth to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries…The commonwealth has not adequately demonstrated that exigent circumstances existed to overcome that presumption by merely showing a person was moving around in the house. Due to there being no exigent circumstances, the entry into the house was illegal."

Morton v. Commonwealth
232 S.W.3d 566 (Ky. Ct. App. 2007)

Markus Morton was stopped in Maysville after not signaling when he turned onto US 68, and after he was observed to be weaving from side to side on the highway. Officer Hord looked at Morton's license, but Morton had no proof of insurance. At some point during the stop, Hord used a drug-sniffing dog which had been in Hord's car. The dog alerted to the trunk of the car and the driver's side door. Hord put the dog back in his car and then asked Morton for consent to search the car. Morton refused consent. Hord asked Morton to get out of the car and then conducted a pat down search of Morton. Feeling something unknown in Morton's pocket, Hord removed it, finding a ten dollar bill with crack cocaine inside it. Morton was arrested and charged with possession of cocaine. After his motion to suppress was denied, Morton entered a conditional plea of guilty.

Notably, there is nothing in the opinion indicating that Morton was intoxicated. Remember that Morton was stopped partly for "weaving" from side to side on the highway. That left the failure to signal from a side street as the sole justification for stopping Morton. Another notable fact is that the drug-sniffing dog alerted to the trunk of Morton's car. Yet, no drugs were found in the search of the car.

Notwithstanding those obvious problems, the Court of Appeals affirmed the trial court decision overruling the motion to suppress. Morton did not challenge the stop. Morton also acknowledged that there was probable cause to search the car under the automobile exception. Morton's only challenge was that probable cause to search the car did not justify the warrantless search of Morton's person. In an opinion written by Judge Thompson and joined by Judges Wine and Henry, the Court disagreed with Morton. "[W]hen the drug dog detected the odor of drugs inside Morton's vehicle, particularly at the driver's side door, Hord was provided with probable cause to search the vehicle pursuant to the automobile exception which extended to a search of Morton under the facts of this case."

The Court's opinion does not extend to passengers. Thus, passengers may not be searched when a drug dog alerts to a car. "[W]e conclude that a positive canine alert, signifying the presence of drugs inside a vehicle, provides law enforcement with the authority to search the driver for drugs but does not permit the search of the vehicle's passengers for drugs unless law enforcement can articulate an independent showing of probable cause as to each passenger searched."

The Court concluded by acknowledging that Morton would have been unlawfully searched without the drug dog's alerting. The Court found that the police conducting a pat-down could not have reached into Morton's pocket to pull out the folded 10-dollar bill without some information that it was either a weapon or contraband. However, because there was probable cause established by the dog alerting, the search was in fact legal.

United States v. Gooch
499 F. 3d 596 (6th Cir. 2007)

Club Prizm was apparently a hot spot in Nashville, complete with a VIP section of a public parking lot, valet parking according to status, and lots of fights, drugs, and shootings. Metro Police would regularly come to the parking lot and shine flashlights into cars. One night they did so and saw a gun sticking out of a Crown Royal bag. They determined that the car was owned by Gooch and that Gooch was a convicted felon. The police waited until Gooch came out of the club with his wife, and when he tried to pull out, he was stopped. Gooch was arrested, and a search of the car resulted in a seizure of the weapon. Gooch was charged with unlawfully possessing the gun. He challenged the search of the car, and when he lost, he entered a conditional plea of guilty.

The Sixth Circuit affirmed in an opinion written by Judge Boyce Martin, joined by Judges Rogers and Hood. The case was resolved entirely upon the question of whether Gooch enjoyed a reasonable expectation of privacy in the contents of his car which could be reasonably viewed by flashing a light into its interior, as well as the area in which he parked. The Court acknowledged that there is a reasonable expectation of privacy on occasion even in public parking lots. However, because the general public could walk through this particular lot, the expectation of privacy was not reasonable. "We do not mean to suggest than an individual who parks his or her vehicle in any parking garage or parking lot will necessarily lose all expectations of privacy. There may exist some scenarios in which outside access to a parking garage or lot is so restricted that a reasonable person would not expect a pedestrian or police officer to be able to approach and look into his or her vehicle. However, speculating on when these cases could arise is outside the scope of this case. Here, members of the public and police officers had access to, and were able to walk through, the VIP area. Additionally, the testimony revealed that patrons parked in this area not only for security purposes, but in some cases for notoriety. We hold that here, Gooch had no reasonable expectation of privacy, and therefore, there was no search within the meaning of the Fourth Amendment.

United States v. Davis
514 F.3d 596 (6th Cir. 2008)

A Knoxville City Police Officer named Gilreath was working with the FBI on a task force. On March 9, 2005, he was told that Melvin Davis, who he knew as Tate, was involved in illegal drug activities. He and Officer Fortner went to the area described by the caller, parked their car, and saw Davis standing at the place where the informant said that he would

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be. When Davis got into a Maxima, the officers followed. They ran a records check and found that he did not have a license. They saw him get out of his car, and go toward a barber shop. Gilreath got out and yelled at him to come to the officers. At the door of the barber shop, Gilreath saw "bits of what appeared to be marijuana stuck to the thighs and abdomen area of Davis's pants." Gilreath arrested Davis, and found crack cocaine in Davis's sock during the search incident to arrest. In conversation with Davis, it was determined that he would be suitable as a confidential source.

On August 24, 2005, Davis was arrested again. A week before, Gilreath had heard that Davis was again selling drugs. On August 24, 2005, an informant told Gilreath that Davis was back at the same location in a black Jeep Cherokee smoking marijuana. Gilreath went to the location, and followed Davis when he drove away. They followed him to a high school, where he dropped students off. Gilreath went up to Davis and asked him if he had a license, and he said that he did not. Gilreath could smell marijuana smoke. A student in the car with Davis told the police that she was holding something for Davis, and she showed a baggie of crack cocaine. Davis was arrested. He was charged in federal court and after losing his motion to suppress went to trial, where he was convicted.

The Sixth Circuit affirmed in a decision by Judge Moore joined by Judges Griffin and Tarnow. The Court held that the March 9, 2005 arrest was a legal *Terry* stop based upon specific articulable suspicion. This suspicion was generated by the informant's tip that he would be at a specific location, that he was in a high crime area, and that he was driving without a license. The Court held that once the stop occurred, Gilreath approached Davis in a "manner reasonably related to the scope of the situation at hand."

The Court also affirmed the August 24, 2005 arrest. Their decision was based again upon the informant's tip, conversations in which Davis had said he had not yet obtained a license, and an exchange between Davis and the passenger in his car.

United States v. Garcia
496 F.3d 495 (6th Cir. 2007)

This is a complicated marijuana conspiracy case beginning in 1992, involving pages of complicated facts, superseding indictments, and two previous decisions by the Sixth Circuit. The opinion of the Sixth Circuit affirming the search was written by Judge Batchelder, joined by Judges Hood and Moore.

Garcia challenged the government's search of his Suburban in Michigan. The Suburban had been searched pursuant to a warrant that was issued following a stopping of the vehicle and obtaining a pager during a pat down of Garcia. Garcia challenged the initial stop, and alleged that the search of the Suburban was a fruit of the illegal stop. The Court found reasonable suspicion sufficient to justify a stopping of the Suburban. The Court further held that the canine narcotics sniff of the Suburban did not exceed the scope or duration of the stop. The Court rejected the district court's holding that the seizure of the pager was justified under *Terry*, but held that it was admissible as an item that would have been inevitably discovered.

The Court also rejected Garcia's challenge to the search of his Texas home. Here the Court granted Garcia the force of his arguments, but found the admission of the evidence to be harmless. The DEA had accompanied the San Antonio Police Department on the execution of a state search warrant to search for cocaine. The DEA instead seized hundreds of documents. Garcia challenged this as a general search. "Thus, where the officers unlawfully seize certain items but do not flagrantly disregard the limits of the warrant by unreasonably searching places not authorized in the warrant, the court must suppress the unlawfully seized items, but 'there is certainly no requirement that lawfully seized evidence be suppressed as well.'" The Court held that the DEA search had not exceeded the scope of the warrant and thus was not a general search. However, the Court went on to hold that because the documents were not obvious contraband, their seizure under the plain view doctrine was unlawful.

United States v. Watson
498 F.3d 429 (6th Cir. 2007)

The Knoxville Police Department made 4 controlled buys at a house in Knoxville. They used that to obtain a warrant to search the house and the 4 people in the house. The warrant named the four individuals, but failed to name the residence itself. When they executed the warrant, they found $1494 on Watson, as well as a gun, 2 grams of marijuana, and eighteen grams of crack cocaine. Watson admitted the cocaine was his. He was charged with both a drug and firearm offense and after losing his motion to suppress entered a conditional plea of guilty.

