The Advocate

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Kentucky Department of Public Advocacy

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In lieu of this, we are conducting Distance Learning training most Fridays from April through June. Earn 2 hours of CLE credit per session. http://dpa.ky.gov/ed/ecal.htm

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

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FROM THE EDITOR...

Jeff Sherr

Due to the current budget crisis, the DPA is not able to print and mail **The Advocate** at the present time. This edition of the Advocate is posted online at http://dpa.ky.gov/library/advocate.php. There you can also browse and search all past editions of **The Advocate** and **Legislative Update**.

The Advocate plays an important role in the DPA meeting its statutory duty under KRS 31.030 to provide technical aid to local counsel, to conduct research into, and develop and implement methods of, improving the operation of the criminal justice system, and to do such other things and institute such other programs as are reasonably necessary to carry out the provisions of KRS Chapter 31.

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We are seeking sponsors to fund the printing and mailing of future editions. If you or your firm are interested in sponsoring an edition, please contact me at (502) 564-8006.

This edition brings us up to date with our regular columns – **Kentucky Case Review** by Roy Durham and Erin Hoffman Yang, **Capital Case Review** by David Barron, **The Sixth Circuit Case Review** by Meggan Smith, Dennis J. Burke, and David Harshaw, and the **Fourth Amendment Case Review** by Jamesa J. Drake.

In **Diversion Programs for Misdemeanor Offenses Beneficial for Defendants, the Court System and Communities** Tara Boh Klute, the Executive Officer of the Department of Pretrial Services for the Administrative Office of the Courts, outlines pretrial diversion programs and their benefits.

The cover of this edition features a "word cloud," from the text of this edition of The Advocate. The clouds give greater prominence to words that appear more frequently in the source text. This image was created using the tools at http://wordle.net/.

Diversion Programs for Misdemeanor Offenses Beneficial for Defendants, the Court System and Communities

By Tara Boh Klute
Executive Officer, Department of Pretrial Services,
Administrative Office of the Courts

Pretrial misdemeanor diversion programs provide misdemeanor offenders the opportunity to avoid a criminal conviction by making positive changes in their lives. These programs benefit the offender, the court system and communities.

The Kentucky Court of Justice offers 37 misdemeanor diversion programs through the Department of Pretrial Services of the Administrative Office of the Courts. The AOC is the support arm for the Court of Justice. Of the diversion programs, 30 cover all misdemeanor offenses and seven are specifically for individuals charged with not having automobile insurance. All of the programs are based on the National Association of Pretrial Services Agencies standards for pretrial diversion.

By diverting minor offenses, the court system can reserve resources for more serious cases and shorten dockets. The program attempts to fulfill the client's needs while maintaining the confidence of the victim and the court. The overall success of each diversion program is measured by the impact it has on the clients, the courts and the community.

Benefit to the Diversion Client

The most obvious beneficiary is the client. For first-time offenders with no prior criminal record, their charges are dismissed if they successfully complete the diversion program. Otherwise, the defendant's new criminal record could prevent him or her from gaining employment and professional licensing. Another benefit to the client is behavior modification and treatment. By addressing the issues that led to the charge, such as drug addiction, clients can reduce their chance of involvement in future criminal activity. Clients who are assigned to conduct community service as part of their diversion gain from the experience of giving to others, resulting in a sense of fulfillment and enhanced self-esteem.

Benefit to the Court

Diversion programs reduce the trial docket caseload for courts, allowing resources to be allocated to more serious cases. Caseloads are further reduced through decreased criminal recidivism. Diversion programs also benefit the court system by allowing first-time offenders to gain a positive perception of the judicial process through the system giving them the opportunity to avoid prosecution and change their behavior. A negative situation becomes a life-changing opportunity.

The victim or complainant in the case may have input in the diversion program by suggesting the amount of restitution the client should pay based on the damage or loss resulting from the crime.

Benefit to the Community

There are many benefits to the community. The most visible benefit to a community is diversion clients volunteering hours to help non-profit, charitable and public agencies through the community service. Diversion clients provide the organizations with a steady pool of volunteers. The money saved by using volunteer workers allows organizations to use those funds to better serve the public. The community also benefits from a reduced crime recidivism rate when successful diversion clients become productive citizens.

How the Program Works

Early intervention programs such as the Kentucky Court of Justice pretrial misdemeanor diversion program play a vital role in addressing the problem of criminal recidivism.

Prior to arraignment, a pretrial officer submits a report to the district judge and prosecutor listing defendants who are eligible for diversion under the local court rules. Judges and prosecutors may also choose to refer defendants who are ineligible under local court rules.

Once a judge has referred a defendant to the diversion program, he or she reports to the local Pretrial Services office. Diversion is voluntary; clients decide whether to participate after consulting with their attorneys.

The client is charged a program fee based on the Federal Poverty Guidelines sliding scale. After the client consents to participate, the pretrial officer gets background information and performs an assessment using standardized screening tools or refers the client to an outside agency for further evaluation. During the screening, the pretrial officer may ask questions about education, employment/vocation, physical and mental health, family background, behavioral problems and substance abuse to determine problem areas. Pretrial officers may also consult with the victim in the case.

Pretrial officers who operate diversion programs have completed training on alcohol and drug abuse, mental health issues, conflict management, case monitoring, victim advocacy and customer service for social services professionals.

The pretrial officer uses the information gathered during the intake process to develop an individualized service plan for the client. The service plan is included in a diversion contract. The contract specifically states the terms by which the client must abide to successfully complete the program. Diversion programs use a variety of community resources to address the client's needs and for community service:

- Alcohol and drug treatment
- Mental health and counseling services
- Social services agencies
- Educational programs and institutions
- Vocational and job training agencies
- Health departments and medical facilities
- Public and charitable non-profit agencies for volunteer work

The pretrial officer explains the contract terms to the client and his or her attorney so that they may make an informed decision about participation. The standard contract length ranges from 2 to 12 months. Diversion clients are required to meet with a pretrial officer on a regular basis in order to ensure compliance with all requirements.

Once the client satisfies all requirements of the program, the pretrial officer submits the case to the court for dismissal with prejudice.

If a client fails to meet the contract terms, the pretrial officer attempts to assist the client in compliance. If the client has a valid reason for noncompliance and has put forth a substantial effort to comply, the pretrial officer can redefine the contract terms or grant an extension. If a client still fails to meet their requirements after being given every opportunity for compliance, the pretrial officer notifies the client that he or she is being terminated from the program and refers the case back to court for prosecution.

The Department of Pretrial Services is actively monitoring 3,668 diversion clients. In fiscal year 2008, 6,609 clients were referred to the program. The success rate for general misdemeanor diversion was 71% and was 26% for no insurance diversion. Diversion clients completed 17,313 hours of community service volunteer work and paid $38,576 in restitution to victims.

For more information on pretrial misdemeanor diversion programs, contact Tara Boh Klute, Executive Officer of the Department of Pretrial Services, at 502-573-2350. ■

Neurolaw: A New Interdisciplinary Research

By Ken Strutin
New York Law Journal
January 15, 2009

Justice can be found within the precincts of the mind, in some cases. The new barometer of human behavior is the brain scan and it already has broken ground in important areas of criminal justice, such as competency, culpability and mitigation.

The entire article can be found at :
http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202427455426#

KENTUCKY CASE REVIEW

By Roy Durham and Erin Hoffman Yang
Appeals Branch

Jamie Turner v. Commonwealth
Rendered 03/20/08
248 S.W. 3d 543
Affirming
Opinion by J. Abramson

Jamie Turner was charged with three counts of first-degree and one count of third-degree trafficking in a controlled substance. The Commonwealth alleged that Turner sold methadone wafers on three separate occasions to undercover police officers and to a confidential informant. In addition, during one of these occasions, Turner also allegedly sold 4 Xanax pills. A jury found Turner guilty and she was sentenced as a second-degree persistent felony offender to 3 concurrent prison terms of 20 years each and to a concurrent twelve month term for the lesser offense.

At trial, two officers who participated in the undercover buys testified that the buys were arranged by the informant. They described the meetings with Turner, the drug transactions, and their efforts to procure audio recordings of what transpired. One of the recordings failed, but over Turner's objection the Commonwealth introduced recordings of two of the transactions. The recordings include several comments by the informant, who was not present at trial, and Turner contends that because she was given no opportunity to cross-examine the informant the admission of those comments violated the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Informant's statements were not hearsay and thus their admission did not violate *Crawford*, when they are offered not for their truth, but "to put [the defendant]'s admissions on the tapes into context, making the admissions intelligible for the jury." Turner objected in particular to comments the informant made to one of the officers as they were sitting in the officer's car waiting for Turner to arrive. At one point the informant said, "The methadone is hers, but the Xanaxes, I don't know where they're coming from." A little later she said, "She's coming right now," and "Here she comes." Turner also objects to two of the informant's remarks during one of the transactions: "How much are they?," the informant asked at one point. And at the end of the transaction she said, "Thank you, love you baby." All of these remarks, Turner contends, were offered as statements tending to prove the matters asserted, *i.e.*, Turner's possession of the methadone and the Xanax and a sale.

The Court concluded that even if all of these remarks could be construed as statements (although questions and "thank you's" certainly strain that construction), all but the first of these remarks clearly provided context for Turner's portions of the conversations, and thus their admission did not violate *Crawford*.


Roy Durham


Erin Yang

It is arguable, however, that the informant's pre-transaction statement to the officer about Turner's possession of methadone was testimonial, and it was not reasonably required to place any of Turner's statements into context. In a footnote, the Court stated "It appears likely that an informant's pre-or post-transaction accusatory statements will often raise this issue, so the Commonwealth would be well advised to limit its tape-recorded evidence to the transaction itself." In the context of this case, however, the Court stated "we are convinced that even if the admission of the methadone possession statement was erroneous, the error was harmless beyond a reasonable doubt. The evidence against Turner, (three transactions, two of which were captured on tape, involving two officers), was certainly compelling if not overwhelming."

Rodney Douglas Beckham v. Commonwealth
Rendered 03/20/08
248 S.W.3d 547
Affirming
Opinion by J. Minton – Lambert, C.J.; Abramson, and Cunningham, JJ., concur. Noble, J., concurs in pat and dissents in part by separate opinion which Schroder and Scott, JJ., join.

A circuit court jury convicted Rodney Douglas Beckham of murder and of being a first-degree persistent felony offender (PFO1). The trial court sentenced Beckham to life imprisonment. He appealed as a matter of right, raising two

issues. First, Beckham contends that the trial court erred by denying his motion to suppress incriminating statements he made to police during a lengthy interrogation process that preceded *Miranda* warnings. Second, he contends that the trial court violated his Sixth Amendment right to counsel by prohibiting him from discussing his testimony with his attorneys during an overnight recess that interrupted his cross-examination by the Commonwealth.

In making the determination of whether the trial court correctly found that Beckham was not in custody when he spoke to authorities, the court must objectively assess the entire circumstances surrounding the interaction with the authorities to determine whether a reasonable person in Beckman's situation would have believed he was free to leave. The length of the interrogation is a factor that a court may take into account in determining whether a person was in custody but the length of the interaction with the police is not the only factor to be considered.

The Court stated that this case presents some factors suggesting that Beckham was in custody, primarily the length of the interrogation and the presence of multiple officers. But the weight of the evidence tends to show that Beckham was not in custody. Specifically, the officers testified that they informed Beckham he was free to leave and that Beckham never showed any inclination to leave or otherwise to stop speaking and cooperating with them. And Beckham offered nothing at the suppression hearing to rebut the officers' testimony. The Court concluded that the trial court correctly determined that Beckham was not in custody.

A trial court's limitation of Beckham's consultation with his attorney during an overnight recess did not violate Beckham's Sixth Amendment right to Counsel. During Beckham's cross-examination by the Commonwealth, the trial recessed for an overnight break. The next morning, the attorneys and the trial court discussed jury instructions before the cross-examination resumed. As the discussion between the court and counsel ended, Beckham's attorneys asked permission to speak with Beckham regarding jury instructions and other matters. The trial court granted permission for Beckham's attorneys to speak to him but admonished the attorneys not to talk with Beckham about his testimony. Defense counsel objected to the limitation on their right to confer with their client. The trial court responded by stating that it was not trying to limit Beckham's access to counsel but, rather, was just trying to treat Beckham like any other witness. A short time later, the trial resumed and Beckham was cross-examined further by the Commonwealth. Beckham now contends that the trial court's limitation on his consultation with his attorneys violated his Sixth Amendment right to counsel.

The Court concluded that all the trial judge did in the case at hand was attempt to minimize the risk that Beckham would get "coaching tips" before the resumption of his cross-examination. Since the trial judge's actions attempted to protect the integrity of the proceedings and did not impermissibly limit all attorney-client contact during the waning minutes of the overnight recess, the Court held that the trial court's admonition to counsel did not abridge Beckham's Sixth Amendment right to counsel.

Commonwealth v. Barry Coffey; and Geralean Anderson
Rendered 03/20/08
247 S.W.3d 908
Reversing
Opinion by J. Noble; Lambert C.J.; Cunningham, Schroder and Scott, JJ., concur. Minton, J., dissents by separate opinion in which Abramson, J., joins.

Appellee Barry Coffey entered a plea of guilty to possession of a controlled substance, first degree, based on a plea bargain amending his charge down from trafficking in a controlled substance, first degree. A confidential informant working with local police made two controlled buys of substances from Coffey, who was subsequently indicted on two counts of first-degree trafficking. The first buy was made when the informant got into the car Coffey was driving, a 1971 Chevrolet Malibu, made his transaction, and later gave the substance to police. When tested, this substance was determined to be methamphetamine. The second controlled buy occurred the next day, but testing indicated that this material was not a controlled substance. Consequently, his charges were amended as part of a plea bargain to possession of a controlled substance first degree and trafficking in a simulated controlled substance, with a total recommended sentence of 4 years plus restitution and fees. As a further part of the plea agreement, the Court would conduct a hearing to determine whether the 1971 Malibu would be forfeited to the Glasgow Police Department. Coffey entered his plea on the agreement, and was sentenced on October 18, 2004 accordingly.

The Commonwealth then filed a motion to forfeit the Malibu, claiming that it had been used to conduct drug trafficking activity. The motion also notified the trial court that Coffey was not the title holder of the Malibu, but rather the title named his sister Geralean. Nonetheless, the Commonwealth believed the vehicle was subject to forfeiture.

The trial court concluded that Coffey had placed title in his sister's name solely to avoid forfeiture, that Geralean did not know why the title was put in her name, that Coffey treated the vehicle as if he owned it, and therefore he was the true owner. The court held that Geralean was a "straw man," and further had failed to produce any indicia of ownership other than bare title that would entitle her to claim the "innocent owner" defense to avoid forfeiture under the statute.

The Court of Appeals reversed, finding that since the substance abuse forfeiture statute did not define "owner,"

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that the definition of owner of an automobile should be taken from KRS 186.101(7)(a) in the chapter that deals with auto, driver's and commercial licensure. It therefore determined that "owner" meant title holder or person who has possession of the vehicle due to a bona fide sale. In this case, that person was Geralean, so the Court of Appeals reversed the trial court and remanded for reconsideration of her status in accordance with its Opinion. This appeal followed.

Is the bare title holder of a vehicle, which is under the dominion and control of a defendant who used the vehicle for drug trafficking, the "owner" of the vehicle for purposes of forfeiture pursuant to KRS 218A.410.(h)(2). A transfer of title simply to avoid the potential effects of forfeiture statutes works an inequity and cannot be asserted to avoid the forfeiture. Thus, since the forfeiture portion of the controlled substances chapter contains its own definition, it is not appropriate to look to the licensing chapter to define "owner." At the same time, under KRS 218A.410(1)(h)(2), if a title holder can establish that he or she acts as an owner of the property through dominion and control of the vehicle, and that he or she had no knowledge of or did not consent to use of the vehicle for illegal drug activity, then he or she has the innocent owner defense. The facts specific to each claim of ownership will determine who the owner is for purposes of forfeiture, and the statute does require an innocent owner to establish his or her status, not the Commonwealth.

The Court stated that because Coffey acted as the owner of the Malibu, even though legal title was held by his sister, Geralean, he had an "interest in property" under KRS 218A.405 (1)(b) and (5)(b). Geralean presented no evidence to establish that she was the innocent owner of the Malibu. She was present and represented at the hearing on forfeiture conducted by the trial court, but did not establish any indicia of ownership other than holding legal title to the vehicle. To the contrary, she claimed no knowledge as to why the vehicle was titled in her name, did not use it, and took no responsibility for items found in it. The Court concluded that consequently, under this statute and the facts of this case, Coffey is the owner of the Malibu for purposes of the forfeiture statute, and the trial court ruled correctly.

Jimmy Ray Sparkman v. Commonwealth
Rendered 04/24/08
250 S.W.3d 667
Affirming
Opinion by C.J. Lambert

Sparkman was found guilty of one count of first-degree burglary, fourth-degree assault and violation of a protective order. Sparkman was sentenced to 20 years imprisonment.

A trial court's act in allowing prosecutor to stand between defendant and his two minor children when they testified on direct examination, such that the children and defendant could not see each other, violated statute allowing special provisions for taking testimony from children allegedly physically and sexually abused, and defendant's confrontation rights, but such error was harmless. The United States Supreme Court has held that while face-to-face confrontation is preferred, the primary right secured by the Confrontation Clause is that of cross-examination. Accordingly, the right to confront is not absolute and may be limited to accommodate legitimate competing interests.

KRS 421.350 provides that upon a showing of compelling need, a trial court may allow a child 12 years old or younger to testify via closed circuit broadcast or videotape outside the presence of the accused. "Compelling need" is defined as "the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence."

The court found that in this case, it appears that the trial court did not fully comply with KRS 421.350. There was no finding of "compelling need" to justify impairing Appellant's ability to confront the witnesses against him. In fact, from the record it appears that there was not even an inquiry made to determine the effect conventional testimony would have upon J.W. and D.S. Furthermore, the manner in which the trial court permitted J.W. and D.S. to testify is not among the methods identified in the statute. Preservation of the ability of the accused to "see and hear the witness and assess credibility by observation of the demeanor of the witness" was the key reason this Court upheld KRS 421.350. The manner of testimony allowed by the trial court in this case did not permit Appellant to make such observations. Accordingly, because there was no finding of compelling need and because the method of testimony was not within the parameters of KRS 421.350, the court stated that the trial court committed error when it allowed the prosecutor to stand between Appellant and the minor witnesses when they were giving testimony on direct examination.

The court concluded that however, neither of the child witnesses was the "key witness" against Appellant. Furthermore, beyond speculating that Appellant's sentence might have been shorter had he been able to see J.W. and D.S. during their testimony, Appellant does not identify any information that he might have been able to obtain from observing them that would have assisted in his defense. A determination of prejudicial error by this Court would require some showing that Appellant's unobstructed observation would have affected the substance and credibility of the child witnesses. There has been no such showing. Accordingly, the error was harmless.

Tony R. Crain v. Commonwealth
Rendered 04/24/08
257 S.W.3d 924
Affirming
Opinion by J. Noble

Appellant was found guilty of first-degree criminal mischief, first-degree fleeing or evading police, first-offense DUI, three counts of failure to stop and render aid, reckless driving, and being a persistent felony offender in the first degree. Appellant was sentenced to 20 years in prison.

As a matter of first impression, the fact that insurance paid for repairs to collision victim's truck did not preclude a finding of pecuniary loss element of first-degree criminal mischief. There is no definition of "pecuniary loss" in KRS Chapter 512 relating to criminal damage to property, nor does a definition of the term appear anywhere else in the Kentucky Revised Statutes. The commentary to KRS 512.020 states, "The objective of these sections is to protect property owners against deliberate injury or destruction of their property, a loss which has the same net effect as a loss by theft." There is no further definition of "the net effect of a loss by theft," nor does KRS 514.010, regarding definitions for the chapter about theft, provide any more detail.

KRS 512.020 states that the person is guilty if he "wantonly... destroys or damages *any* property ***causing*** pecuniary loss of $1,000 or more." (Emphasis added.) The statute has no requirement that the pecuniary loss be borne by the victim's bank account, only that the defendant cause a loss. And as the Commonwealth points out, the insurance company has paid over $6,000 for repairs to Mr. Bruce's truck. The criminal statute does not appear to make any distinctions regarding the risk bearing of pecuniary loss. It only makes distinctions regarding causation and the extent of the damage in determining the degree to which one can be punished.

The measure of loss in determining criminal liability should be the fair market value of the loss. The fair market value of the loss Crain caused was the $6,274 paid by his insurance company for repairs. It is not relevant that the insurance company paid for the repairs; it matters only that Appellant was the cause of that amount of damage. The court stated that the Commonwealth also argues persuasively on a point of public policy and sound logic. If Appellant were entitled to a directed verdict on these two counts simply because his insurance company compensated his victim, then he could also avoid criminal liability for first -- and second-degree criminal mischief simply by paying the bills for the damage he causes. But allowing people to simply pay their way out of criminal liability surely cannot be the right outcome. Such logic would effectively neuter the criminal mischief statutes.

Shawn Windsor v. Commonwealth
Rendered 04/24/08
250 S.W.3d 306
Affirming in Part, Reversing in Part, and Remanding
Opinion by J. Schroder

Shawn Windsor entered an unconditional plea of guilty to two counts of murder (and two other charges). At the time he entered a guilty plea, he requested the judge impose the death penalty. At the sentencing hearing, the judge entered a sentence of death on each murder charge (as well as sentences on the other two offenses). By "Order Amending Judgment," entered December 13, 2006, the circuit court amended the judgment "to reflect that [Appellant] has no right to appeal but the Judgment will receive the mandatory review by the Kentucky Supreme Court as provided by statute."

An unconditional guilty plea did not result in waiver of right to appeal certain issues. Although the AOC guilty plea form no. 491 used in this case does contain an express waiver of a direct appeal, the waiver is not absolute. While an unconditional guilty plea waives the right to appeal many constitutional protections as well as the right to appeal a finding of guilt on the sufficiency of the evidence, *Taylor v. Commonwealth*, 724 S.W.2d 223, 225 (Ky.App.1986), there are some remaining issues that can be raised in an appeal. These include competency to plead guilty; whether the plea complied with the requirements of *Boykin v. Alabama*, 395 U.S. 238, 244 (1969); subject matter jurisdiction and failure to charge a public offense; and sentencing issues. In *Roe v. Flores-Ortega*, the United States Supreme Court recognized that "a guilty plea **reduces** the scope of potentially appealable issues." 528 U.S. 470, 480, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (emphasis added). Because some issues do survive an express waiver of the right to appeal, the trial court's amended judgment was in error.

Isiah Fugett v. Commonwealth
Rendered 04/24/08
250 S.W.3d 306
Affirming in Part, Reversing in Part, and Remanding
Opinion by J. Schroder; Dissent by J. Cunningham

Isiah Fugett was convicted of two counts of Manslaughter in the Second Degree, and one count of Tampering with Physical Evidence. By agreement with the Commonwealth, Fugett was sentenced to 30 years in prison.

Statute that granted discretion to personally serve prospective jurors who did not respond to summons initially delivered by mail applied to jury selection. Fugett argued the method of jury selection in Jefferson County violated his right to a jury pool made up of a fair cross section of the community. He points out that of the 700 summonses sent out, 328 were unaccounted for. Fugett argues that under Part II, Section 6 of the Administrative Procedures of the

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Court, the court was required to have the sheriff personally serve a summons on each of the 328 jurors. Instead, the circuit court relied on KRS 29A.060(4), which leaves it to the court's discretion as to whether the jurors are to be personally served.

Under Section 116 of the Kentucky Constitution, the Supreme Court has the authority to prescribe the rules governing procedures before Kentucky courts. Part II, Section 6 of the Administrative Procedures of the Court states in pertinent part, that "[i]f the summons is served by mail, any prospective juror who does not return the juror qualification form within ten (10) days ... shall be personally served by the sheriff." Further, RCr 1.02(2) states that "[t]o the extent that they are not inconsistent with these Rules, the regulations, administrative procedures, and the manuals published by the Administrative Office of the Courts ... shall have the same effect as if incorporated in the Rules." Thus, the procedures adopted by the rules of this Court require that the summons be personally served. This is in conflict with KRS 29A.060(4), which states that "[i]f the summons is served by mail, any prospective juror who does not return the juror qualification form within ten (10) days **may** be personally served by the sheriff at the discretion of the Chief Circuit Judge[.]" (Emphasis added).

Fugett argued that since the statute deals with rules of practice or procedure before the court, it violates the separation of powers doctrine set out in Section 28 of the Kentucky Constitution. The Supreme Court found that in light of the differences between Section 6 and KRS 29A.060(4), a conflict does exist. However, this conclusion does not mandate a finding that the circuit court erred in relying on KRS 29A.060(4) for reasons that the Court considered questions of comity. The Supreme Court concluded that "comity and common sense dictate that we accept the application of KRS 29A.060(4). Under the statute, the court is left with the discretion to utilize the personal summons as it deems necessary. As the statute grants broader discretion to the court, we cannot say it hampers or unreasonably interferes with the administration of justice."

Further, this broader discretion is appropriate in places like Jefferson County, where the size limitations of the courtrooms mandate that jury pools be no larger than a certain number. Thus, even if personal service had been used to bring in more than 150 jurors, the number would still have been reduced to 125 based on limitations under its fire code. Finally, the Court noted Fugett did not show that any portion of the county, or a specific class, was excluded from the pool.

Jurors who believed police officers had greater credibility and who believed that punishment should not be based on mitigating factors should have been excused for cause. Juror 119631 stated that he would probably give more weight or greater credibility to the testimony of a police officer, simply because he was a police officer. He felt firmly about his belief that the police have greater credibility in their testimony and it would not depend on which officer testified; he simply felt police have more credibility than other witnesses. Considering *Shane*, *Stopher*, *Soto*, and *Sholler* together, they support the conclusion that Juror 119631 should have been stricken for cause in this case.

Juror 119631 also presented a problem in considering mitigating evidence in the penalty phase, stating his belief that punishment should be based only on what occurred on the day of the killing, rather than consideration of a person's past. He did not believe that a person's use, or abuse, of alcohol should have any effect on his actions, and so those factors should not be considered. Moreover, he believed that only a person's history of violence should be considered on the issue of punishment.

When asked by the prosecution as to whether he would, in his sentencing decision, consider factors like a defendant's age, IQ, or the kind of home in which he was raised, he responded that he could consider age, if the person were 10, 11, or 12 years of age. Moreover, he stated in general he could consider other factors, but they would not have much effect on his opinion. The Court concluded that "any juror to whom mitigating factors are ... irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis and the evidence developed at trial." *Morgan v. Illinois, 504 U.S. 719, 739, (1992)*. Thus, heeding our recent dictates in *Shane*, designed not only to insure an impartial jury, but to ensure a "level playing field" in the selection of a jury, we must conclude that the failure to excuse Juror 119631 for cause was an abuse of discretion in this case. On its facts, we can read *Shane* no other way."

Michael Wayne Holt v. Commonwealth
Rendered 04/24/08
250 S.W.3d 647
Reversing
Opinion by J. Scott

Michael Holt, appeals from a Court of Appeals decision upholding his conviction by a Jefferson Circuit Court jury on one count of first-degree rape, one count of first-degree sodomy and one count of impersonating a police officer. Appellant received a total sentence of 18 years. This Court granted discretionary review of these convictions.