The Sixth Circuit affirmed in an opinion written by Judge Cole and joined by Judges Gilman and Marbley. The government conceded that the warrant had failed to name the residence in the search warrant. The Court did not make a finding regarding the legality of the warrant but rather went immediately to the good faith exception, holding that it applied. The Court rejected Watson's argument that the warrant was so facially deficient that the good faith exception should not apply. "The omission of the residence from the grant-of-authority section was apparently the result of a clerical error. This is evident because the warrant thoroughly described the residence, and the warrant's affidavit and incorporated documents—maps of the area, a tax-assessment printout, and photographs of the residence—make clear, that the warrant's purpose was to, among other things, authorize a search of the residence."

United States v. Ayoub
498 F.3d 532 (6th Cir. 2007)

Ayoub's half-brother Puzai contacted Homeland Security Agent Howe and told him that his half-brother was engaged in drug activity at their parents' house. After stopping Ayoub and failing to find anything, they went to the house and obtained consent to search from Puzai's sister, Raja Atoui. The search revealed scales, two handguns, and marijuana. Ayoub arrived during the execution of the search and admitted possessing the drugs. Ayoub was charged with possession with intent to distribute marijuana and being a felon in possession of a handgun. His motion to suppress was denied. After being convicted at trial, he appealed.

The Sixth Circuit affirmed in a decision written by Judge Cole and joined by Judges Gilman and Marbley. Ayoub challenged Raja Atoui's authority to consent to the search of the home in which he lived. This contention was rejected, with the court holding that Raja Atoui had the authority to consent and that her consent was voluntary. "Here, not only was Atoui the caretaker of the home during the time her parents were in Lebanon, she of course also has greater authority than a typical employee as the daughter of the homeowners who were not occupying the premises at the time." The Court noted that the officers never asked Ayoub for consent, nor did they obtain a warrant. "That would have been the preferred course in light of the Fourth Amendment's strong partiality to searches conducted pursuant to a warrant." Relying upon the recent case of *Georgia v. Randolph*, 547 U.S. 103 (2006), the Court held that even though Ayoub was present and was never asked to consent, this was not fatal to the government's argument that Atoui had consented voluntarily. "In short, because Ayoub was not present and objecting, Atoui had authority to consent to the search."

United States v. Herndon
501 F.3d 683 (6th Cir. 2007)

Herndon was a convicted sex offender in Tennessee and was placed on probation after serving nine months in prison. One of his conditions of probation was that he not have the internet on his home computer, and that he consent to his probation and parole officer's checking on his computer to ensure compliance. While on probation, Herndon failed to comply with treatment requirements and was kicked out of the treatment program. He told his parole officer that he was looking for work on the internet. In response, the parole officer went to Herndon's home and checked his computer, which revealed evidence of pornography. Herndon was charged with knowing receipt and possession of child pornography. His motion to suppress was denied, and he entered a plea of guilty.

The Sixth Circuit affirmed in a decision written by Judge Gibbons and joined by Cook and Cleland. The Court noted that there were two possible analyses of the propriety of a probation search, *Griffin v. Wisconsin*, 483 U.S. 868 (1987) and *United States v. Knights*, 534 U.S. 112 (2001). The Court noted that the *Griffin* analysis would be inappropriate because the directive authorizing a search of the computer did not articulate reasonable suspicion. Thus, the Court analyzed the search under *Knights*. "Under *Knights*, a search of a probationer's property must be tested for reasonableness in light of the totality of the circumstances 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" The Court found Herndon's privacy interests were reduced based upon Herndon's having agreed to have his computer checked as a condition of his probation. The government's interest in reducing recidivism was viewed as strong. "The requisite weighing of Herndon's diminished privacy interest in his computer activities and the government's comparatively substantial interest in monitoring probationers' activities leads us to the conclusion that Harrien required no more than reasonable suspicion to conduct a check of Herndon's computer."

United States v. Wilson
506 F.3d 488 (6th Cir. 2007)

Michael Jones and his passenger, Lamar Wilson, were driving without their seat belt on Highway 78 in Tiptonville, Tennessee. They were pulled over because of that. As the police began to talk with them, they began to act nervous. Neither Wilson nor Jones were able to produce proof of registration or insurance. Jones then consented to a search of the car. Jones and Wilson were asked to get out of the car. A pat-down of Wilson caused a package wrapped in duct tape to fall from Wilson's pant leg. It was later found to be a pound of powder cocaine. Wilson moved to suppress, and the district court granted the motion. The court granted Jones' motion to suppress.

In an opinion written by Judge Gilman and joined by Judges Varlan and Batchelder, the Sixth Circuit affirmed, agreeing that the police officer did not have a reasonable suspicion sufficient to pat-down Wilson. The government contended that Wilson could be searched due to the need to "protect the officers from an armed and dangerous suspect." Wilson's not owning the car did not support the pat-down. "Most passengers do not own the vehicle in which they are riding." The Court rejected the government's contention that Wilson's "extreme nervousness" was sufficient to justify the pat-down. "Nervous behavior, standing alone, is not enough to justify a *Terry* search." "In sum, the government can point to no specific and articulable facts to justify the pat-down of Wilson on the basis of a reasonable suspicion that he was armed and dangerous….We thus find no error in granting the motion to suppress as to Wilson. Although we do not relish the consequence that the possessor of a large

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quantity of drugs will escape punishment, our overriding concern is that the police must abide by the Fourth Amendment protections afforded to all of the inhabitants of this great country, guilty and innocent alike." *Cf., Owens, Supra.*

United States v. Smith
510 F.3d 641 (6th Cir. 2007)

The DEA and the West Michigan Enforcement Team (WEMET) received a great deal of information that Lakento Brian Smith was trafficking in cocaine in Muskegon County, Michigan. Several confidential informants were involved in trying to purchase cocaine from Smith. Ultimately, Officer Lewkowski applied for a search warrant to search a particular address and all vehicles there. The execution of the warrant resulted in the seizure of $17,000 in cash, cocaine residue, three guns, jewelry, and electronic equipment. Many of the items were seized for forfeiture purposes. Smith was arrested. A search of the vehicles resulted in the seizure of powder cocaine, crack cocaine, a hand mixer, and digital scales. Smith was charged with possession with intent to distribute 50 grams or more of cocaine base, as well as other charges. Smith's motion to suppress was denied. Smith was convicted by a jury and sentenced to life in prison. He appealed to the Sixth Circuit.

In a decision by Judge Gibbons and joined by Judges Martin and Sutton, the Sixth Circuit affirmed. The focus of the opinion was the search of a Pontiac where most of the cocaine was found. The Court held that this search was legal based upon the probable cause exception to the warrant requirement. "{W]hen the officers searched the Pontiac, they possessed information—gleaned both from the lengthy investigation of Smith and from the warrant-supported search of his residence—suggesting that Smith trafficked in cocaine and that he used" his residence to store the cocaine. "Because the officers were aware of Smith's use of vehicles in his drug-trafficking activities, and because they had information indicating that Smith stored cocaine at his residence, there was a 'fair probability' that contraband—in this case, the cocaine referenced by the tipster—would be found in the Pontiac." The Court also found that the Pontiac was validly searched based upon the inventory exception to the warrant requirement. "When police have probable cause to believe that an automobile is forfeitable contraband, it may be seized from a public place without a warrant."

United States v. Stuart
507 F. 3d 391 (6th Cir. 2007)

Richard Hale was a twice convicted felon driving in Michigan carrying a gallon-sized bag of marijuana. He was speeding. When stopped, knowing he faced a life sentence, he told the police that he had purchased the marijuana from Daniel Stuart. The police obtained a warrant to search Stuart's house. When the warrant was executed, the police found four pounds of marijuana and numerous guns. Stuart sought to suppress the evidence, contending that the search had occurred before the warrant had issued. After the motion was denied, Stuart was tried and convicted.

The Sixth Circuit affirmed his conviction in a decision by Judge Sutton, joined by Judges Martin and Gibbons. Stuart contended that the trial court had erred in failing to hold a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). The Court found that Stuart had "made no showing that any of the information in the affidavit was deliberately false or submitted with reckless disregard for its truth" and thus there was no error in failing to hold a *Franks* hearing.

United States v. Kenny
505 F. 3d 458 (6th Cir. 2007)

In 2003, the police in Harrison, Michigan executed a search warrant at property on Coolidge Street. Nearby they also arrested Kenny and his son Christopher in a nearby barn, where they also found a methamphetamine lab and numerous weapons. The following day they executed a search warrant for Kenny's residence. This search resulted in the seizure of more evidence of manufacturing methamphetamine as well as more weapons. Kenny was charged with drug offenses. After his motion to suppress was denied, he was convicted by a jury to 6 years in prison.