Admission of defendant's prior convictions for theft and receiving stolen property that were 24 and 25 years old was abuse of discretion. In a trial which lacked conclusive physical evidence, and where the conviction was highly dependent upon the jury's assessment of credibility, the effect of introducing Appellant's stale convictions mandates reversal.

KRE 609(b) states that "evidence of a conviction under this rule is **not admissible** " if it is more than 10 years old **unless** "the probative value substantially outweighs its prejudicial effect." (emphasis added). Clearly, the language of KRE 609(b) creates a presumption of inadmissibility for convictions over 10 years old unless the convictions are so substantially probative as to tip the scales back in favor of admissibility. While KRE 609(b) does not divest a trial judge of his discretion in admitting stale convictions, it is precatory in that it acknowledges a much higher threshold for admissibility.

In the present instance, witness credibility was central to the furtherance of either side's position, as both Appellant and his accuser gave drastically conflicting testimony about what happened on the night in question. Therefore, the result likely hinged on whose account the jury deemed more reliable. Assuredly, the introduction into evidence that one of the parties telling their story was a convicted felon had the potential to irreparably taint the jury's perception of that person. Therefore, the admission of Appellant's quarter century old prior convictions was an abuse of discretion and particularly prejudicial, bearing in mind the nature of the case.

Julian Chestnut v. Commonwealth
Rendered 04/24/08
250 S.W.3d 288
Reversing
Opinion by J. Scott

Julian Chestnut, was convicted by a Jefferson Circuit Court jury on four counts of burglary in the second degree, receiving stolen property over $300, possession of a controlled substance, and illegal possession of drug paraphernalia. The jury recommended an aggregate sentence of 77 years imprisonment, as enhanced by persistent felony offender status.

Rule requiring Commonwealth to disclose "any oral incriminating statement," was not limited to statements that were written or recorded, overruling *Berry v. Commonwealth, 782 S.W.2d 625, Partin v. Commonwealth, 918 S.W.2d 219,* and *Mathews v. Commonwealth, 997 S.W.2d 449*. The Commonwealth presented testimony which they were bound to disclose to him under RCr 7.24(1), and thus the trial court's admission of said testimony was error.

Looking at the plain language of RCr 7.24(1) stating that, "the Commonwealth shall disclose ... any oral incriminating statement ... made by a defendant," we find that it is apparent from a reading of the language of the rule, that RCr 7.24(1) was intended to apply to both oral and written statements, which were incriminating at the time they were made. Consequently, to the extent that *Berry*, and its progeny *Partin* and *Mathews* hold that RCr 7.24(1) does not apply to a defendant's oral incriminating statements, they are overruled.

The Court stated, "We simply cannot in good faith square such a counterintuitive reading of the rule's manifest intention. The Commonwealth's ability to withhold an incriminating oral statement through oversight, or otherwise, should not permit a surprise attack on an unsuspecting defense counsel's entire defense strategy. Such a result would run afoul of the clear intent of RCr 7.24(1)." The Court concluded "Accordingly, we now conclude that nondisclosure of a defendant's incriminating oral statement by the Commonwealth during discovery constitutes a violation of the discovery rules under RCr 7.24(1), since it was plainly incriminating at the time it was made." However, in a footnote, the court stated this ruling would not be applicable to non-incriminating or innocuous statements made by defendant prior to trial which only become incriminating in the context of testimony at trial.

Admission of the incriminating oral statement to detective that was not disclosed by Commonwealth was reversible error. The Commonwealth asserts that even if the failure to disclose the statements was a discovery violation, the statements could be used in rebuttal. However, the duty of discovery imposed by RCr 7.24(1) to disclose incriminating statements does not end at the close of the Commonwealth's case in chief. Rebuttal does not offer a protective umbrella, under which prosecutors may lay in wait. "A cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced." *James v. Commonwealth,* 482 S.W.2d 92, 94 (Ky.1972).

That the statements were Appellant's own is immaterial. The premise underlying RCr 7.24(1) is not only to inform the defendant that *he* has made these statements, as he should be clearly aware, but rather to inform the defendant (and to make sure his counsel knows) that the Commonwealth is aware that he has made these statements. This ensures that the defendant's counsel is capable of putting on an effective defense, as per the intent of the rule. This is not to say that a defendant is permitted to take the stand and commit perjury without recourse. Indeed, a criminal defendant who testifies in his own defense is bound by the same rights and repercussions as every other witness in a court of law, and may rightfully be subject to impeachment or any other available remedy.

The Court concluded that "by permitting evidence to be admitted on rebuttal which was withheld from the defense in violation of the rules, we find that the trial court abused its discretion in this instance. Surely, there may be some cases where such introduction will be harmless, yet we are not convinced such was the case here. Therefore, Detective Wright's testimony was improperly placed before the jury at trial as rebuttal evidence."

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Commonwealth v. Stewart Oliver
Rendered 05/22/08
253 S.W.3d 520
Affirming
Opinion by J. Abramson

The Supreme Court had never expressly addressed whether a criminal defendant is entitled to have the jury instructed on a lesser-included misdemeanor offense which is supported by the evidence but which was time-barred by KRS 500.050(2) at the time of indictment.

A defendant is entitled to the lesser-included offense instruction even though it was time-barred by KRS 500.050(2) if supported by the evidence. However, by requesting jury consideration of an "expired" misdemeanor; the defendant waives his statute of limitations defense to any resulting conviction. Except where otherwise expressly provided, the prosecution of an offense other than a felony must be commenced within one year after it is committed. The United States Constitution does not require a limitation period on criminal offenses. A limitations period is not a fundamental right and, indeed, at common law there was no limitations period for criminal prosecutions. Kentucky's only criminal limitations period is purely statutory and KRS 500.050(2) hews closely to the common law by excepting only non-felony offenses

Kentucky case law has long recognized that, generally, a statute of limitations is a defense, but not a jurisdictional bar, to an untimely complaint. The Court stated "Under CR 8.03, of course, the statute of limitations is listed among the affirmative defenses which may be waived if not asserted in a timely manner. Although the Criminal Rules contain no precise analogue to CR 8.03, we see no reason, at least under the current penal code, not to recognize in the criminal sphere, via RCr 13.04, a like rule that the statute of limitations is an affirmative defense that may be waived. Indeed, since criminal defendants are permitted to waive their most fundamental constitutional rights, it would make little sense, as many of our sister courts have noted, to disallow the waiver of the merely statutory limitations right."

The waiver of limitations becomes an issue in cases like this one, where the defendant seeks a jury instruction on an expired lesser-included offense. Generally a defendant is entitled to instructions on the whole law of the case including lesser-included offenses whenever, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense.

The United States Supreme Court has held that in capital cases a defendant has an Eighth Amendment right to have the jury instructed regarding any viable lesser-included offense supported by the evidence. *Beck v. Alabama*, 447 U.S. 625 (1980). In *Spaziano v. Florida*, 468 U.S. 447 (1984), however, the Court held that that right did not extend to expired lesser-included offenses unless the defendant was willing to waive the statute of limitations defense.

The Kentucky Supreme Court concluded that "although Beck and Spaziano are capital cases construing the Eighth Amendment to the United States Constitution, numerous state courts have applied their reasoning to non-capital cases and have held that a defendant is not entitled to a lesser-included offense instruction on an expired offense unless he waives the limitations defense. Contrary holdings have been limited to states which, unlike Kentucky, give the jury no role in sentencing. We agree with the majority of state courts and with the United States Supreme Court that an instruction on a time-barred offense tends to deceive the jury and thus is not permitted unless the defendant waives the limitations bar so that a verdict under the instruction has real substance." The request for an expired lesser-included instruction is sufficient to establish waiver, absent other evidence of record that a waiver was not intended.

Benjamin Cole Benet v. Commonwealth
Rendered 05/22/08
253 S.W.3d 528
Affirming
Opinion by J. Minton

Benjamin Cole Benet appealed from a circuit court judgment sentencing him to 20 years' imprisonment for first-degree sodomy and 5 years imprisonment for first-degree sexual abuse, to be served consecutively, for a total of 25 years imprisonment.

Supreme Court lacked jurisdiction to consider and rule on merits of defendant's unpreserved challenge to constitutionality of violent offender statute, overruling *Sherfey v. Sherfey*, 74 S.W.3d 777. The Court of Appeals' conclusion that an appellate court may rule on an "as applied" challenge to a statute's constitutionality, even if a party's failure to comply with KRS 418.075 meant that the same court could not consider a constitutional challenge to the facial validity of a statute. The Supreme Court stated "(A)lthough the Court of Appeals' novel approach may have some superficial appeal, it cannot withstand close scrutiny because KRS 418.075 contains no exceptions for "as applied" challenges. When no exceptions exist in a statute, there is a presumption that the lack of exceptions reflects a conscious decision by the General Assembly; and a court lacks authority to graft an exception onto a statute by fiat. Rather, a reviewing court must interpret a statute as written, without adding to or subtracting from the legislative enactment. Therefore, the Court of Appeals' statement in *Sherfey* that a reviewing court has the power to review improperly preserved "as applied" constitutional challenges must be overruled as being inconsistent with the plain, unambiguous language of KRS 418.075.

A defendant automatically became "violent offender," for purposes of sentencing and parole eligibility, upon his conviction for first-degree sodomy. A defendant automatically becomes a violent offender at the time of his or her conviction of an offense specifically enumerated in KRS 439.3401(1) regardless of whether the final judgment of conviction contains any such designation. Thus, the trial court's failure to designate Benet as a violent offender in the final judgment of conviction is, at least for purposes of this appeal, of no legal significance.

A trial court was not bound to accept jury's recommendation that sentences of 20 years for sodomy and 5 years for sexual abuse run concurrently, overruling *Smith v. Commonwealth,* 806 S.W.2d 647. The Supreme Court stated that they have never attempted in a published opinion to reconcile the principle that trial judges are not bound by a jury's recommendation regarding consecutive or concurrent sentences and *Smith's* opposite proclamation that a trial court lacks the power to refuse to follow a jury's recommendation if such a refusal might adversely affect a defendant's parole eligibility. The Supreme Court found that "having now fully considered these irreconcilable principles, we have concluded that *Smith* must be overruled."

The Supreme Court opined "if we followed the strict dictates of *Smith*, then a jury's recommendation that multiple sentences be served consecutively could be disregarded by a court (because such a change to concurrent sentences would surely not adversely affect a defendant's parole eligibility); but a jury's recommendation that multiple sentences be served concurrently would morph from a recommendation to a binding directive (because such a change could adversely affect a defendant's parole eligibility date). Such a dichotomy is illogical and improper."

The Supreme Court concluded that "therefore, we refuse to require the trial judges of this state to be compelled invariably to follow a jury's recommendation regarding whether multiple sentences be served concurrently or consecutively. Rather, the trial judges of the Commonwealth should sentence all defendants facing multiple terms of incarceration as a trial judge believes in the exercise of discretion is a proper sentence, even if that proper sentence deviates from a jury's recommendation. Of course, it is beyond cavil that trial judges may not increase the sentence actually determined by the jury; but trial judges are not bound by the jury's recommendation of how that sentence shall be served."

William Ryan Dixon v. Commonwealth
Rendered 05/22/08
263 S.W.3d 583
Affirming
Opinion by J. Minton

Serious physical injury was substantive element of first-degree rape if Commonwealth sought to charge defendant with Class A felony rape, overruling *Baker v. Commonwealth,* 922 S.W.2d 371. The Kentucky Supreme Court has previously held that a fact that merely increases the possible punishment for an offense is not an element of the offense. For example, in *Baker v. Commonwealth*, an appellant was convicted of, among other things, kidnapping and reckless homicide. Appellant argued that her convictions for kidnapping and reckless homicide constituted double jeopardy because the death of the kidnapping victim was also the basis for the reckless homicide conviction. This argument was premised, at least in part, on the fact that the felony classification of a kidnapping conviction depends on whether the victim was released alive. The Court rejected that argument, holding that "whether the victim was released alive is not an element of the substantive offense of kidnapping. Such a determination is used only for purposes of determining the range of punishments which may be imposed." Thus, application of Baker would lead to a conclusion that serious physical injury was a mere sentencing factor, not a substantive element of the offense.

But after *Baker*, the United States Supreme Court issued its landmark opinion in *Apprendi v. New Jersey*, in which it held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Unquestionably, Doe's serious physical injury increased Dixon's possible punishment. So in order for Dixon's rape conviction to be properly classified as a Class A felony, the jury was required to find beyond a reasonable doubt that Doe suffered a serious physical injury.

The Kentucky Supreme court concluded that "serious physical injury is a substantive element of first-degree rape if the Commonwealth seeks to have a rape offense classified as a Class A felony. So to the extent that *Baker,* or cases following its rule, hold to the contrary, they are overruled, based upon *Apprendi.* This conclusion should come as no surprise because we have already followed *Apprendi* in similar situations, such as our holding that a jury must find that a defendant possessed a firearm while committing a narcotics-related offense in order for the firearms enhancement statute to apply."

Therefore, in cases like this one, in which the Commonwealth prosecutes a defendant on a charge of first-degree rape under a theory that the victim suffered a serious physical injury, the elements of first-degree rape are as follows: 1) engaging in sexual intercourse with another person, 2) by forcible compulsion, and 3) which results in the victim receiving a serious physical injury.

Separate convictions for first-degree rape premised on serious physical injury and first-degree assault arising from same physical injury did not violate prohibition against double jeopardy, overruling *Sherley v. Commonwealth,* 558 S.W.2d 615. Under the *Blockburger* test, first-degree assault is not a lesser-included offense of first-degree rape, which

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means that Dixon's double jeopardy argument fails as a matter of law. But application of *Blockburger* does not end the inquiry on this topic because Dixon also argued that the holding in *Sherley v. Commonwealth* mandates that his assault conviction merges with his rape conviction.

Sherley contended that simultaneous convictions for first-degree assault, first-degree robbery, and attempted rape violated double jeopardy because the same essential element-serious physical injury to the victim-was used in each offense. The previous court held that the assault and attempted rape convictions merged, stating that "the force causing serious physical injury which elevated the charge of attempted rape to attempt to commit first-degree rape, a Class A felony, being the same serious physical injury, the basis for the first-degree assault conviction also merged the offense of first-degree assault and attempt to commit first-degree rape, a Class A felony. Thus the conviction for first-degree assault merged with the charge of attempt to commit first-degree rape, a Class A felony."

The Court stated that "the force used for conviction of first-degree assault merged with the force used to elevate the punishment for the other offenses and Sherley was convicted of one offense included in others as proscribed in KRS 505.020….However, the *Sherley* case did not contain any reference to *Blockburger*, despite the fact that *Blockburger* was rendered over 40 years before this Court decided *Sherley*. In fact, *Sherley's* failure to use the *Blockburger* test is curious because of the fact that we had expressly relied upon *Blockburger* in at least one previous opinion. Additionally, although the opinions did not explicitly cite *Blockburger*, our predecessor-court had long ago espoused and utilized a test that is the de facto equivalent of the *Blockburger* test."

The Court concluded that "our failure in *Sherley* to use *Blockburger* means that *Sherley* is an aberration in our double jeopardy decisional law. As we made plain 10 years ago in *Burge*, we are firmly committed to the *Blockburger* test to resolve double jeopardy claims. As previously explained, Dixon's double jeopardy argument clearly fails the *Blockburger* test. And *Sherley* is out of step with double jeopardy cases which came both before and after it. Accordingly, we now overrule *Sherley* and hold that the prohibition against double jeopardy is not violated when a defendant is convicted of first-degree assault and first-degree rape (involving a serious physical injury to the victim), even if the same serious physical injury to the victim is used to support each conviction.

Christopher Shaheid Peyton v. Commonwealth
Rendered 05/22/08
253 S.W.3d 504
Affirming in Part and Reversing in Part
Opinion by J. Scott

Appellant, Christopher Shaheid Peyton, was convicted by a Hopkins Circuit Court jury of three counts of first-degree trafficking in a controlled substance and of being a persistent felony offender in the first degree. During sentencing, the jury was instructed, in sentencing instruction 11, "You, the jury, have convicted the Defendant of multiple felonies. You shall also decide whether the felony sentences shall be run concurrently (at the same time) or consecutively (one after the other)." Thereupon, the jury recommended sentences of 7, 8, and 9 years for the three counts. The sentences were then doubled due to the persistent felony offender conviction. This enhanced the jury's recommendations to 14, 16, and 18 years, respectively. The jury elected, as per their right, to run these sentences concurrently so that Appellant would serve a total of 18 years.

At sentencing, however, the trial judge determined she could not sentence Appellant to concurrent terms. The judge concluded the sentences for the two counts in the first indictment should run concurrently, but the sentence for the count in the second indictment should run consecutively to the first indictment. This gave Appellant a 34 year sentence.

Sentences for new felonies committed on parole need not be consecutive to each other, overruling *Devore v. Commonwealth*, 662 S.W.2d 829. *Devore* posits that subsequent multiple-count felony convictions committed while on parole must be run consecutively to one another. And, indeed, this has been the courts' treatment of KRS 533.060(2) in many instances since *Devore.* However, the proper application of the statute under *Devore's* interpretation has been a source of conflict and confusion within the Commonwealth's courts for nearly 24 years now, stemming partly from the incongruous and excessive sentencing results which it may, in some instances, yield. Thus, under *Devore*, the trial courts' treatment of felony offenses committed while on parole has been anything but uniform.

While *Devore's* logic is workable in circumstances wherein a paroled or probated individual commits a singular subsequent felony, it becomes unreasonable when dealing with multiple count subsequent felonies. For example, in the present instance, had the trial court properly applied *Devore's* interpretation of the statute, Appellant would have received a 48 year sentence in addition to the reinstated sentence for which he was on parole. The court stated "While we refrain from passing judgment as to whether this sentence is fitting, it is clearly not the eighteen-year sentence which the jury intended to assign."

The Court concluded that *Devore* leads to an unworkable interpretation of KRS 533.060(2). Rather, the logic espoused by Justice Leibson in his dissent provides an inherently more practical understanding of the statute. "A reasonable interpretation of the phrase 'with any other sentence,' (KRS 533.060(2)) is that 'any other sentence' means only the unserved portion of the sentence for the felony for which probation or parole should be revoked." *Devore*, 662 S.W.2d at 831 (Leibson, J., dissenting).

When an individual on parole is facing multiple and contemporaneous felony convictions for subsequent crimes (committed while on parole), the jury may still recommend whether to run these subsequent convictions consecutively or concurrently with each other. In these circumstances, the discretion remains with the jury to recommend consecutive or concurrent treatment, as per their statutory right. KRS 532.055(2). It must be reiterated, however, that the court may not run these subsequent convictions concurrent with the paroled offense. KRS 533.060(2).

Carlos Couch v. Commonwealth
Rendered 06/19/08
256 S.W.3d 7
Affirming
Opinion by J. Scott

Couch, who was initially convicted of felony sexual offense in another state, was convicted in the Perry Circuit Court of failing to register as a sex offender, and was sentenced to 5 years imprisonment, with one year to serve and 4 years probated.

Pursuant to RCr 4.08, information provided to pretrial services representatives is confidential and cannot be used at trial without the written consent of the defendant, except in certain enumerated exceptions. At Appellant's bench trial, after the conclusion of the evidence and closing arguments, the trial court re-opened the evidence and called Diltner as a witness. As an intake officer with pretrial services, Diltner testified that she interviewed individuals after they were arrested for purposes of assigning a bond. She further testified that she had interviewed Appellant after his arrest and that he had provided a Yerkes, Kentucky address. Moreover, she indicated that he described the physical appearance of the house, and denoted that he had been in the area for about 6 months. No objections were made at the time, and Appellant objected only after the trial judge had made a finding of guilt. Thus, while Appellant included the argument in his motion for acquittal, there was no contemporaneous objection to the introduction of the complained-of testimony at the time of trial.

The Court concluded that the introduction of Diltner's testimony without Appellant's consent was error under RCr 4.08. Yet, there was other substantial evidence presented at trial that Appellant was living in Kentucky at the time of the arrest. Thus, the error in this circumstance did not rise to the level of palpable error and was harmless beyond a reasonable doubt.

Wherein a bench trial is conducted and no jury is present, a trial court should enjoy considerable discretion in its authority to call and interrogate witnesses under KRE 614. Appellant argued that the trial court abused its discretion and functioned as a prosecutor when it re-opened the evidence and called Diltner to testify after closing arguments. While the appellate court agreed with Appellant insofar as the substance of Diltner's testimony should have been excluded, it found that the trial court was properly within its purview to re-open and call such witness pursuant to RCr 9.42 and KRE 614.

The trial judge in the present instance presided over a bench trial of Appellant's request. Therefore, he was bound to elicit such relevant information as he deemed fit. Presumably, the trial judge noticed that Appellant had given a Kentucky address on his bail form, and decided to call Diltner to question her concerning this. The court was acting out of its obligation to elicit the necessary information to properly hear the case. That the information the court sought to ascertain was ultimately confidential does not denigrate the proper intent behind calling the witness, nor does it somehow lessen the court's authority to do so under KRE 614.

The Court stated "Appellant's position principally relies on the language this Court espoused in *LeGrande v. Commonwealth*, 494 S.W.2d 726, 731 (Ky.1973), where we noted that a trial judge cannot conduct himself in such a manner as to place him 'in the role of the prosecutor rather than an arbiter.' Indeed, our case law has tended to lend a wary eye and a cautious approach to judicial involvement in the interrogation of witnesses. *See Terry v. Commonwealth*, 153 S.W.3d 794, 802 (Ky.2005). However, such caution has traditionally hinged on our abundant sensitivity to what effect, if any, such involvement may or may not have upon a jury when the influence of the bench is allowed to 'leak into the crucible,' and our ardent devotion to an impartial and objective judiciary. (Citations omitted)." The Court concluded "thus, necessarily, when such risk of prejudice to the jury is missing, the risk of judicial involvement in interrogation is likewise substantially lessened. Therefore, in instances, such as the one at present, wherein a bench trial is conducted and no jury is present, a trial court should enjoy considerable discretion in its authority to call and interrogate witnesses under KRE 614."

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Jeffrey Allen v. Commonwealth
Rendered 6/19/08
2008 WL 2484952
Not to be Published
Reversing
Memorandum Opinion of the Court, dissent by Scott

Allen was convicted in the Letcher Circuit Court for the wanton murder of his foster child, Dakota. Allen and his wife argued that Dakota's older siblings actually inflicted the fatal injuries.

The introduction into evidence of certain 911 calls violated Allen's Sixth Amendment Right to Confrontation and Crawford v. Washington. Five calls were placed to 911 after Dakota was discovered unconscious. Allen argued that playing the 4th and 5th phone calls, placed after the emergency had subsided, violated his right to confrontation. After Dakota was pronounced dead, the emergency room nurse placed two calls to 911. The fourth call was from a nurse who called 911 from the hospital speculating that the child's injuries did not "fit" Allen's story of being inflicted by a 4 year old sibling. The fifth call was from a member of the Whitesburg Police Department who initially stated "it was the foster parents." Although that statement alone may have been ambiguous, the remainder of the call clarified the insinuation that Allen was responsible for the death. The officer also repeated several hearsay and double hearsay statements.

In *Davis v. Washington* 547 U.S. 813 126 S.Ct. 2266 (2006), the Supreme Court analyzed when 911 calls were testimonial in nature. Factors to evaluate include 1) whether the speaker is referring to events as they are actually happening or past events, 2) whether there is an ongoing emergency, 3) whether the nature of what was asked and answered was necessary to resolve a present emergency, and 4) the level of formality of the conversation. *Id*. at 2276-77.

Because the nurse who placed the fourth call testified at trial, there was no harm in her testimony. However, the fifth call to 911, made by an unknown police officer, should have been excluded because it was clearly testimonial, and there was no opportunity for cross-examination. Here, the trial court failed to recognize when the calls to 911 ceased to address an ongoing emergency situation, and instead became testimonial statements. The phone call by the police officer clearly goes beyond the intent of what the 911 line is to be used for, namely for reporting emergency situations, and segues into testimonial speculation concerning culpability. Because the police officer's 911 call concerned past events with prosecutorial implications, his statements were testimonial and therefore the trial court erred in admitting the call.

Kenneth Campbell and Joseph Metten v. Commonwealth
Rendered 8/21/08
260 S.W.3d 792
Affirming
Memorandum Opinion of the Court

Campbell, Metten and two other co-defendants were tried jointly. Campbell was convicted of tampering with physical evidence, first-degree wanton endangerment, methamphetamine manufacture with firearm enhancement, marijuana possession with firearm enhancement, and drug paraphernalia possession with firearm enhancement and was sentenced to 50 years imprisonment. Metten was convicted of manufacturing methamphetamine, first-degree wanton endangerment, marijuana possession, and possession of drug paraphernalia and was sentenced to 25 years imprisonment.

Metten and his mother's boyfriend, Campbell, were under investigation for suspicious purchases of pseudoephedrine (Sudafed). To investigate the suspicious purchases, law enforcement officers arrived at Campbell's residence to conduct a "knock and talk." While the officers talked to Metten, a child appeared at the door. Responding to the officer's question, the child told them that Campbell was in the back. The child opened the door. The officers could then see Campbell, Thomas Hall, and David Allen inside the house; and they could also see Metten fleeing out the back door. Metten was later taken into custody at another location. The officers also detected the smell of ether and observed items that led them to believe that methamphetamine was being made there. They also found marijuana in the residence and noted the presence of 5 children and Metten's mother, who was also Campbell's girlfriend.

The defendants were not denied the right to jury selected at random. The four co-defendants received a joint jury trial. The trial court had trouble seating a jury because many potential jurors were excused for cause. Even after calling in four potential jurors who had initially been excused, the trial court still did not have enough potential jurors to try the case. The trial court then noticed a man who had been sitting in the courtroom all day. Upon questioning the man, the trial court learned that the man had been summonsed for jury duty; but he did not hear the clerk call his name during roll call. The man told the trial court he had remained in the courtroom all day, had taken the oath to answer truthfully the questions posed to the venire, and had heard all of the questions the court asked. The court allowed counsel for each co-defendant to question the man. This prospective juror's responses revealed no bias or other reason why he should not serve, so the trial court put the man on the jury panel over Metten's objection. The parties each exercised their peremptory strikes, leaving twelve jurors and one alternate to hear the case. Ultimately, one juror was excused for pending litigation against one of the defendants. So the man who had not heard his name called at roll call sat as a juror in the trial of this case.

The defendants argued that because of Juror S's failure to answer in roll call, Juror S's number was not placed in the box from which the clerk randomly pulled potential jurors' numbers to come forward to participate in voir dire. Appellants argue that "[b]y including [Juror S] as the final juror 'drawn' on the voir dire panel, the court manipulated the list of names who will eventually compose the empanelled jury," increasing the likelihood that Juror S would serve on the jury or be eliminated by a peremptory strike by the defense.

Although the trial court's handling of this matter may have deviated from the procedure laid out in RCr 9.30, we find no substantial deviation from the required random selection process. Juror S was a potential juror who had already been summonsed for jury service that day, and his name was initially not put in the box as a result of innocent human error and not as a result of any intentional act to reserve him for last.

This case differs from *Robertson v. Commonwealth*, 597 S.W.2d 864 (Ky. 1980), where we found a substantial deviation meriting reversal, despite apparent lack of prejudice, because the trial court had the jurors called in order of their juror number for questioning, with numbers 1 through 12 called first, with jurors excused for cause replaced by the next number in order. The deviation in *Robertson* was substantial because it created a problem whereby the parties knew who each replacement could be and could manipulate their strikes to obtain a particular person on the panel.

The Court also noted "preservation of this issue is questionable at best." Metten joined Allen's objection, but Allen stated that the objection might be cured with further inquiries into Juror S's presence and attention during voir dire questioning. Metten failed to renew his objection after the trial court indicated Juror S would be seated on the panel following questioning. Campbell never explicitly joined Allen's objection and stated there would be no objection on his part so long as Juror S was subject to voir dire questions.

There was no reversible error in denying a mistrial when a juror recognized a witness. The Appellants argued that a juror should have been dismissed for cause, necessitating a mistrial, when he recognized Alicia Hall. The juror had known her by her maiden name of Alicia Lucas, when he was dating Alicia's aunt 14 years ago. The juror was aware of Alicia's father, who had a notoriously bad reputation. Even the trial court stated that the defendants would not get a fair trial if jurors recognized Alicia as the daughter of Barry Lucas. However, when the juror was questioned, he said he avoided Alicia's father but stated his bias against her father did not carry over to Alicia. Moreover, Alicia's testimony only mentioned the appellants in passing; it directly concerned Hall and Allen, who were acquitted. Given the innocuous nature of Alicia's testimony and her mere passing acquaintance with Campbell and the juror, the court found no error.

There was no error in requiring the four co-defendants to take a "package deal." Prior to trial, the Commonwealth offered Campbell and Metten a plea of 10 years, on the condition that all four defendants accepted the plea. The Appellants argued that they wanted to accept the plea deal but were forced to trial because Hall and Allen would not accept. While conceding that they had no constitutional right to a plea bargain, they contend that the "package plea deal" conditioned upon all defendants agreeing to the plea bargain was arbitrary and left the decision of whether they went to trial in the hands of other defendants. Although some federal courts have expressed concern that such "package plea deals" may be coercive where they have led to a defendant pleading guilty and have led to even more searching analysis of whether a guilty plea is truly voluntary, there is no authority that would support reversing a conviction entered against a defendant who did not plead guilty because of a co-defendant's refusing a package plea deal. The Commonwealth was not required to offer any of the defendants a plea bargain, thus the fact that Metten and Campbell could not enter into a plea bargain because of their co-defendants' refusal of this "all for one deal" does not entitle them to relief

As to Campbell's conviction on a firearm enhancement, inoperability of the gun was an affirmative defense and Campbell bore the burden of proof. Campbell's sentence was enhanced under KRS 2108A.992, possession of a firearm at the time of in furtherance of a drug offense. Police had found a rusty or corroded sawed-off shotgun behind the headboard of a bed in Campbell's home when searching the home for evidence of suspected methamphetamine manufacture. The gun was not subjected to any ballistics testing before trial, and neither party presented proof as to whether the gun was actually capable of firing. A firearm is defined in KRS 237.060(2) as "any weapon which will expel a projectile by the action of an explosive." By the plain language of this definition, a gun must be able to shoot bullets or other projectiles to qualify as a "firearm."

However, because the operability of the firearm is not an element of the firearm enhancement, the inoperability of a firearm is an affirmative defense for which the defense has the burden of proof. Thus, the total lack of proof as to operability did not entitle Campbell to a directed verdict on the firearm enhancement.

David Clark v. Commonwealth
Rendered 8/21/08
267 S.W.3d 668
Affirming in part, Reversing in part
Opinion by J.Scott

David Clark was convicted in Hardin Circuit Court of one count of first-degree rape, seven counts of first-degree sodomy, three counts of second-degree sodomy, eight counts of incest, one count of promoting a sexual

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performance by a minor, two counts of using a minor in a sexual performance, one count of criminal attempt to commit a sexual performance by a minor, and two counts of criminal attempt to commit use of a minor in a sexual performance. Clark was accused of sexually abusing his stepchild and biological children as well as forcing them to perform sexual acts on one another. In sum, Appellant was found guilty of 25 felony offenses.

The Court was not required to disqualify the jury panel due to bias stemming from contact with the media. Prior to Clarks' trial, the Hardin Circuit Court decided the unrelated case of *Commonwealth v. Heck*. The jury found Heck not guilty of rape and sodomy charges. After the *Heck* jury returned, a member of the media approached 4 jurors and chastised them for acquitting Heck, saying that if they had read her articles on the matter they would have known Heck was guilty and suggesting that evidence had been withheld from the jury.

Several members of the *Heck* jury panel were also members of Clark's jury panel. Clark filed a motion to dismiss the entire jury pool, arguing they would have difficulty acquitting another alleged sex offender after being berated by the reporter for acquitting Heck. The trial court denied the motion but stated that members of the panel could be questioned individually at the bench.

Each prospective juror was asked if they had served on the *Heck* trial. If a juror answered in the affirmative, such juror was questioned individually at side bar to determine if the reporter's statements affected their impartiality in the present matter. Seven potential jurors who served on the *Heck* jury were interviewed, and all indicated that they could be impartial. Significantly, no motions were made to strike any juror for cause. While Appellant's counsel did use three peremptory challenges to remove members of the *Heck* jury, ultimately, 4 Heck jurors, including one of the individuals confronted by the reporter, sat on Appellant's jury.

The Court held there was no error since Clark had the opportunity to question the *Heck* jurors for bias , did not ask that any of them be struck for cause and failed to demonstrate actual bias by any of the jurors.

Clark's Convictions for Promotion of a Sexual Performance with a Minor and Use of a Minor in a Sexual Performance Violates Double Jeopardy. The convictions at issue stem from a course of conduct wherein Appellant orchestrated a sexual encounter between his minor daughter, M.C., and his girlfriend's minor son, V.P. According to testimony, V.P. walked into Appellant's bedroom and witnessed M.C. lying on the floor, naked, with Appellant in the room. Appellant then nudged V.P. towards M.C. and instructed him to get on top of her. Appellant undid his pants and masturbated as he pushed V.P. up and down on top of M.C. in a motion to simulate sexual intercourse while a pornographic video played in the background. However, no penetration occurred. The jury convicted Appellant of use of a minor in a sexual performance, KRS 531.310, and promotion of a sexual performance by a minor, KRS 531.320.

In *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky.1996), Kentucky adopted the federal constitutional test for double jeopardy claims as outlined in the seminal United States Supreme Court case of *Blockburger v. United States*, 284 U.S. 299, (1932), and declared that double jeopardy issues arising out of multiple prosecutions henceforth will be analyzed in accordance with the principles set forth *in Blockburger* and KRS 505.020 "The same-elements test, sometimes referred to as the 'Blockburger' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' [sic] and double jeopardy bars additional punishment and successive prosecution." *United States v. Dixon*, 509 U.S. 688, 696, (1993).

Here, the "use" statute required only that the offender either passively ("consent") or actively ("employ") facilitate a minor's participation in a visual representation of a sexual performance before an audience. In effect, under the facts in question, the promotion statute, KRS 531.320 prohibits the same conduct. The "promotion" statute is violated when one either actively or passively prepares, agrees, or brings forth through their efforts the visual representation of a minor in a sexual performance before an audience.

Double Jeopardy prohibits the Commonwealth from "'carving out of one act or transaction two or more offenses.'" However, "the Commonwealth is permitted to carve out of a single criminal episode the most serious offense, but not to punish a single episode as multiple offenses." In the circumstance where the Commonwealth has failed to make such an election and a single criminal episode gives rise to multiple convictions, the courts must do so.

In the present instance, however, Appellant's convictions under KRS 531.310 and KRS 531.320 carry the same weight of punishment. Finding no viable distinction between Appellant's convictions under KRS 531.310 and KRS 531.320, the court reversed and vacate Appellant's conviction for promoting a sexual performance by a minor under KRS 531.320.

The Variance Between Indictment and Jury Instructions Did Not Unfairly Surprise or Prejudice Appellant. Clark argued that he suffered prejudice when the jury instructions on two counts differed from the crimes charged in the indictment. Clark argued that since different victims were named in the indictment and jury instructions, the jury instructions resulted in him being charged with new and different crimes. The Court noted that the indictments should have been amended to conform with the jury instructions,

and failure to do so was "undeniably error." Nonetheless, such error was harmless as it was "little more than clerical in error" and Clark was aware of the charges against him. Moreover, the variance did not hinder his ability to present a defense, since Clark argued that he was not guilty of abusing any of the children.

Despite the lack of notice, Clark was not prejudiced by the testimony of his former girlfriend. Susan Preston was Clark's former girlfriend and the mother of all 3 alleged victims. She testified as to why she began to suspect Clark. Preston also testified that she feared Clark since he was physically abusive. Clark argued introduction of this evidence violated KRE 404(b).

The Court held that the sequence of events that led to Preston suspecting and reporting the sexual abuse was intextricably intertwined with the evidence at trial. Further, Clark's theory of defense was that the children made false allegations against him because he was physically abusive. Thus, Preston's testimony that he was physically abusive was not prejudicial.

Lacy Bedingfield v. Commonwealth of Kentucky
Rendered 8/21/08
260 S.W.3d 805
Reversing
Opinion by J. Scott

In 1996, Bedingfield was convicted of rape in the first degree and of being a persistent felony offender and sentenced to 25 years imprisonment. Bedingfield was accused of raping a young girl and indentified at trial as the source of semen discovered in rape kit. Bedingfield was taken to the hospital to submit samples and said he would confess if doing so would prevent him form having a swab inserted into his penis. He later recanted, stated he confessed in an attempt to avoid the procedure. Bedingfield appealed his conviction to this Court as a matter of right, and in an unpublished memorandum opinion of the Court as rendered on September 4, 1997, affirmed the trial court's conviction.

During the pendency of this matter of right appeal, Bedingfield filed an RCr 11.42 motion asserting ineffective assistance of counsel on grounds that counsel did not adequately pursue DNA testing. Thereafter, this motion was denied by the trial court and the denial was subsequently affirmed by the Court of Appeals.

On July 6, 2004, Appellant filed a motion requesting release of certain physical evidence, consisting of the alleged victim's rape kit and other physical evidence, to be used in forensic testing of the semen samples contained therein. Appellant alleged that the methodologies of testing minute samples presently available were not in existence in 1996, and thus the samples would offer new forensic evidence. The results obtained from the subsequent testing give rise to Appellant's present motion to vacate judgment and to grant a new trial pursuant to CR 60.02, RCr 10.02 and RCr 10.06(1).

Bedingfield claimed that the results of the DNA testing performed on the forensic evidence definitively exclude him as the source of the semen recovered from the alleged victim and, therefore, give rise to sufficient justification for a new trial based on newly discovered evidence. Upon a motion for a new trial, the trial court held that this evidence would not likely change the outcome of the trial with a reasonable certainty. The Court of Appeals affirmed this decision and the Supreme Court granted discretionary review.

Standard of Review. RCr 10.02 establishes that the granting of a new trial is warranted in circumstances wherein a defendant was somehow prevented from having a fair trial, or if otherwise required in the interests of justice. RCr 10.02(1). It is well-accepted that the standard for adjudging whether a new trial is warranted based upon newly discovered evidence is whether such evidence carries a significance which "'would with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted.'" Likewise, evidence which is merely cumulative, collateral, or which impeaches a nonmaterial witness is insufficient to warrant a new trial. However, the converse is equally true. **"When newly discovered evidence is of such a nature that it is manifest to the conviction, substantially impacts the testimony of a material witness, or would have probably induced a different conclusion by the jury had the evidence been heard, then assuredly, the interests of justice demand that a criminal defendant is entitled to have such evidence set before the court."**

Timeliness of the motion. Typically RCr 10.02 motions based upon newly discovered evidence should be made within one year of the rendering of a final judgment. However, RCr 10.06(1) allows entry of a motion "for a new trial based upon the ground of newly discovered evidence ... made within one year after the entry of the judgment or at a later time if the court for good cause so permits."

Similarly, CR 60.02 states that a " motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation." Though CR 60.02 contains no provision for extending the time limit past one year based one newly discovered evidence, justifications under CR 60.02(d), (e), or (f) may be asserted outside of this one year time frame.

Though such considerations were not at issue since Bedingfield specifically pleaded relief under both RCr 10.06(1) and CR 60.02(f), the Court questioned the efficacy of a rule which fails to acknowledge that an "extraordinary nature" may likewise exist under CR 60.02(b), such is the case here. An "extraordinary" circumstance under CR 60.02(f) always

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establishes good cause under RCr 10.06(1) and thus, if good cause is shown, a motion for a new trial can be made outside of the one year limitations period. "Here, it should not be overlooked that the DNA technology which gave rise to this newly discovered evidence did not exist in the time frame when it could have been timely brought under CR 60.02(b)." Despite the disconnect between the permissive time frame of RCr 10.06(1) and the more rigid time frame under CR 60.02, Appellant is permitted to make a motion for a new trial because he proceeded under both RCr 10.06(1) and CR 60.02(f). Therefore, as Appellant has demonstrated good cause, the one year limitation is not applicable here.

Under the circumstances, the newly discovered DNA evidence warranted a new trial. In remanding for a new trial, the Court addressed the fact that Bedingfield "was convicted based, at least in part, on suppositions that we now know to be fundamentally false: namely, that Appellant was the source of semen identified from T.B.'s vaginal swab and that taken from her clothing." The Court could not "ignore the permeating and saturating effect that the evidence, which was construed to identify Appellant as the source of the semen, played in enhancing the viability and credibility of all of the Commonwealth's arguments." And while there was circumstantial evidence which would seemed to inculpate Bedingfield, likewise, there were numerous inconsistencies in the testimony and evidence presented at trial.

The semen evidence collected from the rape kit and clothing played a substantial, if not central, role in Appellant's trial. There were also numerous and troubling testimonial inconsistencies involved in Appellant's trial. The primary witness, T.B., contradicted many of her previous statements both during her testimony and before trial. Additionally, the only other alleged witness, K.P., also gave conflicting and inconsistent accounts. Moreover, it cannot be ignored that there were serious credibility problems with both of these witnesses. K.P.'s mother conceded that she "was not very good at telling the truth," and her testimony would seem to substantiate this conclusion; K.P. had also made at least 3 prior false rape allegations against her mother's previous boyfriends. Similarly, K.P. had just been released from an institution where she was being treated for depression the day prior to the alleged event.

Thus, the circumstantial evidence in this case was far from irrefutable. Ultimately, the substantive exculpatory nature of the newly discovered DNA evidence coupled with the blatant testimonial inconsistencies of the material witnesses and the substantial impact which this newly discovered evidence has upon said testimony, along with the fact that this evidence would probably induce a different conclusion by a jury, all serve to warrant a new trial to avoid a substantial miscarriage of justice. RCr 10.02

Melvin Lee Parrish v. Commonwealth
Rendered 9/18/08
2008WL4286528
___SW3d___
Affirming
Opinion by J. Noble

Parrish was accused of fatally stabbing his cousin when she refused to return money he loaned her earlier in the day. He was also accused of attacking her two children, one of the children died from the injuries. He was convicted of two charges of intentional murder and one charge of attempted murder and one count of robbery. The jury found the robbery to be an aggravating factor and sentenced Parrish to death for the murder of the child.

Parrish filed an RCr 11.42 in the circuit court. The circuit court declined to hold a hearing and entered an Opinion and Order denying his claims.

The Court rejected Parrish's claims of mental retardation. Parrish argued that he was mentally retarded and therefore not subject to execution under *Atkins v. Virginia*, 536 U.S, 304 (2002). First of all, the Court noted that Parrish's claim of retardation was not an appropriate one for an RCr 11.42 motion. Since he did not allege that counsel was ineffective for failing to raise issues regarding his I.Q., the issue should have been addressed on direct appeal. Nonetheless, the Court found that this claim was refuted by the record which indicated his IQ was at least 70.

Trial counsel was not ineffective for failing to offer mitigation evidence of Parrish's diminished intellectual capacity. Parrish argued that trial counsel failed to paint a complete picture of his diminished capacity and only offered evidence he was a poor student with diminished verbal skills. Also, trial counsel failed to offer evidence that Parrish's use of crack cocaine effected his mental capacity.

The Court rejected the claim, noting that the defense called several witnesses in mitigation who testified to Parrish's diminished capacity and how it effected his life.

Addressing the failure to introduce evidence of drug use, the Court noted that "an RCr 11.42 motion is not an exercise in second-guessing counsel's trial strategy." The decision to focus on Appellant's history, spiritual interests, and non-drug-induced mental limitations was certainly reasonable, especially in light of the fact that Appellant's drug use was self-induced, illegal behavior, and that it was posited as part of his motive for the murders. "This type of speculative reaching in the collateral attack context is the precise reason courts apply a strong presumption of trial counsel's reasonableness -- it sets a minimum bar for an argument to withstand scrutiny below which a court need not engage in extended discussion and analysis."

The Court rejected Parrish's claim of ineffective appellate assistance. Parrish claimed that the mitigation instruction as tendered impermissibly limited the jury's consideration of his mental and intellectual limitations as mitigating evidence. Next, he challenged the unanimity instruction, claiming that it improperly required the jury to be unanimous in considering any mitigating evidence or factor. Further, he claimed appellate counsel was ineffective for failing to raise these issues. The Court found that both instructions were proper, moreover, the Court held that there was no cognizable claim of ineffective assistance of appellate counsel unless appellate counsel failed to file a brief on the merits.

Lack of future dangerousness was sufficiently addressed in mitigation. Parrish argued that trial counsel was ineffective when they failed to call witnesses who would testify to his lack of future dangerousness if he were to be incarcerated rather than executed. Indeed, the United States Supreme Court has noted that a defendant has a constitutional right to such evidence, as such the Court found this issue "the most troubling" of those raised by Parrish.

However, Parrish's trial attorneys did introduce some evidence related to his possible future dangerousness in the form of testimony of the jail chaplain, a lay Catholic minister. The chaplain testified that he had known Appellant for the entire period of his incarceration (approximately 3 years), that he had had regular interactions with Appellant, and that Appellant had been involved in a Bible study group and was a leader whom other inmates looked up to. The circuit court noted, "While this particular evidence did not relate to Parrish's absence of disciplinary problems, it was quite clear that Parrish was 'behaving himself in the institution.'" While introduction of this evidence does not necessarily mean that a reasonable attorney would not have sought to introduce other evidence related to future dangerousness, especially after having retained an expert on the subject, effectiveness of counsel is not lacking just because Appellant's lawyers chose not to introduce all possible evidence relating to this issue.

The Court concluded that the chaplain's testimony undercuts any prejudice that Appellant can claim here since it was sufficient to put the mitigation factor of future dangerousness before the jury. Perhaps the result would be different if the prosecution had claimed Appellant would pose a danger in the future, but that is not the case here. As the trial proceeded, the only evidence relating Appellant's future dangerousness went in his favor.

Commonwealth v. James Merriman and LeQua Hickman
Rendered 9/21/08
265 S.W.3d 196
Affirming as to one case, Reversing and remanding as to another
Opinion by J. Noble

Both Hickman and Merriman were convicted of crimes which would designate them violent offenders under KRS 439.3401. However, KRS 640.030(2) states, "Except as provided in KRS 640.070, any sentence imposed upon the youthful offender shall be served in a facility or program operated or contracted by the Department of Juvenile Justice until the expiration of the sentence, the youthful offender is paroled, the youthful offender is probated, or the youthful offender reaches the age of 18, whichever occurs first. The Department of Juvenile Justice shall take custody of a youthful offender, remanded into its custody, within 60 days following sentencing. If an individual sentenced as a youthful offender attains the age of 18 prior to the expiration of his sentence, and has not been probated or released on parole, that individual shall be returned to the sentencing court" to determine whether the offender should be probated, conditionally discharged, returned to the Department of Juvenile Justice to complete a treatment program, or incarcerated in a Department of Corrections institution.

Both men were returned to the sentencing court at age 18. In both instances, the circuit court determined they were violent offenders and were ineligible for probation or conditional discharge. Two different panels of the Court of Appeals considered appeals from the trial court's decisions. In Merriman's case, the panel affirmed the trial court's ruling. In Hickman's case, the Court of Appeals, doing statutory construction, determined that KRS 640.030 and KRS 439.3401 were reconcilable and that it was "the overall legislative purpose of the juvenile code to rehabilitate offenders when possible rather than to punish them." Further, the panel held that even were the statutes not reconcilable, the legislature had the opportunity to amend KRS 640.030 in 2004 to make it conform to the 2002 enactment of the Violent Offender Statute, but did not. Thus, the language in KRS Chapter 640 which specified that its provisions were exceptions to the general law of felony sentencing, "must be taken to apply to KRS 439.3401 as well."

Both KRS 640.030 were enacted in 1986. Though enacted in the same legislative session, neither statute is referenced in the other, and despite subsequent amendments to both statutes, the legislature has not seen fit to make such references. As the two disparate Court of Appeals decisions indicate, reasonable minds have differed over whether the statutes are in conflict, and whether one is controlling over the other. Therefore, this Court must look to the language of the statutes and make its own construction.

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Since the two defendants in this case were juveniles when they committed their respective offenses, they would have been proceeded against under KRS Chapter 635, as Public Offenders, had they not qualified as youthful offenders under KRS Chapter 640. A list of factors for the district court to consider in determining whether a juvenile qualifies as a youthful offender is set forth in KRS 640.010(2)(b). If two or more apply, then the district court may transfer the case to circuit court where the juvenile will be tried as an adult, except for being housed in a juvenile detention facility until serve-out or his 18th birthday. On his 18th birthday, the KRS 640.030(2) adjudications must be made.

KRS 640.030 is an exception. The intent of the Juvenile Code was set forth by the legislature in KRS 600.010: "[P]romoting protection of children"; that "Any child ... under KRS Chapters 600 to 645 ... shall have a right to treatment reasonably calculated to bring about an improvement in his condition"; "providing each child a safe and nurturing home"; and that "all parties are assured prompt and fair hearings," plus other specific intentions. With these goals in mind, KRS Chapter 640, Youthful Offenders, must be read for its purpose as well. This Chapter has no separate introductory statutes, but instead begins with when and how a preliminary hearing shall be conducted. This Chapter makes it clear that if a child qualifies as a youthful offender and is transferred to circuit court, he "shall then be proceeded against in the Circuit Court as an adult, except as otherwise provided in this chapter." KRS 640.010(2)(c) (emphasis added)

This concluding language is important because KRS 640.030, 640.040, and 640.050 do provide otherwise by requiring specific procedures adult offenders do not get, and providing some specific limitations on treating youthful offenders as adults. Particularly, the "resentencing" procedure and required adjudications in KRS 640.030(2) are unique, specific, and mandatory ("that individual shall be returned to the sentencing court"; "the sentencing court shall make one (1) of the following determinations"). Indeed, KRS 640.030 is in its entirety an exception to treating a youthful offender as an adult offender.

The mandatory language regarding what a court must do when a youthful offender is returned on his 18th birthday is a better indication of legislative intent. Even the trial courts who concluded that youthful offenders were not eligible for probation or conditional discharge consideration held the statutorily required hearing. It is unreasonable to believe that the legislature expected the courts to engage in an exercise in futility.

Further, if this is the effect of the Violent Offender Statute, then there would be little point in sending youthful offenders to rehabilitative programs. This treatment is provided at considerable public cost, and it is designed to teach the juvenile how to cope outside criminal behavior. The irony is that under the Commonwealth's view, a youthful offender who has spent significant time in treatment, who has completed high school or other educational programs, who has made significant progress in turning his life around, and whom the juvenile facility has recommended for probation or conditional discharge, would nonetheless be told by the judge at his 18th birthday hearing that the judge has no choice but to now send him to prison. The legislature did not intend such a ridiculous result.

By mandating the courts to make certain determinations when a juvenile is returned on his 18th birthday, the legislature had no need to specifically say in addition that the Violent Offender Statute does not apply. By the very language in KRS 640.030(2), it is apparent that the Violent Offender Statute cannot act to prevent consideration of probation or conditional discharge on the youthful offender's 18th birthday: In Merriman's case, he was told he could not be considered for probation or conditional discharge as he was ineligible because he was a Violent Offender. In making this decision, the trial court failed to do what the statute specifically told him to do, "... make one of the following determinations...."

For the Violent Offender Statute to control over the specific language of KRS 640.030(2), it must have express language saying that it applies to youthful offenders. Even then, if the two statutes were viewed as irreconcilable, KRS 640.030(2) would control as the more specific statute. By statutory interpretation, logic, and belief in the good sense of the legislature, the Violent Offender Statute cannot be read to apply to youthful offenders.

Danny Little v. Commonwealth of Kentucky
Rendered 10/23/08
2008 WL 4691525
___SW3d___
Affirming
Memorandum Opinion of the Court

Little was indicted two counts of using a minor in a sexual performance and two counts of promoting a sexual performance by a minor after he was implicated in making pornographic videotapes of young children. He was convicted on all four counts.

Little's convictions for use of a minor in a sexual performance and promoting a sexual performance did not violate Double Jeopardy. Little argued that his convictions for using a minor in a sexual performance and promoting a sexual performance by a minor amount to a violation of the double jeopardy clauses of both the state and federal constitutions, and of the limitations set out in KRS 505.020 for the prosecution of multiple offenses. Little asserted that the Commonwealth relied on the same facts to establish the elements of both statutes. Thus, Little argues that in the

context of the facts of this case, the statutes do not require proof of distinct facts.

The Court acknowledged that an identical argument was considered in *Clark v. Commonwealth*, —S.W.3d —, discussed *supra.* The Court held that the present charges are readily distinguishable because they arise from multiple incidents memorialized on videotape. Little was not prosecuted twice for the same conduct, but for distinct actions.

A person uses a minor in a sexual performance when he "employs, consents to, authorizes or induces a minor to engage in a sexual performance." KRS 531.130(1). Little consented to Burke filming his daughter, CL, in various stages of undress, both while on the four-wheeler and while being tossed in the air. Little used, or employed, KB in a sexual performance when he tossed her in the air while Burke filmed her bare buttocks.

A person promotes a sexual performance by a minor when, "knowing the character and content thereof, he produces, directs, or promotes any performance which includes sexual conduct by a minor." KRS 531.320. "By filming KB naked on the couch while physically positioning her in various poses, Little was directing a sexual performance by a minor. He promoted a sexual performance by CL when he allowed her to be filmed while naked in the Burkes' bathtub. His verbal directions to CL assisted Burke in the organizing, or production, of footage containing sexual conduct.

Because Little's convictions were based on distinct actions as to separate victims, no Double Jeopardy violation occurred.

Marcus Benjamin v. Commonwealth
Rendered 10/23/08
266 S.W.3d 775
Reversing
Opinion by J. Scott

Marcus Benjamin was convicted of murder and received a life sentence for the death of his estranged wife Michelle. By all accounts, the couple had an extremely tumultuous relationship. Michelle was found strangled in her own closet. Benjamin turned himself in and confessed to the crime, alleging that Michelle was the initial aggressor, in a physical altercation which quickly spun out of control, and eventually resulted in Michelle's death. Details of the precise sequence of events leading up to Michelle's death are unclear. According to Appellant's confession, he indicated he could remember very little of what happened, stating that he was "in and out" during the altercation and then remembers arriving in Murfreesboro, Tennessee to see his children.