On his appeal to the Sixth Circuit, the Court affirmed in a decision by Judge Schwarzer joined by Judges Gibbons and Daughtrey. The Court held that there was probable cause to believe that Kenny was manufacturing methamphetamine, and that evidence would be found at his house. The Court reviewed the affidavit of Officer Stoppa which stated that Kenny had been arrested in a barn where a meth lab was, and that Stoppa's informant had stated that Kenny was cooking meth in that lab. The Court relied upon *United States v. Miggins*, 302 F. 3d 384 (6th Cir. 2002), to hold that "a sufficient nexus existed to search the residence of a known drug dealer after he had been arrested for possession of cocaine."

United States v. Gonzalez
512 F.3d 285 (6th Cir. 2008)

Gonzalez was pulled over on May 27, 2004, in Milan, Ohio, for "minor moving violations." As the officer was writing his warning, Gonzalez invited him to search his van. The officer agreed, and in searching the van saw a "piece of molding in the rear storage area that was slightly out of place." When he touched the molding, it fell off, exposing the face of a rear speaker and the rear quarter-panel. There, the officer could see two plastic-wrapped packages. A narcotics dog alerted to the van. A search warrant was obtained, the execution of which resulted in seven packages of seven kilograms of cocaine. Gonzalez was charged with

possessing with intent to distribute more than five kilos of cocaine. Gonzalez's motion to suppress was denied. He was tried and convicted and sentenced to life imprisonment due to his having two prior offenses.

The Sixth Circuit affirmed in a decision by Judge McKeague and joined by Judges Boggs and Cohn. Gonzalez agreed that he had consented to a search, but contended that the search exceeded the scope of his consent, whereby the officer had damaged the van. The Court rejected this contention, saying that the molding had fallen off upon touch, revealing the plastic baggies. All the actions thereafter were as a result of a legal search warrant.

United States v. Moon
513 F.3d 527 (6th Cir. 2008)

Dr. Young Moon was a provider for TennCare in Crossville, Tennessee. After receiving an allegation that Dr. Moon was giving only partial doses of chemotherapy but charging for full doses, agents of the TBI as well as others conducted a review of her billing practices in her office. They requested permission to scan patient records, and Dr. Moon agreed. Evidence of fraud was discovered and Dr. Moon was charged. Her motion to suppress was denied. At trial, Dr. Moon was convicted on four counts and sentenced to 188 months in federal prison.

In a decision by the Sixth Circuit, written by Judge Clay and joined by Judges Merritt and Cox, the Court affirmed. Among other allegations, the Court rejected Moon's assertion that her consent to search was invalid. The Court rejected Moon's allegation that her consent had not been voluntary but rather than she had acquiesced to a claim of lawful authority.

United States v. Nichols
512 F.3d 789 (6th Cir. 2008)

In September 2004, several Nashville police officers were patrolling in north Nashville near Tennessee State. They saw a car that "grabbed" their "attention." They began to check the license tag and eventually came up with information that Elbert Nichols had an outstanding warrant for robbery. Later they saw the car again and pulled it over and arrested Nichols. A search of the car resulted in a loaded .38 being found near where Nichols had been sitting. Nichols was charged with being a felon in possession of a handgun. His motion to suppress was denied. He entered a conditional plea of guilty.

The Sixth Circuit affirmed in a decision written by Judge Boggs joined by judges Kennedy and Jordan. The Court first rejected Nichols' claim that the police had run a records check on him based upon his race. Judge Boggs stated that "selective enforcement of the law based on a suspect's race may violate the Fourteenth Amendment, we do not agree that the proper remedy for such violations is necessarily suppression of evidence otherwise lawfully obtained. The exclusionary rule is typically applied as a remedy for Fourth Amendment violations, which Amendment does not apply to pre-contact investigatory steps like that presented here…" "Rather, we believe the proper remedy for any alleged violation is a 42 U.S.C. #1983 action against the offending officers."

The Court further rejected Nichols' claim that the officers in this case had acted in a discriminatory fashion. "Nichols cites no direct evidence of discrimination in his case and only the barest of circumstantial evidence. He asserts that '[t]he officer's knowledge boils down to three criteria: early-morning hours, a congregation [of men], and black. Had this been a white congregation at 1:15 a.m. near another university [instead of the historically black Tennessee State University], would an officer decide to run a check for warrants? No.'…Nichols then cites statistical data demonstrating that 'roughly one third of young black men are under control of the criminal justice system'…But bald accusations and irrelevant generalized statistics do not even come close to constituting what is necessary to establish a *prima facie* case of an equal protection violation." "[T]he decision to check for outstanding warrants on Elbert Nichols did not require 'reasonable suspicion'—indeed, it did not require any suspicion at all. All it required was that the decision not be based solely on Nichols's race…To hold otherwise would be to prohibit police from taking even the most basic initial investigatory steps absent some articulable suspicion, such as when officers simply have a 'hunch' or are just following routine procedure—steps which, in this case, led to the apprehension of a dangerous fugitive."

The Court also rejected Nichols' argument that the search of the glove box exceeded the scope of a search incident to arrest, citing *New York v. Belton*, 453 U.S. 454 (1981). *Belton* had stated that a search incident to arrest included "'the passenger compartment of that automobile' including 'any containers found within the passenger compartment'… 'Container' here denotes any object capable of holding another object. It thus includes *closed or open glove compartments…*" The Court reminded that under *Thornton v. United States*, 541 U.S. 615 (2004), "the rule in *Belton* applies even where a police officer does not make contact with a suspect until after he has already left his vehicle." "We therefore join the unanimous view of our sister circuits in holding that the search-incident-to-arrest authority permits an officer to search a glove box, whether open or closed, locked or unlocked."

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SHORT VIEW . . .

1. *State v. Chamberlin*, 162 P.3d 389 (Wash. 2007). There is no per se requirement that a judge must recuse herself where she was the judge who issued a search warrant.
2. *State v. Elders*, 192 N.J. 224, 927 A.2d 1250 (N.J. 2007). The New Jersey Constitution requires the police to have reasonable suspicion prior to their requesting consent to search a disabled car. The Court had previously held that the same constitutional provision mandated reasonable suspicion for requesting permission to search following a traffic stop for a moving violation. "Clearly, in the case of a disabled vehicle, if the police are fulfilling a caretaker function, the consent search of a car for evidence of criminality is hardly in keeping with that mission. The driver of a disabled car facing police officers whose offer of assistance quickly turns into a 'fishing expedition' based on a 'hunch' that criminal activity is afoot is subject to no less compulsion to accede to a consent search than the driver subject to a typical motor vehicle stop."
3. *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007). The *en banc* 9th Circuit has held that when you go into an airport you may be searched without suspicion, and that consent is irrelevant. "Today we clarify that the reasonableness of [airport screening] searches does not depend, in whole or in part, upon the consent of the passenger being searched…The constitutionality of an airport screening search…does not depend on consent,…and requiring that a potential passenger be allowed to revoke consent to an ongoing airport security search makes little sense in a post-9/11 world…[A]ll that is required is the passenger's election to attempt entry into the secured area of an airport."
4. *United States v. Grigg*, 498 F.3d 1070 (9th Cir. 2007). The police may not make a *Terry* stop based upon a completed minor misdemeanor about which they have a reasonable suspicion. As a result, evidence of a machine gun found during a stop to investigate the violation of a noise ordinance should have been suppressed. "We adopt the rule that a reviewing court must consider the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated danger…An assessment of the 'public safety' factor should be considered within the totality of the circumstances, when balancing the privacy interests at stake against the efficacy of a *Terry* stop, along with the possibility that the police may have alternative means to identify the suspect or achieve the investigative purpose of the stop."
5. *State v. Berrios*, 235 S.W.3d 99 (Tenn. 2007). The Tennessee Supreme Court has held that it violates the Fourth Amendment to require a driver stopped for speeding to get out of his car and sit in a patrol car without any suspicion of his being armed and dangerous. "[T]the placement of a driver into the backseat of a patrol car cannot be described as 'de minimus' or a 'mere inconvenience.' A process involving a frisk and placement into the back of a locked patrol car is more akin to a full-scale arrest than the brief detention generally incident to an ordinary traffic stop."
6. *United States v. Moran*, 503 F.3d 1135 (10th Cir. 2007). The 10th Circuit has extended the rule of *United States v. Hensley*, 469 U.S. 221 (1985), which allowed for a *Terry* stop based upon a reasonable suspicion of a completed felony, to completed misdemeanors. The Ninth Circuit disagreed with this in *United States v. Grigg*, 81 Cr. L. 651 (9th Cir. 2007), while the Sixth Circuit agreed in *Gaddis ex rel. Gaddis v. Redford Twp.*, 364 F. 3d 763 (6th Cir. 2004). Thus, the *Terry* stop of Moran who had trespassed in the past, was legal, and thus his conviction for being a felon in possession of a firearm was affirmed
7. *Virginia v. Moore* 636 S.E. 2d 395 (Va. 2007), *cert. granted*, 128 S.Ct. 28, (2007) presents the question of whether the Fourth Amendment requires suppression of evidence that was obtained incident to an arrest where the arrest violated state law.
8. *State v. Washington*, 875 N.E.2d 278 (Ind. Ct. App. 2007). The Indiana Constitution prohibits police officers from asking motorists whether they have drugs in the car unless they have a level of suspicion at the time they are asking. "[T]o allow police to routinely question individuals during a traffic stop about the presence of drugs would open the door to all sorts of inquiries, including whether the person cheated on his last year's tax return or had in the past illegally pirated music from the internet. While tax fraud and internet piracy are—like illegal drug possession—serious concerns, routine traffic stops are not the place for such inquiries."
9. *Jones v. State*, 653 S.E.2d 456 (Ga. 2007). When there is no probation condition allowing for a warrantless search, a probationer maintains his reasonable expectation of privacy. Thus, the police in this capital case violated the defendant's Fourth Amendment rights by searching his home without a warrant, despite the fact that he was on probation. This holding was made in the context of both *United States v. Knights*, 534 U.S. 112 (2001) and *Samson v. California*, 547 U.S. 843 (2006), both of which allowed for searches of probationers where there are probation conditions. Here the Georgia Supreme Court held that *Knights* and *Samson* would not be extended to searches without probation conditions.
10. *People v. Garry*, 67 Cal.Rptr.3d 849 (Cal. Ct. App., 2007). An officer who bathes a pedestrian with light and runs at him asking whether he's on probation or parole has seized the person and thus reasonable suspicion is required, according to the California Court of Appeals. Thus, evidence obtained after the initial approach