There was no *Brady* Violation when the Commonwealth failed to reveal evidence of an alternate perpetrator. Benjamin argued that the prosecution failed to reveal evidence of an alternative perpetrator before trial, thus violating his due process rights. At trial, a detective testified that upon learning of Michelle Benjamin's death, he initially thought that Tim Brown may have had something to do with the murder. Tim Brown was a known drug dealer in the area and Michelle, who had been working with the Mayfield Police Department as an informant, had made some allegations against Brown. Benjamin alleged that he and counsel were unaware that police had considered an alternative perpetrator until hearing Morrison's testimony at trial. Trial counsel moved for a mistrial upon grounds of a *Brady* violation.

The Court held that the trial court properly denied a mistrial, as Benjamin's confessions to the crime made any information concerning an alternative perpetrator irrelevant.

The trial court erred in failing to include an instruction pertaining to extreme emotional disturbance as an element of the jury's murder instructions. The quandary of how extreme emotional disturbance (EED) should figure into the murder statute, KRS 507.020(1), has provided substantial difficulty for litigants, trial courts, and juries within the Commonwealth for a considerable period of time now. Indeed, this Court has oft wrestled with the appropriate interplay between who assumes the burden of proving its existence and, when established, its proper configuration within the statutory pattern.

Once evidence has been introduced establishing EED as a statutory element, the burden then shifts to the Commonwealth to affirmatively disprove its existence. However, we have qualified this requirement by relieving the Commonwealth of an affirmative duty to prove the non-existence of EED if "such proof is already present." But if there is evidence, taken in the light most favorable to the Commonwealth, which puts the existence of EED in dispute, the Commonwealth has met its burden and the existence of EED becomes a question for the jury.

The Court noted that while provocation adequate to induce an EED analysis must be sudden and uninterrupted, we have consistently held that this event need not be contemporaneous with the triggering event. *Foster v. Commonwealth*, 827 S.W.2d 670, 678 (Ky.1991). Unlike "heat of passion," the triggering event for extreme emotional disturbance may "fester in the mind" before surfacing to exact its damage. *Springer v. Commonwealth*, 998 S.W.2d 439, 452 (Ky.1999). We have further suggested that such a delayed event may be the "impact of a series of related events" with no specific time frame between the triggering event and the actual homicide.

These sound principles ensure that EED is not so constrained as to be attainable only through instantaneous reactions, yet not so lenient as to allow convenient abuse of the mitigating effects of the doctrine. As a result, the Court need not limit its consideration to only those events immediately

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prior to the actual crime; review may well consider all circumstances leading up to and surrounding the commission of the crime.

The Court found that there was sufficient evidence at trial to place the issue before a jury to render a finding of fact. The night before the homicide, Marcus Benjamin was confronted with allegations of infidelity as well as the news that his wife had been engaging in an extramarital affair with a family member. The following morning, the victim returned and the argument between the two resumed, this time including assertions that Benjamin would never see his children again. Further, Benjamin claims that he was physically attacked by the victim during this final argument, at which point the altercation turned deadly. This series of events, while not necessarily establishing that extreme emotional disturbance existed, is wholly sufficient to warrant an instruction for EED for the jury's benefit. Therefore, the trial court committed reversible error by failing to instruct the jury on EED.

Joseph Kozak v. Commonwealth
Rendered November 26, 2008
2008 WL 5046722
___SW3d___
Reversing

Fifteen-year-old Joseph Kozak was indicted on 6 counts of sexual abuse in the first degree involving two victims and two counts of rape in the first degree, both of which involved one of the same victims named in the sexual abuse charges. In 2007, a then 17 year old Kozak filed a motion to enter a guilty plea based upon an offer by the Commonwealth, which would have amended the rape charges to sexual abuse with the Commonwealth recommending a total sentence of 20 years imprisonment. In July 2007, Kozak was sentenced in accordance with the terms of the plea agreement and the Commonwealth's recommendation as to sentencing. At that time, the trial court denied Kozak's motion to be sentenced under the more lenient provisions set forth for juveniles in Kentucky Revised Statutes (KRS) 635.060. The trial court did order, however, that Kozak be committed to the Department of Juvenile Justice until his 18th birthday, at which time he was to be returned to the Graves Circuit Court for sentencing. Arguing that the trial court erred by not applying KRS 635.060, Kozak filed this appeal as a matter of right.

The Court held that a juvenile must be fully informed of his rights under the juvenile code by the trial court before the trial court may accept a juvenile's guilty plea. This safeguard should ensure that any juvenile's plea satisfies the requirement that the plea be knowingly and voluntarily made. **In addition to informing the juvenile of the basic rights that any criminal defendant waives by pleading guilty, the trial courts of this Commonwealth must also explain on the record the rights that the juvenile would waive (such as those set forth at KRS 635.060) by persisting in a plea of guilty**. In other words, it is the trial court's obligation to make the juvenile fully cognizant of the procedural and substantive differences between being sentenced as an adult and being sentenced as a juvenile (such as the more lenient dispositional alternatives set forth at KRS 635.060) before accepting a plea agreement between the Commonwealth and a juvenile defendant. The colloquy should follow the same general contours as that engaged in between trial courts and adults who wish to plead guilty, with the additional requirement that the trial court must inform the juvenile that a plea of guilty would waive his rights under the juvenile code (*i.e.*, the right in appropriate cases, such as this one, to be sentenced under the terms of KRS 635.060).

The Court emphasized that they were not holding that a juvenile may not enter into a plea agreement with the Commonwealth. "To the contrary, we express our agreement with the United States Supreme Court's observation that guilty pleas and plea agreements are 'important components of this country's criminal justice system.' Rather, we simply hold that a trial court must inform the juvenile of the rights the juvenile would waive under the juvenile code before the trial court may accept a plea agreement involving a juvenile defendant in order for the juvenile's proposed guilty plea truly to be intelligently made."

Commonwealth v. Deanna Wooten
Rendered 11/26/08
2008 WL 5046782
__SW3d___
Affirming
Opinion by J. Schroeder

Deanna Wooten was charged with criminal abuse for allowing a boyfriend to abuse her children. She sought funds for an independent mental health expert. Her request was granted and she was found incompetent to stand trial.

The Commonwealth appealed to the Court of Appeals from the order granting Deanna's ex parte motion for expert funding, the order denying the Commonwealth's motion to require the expert to give a more specific report, and the court's order determining that Deanna was incompetent to stand trial. The Court of Appeals agreed with the Commonwealth that KRS 31.185 does not authorize funds for a defense expert on the issue of competence to stand trial, and that under the applicable statute, KRS 504.100, neither the defense nor the prosecution is entitled to an independent evaluation on competency to stand trial. The Court of Appeals also agreed with the Commonwealth that the trial court abused its discretion in granting the ex parte motion for expert funding because the defense failed to demonstrate that the use of state facilities would be impractical or that a private expert was reasonably necessary, a precondition to funding under KRS 31.185. However, the Court of Appeals adjudged the resulting error to be harmless,

reasoning that KRS 504.100 did not prohibit consideration of the expert testimony once it was available, even though it was erroneously obtained. As to the failure to require the expert to provide a more specific report, the Court of Appeals ruled there was no error because the statutes do not require the expert to give a specific opinion.

An indigent defendant is entitled to an independent expert for purposes of determining competency under a proper showing of necessity and unavailability/impracticality of state services. In order to hire a state-funded private psychologist, the defendant must make the requisite showing that the state facilities were unavailable or that the use of state facilities would be impractical. KRS 31.185(1). The defendant must also demonstrate that the desired expert assistance is "reasonably necessary." Because the order for funding was obtained ex parte in this case, the record is not clear whether a hearing was held on the reasonable necessity of a private expert or the impracticality or unavailability of state facilities. The record does not reflect that such a hearing was held. However, the ex parte order authorizing the employment of Dr. Peggy Pack stated that "[a] reasonable necessity has been shown for the defendant herein to employ the services of Dr. Peggy Pack as a forensic psychologist. There are no state facilities nor personnel available whom defense counsel could utilize to obtain this assistance, which is necessary to provide the defendant with a fair trial under both state and federal constitutional law."

Given the court's findings, the Court presumed that Deanna made a sufficient showing of unavailability of state services and of reasonable necessity for the hiring of Dr. Pack to support the trial court's order.

The Commonwealth was not prejudiced by the expert's failure to file a more specific report. The trial court makes the ultimate determination of whether a defendant is competent to stand trial. To aid the court in making this determination, KRS 504.100(1) requires the court to appoint at least one psychologist or psychiatrist to examine and report on the defendant's mental condition. KRS 504.100(2) provides:

(2) The report of the psychologist or psychiatrist shall state whether or not he finds the defendant incompetent to stand trial. If he finds the defendant is incompetent, the report shall state:
(a) Whether there is a substantial probability of his attaining competency in the foreseeable future; and
(b) What type treatment and what type treatment facility the examiner recommends.

While the language of subsection (2) requires a specific finding of competency, in reading the statute as a whole, the Court found the requirements of specificity in subsection (2) apply only to the report of the court-appointed neutral expert, and not to the defendant's independent expert. The language of subsection (2) is clearly in reference to the court-appointed psychologist or psychiatrist in subsection (1), and applies to the report from that examiner, who is working for the court and not the defense or the prosecution**.**

Further, the Commonwealth did not object to the experts testimony at the competency hearing. While the report did not explicitly state Deanna was incompetent it was full of references to her diminished capacity and questioned her ability to stand trial.

There was sufficient evidence supporting the trial court's determination Deanna was incompetent to stand trial. Although both experts opined that Deanna was competent to stand trial, they also agreed that Deanna was mildly mentally retarded and noted Deanna's severe mental limitations. Dr. Pack testified that Deanna was "marginally competent," and that as a result of her cognitive impairments, Deanna would need a lot support during the trial proceedings. In particular, Dr. Pack noted that Deanna's problems processing information would make it difficult for her to assist her attorney, as she would not know what questions to ask and could not recognize a lie. Dr. Pack questioned Deanna's ability to keep up and understand what was going on during the trial. Dr. Pack also stated that the use of unfamiliar vocabulary would require a great deal of explanation during legal proceedings and that is was "very likely" that Deanna did not understand what was happening at the competency hearing.

Competency determinations are made based on a preponderance of the evidence standard. In light of all the evidence of Deanna's mental impairments and limitations, we cannot say that the trial court abused its discretion in finding Deanna incompetent to stand trial. Notwithstanding the experts' conclusions that Deanna was competent or marginally competent to stand trial, there was substantial evidence presented of Deanna's inability to participate rationally in her own defense. ■

Applied Research Center Releases Agenda For Racial Justice In Cooperation With The Sentencing Project

The Applied Research Center (ARC) has just released its Compact for Racial Justice: An Agenda for Fairness and Unity. This proactive agenda reviews the steps that led the U.S. to its current status, as well as the steps needed to arrive at racial fairness and unity. Its chapters summarize opinions and recommendations from multiple fields of interest in racial justice, including civil rights, biotechnology, criminal justice, green economies, health care, education, economy, and immigration. The Sentencing Project's Research Analyst, Ashley Nellis, and colleagues, authored the chapter on Criminal Justice.
http://www.sentencingproject.org/

SIXTH CIRCUIT CASE REVIEW
2008 YEAR IN REVIEW

By Meggan Smith, Dennis J. Burke, and David Harshaw
Post-Conviction Branch

Here are notable 2008 cases from the Sixth Circuit that involve neither the death penalty nor the 4th Amendment, which are topics covered in other columns.

***Thompkins v. Berghuis*,**
547 F.3d 572 (2008), before Moore, Clay, and Rogers, Circuit Judges.

Defendant's confession was obtained in violation of the 5th Amendment when the officers questioned him for nearly three hours, the officers described the interview as "very, very one-sided," and the officers described the defendant as "not verbally communicative" and as having "shared very limited verbal responses" while "largely remaining silent."

Van Chester Thompkins was charged with first degree murder, assault with intent to commit murder, and several firearms-related charges. At trial, one of the investigating officers testified that after two hours and forty-five minutes of a "very, very one-sided" interview, he took a "spiritual tack" with Thompkins and asked him whether he believed in God. He testified that Thompkins made eye contact with him for one of the few times during the interview and his eyes welled up. The officer asked Thompkins if he asked God to forgive him for "shooting that boy down" and Thompkins responded "yes."

At the beginning of the interview, the officers had read Thompkins his rights, but he had refused to sign a form acknowledging the he had been read his rights. Prior to the office taking a "spiritual tack," the interview was "very, very one-sided" and "nearly a monologue." The officer described Thompkins as "so uncommunicative," as "not verbally communicative," and stated that "Thompkins shared very limited verbal responses with us" and he "talked with us very sporadically." Asked whether Thompkins had consistently exercised his right to remain substantively silent for at least two hours and forty-five minutes, the officer relied, "yes, that's right."

Despite the officer's description of the interview, the Michigan court denied Thompkin's motion to suppress his statement because he "never invoked his right to remain silent and participated in the interview by making eye contact, nodding, and answering questions with, 'I don't know.'"

Reviewing the state court's ruling under AEDPA, the Sixth Circuit held that the Michigan state courts had unreasonably applied clearly established 5th Amendment law by denying Thompkin's motion to suppress his statement. Specifically, the court agreed with Thompkins contention that the prosecution did not meet its heavy burden in proving a valid waiver of the right to remain silent given the officer's repeated descriptions of Thompkins as silent and uncommunicative and the officer's inability to identify answers to specific questions that Thompkins made in the first two hours and forty-five minutes of the interview.

Emphasizing the distinction between the inquiries as to whether a suspect initially waived his rights and whether, after a waiver, a suspect later invokes his rights and the importance of not blurring those inquiries, the Court noted that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." In rejecting the Michigan trial court's conclusion that Thompkins knowingly and intelligently waived his rights because he never invoked his right to remain silent and participated in the interview by making eye contact, nodding, and answering questions with "I don't know," the Court stated "the state court's analysis failed to pay proper heed to the Supreme Court's holding that 'the courts must presume that a defendant did not waive his rights; the prosecution's burden is great.'"

In finding that Thompkins had not waived his right to remain silent, the Court emphasized two facts in particular: (1) that Thompkins had refused to sign even a form acknowledging that his rights had been read to him, and (2) that the officer could not identify any particular exchange involving an instance of eye contact or head nodding or any specific question to which Thompkins responded "I don't know." While acknowledging that Supreme Court precedent permits implied waivers of *Miranda* rights, the Court held that Thompkins had not expressly or impliedly waived his right to remain silent.

***Brown v. Smith*,**
— F.3d — (2008), before Boggs, Chief Judge, and Moore and Clay, Circuit Judges

Ineffective assistance of counsel claim had not been "adjudicated on the merits," and, therefore, state court's ruling was not entitled to AEDPA deference, because the

evidence that formed the basis of the claim was not in the record before the state court and petitioner was not at fault for failing to develop the evidence in state court.

Following his conviction for criminal sexual abuse, Michael Brown claimed that his attorney's failure to investigate and obtain records related to the victim's counseling sessions, which would undermine her credibility, amounted to ineffective assistance of counsel. At trial, the only direct evidence presented was the victim's testimony that Brown sexually assaulted her on two occasions.

After his trial, Brown argued that his attorney should have requested the victim's counseling records to support his claim that she had fabricated the abuse allegations to keep him from marrying his girlfriend, whom the victim despised. The state court denied a hearing on Brown's ineffective assistance of counsel claim and denied the claim on the merits, finding that the decision not to call the victim's counselor as a witness was a matter of trial strategy.

The federal district court, applying AEDPA deference, found that, although the records could have provided additional grounds for impeachment, there was no prejudice because defense counsel had already impeached the victim's testimony and some of the information in the records was consistent with her testimony at trial.

The Sixth Circuit first held that the district court erred in applying AEDPA deference.

> AEDPA requires that a state court's adjudication with respect to a habeas claim cannot be overturned unless it is contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. This deferential standard of review, however, applies only to a claim that has been "adjudicated on the merits in State court proceedings."

Analogizing Brown's ineffective assistance of counsel claim to a *Brady* claim, the Court noted that:

> When the petitioner's habeas claim involves *Brady* material that was uncovered only during the federal habeas proceedings, AEDPA deference does not apply to an earlier, state-court *Brady* adjudication involving a different mix of allegedly improperly withheld evidence. We think that the same principle applies generally whenever new, substantial evidence supporting a habeas claim comes to light during the proceedings in federal district court.

The Court goes on to clarify that this rule assumes that the petitioner has met the standard for admitting new evidence in the federal district court: (1) the petitioner must not be at fault for failing to develop the evidence in state court, or (2) if the petitioner is at fault, the narrow exceptions of 28 U.S.C. 2254(e)(2) apply. The Court found that Brown was not at fault for failing to develop the evidence in state court because his motions for a hearing to develop the evidence were denied and the victim's counselor had apparently refused to disclose her notes in the absence of a court order. The notes were first made available to Brown during the federal habeas proceeding when the district court provided them to the parties after an *in camera* review.

Reviewing Brown's ineffectiveness claim de novo, the Court found that defense counsel was deficient for failing to investigate the counseling records when they knew they existed and Brown was prejudiced by this failure because the state's case hinged entirely on the victim's testimony and the counseling notes provided valuable and noncumulative impeachment evidence.

Justice Clay filed a concurring opinion simply to emphasize the importance of the majority opinion's AEDPA ruling.

***Smith v. Berghuis*,**
543 F.3d 326 (2008), before Moore and Clay, Circuit Judges, and Schwarzer, Senior District Judge.

Defendant was denied an impartial jury drawn from a fair cross-section of the community. The Court discusses what method of statistical measurement was necessary to show underrepresentation and what evidence was sufficient to show systematic exclusion.

Prior to his murder trial, Diapolis Smith challenged the composition of both the venire panel and the petit jury, alleging that African-Americans had been improperly excluded. Near the time of Smith's trial, 7.8% of the jury-eligible population in the county was African-American and the overall percentage of African-Americans in the largest city in the county was 18.1%. The city's African-American population accounted for 85% of the county's overall African-American population.

At the time of Smith's trial, the jury lists came from the driver's license lists and the state identification cards issued by the Secretary of State. After twice mailing juror questionnaires to the potential jurors, a qualified juror list is composed from the questionnaires returned. Once the prospective jurors appeared, those having non-statutory excuses, such as transportation problems, child care concerns, or the inability to take time away from work, were generally excused with no proof regarding the excuse required.

From the pool of prospective jurors, jurors were first selected for the city district court and the remaining jurors were assigned to the county circuit court. State law required that only city, not county, residents would be assigned to the district court. City residents would be assigned to the circuit court only after the district court had the required number of jurors. After Smith's trial, the order of juror assignment was reversed based on "the belief that the respective districts swallowed up most of the minority jurors, and circuit court

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was essentially left with whatever was left, which did not represent the entire county."

According to the statistical analysis performed, during the six month period prior to Smith's trial, African-Americans were underrepresented on circuit court venires by approximately 18%. During the month of Smith's trial, the underrepresentation was 34.8%. The state court also heard testimony that the non-statutory excuses that enabled prospective jurors to be removed from the qualified list disproportionately impacted African-American communities.

Applying AEDPA deference, the Sixth Circuit considered whether the state courts had unreasonably applied clearly established federal law in holding that Smith had not shown a violation of his right to a impartial jury from a fair cross-section of the community. In order to establish a violation of the Sixth Amendment's fair cross-section requirement, a defendant must make a prima facie showing:

(1) that the groups alleged to be excluded is a 'distinctive' group in the community;
(2) that the representation of this group in venires from which the juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
(3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Regarding the fair and reasonable representation, the state court found that Smith had not shown a constitutionally significant disparity using either the absolute or comparative disparity tests. The Sixth Circuit agreed with the state court that 1.28% absolute disparity between jury-eligible African-Americans and those that actually appeared for venire panels was insufficient to show underrepresentation. However, the Court noted that the Supreme Court has not mandated that a particular method be used to measure underrepresentation in Sixth Amendment challenges and that, where the distinctive group is small, as was the case in Smith's case, the comparative disparity test is the more appropriate measure of underrepresentation.

As measured by comparative disparity, African-Americans were underrepresented on venire panels by 18% in the sixth months prior to Smith's trial and 34% during the month of Smith's trial. The Sixth Circuit found that these disparities were sufficient to demonstrate that the representation of African-Americans was unfair and unreasonable.

While noting that other courts presented with similar disparities had reached the conclusion that a group was not underrepresented, the Court still found that the state court had unreasonably applied clearly established federal law. Because none of the applicable measures, including comparative disparity, could appropriately measure underrepresentation due to the relatively small size of the African-American population in the relevant county, the Court found that "non-benign" factors in the jury selection process, that are normally relevant to the determination of whether exclusion was systematic, weighed in favor of finding that African-Americans were underrepresented. "In such case, 'if a jury selection process appears ex ante likely to systematically exclude a distinction group, that is, the system contains 'non-benign' factors, a court may essentially give a defendant the benefit of the doubt on underrepresentation, even if the system ex post proves to work no systematic exclusion.'"

Turning to the question of whether the underrepresentation of African-Americans resulted from systematic exclusion, the Court held that two aspects of the jury selection process were particularly important. First, the practice of assigning jurors to district court panels prior to assigning them to circuit courts contributed to the underrepresentation. Second, the practice of granting excused absences for reasons such as lack of transportation or child care resulted in the disproportionate excusal or exclusion of African-Americans from venire panels.

Next, the Court considered whether the state met its burden "to demonstrate that 'a significant state interest is manifestly and primarily advanced by those aspects of the jury selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group.'" The Court found that the state has a significant interest in avoiding undue burdens on individuals by allowing excuses based on the inability to obtain transportation and 'in assuring that those members of the family responsible for the care of children are available to do so," but that the state had not demonstrated a significant interest in the assignment of city residents to the district court prior to assignment to the circuit court. Therefore, Smith had demonstrated a violation of his 6th Amendment right to a jury drawn from a fair cross-section of the community.

***Avery v. Prelesnik*,**
548 F.3d 434 (2008), before Martin and Gilman, Circuit Judges, and Dowd, District Judge.

The state court unreasonably applied *Strickland* in holding that defense counsel made a valid strategic decision not to present an alibi defense.

Chamar Avery was charged with first degree felony murder and felony firearms possession in Michigan. Before trial, Avery informed his attorney that he could not have committed the murder because, at the time of the crime (approximately 8:00), he was thirty minutes away from the location of the murder with a friend waiting for his car to be repaired. Defense counsel sent an investigator to the maintenance shop where Avery told him he could contact potential alibi witnesses. The investigator met with a witness that said Avery left his car for repairs and left the shop with Damar Crimes to visit someone. Avery returned to the shop at approximately 9:30. The investigator did not ask this witness how he could contact

Damar Crimes. He simply left a card with the witness and asked him to contact defense counsel. Neither the attorney nor the investigator spoke with Damar Crimes. The witness from the maintenance shop never contacted defense counsel and no efforts were made to get back in touch with him. At the post-conviction evidentiary hearing, Damar Crimes and Darius Boyd testified that they were with Avery at the time of the murder. Although it is unclear from the opinion, Boyd is presumably the person Crimes and Avery visited after they left the auto shop the first time.

Based on counsel's pre-trial investigative efforts, the Michigan court concluded that defense counsel "adequately investigated" Avery's potential alibi witnesses and that he "made a valid strategical decision not to present such a defense because the information he obtained did not provide defendant with an alibi for the time of the crime." The Sixth Circuit found this to be an unreasonable application of *Strickland*:

> [W]e believe that [defense counsel's] investigation was far "less than complete." He never personally attempted to contact *any* of the potential alibi witnesses, and, after the investigator learned from [the witness] that Avery was with Damar Crimes during the time of the murder, the investigator did not ask for Damar's home address or phone number, even though [the witness] could have provided it. At the evidentiary hearing, [defense counsel] testified that after the report from the investigator, he was "interested . . . sounded like I want to talk to Damar." But at the time, [the witness] was only seventeen years old, and the investigator (and consequently [defense counsel]) left it up to him to get back in touch with important alibi evidence in a murder trial. We agree with the district court's recognition that "this sequence of events shows just how unreasonable it was for a seasoned attorney like [defense counsel] to leave it up to teenagers to get back in touch with him about important alibi evidence in a murder trial."
>
> The State, nevertheless, argues that [defense counsel] "had inadequate information on which to base an alibi defense, not through lack of investigation but because of inconsistent accounts of the events on the evening of the murder." But the limitations on [defense counsel]'s investigation rendered it impossible for him to have made a "strategic choice" not to have Damar Crimes or Darius Boyd testify because he had no idea what they would have said. There is no reason based on "professional judgment" why [defense counsel] would not have pursued speaking to Damar Crimes. The district court correctly concluded that "[defense counsel] was under a duty to reasonably investigate, which entails, at the bare minimum, asking for Damar's phone number or address and reasonably attempting to contact him." The district court also correctly observed, this does not mean that [defense counsel] was under an obligation to actually track down Damar Crimes, only that he put in a reasonable effort to do so.

Having found that the state court's ruling that counsel's performance was not deficient was unreasonable, the Sixth Circuit Court next considered whether Avery was prejudiced by counsel's deficient performance. Because the state court had not reached the issue of prejudice, the Court reviewed this prong of *Strickland* de novo and found that Avery was prejudiced by his counsel's failure to adequately investigate his alibi defense.

> To evaluate a claim of prejudice, the court must assess how reasonable jurors would react to the additional alibi testimony had it been presented. In this case, the state judge presiding over the post-conviction evidentiary hearing, describing herself as "the factfinder," found Boyd's testimony to be "totally incredible" and to suggest "manufacturing testimony." We do not denigrate the role of the factfinder in judging credibility when we review a record in hindsight, but evaluation of the credibility of alibi witnesses is "exactly the task to be performed by a rational jury," not by a reviewing court. Here, although the factors the state judge highlighted in her credibility assessment – including Boyd's ability to remember exact times while failing to recall the date or day of the week that Avery visited his home – may have ultimately affected the credibility of his testimony in the eyes of the jury, but they do not dispose of the issue of prejudice. Notably, the evidentiary hearing occurred approximately a year and three months after Avery's trial, and the record before us does not demonstrate that the presiding judge found fault with Crimes's testimony. Ultimately, as the district court properly recognized, "Our Constitution leaves it to the jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence.

The Sixth Circuit concluded that Avery had received ineffective assistance of counsel due to his counsel's failure to adequately investigate his alibi defense and that he had been prejudiced by such failure.

***United States v. Pacheco-Lopez*, 531 F.3d 420 (6th Cir. 2008) before Merritt, Cole and Griffin, Circuit Judges. Merritt delivered the opinion which Cole joined. Griffin dissented.**

The court reversed a district court decision denying relief based upon *Miranda v. Arizona*, 384 U.S. 436 (1966). This case further delineates the line between questions relating to the processing of an arrest that are biographical and questions of an investigatory nature which constitute "interrogation" thus implicating the Fifth Amendment and the *Miranda* warning.

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Lopez was discovered and arrested by police when they arrived to execute a search warrant at a home in Louisville, KY. At the time of the arrest police had no information concerning Lopez. The police handcuffed him and placed him at the kitchen table for questioning. Lopez was asked several questions including his name, where he was from, when he had arrived at the house and how he had arrived. He replied that he had driven from Mexico the previous Sunday in a white pickup truck; he volunteered the keys to the pickup. At that point he was advised of his *Miranda* rights. Immediately after being read his "rights" Lopez admitted transporting cocaine. He then indicated that he no longer wished to speak with police. Police went to search the white pickup truck and discovered that the drive shaft was hollowed out to accommodate cocaine.