should have been suppressed. "No matter how politely [the officer] may have stated his probation/parole question, any reasonable person who found himself in the defendant's circumstances, suddenly illuminated by a police spotlight with a uniformed, armed officer rushing directly at him asking about his legal status, would believe themselves to be 'under compulsion of a direct command by the officer.'"

11. *State v. Stone*, 653 S.E.2d 414 (N.C. 2007). The North Carolina Supreme Court states that when a passenger of a lawfully stopped vehicle gives consent for a search, that does not include shining a flashlight down the passenger's pants. As succinctly stated by Justice Robin Hudson, a "reasonable person in defendant's circumstances would not have understood that his general consent to search included allowing the law enforcement officer to pull his pants and underwear away from his body and shine a flashlight on his genitals."
12. *State v. Jackson* and *State v. Jordan*, 742 N.W.2d 149 (Minn. 2007). Despite having a warrant authorizing a nighttime search, the Minnesota Supreme Court held that in both cases there was insufficient evidence presented in the affidavit to justify specifically the execution of the warrant at night. "While the Supreme Court has never held that a nighttime search implicates the reasonableness requirement of the Fourth Amendment, it has repeatedly acknowledged the especially intrusive nature of nighttime searches of the home…[W]e conclude that the search of a home at night is a factor to be considered in determining whether a search is reasonable under the Fourth Amendment. We further conclude that in order to be constitutionally reasonable, nighttime searches require additional justification beyond the probable cause required for a daytime search."
13. *United States v. Collins*, 510 F.3d 697 (7th Cir. 2007). The Seventh Circuit holds in this case that where the police have probable cause to believe that drugs are being sold out of a house, and go to the house without a warrant but with a battering ram, that they violate the Fourth Amendment by bursting in after 20 seconds and hearing someone say "the police are at the door." This was not a sufficient exigency to justify a warrantless entry.
14. *State v. Young*, 974 So.2d 601 (Fla. Dist. Ct. App. 2008). A Florida Methodist minister had a reasonable expectation of privacy in his computer provided for him by his church, and thus the permission given by a regional church official was not valid, and a search of the computer resulting in finding child pornography was violative of the Fourth Amendment. Essential to the holding was that the church had no policy regarding computers. "[W]here an employer has a clear policy allowing others to monitor a workplace computer, an employee who uses the computer has no reasonable expectation of privacy in it. In the absence of such a policy, the legitimacy of an expectation of privacy depends on the other circumstances of the workplace."
15. *Lake City v. Bench*, 177 P.3d 655 (Utah Ct. App. 2008). When an ex-wife calls the police and tells them that her husband had been to her house and that he was drunk, that is not sufficiently reliable to constitute an articulable suspicion sufficient for a stopping. Here, the police found the husband, followed him (while he was driving cautiously), and stopped him. The Court was not willing to treat her as a typical anonymous tipster, viewing her rather as "Bench's ex-wife and that malice or ill will is a typical—albeit not inevitable—product of divorce." The Court also said the following about the husband's cautious driving: "Safe, ultra-cautious driving, however, even if motivated by a desire to avoid police contact, does not, without more, create reasonable suspicion sufficient to justify a traffic stop. Simply put, a desire to avoid an encounter with police does not indicate that a person is driving while intoxicated or is otherwise engaged in criminal activity." ■

Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities

http://www.sentencingproject.org/Admin/Documents/publications/rd_racialimpactstatements.pdf

An article by Marc Mauer, Director of the Sentencing Project, in the Ohio State Journal of Criminal Law that proposes the development of "Racial Impact Statements" as a means of assessing the impact of proposed sentencing policies.

In "Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities", he suggests that these statements have much in common with fiscal and environmental impact statements that have become commonplace at many levels of government. The goal of a racial impact statement would be to assess the projected impact of new sentencing legislation on racial and ethnic minorities prior to enactment of the policy. If the statement indicates that unwarranted sentencing disparities might be produced, legislators would have the opportunity of considering alternative means of achieving public safety goals that would not exacerbate existing disparities.

CAPITAL CASE REVIEW

By David M. Barron, Capital Post Conviction Unit

Supreme Court of the United States

***Allen v. Siebert*, 128 S.Ct. 2 (2007)** (*per curiam*)
The Court held that the statute of limitations for filing a state post conviction action remains a filing requirement when the state law says the expiration of the statute of limitations is an affirmative defense. Thus, the one-year statute of limitations for filing a federal habeas petition is not tolled by an untimely post conviction action in jurisdictions where the timeliness of the action is an affirmative defense.

Stevens, J., joined by Ginsburg, J., dissenting: They believe "[t]here is an obvious distinction between time limits that go to the very initiation of a petition, and time limits that create an affirmative defense that can be waived," and there is reasonable basis for concluding that an untimely petition has not been "properly filed" for purposes of the AEDPA when the state statute of limitations is jurisdictional.

***Norris v. Jones*, 2007 WL 2999165 (Oct. 16)** *(Scalia, J., dissenting from the denial of an application to vacate a stay of execution)*

Scalia voted to vacate the stay of execution because he thought the lower court's decision to stay the execution was based on the mistaken premise that the grant of certiorari in *Baze v. Rees*, 07-5439, "calls for the stay of every execution in which an individual raises an Eighth Amendment challenge to the lethal injection protocol. The grant of certiorari in a single case does not alter the application of normal rules of procedure, including those related to timeliness. In this case, Jones's challenge to the lethal injection protocol, which was brought nine years after his conviction and sentence became final, was dilatory."

***Emmett v. Kelly*, 128 S.Ct. 1 (2007)**
(*Stevens, J., joined by, Ginsburg, J., respecting the denial of certiorari)*

They "remain firmly convinced that no State should be allowed to foreshorten this Court's orderly review of federal constitutional claims of first-time habeas petitioners by executing prisoners before that review can be completed. Both the interest in avoiding irreversible error in capital cases, and the interest in the efficient management of our docket, would be served by a routine practice of staying all executions scheduled in advance of the completion of our review of the denial of a capital defendant's first application for a federal writ of habeas corpus. Such a practice would be faithful to the distinction between first and successive habeas petitions recognized by Congress in the Antiterrorism and Effective Death Penalty Act (AEDPA) and would accord death row inmates the same, rather than lesser, procedural safeguards as ordinary litigants."

David M. Barron

Supreme Court Grants of *Certiorari*

Kennedy v. Louisiana, No. 07-343, decision below, 957 So.2d 757 (cert. granted, Jan. 4, 2008)

1. Whether the Eighth Amendment's Cruel and Unusual Punishment Clause permits a State to punish the crime of rape of a child with the death penalty.

2. If so, whether Louisiana's capital rape statute violates the Eighth Amendment insofar as it fails genuinely to narrow the class of such offenders eligible for the death penalty.

Arave v. Hoffman, No. 07-110, decision below, *Hoffman v. Arave*, 455 F.3d 926 (9th Cir.) (cert. granted, Nov. 5, 2007) (dismissed as moot because inmate abandoned claim that counsel was ineffective during plea bargaining)

Five weeks before his trial, Respondent Maxwell Hoffman rejected an offer by the state to recommend a life sentence if he would plead guilty to first-degree murder. Hoffman's attorney, William Wellman, recommended Hoffman reject the offer because the Ninth Circuit had earlier determined the Constitution required juries to find statutory aggravating factors, while in Idaho, judges made such findings. Wellman believed if Hoffman received a death sentence it would be reversed on appeal. However in *Walton v. Arizona*, 497 U.S. 639 (1990), the Supreme Court determined the Constitution permits judges to find statutory aggravating factors. Nevertheless, the Ninth Circuit determined Wellman's representation was ineffective during plea negotiations because he "based his advice on incomplete research, and second, Wellman recommended that his client risk much in exchange for very little." The Ninth Circuit also concluded, "Hoffman's desire to have the State prove its case was not a principled stand against accepting a plea agreement," but "a misunderstanding of aiding and abetting liability led him to believe that the State was not likely to prove a first-degree murder charge against him."

1. Because the Ninth Circuit did not require Hoffman to prove Wellman's recommendation constituted "gross error" and mandated Wellman "be prescient about the direction the law will take," did the Ninth Circuit err by rejecting this Court's prohibition regarding the use of hindsight to conclude Hoffman established deficient performance?

2. Because Hoffman failed to allege he would have accepted the state's plea offer but for Wellman's advice and the Ninth Circuit determined Hoffman's decision to reject the offer was not a "principled stand," did the Ninth Circuit err by concluding Hoffman established prejudice?

The Court added the following question presented:

> What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?

Baze and Bowling v. Rees, et al., No. 07-5439, decision below, 217 S.W.3d 207 (Ky. 2006) (cert. granted, Sept. 25, 2007; argued on January 7, 2008)

Although the Court has authorized civil actions challenging portions of a method of execution, it has not addressed the constitutionality of a method of execution or the legal standard for determining whether a method of execution violates the Eighth Amendment in over 100 years—leaving lower courts with no guidance on the law to apply to the many lethal injection challenges filed since the Court's rulings allowing the claim in a civil action. Lower courts have been left to look to cursory language in the Court's opinions dealing with the death penalty on its face and prison conditions. As a result, the law applied by lower courts is a haphazard flux ranging from requiring "wanton infliction of pain," "excessive pain," "unnecessary pain," "substantial risk", "unnecessary risk," "substantial risk of wanton and unnecessary pain," and numerous other ways of describing when a method of execution is cruel and unusual.

Considering that at least half the death row inmates facing an imminent execution in the last two years have filed suit challenging the chemicals used in lethal injections, certiorari petitions and stay motions on the issue are arriving before the Court so often that this issue is one of the most common issues. Thus, it is important for the Court to determine the appropriate legal standard, particularly because the difference between the standards being used is the difference between prevailing and not.

This case presents the Court with the clearest opportunity to provide guidance to the lower courts on the applicable legal standard for method of execution cases. This case arrives at the Court without the constraints of an impending execution and with a fully developed record stemming from a 20-witness trial. The record contains undisputed evidence that any and all of the current lethal injection chemicals could be replaced with other chemicals that would pose less risk of pain while causing death than the tri-chemical cocktail currently used. Although this automatically makes the risk of pain associated with the use of sodium thiopental, pancuronium bromide, and potassium chloride unnecessary, relief was denied on the basis that a "substantial risk of wanton and unnecessary pain" had not been established. This squarely places the issue of whether "unnecessary risk" is part of the cruel and unusual punishment equation and whether an "unnecessary risk" exists upon a showing that readily available alternatives are known.

The Kentucky Supreme Court's decision gives rise to the following important questions:

I. Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?

II. Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?

III. Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?

Stays of Execution

Each execution scheduled for after September 25, 2007, has been stayed on a case by case basis pending the Supreme Court of the United States ruling in *Baze and Bowling v. Rees, et al.*, No. 07-5439. Stays have been granted by the Supreme Court of the United States, the United States Court of Appeals for the Eighth Circuit, the Arizona Supreme Court, the Georgia Supreme Court, the Nevada Supreme Court, the Texas Court of Criminal Appeals.

United States Court of Appeals for the Sixth Circuit

***Wilson v. Parker*, 2008 WL 220418 (6th Cir., Jan. 29, 2008)**
(*Boggs, C.J., joined by, Gibbons and Cook, JJ.)*
Unsatisfied with the qualifications of the attorneys the trial court appointed to represent him, which volunteered based on a sign posted on the courthouse door, Wilson informed the court that he wanted new counsel but did not want to go pro se. When Wilson told the judge that the appointed attorneys do not represent him, the court told Wilson that he would represent himself and the appointed attorneys

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would remain as stand-by counsel. The court then explained the hazards of proceeding pro se and concluded that Wilson was acting consciously and voluntarily.

Wilson's waiver of the right to counsel was not rendered invalid because he was forced to choose between going pro se or continuing with allegedly incompetent counsel: For a waiver of counsel to be knowing and intelligent, all the record must show that the defendant was offered counsel, the risks and dangers of proceeding pro se were explained to the defendant, and the defendant knows what he is doing by waiving counsel. Noting that the trial judge had a lengthy colloquy with Wilson that was modeled after the standards for obtaining a waiver set out for federal district courts, to which Wilson responded, "I will proceed pro se," the court held that the state court's determination that the waiver of counsel was knowing and intelligent was not contrary to nor an unreasonable application of clearly established Supreme Court law.

Proceeding pro se prohibits prevailing on an ineffective assistance of counsel claim: Because Wilson elected to proceed pro se, Wilson waived his right to the effective assistance of counsel. With regard to pre-waiver ineffectiveness for failing to investigate mitigating evidence, Wilson's decision to proceed pro se prevents a finding of prejudice.

Wilson did not suffer actual prejudice from being tried jointly with his codefendant: Because the damaging testimony introduced at trial would have been admissible if Wilson had been tried separately and because Wilson did not cross-examine the codefendant, thereby failing to minimize the impact of her testimony blaming him for the murder, Wilson did not suffer actual prejudice from being tried jointly with his codefendant.

Direct appeal counsel was not ineffective for raising ineffective assistance of trial counsel on direct appeal: Because Wilson repeatedly questioned his trial counsel's performance during the trial, Wilson might have been prevented from raising the issue in post conviction proceedings if he had not raised it on direct appeal because the claim was apparent from the record. Thus, it was not objectively unreasonable for defense counsel to raise ineffective assistance of counsel on direct appeal. Further, even if the claim was raised solely in post conviction proceedings, Wilson would not have prevailed because he chose to represent himself at trial.

Wilson was not denied a forum to bring his ineffective assistance of direct appeal counsel claim in state court: The court ruled that the United States Supreme Court case law on the right to effective assistance of counsel only applies where the appeal was dismissed in its entirety because of the performance of counsel, not to cases where particular claims were not raised on direct appeal or were raised and should not have been.

***Fautenberry v. Mitchell*, 2008 WL 199542 (6th Cir., Jan. 25, 2008)** (*Batchelder, J., joined by Gilman, J.; Moore, J., dissenting) (denying habeas relief)*

Failing to meaningfully communicate with defendant is not ineffective assistance of counsel: Fautenberry claimed that his counsel rendered deficient performance by not meaningfully communicating with him. The Sixth Circuit, however, ruled that the Sixth Amendment protects the defendant's right to have counsel acting in the role of advocate by subjecting the prosecution's case to meaningful adversarial testing. Thus, it is the adversarial process, not the accused's relationship with counsel that can give rise to an ineffective assistance of counsel claim. Even if the relationship with counsel could amount to cognizable claim, the record suggests that Fautenberry was responsible for the lack of communication because he refused to cooperate with his lawyers.

Counsels' mitigation investigation was not unreasonable: Fautenberry claimed that further investigation would have revealed past head injuries and alerted his attorneys to the likelihood that he had permanent brain damage. Rejecting this claim, the court noted that counsel retained numerous experts and that Fautenberry's brain damage went undiscovered likely because he refused to submit to a neuropsychological examination; thereby making it Fautenberry's fault. The court also ruled that even assuming the retained expert was incompetent, that does not help Fautenberry because a licensed practitioner is presumed competent and counsel had no good reason to believe his expert was incompetent.

Even if the investigation was unreasonable, Fautenberry suffered no prejudice: The alleged mitigation that Fautenberry claims the jury did not hear was: 1) his personal struggle with, and his family's history of, depression; 2) the connection between his abusive childhood and the commission of these murders; 3) his head injuries and resulting organic brain damage; and, 4) the sexual aspects of the murders he committed. But, the three-judge panel that sentenced Fautenberry to death found the following mitigating circumstances did not outweigh the aggravators: 1) Fautenberry's "past history"; 2) his abuse as a child; 3) the "rage" of his childhood; 4) his abuse of drugs and alcohol; and, 5) his low self-esteem and rejection. Believing that the omitted mitigating evidence mirrored the evidence actually presented at the sentencing phase and the mitigators found by the sentencing body, the court held that the failure to uncover the mitigating evidence presented in post conviction did not prejudice Fautenberry. The court also found that the brain impairments Fautenberry suffers from - - impulse control problems, modulation of affect, planning, problem solving, and the capacity to tolerate frustration - - was not likely to

have changed the outcome because it could just as easily have been considered aggravating instead of mitigating.