The court summarized the law applying to suspect questioning as follows:

> Before the police may interrogate a suspect in custody, they must first read the *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). An "interrogation" comprises "not only express questioning, but also any words or actions on the part of the police that the police know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). *Miranda* warnings are not, however, required for questions "reasonably related to the police's administrative concerns," such as the defendant's name, address, height, weight, eye color, date of birth, and current address. *Pennsylvania v. Muniz*, 496 U.S. 582, 601, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990); *United States v. Clark*, 982 F.2d 965, 968 (6th Cir.1993) ("ordinarily ... the routine gathering of biographical data for booking purposes should not constitute interrogation under *Miranda* "). This "booking exception" to *Miranda* requires the reviewing court to carefully scrutinize the facts, as "[e]ven a relatively innocuous series of questions may, in light of the factual circumstance and the susceptibility of a particular suspect, be reasonably likely to elicit an incriminating response." *United States v. Avery*, 717 F.2d 1020, 1025 (6th Cir.1983). Where the booking exception does not apply to statements made before administration and voluntary waiver of *Miranda* rights, those statements are "irrebuttably presumed involuntary" and must be suppressed. *United States v. Mashburn*, 406 F.3d 303, 306 (4th Cir.2005) (citing *Oregon v. Elstad*, 470 U.S. 298, 307, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985)).

Addressing the particular facts pertaining to Mr. Lopez, the court found:

A. Pre-*Miranda* Statements

> Lopez's pre- *Miranda* statements cannot be described as merely biographical, but instead resulted from an interrogation subject to the protections of *Miranda.* Some of the initial questions would not - in isolation - implicate *Miranda*; at the very least, asking the defendant his name is the type of biographical question permitted under the booking exception. But asking Lopez where he was from, how he had arrived at the house, and when he had arrived are questions "reasonably likely to elicit an incriminating response," thus mandating a *Miranda* warning. The fact that [the police officers] did not actually know that Lopez was involved in criminal activity does not affect our analysis. The officers who questioned Lopez did know that the shipment of cocaine involved in the arranged buy had arrived from outside the state during the previous week. Consequently, asking questions about when and how Lopez arrived at a household ostensibly linked to a drug sale, as well as his origin, are relevant to an investigation and cannot be described as related only to securing the house or identifying the defendant. Furthermore, the officers immediately ascertained that Lopez did not speak English and learned shortly thereafter that he was from Mexico, factors making him "particularly susceptible" to questioning before *Miranda* warnings. These facts implicate *Miranda's* concern about the danger of coercion resulting from "the interaction of custody and official interrogation." *See Illinois v. Perkins*, 496 U.S. 292, 296, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990) (discussing the purpose of *Miranda* and contrasting a situation where a defendant does not "feel compelled to speak by the fear of reprisal for remaining silent").

B. *Miranda* in the Middle of Interrogation

> Midway through the interrogation at the kitchen table, police read Lopez his *Miranda* rights in Spanish. They then asked him whether he transported cocaine from Mexico and he admitted he did. The district court ruled that his statement after the *Miranda* warning was admissible because the pre-*Miranda* questions were merely biographical subject to the pre-booking exception and did not constitute an interrogation. As noted, the Court of Appeals disagreed. Therefore, applying the Supreme Court's two central cases addressing middle of the interrogation *Miranda* warnings, the court of appeals held that it must suppress the post-*Miranda* warning statements as well. *See Oregon v. Elstad*, 470 U.S. 298, 317, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) (analyzing whether the latter statement was voluntary, an inquiry based on whether the taint of the earlier compelled statements dissipated through the passing of time or changed circumstances); *Missouri v. Seibert*, 542 U.S.

600, 608-09, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (administering *Miranda* warning before a suspect makes a custodial confession admissible so long as there was proper waiver).

In dissent, Judge Griffin argues that the post *Miranda* warning statement should be admissible in the prosecutions case in chief because Lopez made an informed choice to confess, as he demonstrated when he later invoked his right to remain silent. The majority rejected that analysis because there was "insufficient evidence in the record that Lopez was aware that his earlier confession would not be admissible against him, nor do the circumstances suggest that the second confession was separate from the first in any way.

United States v. Kimbrel,
532 F.3d 461, (6th Cir. 2008) before Keith and Sutton, Circuit Judges and Ackerman, District Judge

A *Batson* claim was raised during jury voir dire by the prosecution which alleged Kimbrel was improperly striking white jurors. The trial court sustained the prosecution's objection leading the Court of Appeals to reverse and remand for a new trial because the trial court conducted a flawed *Batson* analysis.

During *voir dire*, defense counsel exercised preemptory strikes against several potential jurors, all but one of whom were white. Defense counsel then moved to strike yet another white juror, at which point the prosecution objected under *Batson v. Kentucky*, 476 U.S. 79 (1986).

The Court of Appeals described the ensuing colloquy:

> Kimbrel's counsel proceeded to articulate his race-neutral reason for the strike, explaining that he "detected a bit of ego there that [he] thought might color her role as a juror," as Goetz [the challenged strike] had seemed "too assured and too comfortable and too confident" and left the impression that "she was relishing a little bit too much the possibility of being in the court." JA 215-16. After the district court pressed counsel for some further explanation, *see* JA 215 ("You sure you don't have another [explanation]? I would be glad to hear another one."), it turned to the government for a response. The government contested defense counsel's assertion that Goetz had displayed "ego" or any similar attribute that "would somehow affect her role as a juror." JA 216-17. Kimbrel's counsel rejoined that the decision to strike was "just a gut call" based on a perception that "there might be something there that would tend to be very powerful in the jury." JA 217. After hearing from both sides the trial court sustained the objection, finding that the government had established a prima facie case and that Kimbrel, "the *party with the burden of persuasion* regarding a nondiscriminatory basis[,] ha[d] failed" to produce a facially neutral justification" for striking the white juror. (Emphasis added).

Batson applies to peremptory challenges based on race or gender. *See United States v. Mahan*, 190 F.3d 416, 424 (6th Cir.1999). It applies to challenges made by both the government and by criminal defendants. *See Georgia v. McCollum*, 505 U.S. 42, 59 (1992). The *Batson* review is a three step process. The first step is for the party opposing the juror strike to establish a *prima facie* case of discrimination. Here, that required the prosecution to show that "relevant circumstances raise an inference that the defendant excluded a potential juror from the petit jury because of race. Second, the proponent of the strike, in this case Kimbrel, must offer a facially valid race-neutral explanation for the challenge. Third, if the proponent of the strike has produced a facially valid explanation for the strike, then the trial court must decide whether the proponent has proven purposeful discrimination. *See Paschal v. Flagstar Bank*, 295 F.3d 565, 574 (6th Cir. 2002).

As the Court of Appeals emphasized:

> Although the burden of *production* switches after step one and again after step two, "the ultimate burden of *persuasion* regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam) (emphasis added); *see also McCurdy v. Montgomery County*, 240 F.3d 512, 521 (6th Cir.2001). And the trial court may not short circuit the process by consolidating any two of the steps. *See Purkett*, 514 U.S. at 768, 115 S.Ct. 1769; *United States v. McFerron*, 163 F.3d 952, 955 (6th Cir.1998).

The trial court's analysis of the prosecution's *Batson* challenge improperly shifted the burden of persuasion from the opponent of the strike (the prosecution) to the proponent of the strike (Kimbrel). Furthermore, the court's conclusion that Kimbrel had failed to produce a facially neutral justification for striking the white juror was also incorrect. The reason offered by the proponent of the strike in step two must be "clear and reasonably specific" *Batson*, 476 U.S. at 98 n. 20. It also must be more than a mere denial of an improper motive or an assurance of good faith. *United States v. Hill*, 146 F.3d 337, 341 (6th Cir. 1998) Beyond those limitations, however, the proponent of the strike is not required to produce "a reason that makes sense only a reason that does not deny equal protection." *Purkett*, 514 U.S. at 768. Eventually, in step three of the process while weighing the proponent's asserted justification for the strike against the opponent's *prima facie* case of discrimination the trial court must reject nonsensical claims. But here at step two of the *Batson* analysis, the proffered justification for the strike, "too assured and too comfortable and too confident" and left the impression that "she was relishing a little bit too much the possibility of being in the court" was sufficient.

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***Harris v. Haeberlin*,**
526 F.3d 903 (6th Cir. 2008), before Cole, Griffin and Batchelder, Circuit Judges. Cole delivered the opinion of the court. Batchelder delivered a separate dissenting opinion.

The Court reversed denial of petition for writ of habeas corpus and remanded to the district court for a renewed *Batson* hearing. The Court found that under *Batson v. Kentucky*, 476 U.S. 79 (1986), when after acquired evidence bearing on prosecutorial demeanor surfaces, it is the trial court not the appellate court that shall consider the evidence as part of the *Batson* fact finding process, so as to avoid appellate court guesswork.

In 1998, a Kentucky jury found Harris guilty of kidnapping, multiple counts of robbery, and being a persistent felony offender.

During the jury selection process the prosecution exercised four of its nine preemptory challenges to remove prospective African-American jurors from the jury pool. Harris objected claiming a prima facie showing of purposeful racial discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986). The prosecution proffered race neutral justifications for the strikes. The trial court made a finding that the prosecution had utilized all of its preemptory strikes in a race-neutral manner and rejected the *Batson* claim.

Smoking gun?

After Harris was convicted and sentenced to 75 years in prison, his counsel discovered an in-court videotape recording of the two prosecutors and the police detective on the case privately discussing how to exercise the last of the nine peremptory strikes. The recorded conversation proceeded as follows:

DOLAN: Okay, this is who we got guys so far. We got 76, [name deleted]. That's the guy we at first liked, but who had been accused by his girlfriend. We've got 128, [name deleted], kind of hippy, with the beard and the hair, who sat behind [name deleted]. He was on the not guilty jury. We've got [name deleted], 82. She was the last person on the second row. She was also a juror on the carrying concealed deadly weapon charge, which was a 10-2 to acquit. We've got [name deleted], who is the girl at *Seiller and Handmaker* [a local law firm]. We've got 77 [name deleted], who you originally liked, but who was a juror on the Robbery I case. We've got [name deleted], 138. She was the black female who said her cousins were charged and convicted of armed robbery. ***We've got [name deleted], 49, she's the old lady, the black lady. The other one is already off.*** Then there's [name deleted], 160, the first guy out here, who was sleeping. We've got one more to go. What do you guys think?

AUBREY: How about the lady that sat right here (gesturing)? She's on her third criminal jury.

SCHULER: Have you got anything down for [name deleted], number 151?

DOLAN: He sat on a rape charge a long time ago.

SCHULER: He's pretty old?

DOLAN: There are a lot of old people on here.

SCHULER: How about the guy in the first row, number 53? He was one of the ones who said he wanted to see some evidence? Black shirt. What does he do?

DOLAN: Supervisor at (unintelligible) ... I'm going to do this old guy, 152, because he was also on that jury. (emphasis added).

On appeal to the Kentucky Supreme Court, Harris asserted the videotape was "smoking gun" evidence of the prosecution utilizing the preemptory challenge process to strike African – Americans. The Supreme Court by a 4-3 vote rejected the Batson claim finding that the videotape evidence did not tend to prove that the prosecution's preemptory strikes were race neutral. The three dissenting justices would have remanded the case to the trial court to allow the trial judge to consider the videotaped evidence.

Federal Court

After losing in state court Harris filed the instant petition in the federal district court.

The AEDPA governs federal court review of the decisions of the Kentucky trial and appellate courts.

In AEDPA, Congress provided that:

> [A]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d)(1)-(2).

Under the "unreasonable application of clearly established federal law" clause, habeas relief is available if "the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that

principle to the facts of the prisoner's case." *See Dennis v. Mitchell*, 354 F.3d 511, 516-517 (6th Cir. 2003). This clause is also triggered when a "state court decision either unreasonably extends or unreasonably refuses to extend a legal principle from the Supreme Court precedent to a new context." *Keith v. Mitchell*, 455 F.3d 662, 669 (6th Cir.2006).

The habeas petition was denied in district court. The court concluded that no *Batson* violation occurred during the trial but granted a certificate of appealability to the Court of Appeals.

The Court of Appeals reversed the district court and remanded finding that the Kentucky Supreme Court had unreasonably applied clearly established federal law when it independently analyzed significant factual evidence that was unavailable to the trial court at the time that it ruled upon the *Batson* claim. The *Batson* decision required a remand directly to the Kentucky trial court, rather than the Kentucky Supreme Court. Specifically, the *Batson* Court held that:

> [B]ecause the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the *trial court* decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. *Batson*, 476 U.S. at 100 (emphasis added).

***Moore v. Haviland*,**
531 F.3d 393 (6th Cir. 2008) before Boggs, Chief Judge, Rogers, Circuit Judge and Shadur, District Judge. Shadur delivered the opinion of the court, joined by Boggs. Rogers dissented.

Court of Appeals affirms district court's issuance of writ of habeas corpus based upon Moore's claim that he was denied the constitutional right to represent himself at trial.

On the third day of Moore's jury trial his appointed counsel informed the court that Moore was displeased with parts of his counsel's representation and wanted to address the court. Outside the presence of the jury, Moore informed the judge that he was unhappy with counsel regarding the questioning of witnesses. The court explained that Moore could have hired his own attorney (presumably Moore was appointed counsel because he was indigent but that small matter not withstanding….) and "the dream team is occupied." The court further explained that alternatively Moore could represent himself. However, when Moore informed the court that he wished to proceed pro se, the court refused to consider his request until Moore "put it in writing over the lunch hour." Moore prepared a letter and presented it after lunch.

In his letter, Moore requested to assist his counsel "to the best of my abilities and on important matters of strategy and fact toward witnesses and evidence." Alternatively, he requested that his counsel assist him in presenting his own defense (presumably whisper counsel). Failing that, Moore requested "to proceed pro se after a reasonable continuance [48 hours]."

Although Moore's attorney presented Moore's letter and raised the subject of Moore's wish to proceed pro se, a number of times during the remainder of the trial, the court repeatedly put Moore off, urging him to think about it and talk with his counsel. Eventually, Moore was found guilty. On direct appeal in state court, his conviction was affirmed and he filed a writ of habeas corpus in federal court.

Federal Court

The Court of Appeals succinctly described the constitutional right to self-representation as follows:

> Although courts are most frequently called upon to deal with and to enforce the Sixth Amendment guaranty that every criminal defendant facing potential incarceration has the right to counsel at all "critical stages" of the criminal process (*United States v. Wade*, 388 U.S. 218, 223-27, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972)), the Constitution also affords -with equal importance - the right to self-representation (*Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). Those two rights are mutually exclusive, and invocation of one is necessarily intertwined with waiver of the other. Just as had earlier been done with the right to counsel (*Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)), *Faretta* incorporated against the states a criminal defendant's right to self-representation via the Fourteenth Amendment's Due Process Clause. *Faretta*, 422 U.S. at 819-20, 95 S.Ct. 2525 (footnote omitted), the only clearly established federal law (within the meaning of Section 2254(d)(1)) that is relevant to this habeas petition, confirmed that right in these straightforward terms:
>
> > Although not stated in the Amendment in so many words, the right to self-representation - to make one's own defense personally - is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.
>
> Waiver of the right to counsel by an accused must be knowing, voluntary and intelligent (*Johnson v. Zerbst*, 304 U.S. 458, 464-65, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). For any such waiver to be effective, the accused "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with

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> eyes open'" (*Faretta,* 422 U.S. at 835, 95 S.Ct. 2525, quoting *Adams v. United States ex rel. McCann,* 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942)).

In affirming the district court ruling, the court of appeals rejected the government's claim that Moore's request to represent himself was unclear and that as a result the trial judge did not have to engage in a *Farretta* based colloquy with Moore. The government also claimed that Moore's request to represent himself was untimely because he waited until the third day of trial to make his request. The court was equally unsympathetic to that argument.

> Moore's requests were not rejected for untimeliness, either at trial or by the state appellate court….We have no quarrel of course with the notion that a defendant's invocation of the right of self-representation must be timely - but here it was not until the trial was well under way that Moore's grounds for dissatisfaction with counsel's representation arose - and he then acted swiftly. Moore can scarcely be faulted on some concept of tardiness under those circumstances. If he had not acted when he did - if he had waited for the trial to conclude and then sought post-conviction relief on the basis of constitutionally ineffective representation by his appointed counsel - we can be quite certain that he would have been met not only with arguments as to asserted substantive inadequacies of that contention but with the added argument that he should have raised that issue when it first arose at trial.

In conclusion the court of appeals stated:

> [T]he trial court flat-out failed to exercise its discretion and ultimately did not rule on the [pro se] requests, but let the issue go by default instead. Such failure to make a ruling on a criminal defendant's unequivocal request to proceed pro se was objectively unreasonable in light of *Faretta*.

In dissent, Judge Rogers would have found Moore's request untimely. Furthermore, Judge Rogers wrote that Supreme Court precedent does not guarantee the right to self representation based upon "the dissatisfaction of counsel's representation during trial" and therefore the state court ruling was not objectively unreasonable.

United States v. Odeneal,
517 F.3d 406 (2008), before Guy, Clay, and Martin, Circuit Judges.

The Court applies comparative juror analysis to a *Batson* claim.

Judge Guy wrote the lead opinion. He would have affirmed the criminal convictions of Deshaun Odeneal and Shane Andres. However, on one issue - the prosecutor's use of peremptory challenges - Judge Clay's second opinion controlled and reversed. It appears that Judge Martin, the swing vote, changed his mind after the two opinions had already been drafted.

Odeneal and Andres were charged with drug crimes. During jury selection, the prosecutor used a peremptory on an African-American juror. When challenged under *Batson v. Kentucky*, the prosecutor stated that he removed the juror because (1) she had previously been on a jury that had returned an acquittal, and because, (2) she said she had requested to be excused from jury duty due to her ongoing divorce proceedings. The defense attorney pointed out that prosecutor had not struck a white juror who had also served on the other jury. When asked why this was so, the prosecutor stated that he was unaware of this fact. The white juror also had not been going through a divorce. The district judge accepted the prosecutor's reasons as race neutral.

Batson is a three step process. The first step is for the defendant to make out a *prima facie* case of discrimination. Next the prosecutor must offer an explanation for the strike or strikes. This explanation is not required to be persuasive – just race-neutral. Lastly, the defendant must prove that the race-neutral reason is a pretext for discrimination, a step that to a large part involves the judge making credibility determinations. Implausible prosecutorial explanations are likely to be found wanting. *See Purkett v. Elem*, 514 U.S. 765, 767-68 (1995).

Judge Guy found that the district court's credibility determination that the prosecutor did not have discriminatory intent was not clearly erroneous. Judge Clay speaking for the Court, however, found that the prosecutor's reasoning was facially pretextual on the issue of prior jury service:

> [T]he prosecutor's explanations would have been revealed as pretextual had the district court engaged in an adequate comparison between juror 194 and the similarly situated white juror who was seated. As the Supreme Court noted in *Miller-El v. Dretke,* 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005), a district court's consideration of the totality of the circumstances surrounding a strike should include consideration of the prosecutor's stated reasons as well as a comparison between the affected juror as well as others who went unchallenged. "If a prosecutor's proffered reason for striking a black panelist equally applies to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Id.* at 2325. Proper application of a "comparative juror analysis" bears this point out.

Judge Clay also addressed the government's argument that the two jurors were differently situated because the white juror was not going through a divorce:

As the Supreme Court noted in *Miller El v. Dretke*, a "per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." 125 S.Ct. at 2329 n. 6.

***United States v. Bell*,**
516 F.3d 432 (2008), before Clay and Keith, Circuit Judges and Steeh, District Judge.

Under Federal Rule of Evidence 404(b) (analogous to KRE 404(b)) the defendant must do more than deny knowledge of the current crime for prior bad acts to become admissible under absence of mistake or accident. Further, under the intent portion of FRE 404(b), a defendant's prior bad acts must share a *modus operandi* and/or be part of the same criminal scheme to be admissible.

Judge Clay wrote the court's opinion, joined by Judge Keith, reversing Bell's conviction. Judge Steeh dissented.

Bell was tried for drug trafficking. The police seized 94 grams of crack cocaine and 11,071 grams of marijuana, each packaged for individual sale, at a residence at which testimony established Bell often stayed. Bell was arrested at the residence. $1800 was found on his person. Bell's defense was that he was unaware that there were drugs in the house. He offered a witness who testified that he lived elsewhere.

The district court allowed the government to put Bell's four prior convictions for distributing either cocaine or marijuana before the jury. The most recent of these convictions was from five years before the instant case. The district judge allowed the evidence under the theory that it was admissible for the purposes of both (1) absence of mistake or accident or (2) intent.

The Court found that the prior convictions did not qualify under the theory of absence of mistake or accident. While the district judge ruled that Bell's defense of lack of knowledge allowed the government to counter that the drugs were not mistakenly or accidentally at the home, the Court found that this was an attenuated reading of this portion of 404(b). The Court stated:

Absence of mistake or accident is one of the permissible purposes listed in Rule 404(b). However, "the government's purpose in introducing the evidence must be to prove a fact that the defendant has placed, or conceivably will place, in issue, or a fact that the statutory elements obligate the government to prove."

The Court found that Bell never argued that he "was mistaken about the narcotic nature" of the drugs; rather, Bell argued he had never seen the drugs.

By contrast, the Court did find that the district court was correct that the prior convictions were evidence of Bell's intent to distribute drugs. Further, intent was an element of the crime that the government needed to prove. However, because the prior convictions were not part of the same common scheme or plan and because they did not share the same *modus operandi*, the government could not use them. The priors were not probative of Bell's *present* intent to distribute drugs. Without some nexus to the current offense, their admission only informed the jury that "because Bell has distributed drugs in the past, it is likely that he was doing so in the present case."

Lastly, the Court weighed whether the error was harmless. Because no witness actually said that Bell had possession of the drugs and because there were competing stories as to whether Bell lived at the house, the Court found that the error was not harmless.

Judge Steeh, in dissent, would have found that the district court did not abuse its discretion in admitting the evidence. He felt the Court did not give proper deference to the prejudicial versus probative weighing done below. He saw the prior convictions as probative because they diminish "the likelihood that [Bell] innocently overlooked the illegal contraband within the residence, and also diminish the chances that these items were planted or left at the residence by someone else."

***Gray v. Moore*,**
520 F.3d 616 (2008), before Kennedy, Martin and Cole, Circuit Judges.

The Court found that *Illinois v. Allen* requires that a trial judge must warn a defendant, who has made an outburst during trial, before removing him.

Judge Cole delivered the opinion for the unanimous Court.

Matthew Gray killed his brother in the course of a family feud over their incapacitated father's property. Gray went to his brother's house and confronted him over the selling of a piece of their father's construction equipment. After an argument, Gray shot his brother. Gray then sought out his brother's girlfriend, who was hiding under a bed, and he put his gun to her head. Gray forced her to another room. Twice Gray left the girlfriend to fire additional shots into his brother. The second time he did this, the girlfriend escaped the house. Gray then fled.

Gray subsequently turned himself into the police. He claimed that the crime was an accidental discharge of the weapon. He also said that he had never threatened the girlfriend. Gray was charged with the murder of his brother and the kidnapping of the girlfriend.

During Gray's trial, his brother's girlfriend took the stand. During the portion of her testimony when she was describing Gray putting the gun to her head, Gray made several outbursts in front of the jury. He repeatedly stated that she was "Lying!"

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The Judge removed Gray from the courtroom. The Judge gave Gray no prior warning before removing him.

Gray lost his appeals in state court and subsequently filed a federal habeas. One of his claims was that the trial judge had removed him from the courtroom without first giving him a warning as required by *Illinois v. Allen*, 397 U.S. 337 (1970). The district court found that the United States Supreme Court had not made a warning a prerequisite to removal of a disruptive defendant.

The Circuit Court reversed in part. The Court found that *Illinois v. Allen*'s text required at a minimum a warning before removal. The Court reversed the kidnapping conviction because Gray was removed during the testimony of the only witness against him as to this charge. The Court, however, did not reverse as to the murder conviction. The Court noted the uncontroverted evidence of multiple shots to the back of the brother's torso and the back of the brother's head.

***Jeffries v. Morgan*,**
522 F.3d 640 (2008), before Martin and Sutton, Circuit Judges and Oberdorfer, District Judge.

The Court found that for certain habeas claims that the entire state court record must be before the district court.

Judge Martin delivered the opinion for a unanimous court.

Billy Jeffries appealed the denial of his habeas corpus action. Jeffries was convicted in Kentucky of murder. He claimed that there was insufficient evidence to sustain his conviction and that the prosecution had violated *Brady v. Maryland*. The district court denied his habeas claims despite a pending motion by Jeffries to expand the habeas record to include the entirety of the state court record. After adversely deciding Jeffries' two claims, the district court found that the motion to expand the record was moot.

The Circuit Court reversed. The Court found that Jeffries' two challenges to his conviction were claims that either rose or fell on the complete record. Further, Jeffries disputed the state courts' assessment of the record. The Court remanded back to the district court to expand the record and then consider anew Jeffries' claims.

***Bell v. Bell*,**
512 F.3d 223 (2008), 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.

Additionally, the Court reaffirmed that a *Brady* violation cannot occur regarding exculpatory evidence available to a defendant from another 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 of 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.
>
> 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.
>
> 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: (1) by the prosecution not turning over the tacit agreement between Davenport and Miller, (2) by the prosecution not turning over Miller's notes of his conversation with Davenport, and (3) 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 *en banc* 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 Davenport had been otherwise adequately impeached. The Court also found that no *Brady* violation occurred regarding

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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.

***Wilkins v. Timmerman-Cooper*,**
512 F.3d 768 (2008), 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. ■

Fourth Amendment Case Review: The Unrecognizable Fourth Amendment

By Jamesa J. Drake, Appeals Branch

The Fourth Amendment is in peril. In 2002, the President declared Jose Padilla, an American citizen, to be an "enemy combatant." Padilla was imprisoned in a Naval Brig in South Carolina for more than three years. He was allegedly shackled, blindfolded, and held in solitary confinement. He was not arraigned, and no probable cause hearing preceded Padilla's detention. The Padilla case reached the Supreme Court, but the Court did not decide the case on the merits. The Fourth Circuit has since struck down the detention of "enemy combatants," but on due process – not Fourth Amendment – grounds.

In 2006, the President acknowledged that, despite his earlier statements to the contrary, he had secretly authorized the National Security Agency (NSA) to intercept Americans' telephone calls and e-mail messages without probable cause and without a court order. Reportedly, the NSA has since amassed data on tens of millions of people unsuspected of any crime. The Sixth Circuit dismissed a challenge to the wiretapping without a warrant program on the ground that the plaintiffs lacked standing. President-elect Obama voted in favor of legislation to grant immunity to the telecommunications companies that cooperated with the wiretapping program. *See* Jed Rubenfeld, *The End of Privacy*, 61 Stan. L. Rev. 101 (2008) (discussing infringements on privacy during the Bush Administration).

In 2007, the United States Supreme Court decided *Hudson v. Michigan*, which held that a clear Fourth Amendment violation of the knock-and-announce rule did not require the suppression of evidence. In his concurring opinion, Justice Kennedy wrote to clarify that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt." But the dissenters and many legal commentators remain skeptical.

In the months ahead, this column will examine significant case law developments in Fourth Amendment jurisprudence. This first column, however, will very briefly review the origins and early applications of the Fourth Amendment.