Trial counsel did not have a conflict of interest because he was a trustee of the township where the victim's body was found: A habeas petitioner can established ineffective assistance of counsel without showing prejudice by demonstrating that counsel labored under an actual conflict of interest, which is a conflict of interest that adversely affects counsel's performance. Because Fautenberry has not established that the township had an interest in the outcome of the case or that serving as a trustee for the township adversely affected trial counsel, Fautenberry has not shown an actual conflict of interest, thereby requiring denial of his claim.

No constitutional violation by being sentenced by a three-judge panel instead of a jury: After ruling that this claim was procedurally defaulted, the court stated that there is no constitutional right to be sentenced by a jury in state court. Thus, in the absence of a statutory right, which does not exist in Ohio, Fautenberry's waiver of a trial by jury also waived the right to a jury determination of whether to impose death.

Victim impact evidence: The court found that the state court's determination that the admission of improper victim impact evidence was harmless was not an unreasonable application of Supreme Court law since Supreme Court law does not say automatic reversal is required. The court also noted that Supreme Court case law concerning the admissibility of victim impact evidence may not apply because the concerns expressed in those cases only exist when a jury, not a judge, determines whether to impose death.

The court also rejected Fautenberry's claim that the prosecution failed to disclose material, exculpatory evidence and that his no-contest plea was not knowing and voluntary.

Moore, J., dissenting: She believes that "simply hiring any so-called expert, regardless of the quality of the expert's work, does not entitle counsel to a free pass with regards to their own performance at the mitigation phase. . . . when defense counsel is on notice of past incidents that would suggest brain damage, [there] can [be] no rational trial strategy that would justify the failure of defense counsel to investigate and present evidence of his brain impairment." Here, counsel was aware of numerous red flags, including: mental illness in Fautenberry's family, that physical abuse was a frequent element in Fautenberry's childhood, that he was hit in the back of the head by a wooden swing, which may have fractured his skull, and that he suffered a head injury in the military. Moore believes this evidence provided notice to Fautenberry's attorneys of the possibility of an organic brain defect. Counsel, however, believed there was no organic brain damage and presented a witness who impressed that conclusion to the sentencing panel three separate times. Doing so was deficient because counsel did not have a basic understanding of forensic science. If they did, they would have been able to sufficiently evaluate the correctness of their expert's analysis and would have concluded that further investigation was necessary. Thus, the failure to collect and present readily obtainable evidence of Fautenberry's brain damage was an abdication of advocacy. Fault for this cannot be laid on a man who supposedly suffers from an organic brain impairment. Being that brain impairment is very significant mitigation and the sentencing panel was repeatedly told that Fautenberry was mentally healthy, there is a reasonable probability that one member of the panel would have voted for less than death if informed of Fautenberry's brain impairment. Thus, Moore believes Fautenberry was prejudiced by counsels' deficient performance and would grant him a new sentencing hearing.

***Brooks v. Bagley*, 2008 WL 169565 (6th Cir., Jan. 22)** *(Sutton, J., joined by, McKeague and Griffin, JJ. denying habeas relief)*

AEDPA 2254(d) applies to merits rulings rendered only as an alternative to a procedural default: Because the language of 2254(d) does not distinguish between cases involving alternative rulings but instead refers to any claims that were adjudicated on the merits in state court proceedings, the court ruled that 2254(d) applies to alternative rulings by a state court.

Trial counsel was not ineffective for failing to present additional mental health evidence:
Undisputed evidence at trial showed that Brooks suffered from schizophrenia. In post conviction, the following unpresented mitigating evidence was uncovered: 1) Brooks' belief in voodoo and his mutilation of dolls and destruction of property; 2) Brooks accusation that his wife was having an incestuous relationship with their oldest son; and, 3) Brooks' refusal to allow the oldest son to display his athletic trophies. Finding that this information merely echoed evidence already presented to and considered by the sentencing body and that none of the affidavits showed how this evidence would have impacted the sentencer, to the extent the record showed that this evidence was not uncovered by trial counsel, the court held that state court reasonably determined that the result would have been same if this mitigating evidence has been presented.

***Spisak v. Hudson*, 2008 WL 104956 (6th Cir., Jan. 11)** (*before Martin, Moore, and Clay, JJ.)*
In *Spisak v. Mitchell*, 465 F.3d 684 (6th Cir. 2006), the court granted Spisak sentencing phase relief on an ineffective assistance of counsel claim because trial counsel closing argument focused almost entirely on the heinous nature of Spisak's crimes and his deficient nature as a person, for which there was no evidence in the record suggesting Spisak consented to counsel's remarks. The warden sought

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certiorari and the Supreme Court of the United States vacated the decision and remanded for further consideration in light of *Carey v. Musladin*, 127 S.Ct. 649 (2006), and *Schriro v. Landrigan*, 127 S.Ct. 1933 (2007). On remand, the Sixth Circuit reinstated its opinion in *Spisak v. Hudson*.

***Musladin* is distinguishable and does not prevent relief for three reasons:** 1) *Musladin* involved a habeas petition alleging an infringement on the right to a fair trial based upon spectator conduct whereas *Spisak* alleged constitutionally ineffective assistance of counsel as a result of counsel's arguments to the jury; 2) unlike *Musladin*, the court's holding in *Spisak* did not address an undeveloped area of the law; rather, the court's holding relied on well-settled Supreme Court precedent regarding ineffective assistance of counsel; and, 3) the fact that the Supreme Court has not squarely addressed a situation involving a counsel's deficient performance during closing arguments of the mitigation phase of a trial does not preclude a finding that the state court unreasonably applied federal law concerning ineffective assistance of counsel - - a court may find the application of a principle of federal law unreasonable despite the involvement of facts different from those of the case in which the principle was announced.

***Landrigan* is distinguishable and does not prevent relief:** Unlike *Landrigan*, defense counsel here described Spisak as undeserving of sympathy and demented. Also, there was no evidence that Spisak consented to this line of argument or prevented counsel from presenting a more persuasive case for leniency. Finally, the court noted that lending credence to the aggravating evidence presented by the prosecution is much more egregious than failing to introduce mitigation.

***Morales v. Mitchell*, 507 F.3d 916 (6th Cir. 2007)** (*Moore, J., joined by, Clay, J.; Suhrheinrich, J., dissenting) (granting sentencing phase on failure to investigate and present mitigation)*

The court ruled that trial counsel's failure to conduct a reasonable mitigation investigation prejudiced Morales, but denied all other claims.

Trial counsel's deficient mitigation investigation: Trial counsel failed to interview any member of Morales' family, any of his friends, or anyone else who knew him. Counsel also failed to search for any records pertaining to Morales' education, health, mental problems, or juvenile offense, and did not retain a mitigation expert. Counsel also did not prepare Morales for his unsworn statement to the jury at the penalty phase. Finally, counsel failed to adequately investigate Morales' cultural background and the effect it had on his life, and the possibility of a neurological cause of Morales' mental and emotion deficiencies due to his lifelong alcohol consumption. As a result, counsel presented no sworn testimony or any evidence at all at the sentencing phase.

The mitigating evidence trial counsel did not discover and the impact of it: 1) the chaotic and dysfunctional family environment in which Morales was raised; 2) the alcohol abuse by Morales' mother and father; 3) the effect that his mentally retarded brother had on his life; 4) the effect that the suicide of his emotionally disturbed sister had on him; 5) the effect of Morales' mother's emotional problems on his development; 6) the role of alcohol in the Native American Indian culture in which he was raised; 7) the early (since age 9) and continued use of alcohol by Morales; 8) Morales' drug use; 9) the lack of parental supervision during Morales' youth and adolescence; and, 10) the lack of counseling or programming received by Morales when he was incarcerated in the Mansfield Correctional Facility. The documentation of this, the court held, establishes that counsel failed to adequately investigate and thus was unable to present compelling mitigating evidence that was readily available at the time of trial. Comparing it to cases where prejudice has been found for not presenting compelling mitigating evidence, the court held that "it is reasonably probable that at least one juror hearing that evidence would have been persuaded to impose a life, rather than death sentence." Thus, the court granted sentencing phase relief.

The trial court did not err in excusing a juror based on death penalty viewpoints: Recognizing that "isolated statements indicating an ability to impose the death penalty do not suffice to preclude the prosecution from striking for cause a juror whose responses, taken together, indicate a lack of such ability or a failure to comprehend the responsibilities of a juror," the court held that the district court did not err in upholding the excusal of a juror who said "I guess I could" impose the death penalty when the circumstances in which the juror said he could impose death did not include the circumstances of the murder in which Morales was charged.

After finding that a guilt phase ineffective assistance of counsel was not defaulted by the failure to present it on direct appeal since it relied on evidence from outside the record, the court found the claim meritless because there was no medical proof of the mental condition that counsel failed to present at the guilt phase and because the one unhelpful comment by a witness was admitted over a defense objection.