The *only* way for us, as a nation, to walk back from the precipice of "enemy combatants," warrantless wiretaps, and the selective use of the exclusionary rule, is for us, as criminal defense attorneys, to convince the courts that they have strayed from the original meaning of the Fourth Amendment. We must pattern the debate over the continuing validity and application of the Fourth Amendment after our colleagues who litigate Second Amendment issues. We must constantly ask ourselves and the court: What did the Framers intend?

Not surprisingly, what the Federal Framers *actually* intended is open to debate. Professor Akhil Amar's research on the subject, in particular, is hotly contested. *See, e.g.*, Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547 (1999) (refuting Professor Amar's conclusions). I do not delve into the details here. This column simply outlines the search and seizure practices that were in existence in Revolutionary America. By understanding the way the criminal justice system operated when the First Congress adopted the Fourth Amendment (1789) and the states ratified it (1791), we get a better gut-level feeling for what the Framers would – and would not – have tolerated today. I do not argue here, as Justices Scalia and Thomas do, that framing-era common law doctrine should *always* be consulted as the starting point for analyzing constitutional search and seizure issues. *See, e.g., Virginia v. Moore*, __ U.S. __, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008) (articulating one methodology for constitutional construction). Rather, I side with the Kentucky-born Pulitzer Prize-winning poet Robert Penn Warren. I agree that "the past is always a rebuke to the present."

Today, criminal law is thought of as a dispute between the accused and the state. The exclusionary rule is a very modern invention. For most of our history, criminal law was thought of as a dispute between private citizens. State-funded law enforcement was largely nonexistent in the late-eighteenth century. There were no police departments in the colonies or early states, and there were no professional law enforcement officers. Each parish or ward typically employed one part-time constable, who was expected to preserve order by responding to disturbances. A constable was not expected to prevent or to investigate criminal activity. He could not take a criminal complaint, and he could not, under the color of his own authority, arrest a subject or search the premises.

Moreover, a constable needed the prior approval of the justice of the peace, the lowest ranking judicial officer, before he could act. Scholars unanimously agree that the Framers (and their English predecessors) shared a deeply-held, innate distrust of the judgment of ordinary police officers and a steadfast belief that "a petty officer" should not decide for himself when to search or seize.

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A constable who exceeded his authority faced very serious consequences. Both before and (long) after the Revolution, a police officer could expect to be sued personally for trespass or malicious prosecution for initiating an illegal arrest or seizure. And it was up to a jury to decide whether the constable's search or seizure was unreasonable. If it were, the police officer would be obliged to pay heavy damages. The infamous *Wilkes* case, which is widely viewed as a significant motivation for the Warrants Clause, was one such lawsuit; the jury ordered the officers who executed a (general) search warrant to pay trespass damages to Wilkes.

Constables raised "the defense of probable cause" in trespass and malicious prosecution cases. It was up to the jury to decide whether probable cause existed and justified the constable's actions. For a full exposition of the common law history of probable cause, *see, e.g.*, Davies, *supra;* Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical View*, 77 B.U. L. Rev. 925 (1997); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994).

Holding police officers personally liable for their mistakes – as the primary mode of remedying Fourth Amendment violations – continued for a remarkably long time. For example, in 1897, over one hundred years after the ratification of the Fourth Amendment, the Kentucky Court of Appeals explained that "police judges" and those who aid them are "personally responsible" for their actions, and "appellant must look alone to them for redress, the charge being an offense against the general law of the state, for the wrong and illegal trespass and injury." *Fox v. City of Richmond*, 19 Ky. L. Rptr. 326 (1897).

In 1916, the Kentucky Court of Appeals reiterated: "This court has uniformly held that if a defendant [in this case, the sheriff of Jefferson County] could show that, before he procured the order of arrest of the plaintiff, he laid the facts before a competent attorney and fairly obtained his advice that the defendant in the prosecution was guilty, this could constitute probable cause for instituting the prosecution, and consequently a defense to an action to recover damages therefore. … [I]f the facts relied upon to establish probable cause are disputed, the question of the existence of probable cause should be submitted to the jury…." *Emler v. Fox et al.*, 189 S.W. 469 (Ky. App. 1916).

The notion that police officers were not to be trusted with the authority to search and seize on their own volition, or that an officer should expect to answer personally to a jury of his peers any time he acted without sufficient cause – the bedrock principles that the Framers espoused – has long since been discarded. Inexplicably, and in the name of actually affording less discretionary authority to police officers, these principles have been replaced with a myriad of bright-line rules, most of which threaten to undermine the personal autonomy that the Founders zealously guarded.

The Fourth Amendment, at its core, guarantees "the right of the people to be secure in their persons, houses, papers, and effects…" The "right to be secure," as the Framer's understood it, is analogous to the "right to be left alone," a so-called "fundamental right" embodied by the Fourteenth Amendment. In 1886, the United States Supreme Court explained the Framer's intent thusly: "It is not the breaking of his door, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense…." *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886).

If we bear that in mind – if we turn our focus and the court's focus – to the original intent of the Framers, *i.e.*, to strictly limit police discretion and prohibit arbitrary infringements on personal autonomy, we help our clients and ourselves. And the test by which we measure the legality of police action becomes easier to apply.

A person is not "secure" if she may, at any time and for any unarticulated reason, be declared an "enemy combatant." A person is not "secure" in her papers and effects when the government surreptitiously copies and preserves them indiscriminately. People are not "secure" when the exceptions to the warrant requirement swallow the warrant requirement itself.

Professor Amar has aptly summarized the Fourth Amendment frustrations, felt by defense attorneys and prosecutors alike, as follows: "The Fourth Amendment today is an embarrassment. … Warrants are not required – until they are. All searches and seizures must be grounded in probable cause – but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes say so." Amar, *supra.*

Of course, Kentucky could quite easily turn its back on the recent contortions of the Fourth Amendment. The Kentucky Supreme Court could simply state the obvious: whatever the United States Supreme Court may decide with regard to the Fourth Amendment, the Kentucky Supreme Court remains free to reach a different decision under Section 10 of the Kentucky Constitution. Every time a Kentucky Court declares that the Kentucky Constitution confers "the same" rights as the federal Constitution, Thomas Jefferson turns over in his grave. Our state constitution is in no way tethered to the federal Constitution. Until we acknowledge our Kentucky Founders with more than a passing reference and encourage our courts to do the same, we are stuck with the Fourth Amendment as both the "floor" and the "ceiling" in search and seizure cases. It does not have to be that way.

The Fourth Amendment today would likely be unrecognizable to our Federal Founders (and our Kentucky Founders, too). We must convince our courts to look first, and independently, to the Kentucky Constitution. And we must return to Fourth Amendment first principles. ■

CAPITAL CASE REVIEW

By David M. Barron
Capital Post Conviction Branch

Supreme Court of the United States

Kelly v. California and Zamudio v. California,
129 S.Ct. 567 (2008)
(*Breyer, J., dissenting from the denial of certiorari*)
Justice Breyer would have granted *certiorari* to determine whether the admissibility of a film about the victim's life goes beyond the permissible limits of victim impact evidence because deciding that issue and providing examples of what would not be admissible "can help elucidate constitutional principles."

Kelly v. California and Zamudio v. California,
129 S.Ct. 564 (2008)
(*Stevens, J., dissenting from the denial of certiorari*)
Justice Stevens reiterated his viewpoint that victim impact evidence should not be admissible in capital cases and thought *certiorari* should be granted either to overrule law allowing victim impact evidence at the sentencing phase or, at least, to "provide the lower courts with long-overdue guidance on the scope of admissible victim impact evidence." Stevens believes that "[h]aving decided to tolerate the introduction of evidence that puts a heavy thumb on the prosecutor's side of the scale in death cases, the Court has a duty to consider what reasonable limits should be placed on its use." As for this case, he believed that the victim impact videos introduced were "especially prejudicial" because the videos were "emotionally evocative," "not probative of the culpability or character of the offender or the circumstances of the offense," and not "particularly probative of the impact of the crimes on the victims' family members." Instead, they "portrayed events that occurred long before the respective crimes were committed and that bore no direct relation to the effect of crime on the victims' family members." Justice Stevens also believes that "when victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming."

***Vail v. Stenson,* 129 S.Ct. 537 (2008)**
(*Stevens, J., concurring in vacating the stay of execution; joined by, Ginsburg, J.*)
After the state court denied a stay of execution and decided under state law that it did not need more time to decide Stenson's lethal injection challenge, the federal district court granted a stay of execution so the state court could have more time to fully and fairly consider the merits of Stenson's lethal injection challenge. Justice Stevens believed the federal court erred by granting a stay to give the state court additional time it decided was not warranted. Stevens, however, noted that he voted to vacate the stay of execution "[i]n light of that procedural error, and on that basis alone."


David M. Barron

Walker v. Georgia,
129 S.Ct. 481 (2008)
(*Thomas, J., concurring in the denial of certiorari)*
Noting that proportionality review is not required in a capital case and relying on two prior capital decisions in Georgia cases, Justice Thomas believes that a state's failure to consider cases in which death was not imposed when conducting proportionality review of a death sentence does not render a death penalty scheme unconstitutional by creating a risk of arbitrary and capricious death sentences.

***Walker v. Georgia,* 129 S.Ct. 453 (2008)**
(*Stevens, J., respecting the denial of certiorari)*
The question presented by the *certiorari* petition was whether Georgia's current administration of the death penalty violates the Eighth Amendment's guarantee against arbitrariness and discrimination in capital sentencing because the Georgia Supreme Court failed to: 1) conduct meaningful proportionality review; and 2) enforce reporting requirements under Georgia's capital sentencing scheme. Without explaining why, Justice Stevens found that Walker's failure to raise and litigate those claims in state court provides a legitimate basis for denying *certiorari*. But, he wrote separately to "emphasize that the Court's denial has no precedential effect," and "to note that petitioner's submission is supported by our prior opinions evaluating the constitutionality of the Georgia statute." According to Justice Stevens, the Court's decision, in *Gregg v. Georgia*, 428 U.S. 153 (1976), to uphold Georgia's death penalty statute "was funded on the understanding that the new procedures the statute prescribed would protect against the imposition of death sentences influenced by impermissible factors such as race. Among the new procedures was a requirement that the Georgia Supreme Court compare each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. We assumed that the court would

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consider whether there were 'similarly situated defendants' who had not been put to death because that inquiry is an essential part of any meaningful proportionality review. That assumption was confirmed a few years later in *Zant v. Stephens*, 462 U.S. 862 (1983). . . . As in *Gregg*, our decision to uphold the sentence 'depended in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality. In response to our certified question regarding the operation of the State's capital sentencing scheme, the Georgia Supreme Court expressly stated that its proportionality review 'uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed.' That approach seemed judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court. The opinions in another Georgia case, *McCleskey v. Kemp*, 481 U.S. 279 (1987), make it abundantly clear that there is a special risk of arbitrariness in cases that involved black defendants and white victims. . . . Rather than perform a thorough proportionality review to mitigate the heightened risks of arbitrariness and discrimination . . ., the Georgia Supreme Court carried out an utterly perfunctory review. Its undertaking consisted of a single paragraph, only the final sentence of which considered whether imposition of the death penalty in this case was proportionate as compared to the sentences imposed for similar offenses. And even then the court stated its review in the most conclusory terms: 'the cases cited in the Appendix support our conclusion that petitioner's punishment is not disproportionate in that each involved a deliberate plan to kill and killing for the purpose of receiving something of monetary value.' The appendix consists of a string citation of 21 cases in which the jury imposed a death sentence; it makes no reference to the facts of those cases or to the aggravating circumstances found by the jury. Had the Georgia Supreme Court looked outside the universe of cases in which the jury imposed a death sentence, it would have found numerous cases involving offenses very similar to petitioner's in which the jury imposed a sentence of life imprisonment. If the Georgia Supreme Court had expanded its inquiry still further, it would have discovered many similar cases in which the State did not even seek death. Cases in both of these categories are eminently relevant to the question whether a death sentence in a given case is proportionate to the offense. The Georgia Supreme Court's failure to acknowledge these or any other cases outside the limited universe of cases in which the defendant was sentenced to death creates an unacceptable risk that it will overlook a sentenced infected by impermissible considerations. . . . the likely result of such a truncated review - - particularly in conjunction with the remainder of the Georgia scheme, which does not cabin the jury's discretion in weighing aggravating and mitigating factors - - is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment."

***Medellin v. Texas*, 129 S.Ct. 360 (2008)** (*per curiam)*
Medellin requested that the Court recall and stay its mandate and stay Medellin's execution so Congress would have time to act on a bill that had been introduced to implement obligations undertaken under a treaty which does not itself have the force and effect of domestic law. Finding the likelihood of the bill passing too remote, the Court denied all relief.

Stevens, J., dissenting: Justice Stevens would request the views of the Solicitor General and would grant a stay of execution so the Solicitor's views could be obtained and considered.

Souter, J., dissenting: Justice Souter invoked the rule that it is "reasonable to adhere to a dissenting position throughout the Term of Court in which it was announced," and would grant a stay of execution for the rest of the Supreme Court term to allow for a "current statement of the views of the Solicitor General and for any congressional action that could affect the disposition of petitioner's filings."

Ginsburg, J., dissenting: Justice Ginsburg would grant the stay of execution and would invite the views of the Solicitor General.

Breyer, J., dissenting: Justice Breyer believes six factors favor granting a stay of execution: 1) Mexico has returned to the International Court of Justice requesting the United States' compliance with its international obligations; and the ICJ has asked the United States take all measures necessary to ensure that Mexican nationals are not executed unless and until they receive review and reconsideration consistent with the ICJ's earlier *Avena* decision; 2) "legislation has been introduced in Congress seeking to provide the legislative approval necessary to transform our international legal obligations into binding domestic law"; 3) "prior to *Medellin*, Congress may not have understood the legal need for further legislation of this kind," which when combined with the approaching election, mean more than a few days or weeks are likely necessary for Congress to determine whether to enact the proposed legislation; 4) "to permit the execution to proceed forthwith places the United States irremediably in violation of international law and breaks our treaty obligation"; 5) "the President of the United States has emphasized the importance of carrying out our treaty-based obligations in this case", which "along with the President's responsibility for foreign affairs, makes the Executive's views of the matter pertinent"; and, 6) "different Members of this Court seem to have very different views of what this case is about." Breyer also believes the views of the Solicitor General should be sought and that a stay of execution should be granted to provide sufficient

time for "careful consideration of those views, along with the other briefs and materials filed in this suit." He then took the Court to task for failing to request the Solicitor's views: "A sufficient number of Justices having voted to secure those views (four), it is particularly disappointing that no Member of the majority has proved willing to provide a courtesy vote for a stay so that we can consider the Solicitor General's view once received. As it is, the request will be mooted by petitioner's execution, which execution, as I have said, will place this Nation in violation of international law."

***Kennedy v. Louisiana*, 129 S.Ct. 1 (2008)**

The opinion of the Court is modified by the addition of a footnote at page 15 after the word "considered" in the last paragraph of Part II-A. The footnote says "when issued and announced on June 25, 2008, the Court's decision neither noted nor discussed the military penalty for rape under the Uniform Code of Military Justice. See 10 U.S.C. §§ 856, 920; Manual for Courts-Martial, United States, Part IV, ¶45.f(1) (2008). In a petition for rehearing respondent argues that the military penalty bears on our consideration of the question in this case. For the reasons set forth in the statement respecting the denial of rehearing, we find that the military penalty does not affect our reasoning or conclusions."

Justices Thomas and Alito would grant the petition for rehearing but did not say why.

(Kennedy, J., respecting the denial of rehearing in merits case; joined by, Stevens, Souter, Ginsburg, and Breyer, JJ.)

Noting that the military death penalty has not been carried out since 1961, and only six people are currently on military death row (all for murder), the Court held "authorization of the death penalty in the military sphere does not indicate that the penalty is constitutional in the civilian context." None of the Court's recent death penalty cases mentioned military law. Thus, the Court held that military law "does not draw into question our conclusions that there is consensus against the death penalty for the crime in the civilian context and that the penalty here is unconstitutional. The laws of the separate States, which have responsibility for the administration of the criminal law for their civilian populations, are entitled to considerable weight over and above the punishments Congress and the President consider appropriate in the military context. The more relevant federal benchmark is federal criminal law that applies to civilians, and that law does not permit the death penalty for child rape."

(Scalia, J., respecting the denial of rehearing; joined by, Roberts, C.J.)

They voted against rehearing because the views of the American people on the death penalty for child rape were irrelevant to the majority's decision, and there is no reason to believe that absence of a national consensus would change the majority's decision.

***Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008)**

(*Kennedy, J., for the Court, joined by, Stevens, Breyer, Souter, and Ginsburg, JJ.; Alito, J., dissenting, joined by Roberts, C.J., Scalia, and Thomas, JJ.*)

The Louisiana Supreme Court held that the Eighth Amendment does not prohibit the death penalty for child rape that did not result in murder even though it prohibits the death penalty for the rape of an adult. The Supreme Court granted *certiorari*. It began its analysis by pointing out "[e]volving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule." Thus, "punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution. It is the last of these, retribution, that most often can contradict the law's own ends. This is of particular concern when the Court interprets the meaning of the Eighth Amendment in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint. For these reasons we have explained that capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution. Though the death penalty is not invariably unconstitutional, the Court insists upon confining the instances in which the punishment can be imposed. Applying this principle, we held in *Roper* and *Atkins* that the execution of juveniles and mentally retarded persons are punishments violative of the Eighth Amendment because the offender had a diminished personal responsibility for the crime. The Court further has held that the death penalty can be disproportionate to the crime itself where the crime did not result, or was not intended to result, in death of the victim. . . . In these cases the Court has been guided by objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions. The inquiry does not end there, however. Consensus is not dispositive. Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose. Based both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments."

Objective indicia of consensus against executing for child rape: In 1925, 18 states, the District of Columbia, and the Federal Government authorized the death penalty for the rape of a child or an adult. The last execution for the rape of a child occurred in 1964. After *Furman* invalidated the death penalty statutes in the United States, only six states reenacted their capital rape provisions, and only three of

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them authorized death for the rape of a child. All six statutes were later invalidated under state or federal law. In 1995, Louisiana enacted a statute authorizing the death penalty for child rape. Since then, five additional states have done so, but four of them only authorize it where the offender had previously been convicted of rape. By contrast, 44 states have not made child rape a capital offense. After considering these statistics to suggest a consensus against the death penalty for all child rape, the Court compared the number of states without the death penalty for child rape to the number of states that prohibited executing the mentally retarded when *Atkins* was decided and the number of states that prohibited execution juveniles when *Roper v. Simmons* was decided, finding that the number is greater here than was the case in those situations.

The possibility that some states may have construed a prior Supreme Court decision to bar the death penalty for any rape does not undermine the legislative consensus against executing people for child rape: The Court concluded that the language it used in *Coker* to strike down the death penalty for the rape of an adult made clear that its holding was limited to the rape of an adult. Specifically, the *Coker* Court framed the issue before it as whether "with respect to the rape of an adult woman," the death penalty is disproportionate punishment. *Coker* also repeated the phrase "adult woman" or "an adult female" in discussing the act of rape or the victim of rape eight times, and the distinction between adult and child rape was "central to the Court's reasoning." Indeed, *Coker* noted that some states authorize the death penalty in rape cases "but only where the victim was a child and the rapist an adult" and "only two other jurisdictions provide capital punishment when the victim is a child." *Coker* then concluded, that "obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." Aside from the language of *Coker*, the Court found little evidence, other than speculation, that states misunderstood *Coker* to prohibit the death penalty for child rapists and thus did not enact statutes authorizing the death penalty for it. Indeed, as the Court noted, the state courts that have addressed the issue since *Coker* have uniformly held that *Coker* does not address the constitutionality of the death penalty for child rape.

No consistent change in the direction of allowing the death penalty for child rape has been shown: The court acknowledged that "[c]onsistent change might counterbalance an otherwise weak demonstration of consensus," but held that "no showing of consistent change has been made in this case." In so ruling, the court refused to consider pending legislation, and concluded that six new statutes allowing the death penalty for child rape, including three in the past two years, pales in consideration to the data in *Atkins* where 18 states between 1986 and 2001 had enacted legislation prohibiting the execution of the mentally retarded and also in comparison to *Roper v. Simmons* where the total number of states prohibiting the death penalty for juveniles was significantly higher than the number of states allowing the death penalty for child rape.

The number of people on death row for child rape and the number of people executed for rape also show a consensus against it: Although nine states allow the death penalty for adult or child rape, no one has been executed for rape since 1964 and no execution for any other non-homicide offense has taken place since 1963. Further, Louisiana is the only state since 1964 that has sentenced a person to death for the crime of child rape and only two people are now on death row for the rape of a child. This data, held the Court, also shows a national consensus against capital punishment for the crime of child rape.

The Court's own judgment is that the death penalty for child rape is disproportionate to the offense: The Court acknowledged that "there are moral grounds to question a rule barring capital punishment for a crime against an individual that did not result in death," including "rape has a permanent psychological, emotional, and sometimes physical impact on the child," and more generally, "the victim's fright, the sense of betrayal, and the nature of [the victim's] injuries cause more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin." Yet, the Court concluded that does not mean the death penalty is proportionate to the offense for "[i]t is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment." The Court's response to that "has been to insist upon confining the instances in which capital punishment may be imposed." Thus, in its independent judgment, the Court concluded that "the death penalty should not be expanded to instances where the victim's life was not taken." In reaching that conclusion, the Court "[found] significant the number of executions that would be allowed under respondent's approach. The crime of child rape, considering its reported incidents, occurs more often than first-degree murder." Only 2.2% of convicted first-degree murderers are sentenced to death. "But under respondent's approach, the 36 States that permit the death penalty could sentence to death all persons convicted of raping a child less than 12 years of age. This could not be reconciled with our evolving standards of decency and the necessity to constrain the use of the death penalty," particularly since rape cases will often "overwhelm a decent persons' judgment" thereby leaving the Court with "no confidence that the imposition of the death penalty would not be so arbitrary as to be freakish." Finally, the Court concluded, "beginning the same process [the Court spent more than 32 years articulating for the death penalty for murder] would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty. Evolving standards of decency are difficult to reconcile with a regime that seeks to

expand the death penalty to an area where standards to confine its use are indefinite and obscure."

The death penalty does not serve the social purposes of the death penalty – retribution and deterrence: The Court noted that it "cannot be said with any certainty that the death penalty for child rape serves no deterrent or retributive function," but held that cannot overcome the other reasons for not allowing the death penalty for child rape. Particularly, "if the death penalty adds to the risk of non-reporting [of child rape], that, too, diminishes the penalty's objective." As the amici noted, according to the Court, where the perpetrator is a family member and the punishment is death, it is more likely that the crime will not be reported. Thus, the death penalty for child rape "may not result in more deterrence or more effective enforcement." Further, "by in effect making the punishment for child rape and murder equivalent, a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim." As for retribution, the Court noted that "[i]t is not at all evident that the child rape victim's hurt is lessened when the law permits the death of the perpetrator. Capital cases require a long-term commitment by those who testify for the prosecution, especially when guilt and sentencing determinations are in multiple proceedings. In cases like this, the key testimony is not just from the family but from the victim herself.... Society's desire to inflict the death penalty for child rape by enlisting the child victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice. The way the death penalty here involves the child victim in its enforcement can compromise a decent legal system; and this is but a subset of fundamental difficulties capital punishment can cause in the administration and enforcement of laws proscribing child rape.

Systematic concerns about prosecuting child rape favor not allowing the death penalty for it: "The problem of unreliable, induced, and even imagined child testimony means there is a special risk of wrongful execution in some child rape cases. This undermines, at least to some degree, the meaningful contribution of the death penalty to legitimate goals of punishment."

Note: The Court expressly said its ruling is "limited to crimes against individual persons," and it does not address "crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State."

Alito, J., dissenting: Justice Alito believed dicta in *Coker* "stunted legislative consideration of the question whether the death penalty for the targeted offense of raping a young child is consistent with prevailing standards of decency," thereby preventing the Court from drawing any legislative consensus against the death penalty for child rape. Alito also concluded that the recent adoption of statutes allowing the death penalty for child rape represents a trend towards allowing the death penalty for child rape. In sum, Alito believes the objective indicia of society's evolving standards of decency can be summarized as follows: "Neither Congress nor juries have done anything that can plausibly be interpreted as evidencing the national consensus that the [majority] perceives. State legislatures, for more than 30 years, have operated under the ominous shadow of *Coker* dicta and thus have not been free to express their own understanding of our society's standards of decency. And in the months following our grant of *certiorari* in this case, statute legislatures have had an additional reason to pause. Yet despite the inhibiting legal atmosphere that has prevailed since 1977, six States have recently enacted new, targeted child-rape laws. I do not suggest that six new state laws necessarily establish a national consensus or even that they are sure evidence of an ineluctable trend. In terms of the Court's metaphor or moral evolution, these enactments might have turned out to be an evolutionary dead end. But they might also have been the beginning of a strong new evolutionary line. We will never know, because the Court today snuffs out the line in its incipient stage." Justice Alito also believes the policy arguments are not pertinent to a constitutional analysis. Finally, Alito concluded that a child rapist is more depraved then a person who commits a robbery and watches his accomplice kill the store owner, yet the latter is, under Supreme Court law, eligible for the death penalty. On the whole, Alito believes: 1) the majority's "holding is not supported by the original meaning of the Eighth Amendment; 2) neither *Coker* nor any other prior precedent commands this result; 3) there are no reliable objective indicia of a national consensus in support of the Court's position; 4) sustaining the constitutionality of the state law before us would not extend or expand the death penalty; 5) this Court has previously rejected the proposition that the Eighth Amendment is a one-way ratchet that prohibits legislatures from adopting new capital punishment statutes to meet new problems; 6) the worst child rapists exhibits the epitome of moral depravity; and, 7) child rape inflicts grievous injury on victims and on society in general."

Certiorari Grants

***District Attorney's Office v. Osborne*, No. 08-6, decision below, 521 F.3d 1118 (9th Cir.) (non-capital)**

1. May Osborne use §1983 as a discovery device for obtaining post-conviction access to the state's biological evidence when he has no pending substantive claim for which that evidence would be material?

2. Does Osborne have a right under the Fourteenth Amendment's Due Process Clause to obtain post-conviction access to the state's biological evidence when the claim he intends to assert – a freestanding claim of innocence – is not legally cognizable?

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***Harbison v. Bell*, No. 07-8521,**
decision below, 503 F.3d 566 (6th Cir.)
Every jurisdiction that authorizes the death penalty provides for clemency, which is of vital importance in assuring that the death penalty is carried out justly. But, in this case the District Court held Mr. Harbison's federally-funded lawyers could not present, on his behalf, a clemency request to Tennessee's governor. The denial of clemency counsel contravenes basic principles of justice as Chief Justice Rehnquist noted in *Herrera v. Collins*.

Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted. Indeed, the clemency power exists because "the administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt." Thus, executive clemency is the "fail safe in our criminal justice system." A system which includes capital punishment but does not provide a meaningful opportunity for executive clemency is "totally alien to our notions of criminal justice."