Suhrheinrich, J., dissenting: He believed that the unpresented mitigating evidence was made known to the jury through Morales' unsworn statement to them and that it did not rise to the level of other cases in which prejudice had been found. He also noted that the "new" evidence would have opened the door to prejudicial information.

***Harbison v. Bell*, 503 F.3d 566 (6th Cir. 2007)** (*Siler, J., joined by, Cook. J.; Clay, J., dissenting):*

This case arose out of a Rule 60(b) motion that was partially denied on the merits and partially transferred to the Sixth Circuit for authorization to file a successive habeas petition. The majority denied authorization, ruling that the newly discovered evidence was unlikely to change the result of the trial. The court also rejected the appeal of the denial of the 60(b) motion, first ruling that a certificate of appealability (COA) is necessary to appeal the denial of 60(b) relief and that Harbison had not met the standard for issuance of a COA - - a substantial showing of the denial of a federal right, which is satisfied by demonstrating that reasonable jurists could disagree with the district court's resolution of the constitutional claims or that jurists could conclude that the issues raised are adequate to deserve further review. The court the held that the 60(b) motion was also untimely because it was not filed within one year of judgment and even if timely, he failed to meet the extraordinary circumstance requirement for the grant of 60(b) relief under the "catch-all" provision. This was because Harbison's claims remain procedurally defaulted albeit for a different reason than the court ruled in habeas proceedings. The court also ruled that the federal habeas appointment statute (18 U.S.C. §3599) does not authorize federal compensation for legal representation in state matters, thereby prohibiting the appointment of counsel for clemency proceedings.

Clay, J., dissenting: He believes Harbison presented a meritorious claim and thus established cause ad prejudice to overcome any procedural default.

***Garner v. Mitchell*, 502 F.3d 394 (6th Cir. 2007)** (*Moore, J., joined by, Martin, J.; Rogers, J., dissenting) (finding that Miranda waiver was not knowing and intelligent, given expert's interpretation of test result as showing lack of full comprehension of warnings)*

The procedural default defense was waived: Although the defense of procedural default can be addressed by an appellate court when raised for the first time on appeal as was the case here, even though the default appeared apparent on the record, the court exercised its discretion to not do so because the district court expended a consider amount of time in deciding the *Miranda* claim and because the petitioner faces the death penalty.

De novo review applies to the *Miranda* claim: The state argued that modified AEDPA review, in which the court conducts and independent review of the record and applicable law but can granted habeas relief only if the state court's decision was contrary to or an unreasonable application of clearly established federal law, should apply to this claim that was not raised in state court. The Sixth Circuit, however, has only applied this modified review when the state court decides the issue in question but does not articulate its reasoning and when the state court decision does not squarely address the federal constitutional issue in question but its analysis bears some similarity to the requisite constitutional analysis. Without a state court decision on the claim at issue or analysis similar to the requisite constitutional analysis, the court held that de novo review is required.

The district court did not err in expanding the record: Appellate courts review a district court's decision to expand the record under the abuse of discretion standard. A prisoner may introduce new evidence in support of an evidentiary hearing or relief without an evidentiary hearing only if the prisoner was not at fault in failing to develop that evidence in state court. Because Garner's request for an evidentiary hearing, discovery, and expert funds were denied in state court, he was not at fault for failing to discover this evidence in state court.

Legal standards governing validity of waivers: Whether the waiver of *Miranda* rights is knowing and intelligent is a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. A court must examine the totality of the circumstances to determine whether a suspect's waiver was knowing and intelligent, including inquiries into the suspect's age, experience, education, background, and intelligence, and whether he has the capacity to understand the warnings given him and the consequences of waiving them.

Garner's waiver was not knowing and intelligent: Garner was 19 years old at the time of the offense, a product of a very abusive and disorganized family. He completed only the seventh grade, doing poorly in school. He also had an I.Q. of 76. And, an expert testified that Garner's "borderline intelligence, functional brain impairment, abusive and socially deprived background, and long history of impulsivity raise serious questions as to whether he could or did understand the consequences of signing the waiver of rights." On a test used specifically to determine ability to understand *Miranda* rights, Garner scored the same as an average twelve-year old, and could not define the word "right" or understand the right to remain silent. The expert testimony went unrebutted. The totality of these circumstances, the court held, establish that Garner's *Miranda* waiver was not made knowingly and intelligently. Noting that the state did not argue that the error was harmless, the court ruled that the admission of the statement was not harmless and granted Garner a new trial, refusing to rule on his other claims.

***Bey v. Bagley*, 500 F.3d 514 (6th Cir. 2007)** (*Batchelder, J., joined by, Rogers and Sutton, JJ. denying habeas relief)*

To establish the killer's identity, the prosecution introduced evidence of a similar murder for which Bey had been convicted. The court held that use of this prior murder to establish identity did not violate due process and that Bey presented no Supreme Court authority contrary to Ohio's rule for admission of other acts' evidence.

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***In re Bowling*, No. 06-5937 (6th Cir., Sept. 12, 2007)** (*Moore and Gilman, JJ.; Gibbons, J., dissenting):*

After being denied authorization to file a successive habeas petition alleging that his execution was barred by his mental retardation, Bowling filed a habeas petition in federal district court raising five issues that he claimed could be raised in the first instance since the federal right they stemmed from was not recognized until after the district court had denied his first-in-time habeas petition. Those five claims are: 1) applying the procedural default rule to bar a claim of mental retardation violates *Atkins*; 2) executing Bowling violates the Eighth Amendment because he is mentally retarded; 3) Kentucky's procedures for adjudicating *Atkins* claims violate due process; 4) Kentucky's definition of mental retardation and its procedures for determining mental retardation violate the Eighth Amendment; and, 5) *Atkins* increases the mitigating value of intellectual impairment, which mandates a new sentencing hearing. The federal district court transferred the case to the Sixth Circuit for authorization to file a successive habeas petition. Bowling filed a motion to retransfer the case to the district court as an initial habeas petition.

The court ruled that the phrase "second or successive" is a term of art that is not to be read literally. To determine whether a petition is "second or successive" and thus requires authorization from the circuit court to file, courts apply the abuse of the writ doctrine. If the petitioner has a legitimate excuse for failing to raise the claim in a previous habeas petition (not deliberate abandonment or inexcusable neglect), the claim is not successive and thus can proceed initially in the district court. With regard to claims one, three, and four, the court held that the factual basis did not exist until the Kentucky courts ruled on Bowling's *Atkins'* claim in 2005, making the claim unavailable at the time the first habeas petition was decided or when Bowling sought authorization to file a successive petition in 2004. Thus, the court ruled that these claims were not successive and had to be retransferred to the district court for consideration in the first instance as an initial habeas petition. As for the second and fifth claims, the court ruled they were presented in Bowling's 2004 application to file a successive habeas petition and thus are an abuse of the writ.

Gibbons, J., dissenting: She believes that controlling Sixth Circuit precedent is that if a previous petition had been dismissed on the merits, then any subsequent petition is "second or successive." Because Bowling's previous habeas petition was denied on the merits, she would rule that all of Bowling's claims are successive. She also believes that the majority's approach of looking at whether the factual basis for a claim existed at the time of the earlier petition to determine whether the claim is "second or successive" render the portion of the Anti-terrorism and Effective Death Penalty Act authorizing a successive petition when the factual predicate of the claim could not have been discovered previously through the exercise of due diligence a nullity, the end result of which is the elimination of the gatekeeping requirements applicable to such claims.

Note: This decision means that if the federal district court rules in Bowling's favor on claims one, three, or four, the writ of habeas corpus will issue with regard to Bowling's death sentence unless the state courts provide Bowling with a procedure for determining mental retardation that conforms with the federal constitution.

***Wilson v. Mitchell*, 498 F.3d 491 (6th Cir. 2007)** (*Cole, J., joined by, Clay, J.; Rogers, J., concurring in result) (denying habeas relief)*

The court held that harmless error review applies when an invalid death eligibility factor is considered by the jury in a state where the jurors can only consider the aggravating circumstances laid out by statute. Based on the facts of this case, the court held that an instruction shifting the burden to the petitioner to establish that he lacked the intent due to intoxication to commit kidnapping was harmless because the burden shifting instruction did not have a substantial and injurious effect on the verdict since the evidence strongly supported the death specification beyond a reasonable doubt.

Note: This case has a lengthy and detailed discussion of the type of review when an aggravator is found invalid, tracing Supreme Court and Sixth Circuit case law on the issue.

***Reynolds v. Bagley*, 498 F.3d 549 (6th Cir. 2007)** (*Martin, J., joined by Cole and Sutton, JJ. denying habeas relief)*

District court did not abuse its discretion in denying an evidentiary hearing: Noting that the denial of an evidentiary hearing in federal court is reviewed on appeal under the abuse of discretion standard but that the court must take into account whether a state court's decision to deny an evidentiary hearing was contrary to or a unreasonable application of clearly established law, the court ruled that it was not unreasonable for the state court to deny an evidentiary hearing since Reynolds had failed to make an initial showing that he would prevail if the information he intended to develop at the hearing was true. Thus, the federal district court did not abuse its discretion in denying an evidentiary hearing.

Trial court did not err in failing to dismiss a potential juror before he made comments to the entire panel: One of the potential jurors knew a key witness and also prosecutor, noting in the presence of the other potential jurors that he always found the witness to be truthful and that the prosecutor was efficient. This potential juror was excused for cause but counsel never asked the court to strike the entire venire panel based on these statements. Finding that

Reynolds has failed to show any actual bias by the jurors, the court denied the claim but noted that it can conceive of a hypothetical situation in which a single venire member's comments could irreparably prejudice the remaining jurors.

The court also denied an IAC for failing to retain an alcohol expert, finding that the state court's ruling that the failure to obtain an expert to supplement the lay testimony on the effect alcoholism had on Reynolds' behavior did not prejudice Reynolds was not ureasonable.

***Bowling v. Haeberline*, 246 Fed.Appx. 303 (6th Cir. 2007)** (*Batchelder, J., joined by, Merritt and Cook, JJ.) (reinstating habeas petition that was improperly dismissed as a mixed petition)*

While a CR 60.02 motion was pending on Bowling's behalf in state court, Bowling filed a federal habeas petition because it was unclear if a 60.02 motion tolled the statute of limitations for filing a habeas petition. *Sua sponte* and without notice, the federal district court dismissed Bowling's habeas petition because Bowling had a pending state court action against the same judgment of conviction he challenged in his federal habeas petition. Believing that "judgment" and "claim" is the same thing, the court ruled that Bowling's state court action rendered his federal claims unexhausted and his habeas petition thus premature. The habeas petition was dismissed, but the district court granted a certificate of appealability on whether the court properly dismissed Bowling's habeas petition. The Sixth Circuit held that the district court erred in dismissing Bowling's habeas petition, reinstated the petition, and remanded it for further proceedings.

Dismissing a habeas petition on timeliness grounds *sua sponte* and without notice is improper: District courts are allowed, but not obligated, to consider, *sua sponte*, the timeliness of a state' prisoner's habeas petition. But, "before acting on its own initiative, a court must accord the parties fair 'notice' and an opportunity to present their positions." Because the district court did not do so, it erred in dismissing Bowling's habeas petition.

"Judgment" and "claim" have distinct meanings: A "judgment" means a judgment of conviction, while a "claim" means an assertion of error in that judgment. A person is usually incarcerated under a single judgment but raises numerous claims of constitutional error to challenge that judgment. A court must evaluate a habeas petition on the status of its included claims.

What is an unexhausted claim? A claim that has not been presented to the state court and litigated to the highest state forum. Whenever a person has the right under state law to raise, by any available procedure, an issue presented in the habeas petition, but has not done so, the claim is deemed unexhausted.

Note: Claims that were not presented in state court are considered exhausted when no state court forum remains to present those claims. But, they may be procedurally defaulted by the failure to present them in state court in accord with a state rule.

What is a mixed petition? A petition that contains exhausted and unexhausted claims

Mixed petitions must be dismissed: A federal court cannot grant habeas relief on a claim unless the petitioner has exhausted state remedies. District courts must dismiss a mixed petition, leaving the petitioner with the choice of returning to state court to exhaust his claims or amending the habeas petition to present only exhausted claims to the district court.

Note: While the court does not discuss it, district courts have the option of holding a mixed petition in abeyance while the inmate exhausts any unexhausted claim in state court. This is usually done when failing to do so means the statute of limitations for filing a habeas petition may run before the inmate returns to federal court.

Bowling's petition was not a mixed petition and thus should not have been dismissed: Bowling's habeas petition "contained only claims that had been fully exhausted in state court. The fact that he had an independent proceeding pending in state court did not render his federal petition a mixed petition." Thus, it should not have been dismissed as a mixed petition. Rather, Bowling should have been able to proceed on his exhausted claims in federal court while simultaneously pursuing claims that were not contained in his habeas petition in state court.

Can Bowling file a federal habeas petition in the future that contains only the claims he is currently exhausting in state court: The court expressly stated it does "not opine on whether Bowling would abuse the writ if he ever does bring his current state-court claims to federal court in a successive petition."

United States District Courts of Kentucky

***Moore v. Rees, et al.*, 2007 WL 2955947 (E.D.Ky, Oct. 1, 2007)** (granting Epperson's motion to intervene)

To establish a viable case for permissive intervention, a proposed intervenor must show that its motion to intervene is timely made and that he or she alleges at least one question of law or fact common to those already before the court. The court must then consider whether permitting intervention will cause any undue delay or prejudice to the existing parties, and balance any other relevant factors to determine whether intervention should be allowed. Timeliness for purposes of intervention is not determined by whether the claim of the intervenor is timely asserted - - matters governed by the

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statute of limitations and the doctrine of laches - - but instead by how long the proceedings had been pending and the length of time the proposed intervenor waited before seeking to intervene after becoming aware of the factual and/or legal basis for doing so. Finding that Epperson waiting until the conclusion of his direct appeal before moving to intervene was reasonable, the court ruled that his motion to intervene is timely. Being that only limited discovery has taken and further discovery has been stayed pending resolution of other preliminary matters, the court held that the parties would not be prejudiced by permitting Epperson to intervene. And, Epperson's claims are nearly identical to those asserted by the existing plaintiff. For these reasons, the court allowed Epperson to intervene.

***Moore v. Rees, et al.*, 2007 WL 2809844 (E.D.Ky, Sept. 25, 2007)**

After unsuccessful state court lethal injection litigation, Baze and Bowling moved to intervene in a federal court lethal injection lawsuit. The court held that res judicata barred intervention.

Rooker-Feldman doctrine does not bar Baze and Bowling from intervening: This doctrine prohibits federal courts from having subject matter jurisdiction over an action that effectively serves as an appeal from a state court judgment. The doctrine applies only where the prior state court judgment is the source of the injury complained of in the subsequent federal action. Thus, if a plaintiff in a federal court action asserts the prior state court judgment violated his or her substantive or procedural due process rights, the state court judgment is the source of the injury and the federal court has no jurisdiction to review it. The same is true when the plaintiff does not expressly identify the state court judgment as the source of the injury but where the conduct complained of is either enabled by or the inevitable consequent of the prior state court judgment. By contrast, where the subsequent action merely calls into question the propriety of the prior state court judgment, *i.e.*, asserting the same claims in federal court that were previously asserted in state court, the effect of the prior state court adjudication is governed by ordinary application of principles regarding claim and issue preclusion. Because Baze does not expressly identify the prior state court judgment as the source of his injury, because he challenged the constitutionality of an ongoing corrections' policy, and because the minor change in the protocol (removing possibility of inserting I.V. in the neck) does not affect the core of Baze's allegations, the future conduct of corrections in carrying out Baze's death sentence is not the product of the state court litigation. Thus, intervention is not barred by the *Rooker-Feldman* Doctrine.

Baze and Bowling satisfy the requirements of permissive intervention: To establish a viable case for permissive intervention, a proposed intervenor must show that its motion to intervene is timely made and that he or she alleges at least one question of law or fact common to those already before the court. The court must then consider whether permitting intervention will cause any undue delay or prejudice to the existing parties, and balance any other relevant factors to determine whether intervention should be allowed. Because the claims in Baze's proposed intervenor complaint are almost exactly the same as presented by Moore, because the case remains in the early stages of discovery, and because the parties will not be prejudiced by intervention, Baze satisfied the requirements to intervene.

Intervention is barred by res judicata: Res judicata bars a claim where there is: 1) a prior final decision on the merits by a court of competent jurisdiction; 2) a subsequent action between the same parties or their privies; 3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and, 4) an identity of the causes of action. Even if these four prongs are satisfied, res judicata does not bar a claim if a litigant did not receive a full and fair opportunity to litigate the claim or issue (in other words, deprived of a hearing in accord with due process). Typically, this occurs where a hearing was held with only a few days notice, the opportunity to present evidence or arguments were strictly limited, or the scope of the appeal was very narrow. None of that was the case here. Baze received a full trial on the merits where approximately twenty witnesses testified. Finding that the trial comported with due process, the court ruled that Baze received a full and fair hearing in state court, thereby meaning res judicata bars intervention. ■

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

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

For more information regarding KACDL programs:

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For more information regarding NLADA programs:

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

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For more information regarding NCDC programs:

Rosie Flanagan
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Web: http://www.ncdc.net/

**** KBA ****

Annual Seminar
Lexington, KY
June 18-19, 2008

New Lawyer
Lexington, KY
June 18-19, 2008

**** NLADA ****

Annual Conference
Washington, DC
November 19-22, 2008