Yet, the lower courts arbitrarily denied Mr. Harbison's federally-funded habeas counsel permission to represent him in state clemency proceedings after the State had denied him counsel for that purpose. The District Court and the Court of Appeals for the Sixth Circuit not only defied Congress' explicit directions to provide clemency counsel for the condemned, but denied Mr. Harbison a meaningful opportunity to present compelling facts mitigating his guilt and the punishment of death to the only person presently able to consider them, the Governor of the State of Tennessee.

Equally troubling, the Sixth Circuit barred Harbison from appealing the denial of clemency counsel by refusing to grant a certificate of appealability on the issue.

In order to harmonize the law of the circuits and to decide an important issue regarding the appeals court's jurisdiction, this Court should resolve the following questions:

1. Does 18 U.S.C. §3599(a)(2) and (e) (recodifying verbatim former 21 U.S.C. §848(q)(4)(B) and (q)(8)), permit federally-funded habeas counsel to represent a condemned inmate in state clemency proceedings when the state has denied state-funded counsel for that purpose?

2. Is a certificate of appealability required to appeal an order denying a request for federally-funded counsel under 18 U.S.C. §3599(a)(2) and (e)?

***Cone v. Bell*, No. 07-1114,**
decision below, 492 F.3d 743 (6th Cir.)
On state post-conviction review, the Tennessee courts refused to consider petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), on the ground that the claim had already been "previously determined" in the state system. On federal habeas, a divided panel of the Sixth Circuit held the state courts' ruling precluded consideration of the *Brady* claim. The court of appeals reasoned (in conflict with decisions of five other circuits) that the claim had been 'procedurally defaulted.' The court of appeals further reasoned (widening an existing four-to-two circuit split) that the state courts' ruling was unreviewable. Seven justices dissented from the denial of rehearing en banc.

The question presented is whether petitioner is entitled to federal habeas review of his claim that the State suppressed material evidence in violation of *Brady v. Maryland*, which encompasses two sub-questions:

1. Is a federal habeas claim 'procedurally defaulted' because it has been presented twice to the state courts?

2. Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?

United States Court of Appeals for the Sixth Circuit

***West v. Bell*, 2008 WL 5245683 (6th Cir.)**
(*Boggs, C.J. for the Court; joined by, Norris, J.; Moore, J., dissenting)*

Standard of review: The denial of habeas relief is a question of law reviewed de novo. A district court's factual findings are reviewed for clear error, except when the findings are based on the district court's review of state court trial transcripts or other court records, in which case they are reviewed de novo.

AEDPA allows considering ineffective assistance of counsel claims decided after the conviction became final: The Sixth Circuit held that "[t]hough AEDPA constrains the court to the law as clearly established at the time the state conviction became final, this Court may rely on any later decisions analyzing or explaining the law (as opposed to creating new law). *Strickland* was clearly established well before West's criminal trial concluded in 1987. We can rely on *Rompilla*, *Wiggins* and *Williams* because they merely explain *Strickland*."

The state courts stated the wrong standard for prejudice in an ineffective assistance of counsel claim: Although the state courts cited *Strickland*, the Sixth Circuit held they used the wrong standard for proving prejudice by applying the "preponderance of the evidence" burden of proof rather than a "reasonable probability" and by ruling that "an analysis focusing solely on mere outcome determination without attention to whether the result of the proceeding was fundamentally unfair or unreliable is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle

him." Because of that, the state court's decision was an unreasonable application of clearly established federal law.

Trial counsel's lack of investigation of mitigating evidence was not ineffective assistance of counsel: West emphasized the following facts as evidence of counsel's ineffectiveness: 1) defense counsel interviewed only West, his parents, and one sister, and they opted not to conduct separate interviews of West's siblings outside of the presence of his parents; 2) while defense counsel hired an expert to conduct a mental health examination of West to determine his competency and any bases for an insanity-type defense, counsel did not hire a second expert to testify at the sentencing phase; 3) counsel failed to investigate West's employment records or interview West's employers; 4) counsel failed to introduce West's school records, though apparently they did subpoena them; 5) counsel did not introduce West's military records; and, 6) counsel failed to subpoena or examine West's medical records. According to the court, "the most significant alleged error – the failure to adequately investigate West's past abuse – is also the most contested." The trial attorneys denied they were informed of the abuse, West, specifically denied being abused, and the experts disagree over whether West's evaluations contain evidence of abuse. "As for West's other objections, the record demonstrates that West's counsel, in fact, did a fair amount of investigation in preparation for the mitigation phase. West's defense counsel interviewed West's family multiple times. They met individually with West's sister, Debbie, multiple times. They examined numerous historical records. Even if they could not remember doing so (which is understandable considering that ten years had elapsed between West's criminal trial and the post-conviction hearing), the record demonstrates that they subpoenaed West's school records. Indeed, West testified that he had been on the honor roll and in the Beta Club. They also examined West's military record but made a decision not to put it into evidence as the record noted that West had a pattern of misconduct. . . . The attorneys also investigated West's mental state." The evaluation of the expert they employed to determine competency and sanity did not lead counsel to believe anything along the lines of "long-term personality disorder" as diagnosed in post conviction. Defense counsel also requested funds for an additional expert, but the court denied it because West had objected to the trial court's sua sponte ordering of a psychological examination to determine competency. The Sixth Circuit then held West's lack of cooperation with the competency evaluation, by virtue of objecting to it, was why counsel did not discover some mitigating evidence since that was the reason funds for an additional expert were denied. For these reasons, the court held trial counsel's performance was not deficient. The court also held that the presentation of the unfound mitigating evidence would was not sufficient to create a reasonable probability of a different outcome because the evidence of abuse and violence could have led the jury to believe "violence begets violence and thus West's past abuse made him the kind of person who could have raped and tortured a fifteen year-old girl. They might have despised West and sentenced him to death with greater zeal."

West did not procedurally default his exclusion of evidence claims: The state argued that West procedurally defaulted his claim by raising it solely as a matter of state law before the state courts. Although West did not cite federal law in his subsection on one of the witness' testimony, he did cite federal law in the argument concerning a tape recording and concluded both sections by arguing that the exclusion of the evidence violated "Due Process rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution." Under Supreme Court law, "a litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in state court. . . by citing in conjunction with the claim the federal source of law . . . or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.' The Sixth Circuit also ruled a federal claim is fairly presented to a state court by: 1) reliance upon federal cases employing constitutional analysis; 2) reliance upon state cases employing federal constitutional analysis; 3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or, 4) alleging facts well within the mainstream of constitutional law. Applying this, the Sixth Circuit held West preserved his federal claim by referring to the United States Constitution in the summary of his argument. The Sixth Circuit also noted that the state court analyzing the claim only under state law is irrelevant because a state court's failure to analyze a petitioner's federal claim does not deprive the federal court of jurisdiction. Finally, the Sixth Circuit held West's argument that prosecutorial argument was "highly prejudicial and improper" sufficiently preserved a federal claim because it used language contained in a prior Sixth Circuit case dealing with improper prosecutorial argument.

The state court ruling excluding evidence was not contrary to Supreme Court law: In *Chambers v. Mississippi*, the Supreme Court ruled that a defendant must be allowed to introduce testimony that another person confessed to the murder even if the testimony was hearsay. However, in contrast to West's case, the state's theory in *Chambers* was that there was only a single shooter. As a result, the testimony West sought to introduce showing the codefendant intended to kill the victim could neither refute the state's theory nor exculpate West. Thus, the Sixth Circuit held that the state court's decision to exclude the testimony as hearsay was not contrary to *Chambers*. Likewise, the Sixth Circuit held that the exclusion of evidence because the declarant was unavailable for cross-examination because the declarant invoked the Fifth Amendment was not contrary to *Chambers* because, in *Chambers*, the declarant was available for cross examination.

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The prosecutor did not minimize the jury's sentencing responsibility: In *Caldwell v. Mississippi*, the Supreme Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." Relying on that, West argued the prosecutor diminished the jury's responsibility by informing it that "the law is self-executing," the law "provides the punishment, not you," and "you don't impose the sentence, the law provides the sentence, you are merely finders of fact" The Tennessee courts agreed that these comments violated *Caldwell* but found the error harmless. The Sixth Circuit, however, distinguished these comments from *Caldwell* on the basis that the Caldwell prosecutor told the jury that the responsibility for determining the appropriateness of a death sentence did not rest with them but rather with the appellate court which would later review the case and the *Caldwell* judge then told the jury that its decision would automatically be reviewed by the state supreme court. By contrast, West's prosecutor told the jury that it was the prosecutor's duty to prove aggravating factors and the jury's duty to weigh the evidence and then decide if there were aggravating factors and if those factors were outweighed by any mitigators, and the judge instructed the jury that it was their duty to fix West's punishment. Because of this difference and because the prosecutor corrected the statements that allegedly minimized West's jury's role, the Sixth Circuit held that the state court's ruling that the *Caldwell* error was harmless was not an unreasonable application of clearly established federal law.

Prosecutor's comments in closing argument did not require reversal: Prosecutorial misconduct in argument requires reversal if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." "It is improper to personally attack defense counsel or argue that counsel is attempting to mislead the jury." Further, "a prosecutor should not give his own opinion as to the credibility of witness." Although agreeing that the prosecutor asserted his personal opinion as to West's credibility, the Sixth Circuit found the error harmless given the evidence before the jury that West had contradicted himself on numerous occasions and had given the jury various accounts of the crime. The court also held that any other improper comments were harmless because none were lengthy remarks in a closing argument that took thirty pages of transcript.

Moore, J., dissenting: Moore believes trial counsel was ineffective for failing to adequately investigate and present mitigating evidence. As Moore noted, "counsel has an independent duty to investigate mitigating evidence, even if the defendant is reluctant" and must conduct a reasonable investigation before making tactical decisions regarding what evidence to present. She found the following evidence established trial counsel's ineffectiveness: 1) "two seasoned attorneys who had tried several capital cases testified during the post-conviction hearing that counsel was deficient"; 2) "West's sister testified at the post-conviction hearing that she informed counsel of West's childhood abuse and that counsel told her that it was not relevant"; 3) post conviction testimony was that "two facts should have raised red flags to counsel that West may have suffered abuse": a) "the fact that West was born in a mental hospital" and b) "West's statement that he had no memories before the age of ten." "West's counsel ignored these key pieces of evidence that would have led a reasonable attorney to investigate further." Moore also concluded that the failure to investigate and present evidence of abuse and its effects on West prejudiced him because "it is extremely likely that at least one juror would have determined that West's explanation for what happened to him while the crime took place – essentially that he froze – was plausible, making the death penalty unwarranted." Moore further concluded that West's statement to the competency expert that he was not abused is of questionable relevance because defendants who have been abused are the worst people to talk to about it and because West's statement that he was not abused is not dispositive when a wealth of evidence points to the conclusion that he was abused. Finally, Moore said the majority's statement that the jury may have believed West's unpresented mitigating evidence and still decided to impose death and that it is not enough for this Court to speculate that the jury would have chosen the former path "flies in the face of Supreme Court precedent holding that, 'although we suppose it is possible that a jury could have heard all the evidence and still decided on the death penalty, that is not the test. It goes without saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of the defendant's culpability and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at sentencing.'"

***Owens v. Guida*, 549 F.3d 399 (6th Cir. 2008)**
(*Boggs, C.J., for the Court; joined by, Siler, J.; Merritt, J., dissenting)*

In her post-AEDPA habeas appeal from a death sentence for hiring a man to kill her husband, Owens argued: 1) she received ineffective assistance of counsel when trial counsel failed to adequately investigate her background and failed to overcome the state's hearsay objection to one of her penalty-phase witnesses; 2) the state violated *Brady v. Maryland*, by failing to turn over letters between her deceased husband and her paramour; and, the trial court unconstitutionally prevented her from offering, as mitigating evidence, testimony that she wanted to plead guilty in return for receiving a life sentence. The Sixth Circuit held the state court reasonably applied *Strickland v. Washington* by concluding Owens sabotaged her own defense and counsel is not deficient when counsel follows a client's instructions.

The court rejected the *Brady* claim for a lack of prejudice because Owens could have presented other evidence of the affair but chose not to. The court rejected the final claim because no court has held that failed plea negotiations may be admitted as mitigation.

Owens' efforts thwarting the presentation of mitigating evidence prevent a finding of ineffective assistance of counsel in failing to adequately investigate mitigation: Despite trial counsel's attempts to get Owens to testify at the guilt or penalty phase to win the jury's sympathy, she refused to testify. Likewise, Owens would answer only a few questions asked by the state's mental health physicians despite the trial judge saying he would order funds for an independent mental health examination if the state examination showed cause. And, the state court made a factual finding that Owens refused to let her attorneys interview her family members or call them to testify on her behalf, a finding supported by the post conviction testimony of Owens' sister that Owens ordered her attorneys not to involve her family. In deciding counsel's obligation under these circumstances, the court found *Rompilla* inapplicable because, according to the court, *Rompilla* only held that counsel must conduct a reasonable investigation of evidence counsel expects the prosecution to rely on at trial even when the defendant and his family told counsel that no mitigating evidence existed, By comparison, here, the prosecution did plan to use evidence counsel should have uncovered and counsel realized, based on Owens' directive, that there was no credible way to present the evidence to the jury. Because Owens placed these limits on trial counsel, the Sixth Circuit held she could establish prejudice from the failure to investigate mitigating evidence only by showing the information could have been discovered and "credibly" presented without: 1) Owens testifying at trial; 2) Owens undergoing additional mental health testing; and, 3) counsel interviewing Owens' family. The court then disregarded all mitigation from these sources and turned to the only other area of potential mitigating evidence - - information obtained by the state's mental health experts. The court, however, never explained why the failure to present information obtained from the state's mental health experts was not ineffective assistance of counsel other than to say it was not reasonably likely to lead to a different result. Instead moving directly to information the post conviction attorneys learned from Owens; all of which the court quickly disregarded because: 1) it was hearsay from statements Owens made after the murders and thus lacks credibility; 2) the jury would have seen that Owens was trying to tell her story without swearing to tell the truth or facing cross-examination; 3) it would have allowed the state to bring out Owens contradictory statement to the police that there was very little physical violence in her marriage; 4) it would have allowed the state to call Owens' sister to testify Owens "lied about stuff" as testified at the post conviction hearing; and, 5) it would have allowed the state to ask witnesses if they knew Owens had prior convictions for embezzlement and forgery.

Owens' post conviction expert was not credible: The court held that even if it were to consider the testimony of Owens' post conviction expert, Eric Gentry, it would find him not credible because "his qualifications are dubious, his sources suspicious, and his testimony subject to contradiction." The expert had a "Masters in Counseling" degree but is not a medical doctor, and, at the time of his testimony, he had no license in any discipline and had not published. He claimed certifications included "Art therapy," "biofeedback," and "Eye Movement Desensitization." His experience consisted of one year at an adolescent shelter, one year as a sex abuse counselor, one year working with homeless children, one year as a counselor in a "wilderness school," a year and a half at a community agency, and four years working for another psychiatrist as a therapist. He had no training in forensic psychology and had never testified as an expert before. Gentry concluded that "because Owens grew up in a poor home where she suffered physical and emotional abuse and later suffered additional physical, sexual, and emotional abuse at the hands of [her husband], she developed very poor problem-solving and conflict resolution skills." The court noted that almost all of that testimony was hearsay, some double and triple hearsay, and Gentry produced no medical evidence, performed no clinical tests, and relied extensively on information from Owens' brother who suffers from mental retardation. Finally, the court noted that any evidence that could have been presented through Gentry at trial could easily have been contradicted and would have opened the door to unfavorable evidence. Thus, the court held that even considering the proffered mitigation, none of it supports a finding that trial counsel was ineffective.

Failure to disclose sexually suggestive cards and love notes between the victim and another woman and a police report that discussed the notes and summarized an interview with the woman who admitted to the affair were likely favorable to the defense but no prejudice ensued from the nondisclosure: A *Brady* violation has three components: 1) the evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching; 2) the evidence must have been suppressed by the State, either willfully or inadvertently; and, 3) prejudice must have ensued. Here, the prosecution told the court that it had turned over all physical evidence. Although acknowledging that may have been true because the prosecutors never handled the letters, the Sixth Circuit held that was not true for purposes of *Brady* because *Brady*'s disclosure requirement includes not just information in the prosecutor's files, but also information in the possession of the law enforcement agency investigating the offense. Yet, the court held that the *Brady* claim failed for a lack of prejudice because Owens was aware her husband was having an affair, as shown by the anonymous letter she received informing her of the affair, and could have subpoenaed the mistress to testify about the affair.

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State court reasonably applied federal law in holding that a failed plea attempt is not admissible as mitigation: In *Lockett*, the Supreme Court held the "Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. As a constitutional requirement, this rule trumps other limits on admissible evidence, such as hearsay. Yet the Court qualified this broad statement with a footnote stating that nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Although the court held a failed plea agreement could be relevant to the personal character trait of "acceptance of responsibility," the Sixth Circuit ruled that Owens' attempt to plead guilty was not accepting responsibility but merely attempting to avoid the death penalty for she was only willing to plead guilty if death was not a possible sentence. The court also held the failed negotiations were not related to Owens' "record" or the "circumstances of the offense" because the plea offer says nothing about how the murder was committed and cannot be considered evidence that the prosecution did not think the crime warranted a death sentence for the record does not reflect why the prosecution made the offer. Finally, the court noted that no court has found a failed plea offer to be admissible as mitigation and that is for good reason, it would have a chilling effect on states' willingness to plea out of concern it could be used as mitigating evidence.

Merritt, J., dissenting: Merritt believes *Brady* stands for the proposition that a defendant's knowledge of allegedly non-disclosed information does not satisfy the prosecution's responsibility to provide specific information that it has. Merritt also relied extensively on the 2003 ABA Guidelines to attack the majority's ruling that defense counsel were justified in abandoning mitigation investigation when Owens told counsel she did not want to testify herself. Factually, Merritt concluded that Owens never refused to cooperate with trial counsel and did not tell trial counsel to not put on mitigating evidence, thereby meaning *Rompilla* is indistinguishable. Noting that the prosecutor told the jury that Owens deserved the death penalty because she did acknowledge and repent her murderous behavior, Merritt believes the failed plea agreement was admissible as relevant mitigation under *Eddings*, both to rebut the prosecutor's argument and to show the prosecutor did not believe the case merited the death penalty.

***Bey v. Bagley*, 2008 WL 4911115 (6th Cir.)**
(*Batchelder, J., for the Court; joined by, Rogers and Sutton, JJ.)*

Bey appealed an order from the district court denying a motion for a stay of execution in which he claimed he was entitled, under 18 U.S.C. §3599, to have the Federal Defender office represent him in clemency proceedings. The court denied the motion for a stay of execution for three reasons: 1) unlike the case where *certiorari* was granted to determine if a death-sentenced inmate has the right to federally funded counsel to pursue state clemency proceedings when the state has failed to provide clemency counsel, Bey had counsel from the state public defender for clemency proceedings; 2) whether a stay of execution should be granted to provide additional information to the Governor to determine if clemency should be granted is a matter for the Governor to determine; and, 3) Bey has not only already completed his first round of habeas proceedings, but he has also provided no colorable basis upon which further litigation might proceed under the strict requirements for a second or successive habeas claim.

***Hawkins v. Coyle*, 547 F.3d 540 (6th Cir. 2008)**
(Batchelder, J., for the Court; joined by, Gibbons and Rogers, JJ.)

Hawkins was not prejudiced by his attorney's failure to investigate mitigating evidence: In this post-AEDPA case, as an attempt to establish prejudice, Hawkins pointed to affidavits from nine family members that they would have been willing to testify to the following: 1) Hawkins' biological father had a history of alcohol abuse; 2) Hawkins' father engaged in extramarital affairs and his parents eventually divorced; 3) on one occasion, Hawkins' father physically assaulted his mother, breaking her nose; 4) Hawkins was impacted by favoritism shown to his brother at school and at home; 5) Hawkins' sister died at the age of three and Hawkins appeared depressed afterwards; 6) Hawkins attempted suicide at a young age at least twice; and, 7) Hawkins refused to take a plea bargain, saying he would not plead to a crime he did not commit. The district court held that this information established prejudice and thus granted the writ of habeas corpus. The Sixth Circuit reversed, noting that Hawkins' affidavits "describe a markedly less traumatic and abusive childhood and adolescence than the circumstances of capital defendants in whose cases we have found the failure to investigate was prejudicial. While the alleged suicide attempts make this a somewhat closer case, the affidavits do not demonstrate that Hawkins was the victim of any physical or sexual abuse, and the only instance of violence they describe is an incident in which his mother's nose was broken as a result of her being pushed by his father. Furthermore, and once again in stark contrast to those cases finding prejudice, this record does not indicate that Hawkins suffers from any serious mental or psychological problems. At most, the claimed suicide

attempts point to some kind of mental instability, such as depression, but this is far different from the type of mental and psychological impairments suffered by defendants in the cases where we have found prejudice."

The prosecutor did not commit misconduct: Hawkins alleged the prosecution committed misconduct by: 1) cross-examining Hawkins about an alleged confession to a jailhouse informant that he committed the murders and could have also killed a boy, even though the prosecution had decided not to call the informant to testify because of concerns about his credibility; 2) withholding the name of a witness who could have contradicted the alibi of the person who identified Hawkins as the killer; and, 3) suborning perjury by allowing a witness to testify that Hawkins showed her a gun in 1989 when Hawkins' gun had been in police custody since 1988; and, 4) commenting on the defense's failure to present an expert witness to testify about the bloody fingerprint found on a notebook in the victims' car. In evaluating prosecutorial misconduct claims, the inquiry is whether the improper actions or comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." To determine whether a state court reasonably applied this standard, the Sixth Circuit first determines whether the prosecution's conduct was improper. If so, the court considers the following four factors to decide if the improper acts were sufficiently flagrant to warrant reversal: 1) whether the evidence against the defendant was strong; 2) whether the conduct of the prosecution tended to mislead the jury or prejudice the defendant; 3) whether the conduct or remarks were isolated or extensive; and, 4) whether the remarks were made deliberately or accidentally. The Sixth Circuit then held that the prosecutor cross-examining Hawkins on his alleged confession was harmless because: 1) the trial judge immediately instructed the jury to disregard the questions concerning the confession; 2) it is unlikely the jury was influenced by the questions about the confession since the jury never heard any further evidence to corroborate that the confession actually took place; and, 3) the evidence of guilt was strong. The court also held that withholding the names of witnesses that would have contradicted some of the testimony of one of the witnesses did not require reversal because the withheld witnesses would not have established the person who identified Hawkins did not return to the scene of the murders before they took place and they would not have undermined the forensic evidence against Hawkins. The court then held that the prosecutor did not suborn perjury because the "1989" gun matched a gun box that the evidence showed had nothing to do with the crime. With regard to the other alleged improprieties, the court held that the trial judge's admonitions and limiting instructions cured any errors.

No confrontation clause violation took place when the trial court refused to disclose the juvenile records of a co-defendant who took a deal: The trial court refused to disclose the juvenile records of a codefendant who took a deal, ruling, after an in-camera review of the records, that they contained only information already known to Hawkins or that would not help in preparation of his defense. At trial, the jury was informed that the witness had originally been charged for his involvement in the murders and was being held in police custody at the time of trial, received an immunity deal in return for his testimony, had made a number of inconsistent statements about the events surrounding the murders, and had been involved with drugs. Concluding that the juvenile records did not contain any new and material information, the Sixth Circuit held that the denial of access to the juvenile records did not violate Hawkins' Confrontation Clause rights.

***Davie v. Mitchell*, 547 F.3d 297 (6th Cir. 2008)**
(*Rogers, J., for the Court; joined by, Cole, J.; Cole, J., concurring; Merritt, J., dissenting)*

No Miranda violation took place: Davie was arrested, read his Miranda rights and transported to the police station. About 35 minutes later, Davie was again read his Miranda rights and given the waiver form. Davie initialed the rights form but refused to sign the waiver. At that point, the officers did not attempt to interrogate Davie. About 55 minutes later, officers again read Davie his Miranda rights to which Davie made some comments but ultimately declined to speak further. Two hours and fifteen minutes later, officers again questioned Davie who provided some more information to the police, including that he had his gun with him that morning. But, he did not confess to the crime. Twenty minutes later, Davie indicated he had nothing more to say and the interview ceased. An hour and half later, Davie asked to speak to a specific detective. That detective once again read Davie his Miranda rights, after which Davie confessed. During none of these attempts to question Davie did he ask for a lawyer. Davie argued his Miranda rights had been violated when officers continued to attempt to question him after he said he did not want to talk and after he refused to waive his Miranda rights, and the state courts unreasonably applied clearly established federal law in finding Davie's Miranda rights had not been violated. The Sixth Circuit found that Davie never said anything that precluded later interviews with officers and when Davie said he no longer wished to talk, the police honored that request. The Sixth Circuit also found that Davie initiated the conversation that culminated in his confession. Thus, the court held that whether reviewed de novo or under the scope of the AEDPA, Davie cannot establish that the police continued to interrogate him after he invoked his Miranda rights. The court also rejected the argument that when a suspect refuses to sign a waiver of rights form but agrees to speak to the police, they must inform him that anything he says can be used against him even though he did not sign the waiver form.

Raising ineffective assistance of counsel for failing to raise the underlying claim does not preserve the underlying claim for federal habeas review because the two types of claims

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are analytically distinct. However, if the ineffective assistance of counsel claim has merit, it could serve as cause to excuse a procedural default of the substantive claim, but that determination must be made prior to excusing the default, which is a prerequisite to reaching the merits of a defaulted claim.

Note: To avoid possible default, each issue not previously raised should be raised as a substantive claim with ineffective assistance of counsel as cause to excuse the default and separately as an ineffective assistance of counsel claim.

Note: The AEDPA's limitations on relief do not apply to cause and prejudice or miscarriage of justice exceptions to procedural default arguments. So, while the AEDPA may apply to an ineffective assistance of counsel claim, it does not apply when that same ineffectiveness forms the basis to argue a default should be excused.

Appellate counsel was not ineffective for failing to object to an "acquittal-first" instruction: It was not until 2003 that the Sixth Circuit first held that an instruction implicitly, as opposed to explicitly, requiring the jury to unanimously reject the death penalty before it can consider a life sentence violates Supreme Court law that it is unconstitutional to require a jury agree unanimously as to each mitigating factor. Because at the time of Davie's direct appeal, it was not clear that a non-explicit "acquittal-first" jury instruction was unconstitutional, direct appeal counsel's failure to raise the claim does not fall below an objective standard of reasonableness.

"Acquittal-first" instruction would fail on merits if properly before court: Unlike cases where the "acquittal first" instruction has been found unconstitutional, the unanimity instruction given to Davie's jury did not take place immediately before or after the acquittal instruction. Thus, it did not improperly imply that only in the event of acquittal, which had to be unanimous, could the jurors consider life. Also, Davie's jury was not instructed that "you must find that the State" failed to prove the aggravating factors outweighed the mitigating factors, but instead used the language if "you're not firmly convinced" that the aggravating factors outweigh the mitigating factors, "then the State has not met its burden of proof."

Merritt, J., dissenting: Judge Merritt expressed that "[t]he majority in this case is reading the AEDPA statute unlawfully to suspend the writ of habeas corpus in violation of the Suspension Clause of the United States Constitution, Article I, §9. . . . Here, as I shall explain below, the majority is using the AEDPA statute as a license to overrule *Miranda v. Arizona* and its lineal progeny developed by the Warren-Brennan Court four decades ago to outlaw coerced confessions that abridge the Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination. The capital defendant invoked both his right to silence and counsel to no avail before he was then enticed to confess." Merritt believes Davie's mere act of asking an officer a question is not sufficient to waive a previously invoked right to remain silent. Once Davie invoked his right to silence, the police should not have resumed any interrogation of Davie without first obtaining an unequivocal waiver from him. Merritt also found that continuing interrogation a few hours after a suspect invoked his right to remain silent is not scrupulously honoring the invocation of the right. Applying the "every reasonable presumption against waiver of fundamental constitutional rights" standard adopted by the Supreme Court, Merritt concluded the state did not meet its burden of establishing Davie knowingly, voluntarily, and intelligently waived his privilege against self-incrimination. Merritt then ended his dissent by saying, he "dissent[s] from the effort of my colleagues to bury *Miranda* under a mountain of AEDPA rhetoric. Until the Supreme Court overrules *Miranda*, we should follow it, no matter how much we prefer to side with the police against the liberties created by the Fifth and Sixth Amendments."

***Johnson v. Bagley*, 544 F.3d 592 (6th Cir. 2008)**
(*Sutton, J., for the court; joined by Clay, J.; Siler, J., concurring and dissenting*)

State court did not unreasonably apply federal law in holding that no judicial misconduct occurred when trial judge gave a juror a ride home when she missed her bus: The juror had missed her bus and it was about to rain so the trial judge gave her a ride home after telling her they could not talk about the case. The juror confirmed the sequence of events and the exchange that took place with the judge. Although noting that it is odd, unwise, and may be improper for the trial judge to have given a juror a ride, because the evidence refuted any suggestion that the case was discussed, the court held that the state court did not unreasonably apply clearly established law by denying this claim. The Sixth Circuit also noted that better practice would be for another judge to preside over a hearing to determine whether the judge's contact with the juror was improper.

State court unreasonably applied clearly established law in concluding trial counsel did not fail to adequately investigate mitigating evidence: The court began by acknowledging that "strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation," and that "in judging the reasonableness of the adjudication, [it] look[s] to *Wiggins* and *Rompilla* – even though the state court's decision predated both opinions – because they did not rest on 'new law' but instead 'applied the same clearly established precedent of *Strickland*.'" Then, turning to the 2003 ABA Guidelines, the court noted that counsel should consider Guideline 10.11(F) in deciding what witnesses and evidence to

introduce at the sentencing phase. Candidly, the court recognized that "[a]t a surface level, it appears that Johnson's counsel considered all [options mentioned in Guideline 10.11(F)], performed some investigation with respect to each option and deployed some of these strategies. A central theme of their ultimate penalty-phase strategy was to feature Johnson's grandmother, as a pivotal figure in his life, one who 'did everything that one could reasonable expect to do to try to help' Johnson. The apparent goal was not only to humanize Johnson with Faulkner's testimony but also to present a compelling witness who would suffer from a jury decision to impose a death sentence. In the abstract, this might well have been a legitimate strategic decision, one about which the Constitution would have nothing to say. But in Johnson's case, his counsel pursued this strategy after what can only be described as an anemic and leaderless investigation that suffered from at least three conspicuous flaws. First, Johnson's counsel never interviewed Johnson's mother, who could have explained the precise role that Faulkner played in Johnson's (and her) life but also could have provided other information about Johnson's childhood." Trial counsel, however, chose not to interview her because she "had a very bad background . . . being a prostitute and a drug addict and therefore would be a bad mitigation witness." The court, however, concluded that her "bad background is precisely what should have prompted the defense team to interview her – both to see what that background entailed and to learn more fully how her prostitution and drug addition affected Johnson's childhood. That someone may make a bad witness is no explanation for not interviewing her first. And that is particularly true with respect to this witness, who was Johnson's mother, not a distant aunt or neighbor. No reasonable professional judgment could have supported a decision not to interview [her], and neither the State nor the state court of appeals even attempted to justify such a decision." Second, trial counsel "obtained a large number of files from the Ohio Department of Human Services but apparently never read them. Instead, they simply submitted them to the jury – unorganized and without knowing whether they hurt Johnson's strategy or helped it. . . . Had Johnson's attorneys read all of the records before placing them in front of the jury, surely something even a modestly competent counsel would do, they not only would have removed the records that had no bearing on the proceeding but they also would have learned more about [Johnson's grandmother]. Social workers at Human Services, the records show, were concerned about placing Johnson in [her] custody because of her abusive history, information that would have prompted reasonable mitigation counsel to investigate [her] past further. A review of the records, in short, not only would have tipped them off to a different mitigation strategy but also would have avoided the pitfall of submitting records to the jury that directly contradicted their theory that Faulkner was positive force for change in his life." Third, the court concluded that it appears "no one who participated in Johnson's penalty-phase defense made any deliberate decisions about the scope of the investigation, let alone the 'reasonable' ones *Strickland* requires." Indeed, trial counsel admitted that they "don't plan the investigation. We get the mitigation experts out to do that." They also admitted that as late as a week before trial, they did not know who they would call as mitigation witnesses, and that the day before trial, they did not know what mitigation investigation had been done and they had no mitigation documents. In denying this claim, the state court held that counsel discovered the relevant evidence as shown by the fact that most of the additional evidence could be found in some form either in the testimony or in the documents admitted at the sentencing phase. That, the Sixth Circuit held, was an unreasonable application of *Strickland*. According to the Sixth Circuit, "the testimony [at trial] only scratched the surface of Johnson's horrific childhood. And even if it is true that some aspects of [Johnson's mother's and grandmother's] problematic roles in Johnson's life could be gleaned from reviewing the 12-inche stack of files that defense counsel obtained from Human Services and admitted into evidence, that does not mean defense performed a reasonable investigation or for that matter reasonably used the evidence." Notably, "some of the records contradicted their mitigation strategy" and "it hardly constitutes a reasonable investigation and mitigation strategy simply to obtain Human Services records from the State, then dump the whole file in front of the jury without organizing the files, reading them, eliminating irrelevant files or explaining to the jury how or why they are relevant." The Sixth Circuit further held that state court "unreasonably concluded that Johnson's attorneys presented a meaningful concept of mitigation without looking to the reasonableness of the investigation's scope. Johnson's defense team, to be sure, interviewed some witnesses and submitted some testimony regarding Johnson's past. . . . But an unreasonably truncated mitigation investigation is not cured simply because some steps were taken prior to the penalty-phase hearing and because some evidence was placed before the jury." Simply, "Johnson's attorneys were not in a position to make a reasonable strategic choice because the investigation supporting their choice was unreasonable." Finally, the court disregarded trial counsel's testimony that he spoke to Johnson's mother, finding that trial counsel's memory is not worthy of credence because he did not recognize the name of one of the investigators he used in the case and could not remember if Johnson's mother testified at trial. And, the court rejected the state's argument that Johnson's attorneys cannot be held responsible for the evidence not being presented to the jury because none of the interviewees provided them with evidence of the abusive history, noting that "uncooperative defendants and family members do not shield a mitigation investigation if the attorneys unreasonably failed to utilize other available sources that would have undermined or contradicted information received."

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Trial counsel's unreasonable investigation prejudiced Johnson: Because the trial court did not address the prejudice prong, the Sixth Circuit reviewed that aspect de novo. At trial, not one witness testified about the abuse Johnson suffered and the jury was misled to believe that Johnson's grandmother raised him properly and provided for his needs. If a reasonable investigation had been conducted, the jury would have learned: 1) Johnson's grandmother had a schizoid personality disorder that prevented her from forming intimate relationships; 2) Johnson's grandmother had no maternal instincts; 3) Johnson's grandmother tried to abort his mother and when unsuccessful, she neglected and rejected Johnson's mother; 4) Johnson's grandmother repeatedly beat his mother with fists, extension cords, and broom handles, and once shot at her with a gun; 5) Johnson's grandmother treated Johnson the same way she treated his mother; 6) Johnson's mother was a prostitute who sold herself to buy drugs; 7) Johnson's mother often fed Johnson only sugar water in a bottle; 8) Johnson's mother put Johnson in a closet and gave him beer and a pain killer to stop him from crying; 9) Johnson's mother regularly beat Johnson, put a cigarette out in his eye, and once threatened to kill him; 10) Johnson watched his father beat his mother; 11) Johnson's mother tried to set his father on fire; 12) Johnson's mother taught him how to cook crack and sell it; 13) Johnson's mother killed one of her abusive boyfriends and bragged about it to Johnson; 14) Johnson's mother hit his brother with a glass bottle and told the hospital that Johnson did it; and, 15) Johnson's mother was involved in many abusive relationships. In addition, trial counsel's lack of investigation prevented them from properly using their mitigation expert and led to damaging testimony from him. As the Sixth Circuit held, "it is unreasonable, after a complete investigation to put an expert on the stand who will directly contradict the sole defense theory and render worthless other helpful testimony. Even the prosecution called [the trial mitigation expert's] testimony 'inflammatory' and said to the jury, 'I can't believe it, but [that expert] testified for the defendant allegedly.'" In all, the Sixth Circuit concluded that the trial attorney's "incompetent performance served only to help the prosecutor's case" and the evidence presented in post conviction "forms a mitigation story that bears no relation to the story the jury heard." Thus, the court held Johnson established prejudice.

Siler, J., dissenting: He believes this case differs from most ineffective assistance of counsel cases because here "six persons, including trial counsel, conducted a mitigation investigation that took approximately two months. The defense also presented the testimony of Johnson's foster mother, [grandmother], and [an expert], as well as Johnson's own unsworn statement and various records which were not well organized." Siler also concluded that the unpresented mitigating evidence was presented to the jury in some form so prejudice cannot be shown.

***Cooey v. Strickland*, 544 F.3d 588 (6th Cir. 2008)**
(*Suhrheinrich, J. for the court; joined by, Siler, J.; Gilman, J., concurring*)

Cooey argued that Ohio's lethal injection protocol will violate: 1) his right to be free from cruel and unusual punishment by failing to adequately address the asserted difficulty in accessing his veins due to his obesity; 2) his Eighth Amendment rights by failing to account for potential dosage insufficiency due to his weight and due to taking Topamax for cluster headaches, which decreases sensitivity to sodium thiopental; and 3) due process by unconstitutionally depriving him of a property interest in a quick and painless death. Cooey, however, conceded that a full dose of thiopental being delivered into his circulation would be deeply anesthetized regardless of Topamax but that Topamax decreases the margin of error. The court held that Cooey's claims were barred by the applicable statute of limitations because: 1) Cooey had advised prison personnel of problems accessing his veins in 2003 but did not raise it as an issue until five years later, which could not be excuse by gaining weight after 2003 since the core of the claim was still venous access; 2) the Topomax related claim was contingent on his previously asserted claim of faulty administration that the Sixth Circuit had found time-barred in a previous opinion; and, 3) his "quick and painless death" claim existed since the statute was adopted in 1993, thereby the time for challenging it expired at the same time his previous lethal injection claim did.

Gilman, J., concurring: Judge Gilman concurred because the court's previous decision in *Cooey* compels the conclusion that the statute of limitations has expired on his current claims but wrote separately to reiterate his belief that both Cooey's claims deserve a hearing on the merits and that the prior *Cooey* case was wrongly decided for the reasons articulated in his dissent to that opinion and because *Baze* "made clear that details matter in assessing the constitutionality of a state's lethal injection method."

***Mason v. Mitchell*, 543 F.3d 766 (6th Cir. 2008)**
(*Moore, J., for the court; joined by, Clay, J.; Boggs, C.J., dissenting*)

"Although Mason's counsel reviewed records provided by the state that contained some references to violence and drug use in the Mason family home during Mason's childhood, Mason's counsel failed to investigate Mason's background and essentially conducted no interviews of any of Mason's family members prior to settling upon a plan for the sentencing phase that was limited to appeals for mercy and claims of residual doubt." The Sixth Circuit held that "trial counsel provided ineffective assistance by failing to interview Mason's family members and investigate the red flags contained in state records suggesting that Mason's childhood was pervaded by violence and exposure to drugs in the home from an early age."

Application of the AEDPA: "Clearly established law under AEDPA encompasses more than just bright-line rules laid down by the Supreme Court. It also clearly includes legal principles and standards enunciated in the Court's decisions. The lack of an explicit statement of a rule is not determinative because the [Supreme] Court has made clear that its relevant precedents include not only bright-line rules but also the legal principles and standards flowing from precedent."

Trial counsel's investigation of mitigating evidence was objectively unreasonable: Testimony at the evidentiary hearing showed one trial attorney focused on the guilt phase while the other trial counsel selected his mitigation strategy based on a 75-minute telephone call with the Ohio Public Defender's Office five days before the mitigation phase of trial took place. Thus, the Sixth Circuit held the evaluation of trial counsel's performance "must focus on what knowledge [he] then possessed regarding Mason's childhood and background and what investigation and interviews, if any, that [trial counsel] had performed prior to making that decision." At that point, trial counsel relied "almost exclusively on the records provided by the state and inexplicably failed to conduct his own independent investigation and interview members of Mason's family regarding the circumstances of his childhood and background." Instead, the limited contact trial counsel had with Mason's family members came after he decided "not to include any information about Mason's background or childhood in the mitigation presentation." From the limited information before him, trial counsel had learned that Mason was born into a drug-dependent family that was dealing drugs and where both parents had been incarcerated for drug trafficking, Mason had been exposed to quite a lot of violence, Mason came from a family who "had many problems over the years," Mason's mother and father tied him up, and when Mason was thirteen years old, he was seen with swelling around his left eye, cuts around his nose, and scars on his back and arms that Mason claimed resulted from being beaten by his father." Finally, trial counsel's meetings with Mason were generally not about mitigation. Absent from trial counsel's detailed hand-written notes of time he spent working on Mason's case was any mention of interviewing family members or other potential witnesses regarding mitigation. The only interviews conducted with anyone other than Mason prior to deciding on a mitigation strategy was a six minute conversation with Children's Services and a thirty-six minute meeting with the probation officer for Mason and his father. Trial counsel's notes, however, demonstrate brief conversations with some of Mason's family members but the only date documented in trial counsel's records was after the strategic decision was made. So, any information learned from those conversations saying no violence took place could not have supported his strategic decision. Nonetheless, the court held that trial counsel's "failure to continue his investigation and interview Mason's mother and remaining siblings about any abuse and drug activities is inexcusable given this apparent contrast between the facts contained in the documentary evidence and what he apparently learned from Mason's father and brother." In sum, the court found that "although state records contained information suggesting that Mason's childhood was marked by violence and pervasive drug use, [trial counsel's] investigative efforts to learn any further details about Mason's background were woefully inadequate. His efforts consisted of no more than reviewing documents provided by the state, arranging for a psychiatric evaluation limited to predicting Mason's future dangerousness, talking to Mason himself, and very briefly talking to a small subset of Mason's family members. Under the Supreme Court's governing case law regarding counsel's obligation to undertake a reasonable investigation to support strategic decisions about the presentation of mitigation evidence, we have no doubt that the performance of Mason's counsel was deficient."

Trial counsel's deficient performance prejudiced Mason: The court held that a reasonable probability exists that if the evidence mentioned above had been introduced, at least one juror would have voted for less than death.

The state court unreasonably applied *Strickland*: The Sixth Circuit held that the state court unreasonably applied *Strickland* because it "simply asserted that Mason's counsel had made a strategic decision regarding mitigation strategy, but that court failed to assess whether a thorough and reasonable investigation supported counsel's strategic decision." The state court also unreasonably applied the prejudice prong by holding that "Mason failed to show prejudice by invoking the specter of rebuttal evidence responding to a mitigation strategy that Mason was not advocating."

Boggs, C.J., dissenting: Boggs believes that there was not a "single significant piece of evidence in the record of which [trial counsel] was unaware due to his failure to investigate further." Thus, Boggs concluded that trial counsel's decision to forego a mitigation defense based on family history was not the product of a constitutionally deficient investigation. Boggs then commented that the majority's opinion means "[d]efense counsel is now required to locate and interview the client's family members … and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others; he must interview them long enough so that those interviews can be characterized as extensive and in-depth; every conceivable family member must be contacted, no matter that defense counsel has spoken with the defendant, his wife, mother, father, brother, sister, aunt, and cousin; and he must do all this even if he reasonably believes that the introduction of any evidence regarding the defendant's family background could open the door to truly disastrous rebuttal evidence by the prosecution."

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***Jells v. Mitchell*, 538 F.3d 478 (6 Cir. 2008)**
(*Cole, J., for the Court; joined by, Clay, J.; Batchelder, J. dissenting)*

AEDPA limitation on relief: Relevant Supreme Court precedent for purposes of the AEDPA "include[s] not only bright-line rules but also the legal principles and standards flowing from precedent." Federal courts "may look to lower courts of appeals' decisions, not as binding precedent, but rather to inform the analysis of Supreme Court holdings to determine whether a legal principle had been clearly established by the Supreme Court."

Exhaustion: To obtain federal habeas relief, a petitioner must first exhaust the remedies available in state court by fairly presenting the federal claims to the state courts. That requirement "is satisfied when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims. If a state court did not entertain a claim, a federal court will not review it where the state court's omission is due either to the petitioner's failure to raise those claims in the state court while state remedies were available or to the petitioner's failure to comply with a state procedural rule that prevented the state courts from reaching the merits of the claim."

Procedural default: A federal court will not consider a claim if the last state court to render a judgment in the case rejected the claim for failing to comply with the state's procedural rule if three requirements are satisfied: 1) there must be a state procedure in place that the petitioner failed to follow; 2) the state court must have denied the claim because of the procedural default; and, 3) the state procedural rule must be firmly established and regularly followed at the time of the alleged default and it must be an adequate and independent state ground in that it does not rely on federal law. The procedural default inquiry "generally will involve an examination of the legitimate state interests behind the procedural rule in light of the federal interest in considering federal claims." If these factors are satisfied, a default can be overcome by showing cause and prejudice or the failure to consider the claim will result in a fundamental miscarriage of justice, usually meaning the violation has "probably resulted in the conviction of one who is actually innocent." Cause requires a showing that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule. Ineffective assistance of counsel can constitute cause so long as the ineffective assistance of counsel claim is not itself procedurally defaulted. Prejudice requires a showing that the errors at trial "worked to petitioner's actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."

Standard for determining ineffective assistance of counsel for not adequately investigating mitigation: The Supreme Court has "recognized that counsel in a capital case has an obligation to conduct a thorough investigation of the defendant's background to determine the availability of mitigating evidence. Counsel's investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. This constitutionally required background investigation is necessary to enable counsel to make strategic choices about presenting a mitigation defense." Thus, in determining the "reasonableness of counsel's mitigation strategy in a capital case, a reviewing court must consider the reasonableness of the investigation said to support that strategy" by considering "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Any decision to forego mitigation evidence is unreasonable if not made after a reasonable determination to cease further investigation."

Trial counsel's failure to prepare for the sentencing phase until after Jells was convicted was deficient performance: Jells' expert at trial testified at the post conviction hearing that trial counsel did not contact him until two days after Jells had been convicted and only sixteen days prior to the mitigation hearing. Prior to that, counsel failed to employ a mitigation specialist. When trial counsel contacted their expert, they asked him to perform a psychological evaluation of Jells but failed to provide him with Jells' personal history records, which would have been gathered by a mitigation specialist. Without the history and records, the expert was unable to perform the requested psychological evaluation, causing his trial testimony to not be supported by a complete evaluation of Jells. Jells' attorney "interviewed only three family members, neglecting to speak with many other family members who had lived with Jells and were available. When speaking with the family members they did contact, their inquiry was brief and they failed to ask sufficiently probing questions; as a result they failed to discover the abuse that Jells received from his mother's live-in boyfriend and his stepfather. Jells' counsel did not obtain a psychological report prior to trial, and failed to obtain accessible school records – reports and records that would demonstrate that Jells had mental impairment, including learning difficulties that led to disruptions in the classroom and an extremely low reading level. Further, even if counsel could have claimed ignorance of Jells' difficulties as a result of their abdication of responsibility to inquire into Jells' background, information that would have prodded them into action was readily available to them in the Competency Report. This Competency Report provided the same sort of prodding information as the Department of Social Services records or the Presentence Investigation Report described in *Wiggins*, and, given such information any reasonably competent attorney would have expanded the search mitigating evidence beyond the three witnesses and would have questioned Jells and the three witnesses in further detail." Thus, trial counsel's failure to begin the mitigation preparation until

after Jells' was convicted was objectively unreasonable under *Strickland* so the state court's ruling to the contrary was an unreasonable application of clearly established law.

Trial counsel were ineffective in failing to use a mitigation specialist who would have gathered information about Jells' educational, medical, psychological, and social background necessary to prepare a proper mitigation defense: The court held that, "[w]hile Jells' counsel did not have a specific obligation to employ a mitigation specialist, they did have an obligation to fully investigate the possible mitigation evidence available." Trial counsel conducted some investigation, as evidenced from their "limited presentation of Jells' unstable childhood and academic difficulties during the mitigation hearing." However, counsel's awareness of these facts "should have alerted them that further investigation by a mitigation specialist might prove fruitful." Thus, trial counsel's failure to employ a mitigation specialist was deficient performance.

Jells' suffered prejudice from the inadequate mitigation investigation: At the sentencing phase, defense presented testimony from three family members, a mental health expert, and an unsworn statement from Jells. They testified that Jells: 1) moved frequently as a child; 2) was raised by multiple family members; 3) was "quiet," "liked to work," and never caused any problems; 4) was nonviolent; 5) had no disciplinary problems in school; 6) had an IQ of 77; 7) had trouble dealing with feelings, has a need for a strong nurturing figure, and does not have the ability to cope well in unstructured situations; 8) was sent to juvenile detention for a year for stealing a purse; and, 9) had obtained a GED. In post conviction, the following evidence was presented that could have been uncovered if an adequate investigation had been done: 1) Jells' school records reveal a history of "serious cognitive learning and socialization impairment," including an "inability to function academically"; 2) Jells suffered from a learning disability that led to feelings of inadequacy and insecurity; 3) Jells suffered "serious maladjustment" because of his frequent moves; 4) Jells never received regular counseling at a psychiatric clinic as school officials recommended; 5) Jells' mother had seven children with different men and constantly moved in and out of relationships while Jells was living with her; and, 6) Jells witnessed violence inflicted on his mother. The Sixth Circuit held that "rather than being cumulative, this evidence provides a more nuanced understanding of Jells' psychological background and presents a more sympathetic picture of Jells." Thus, the court concluded that the "undiscovered and omitted evidence detailed above could have shifted the balance between aggravating circumstances and mitigating evidence for at least one [sentencer], leading him to find that a sentence of life rather than death was appropriate." Because "that is all that is required for a showing of prejudice in a capital case, the court held that Jells established prejudice from trial counsel's failure to adequately investigate and present mitigating evidence.

***Brady* standard:** The prosecution is obligated to disclose all material, exculpatory evidence to a defendant, irrespective of whether the failure to disclose was done in good or bad faith. To assert a successful *Brady* claim, a habeas petitioner must show: 1) the withheld evidence was favorable to the petitioner; 2) the evidence was suppressed by the government; and, 3) the petitioner suffered prejudice. *Brady* encompasses both exculpatory and impeachment evidence. Evidence is material if a reasonable probability exists that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is one that sufficiently undermines confidence in the outcome of the trial. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

***Brady* claim is not defaulted:** Jells' explicit reference to the withheld evidence, mention of *Brady*, and statement that the prosecution failed to disclose information until after trial sufficiently presented the claim in state court to preserve it for federal habeas review.

In a factually intensive analysis, the court held that a *Brady* violation took place.

The court denied the following claims: 1) ineffective assistance of counsel in making decision to waive jury trial; 2) the lineup was suggestive.

***Beuke v. Houk*, 537 F.3d 618 (6th Cir. 2008)**
(*Batchelder, J., for the Court; joined by, Norris, J.; Martin, J., dissenting*)

Being required to use a peremptory challenge to excuse a juror who should have been excused for cause is not a constitutional issue: Beuke argued that the trial court violated his right to an impartial jury because the trial court's refusal to excuse four jurors for cause forced Beuke to use peremptory challenges on them. Because the loss of a peremptory challenge does not violate a defendant's constitutional right to an impartial jury since peremptory challenges are not of constitutional dimension, the court denied this claim.

Trial judge did not excuse jurors for cause that should not have been excused: "A juror who in a case would vote for capital punishment regardless of his or her instructions, … must be removed for cause. The proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment … is whether juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. This standard does not require that a juror's bias be proved with unmistakable clarity because such an exacting standard does not comport with

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the realities of voir dire questioning. A state court trial judge's conclusion that a prospective capital-sentencing juror should be excluded for cause because of his views on the death penalty is a finding of fact entitled to a presumption of correctness from this court on federal habeas review." Beuke argued that the trial judge erred in excusing six prospective jurors. The first four indicated they would not impose death under any circumstance. The fifth initially said she did not "think" she could impose the death penalty but said she would "try" to follow the law and impose it but ultimately concluded she could not agree to a verdict recommending death. The sixth did say there may be a proper case where the death penalty would be warranted but eventually "attested to her unalterable opposition to a sentence of death." Because the jurors ultimately said they could not impose death, the court found no error in the trial excusing them for cause.

Victim's wife's victim impact testimony at guilt phase did not violate due process: The victim's wife testified that they had three children, one of whom was born shortly before trial and was given the name Robert, in memory of his father. Beuke argued her testimony violated due process because it was irrelevant and highly inflammatory. To grant relief because of a state court evidentiary ruling, the state court's decision must have been "so fundamentally unfair as to violate the petitioner's due process rights." Because the victim's wife's allegedly improper testimony lasted less than half a page of transcript, although it may have been irrelevant, the Sixth Circuit held her statements were not constitutionally improper because her statements were not inflammatory and did not create a fundamentally unfair trial.

Denial of Beuke's request for a continuance prior to the penalty phase did not violate the right to counsel or due process: A trial court's denial of a continuance rises to the level of a constitutional violation only where there is "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" and the petitioner shows a denial of the continuance actually prejudiced his defense, which can be done by showing additional time would have made relevant witnesses available or otherwise would have benefited the defense. Applying this standard, the court rejected Beuke's claim because trial counsel never stated any particular reason why a continuance was necessary, asserting instead only that the court provided "insufficient" or "inadequate" time to prepare and that the judge's timetable was a "little ridiculous under the circumstances." The court also rejected the claim because trial counsel had more than two months to prepare the guilt and penalty phase and the record does not show counsel failed to prepare during that time

Sentencing phase performance ineffective assistance claims are defaulted: Beuke claimed trial counsel rendered deficient performance at the penalty phase by: 1) requesting a presentence investigation, which revealed to the jury prejudicial information including Beuke's criminal history and victim impact statements; 2) obtaining an inadequate psychiatric evaluation from the probation department; and, 3) presenting an inconsistent closing argument based on a residual doubt theory. The state court held that these claims could have been raised on direct appeal so Beuke defaulted them by failing to do so.

Trial counsel's investigation of mitigating circumstances was not deficient and did not prejudice Beuke: Trial counsel spoke with Beuke's parents prior to the penalty phase and presented their testimony at the sentencing phase. Counsel also asked the probation department to conduct a presentence investigation and a psychiatric evaluation. "While these investigatory efforts fall far short of an exhaustive search, they do not qualify as a complete failure to investigate. Because Beuke's attorneys did not entirely abdicate their duty to investigate for mitigating evidence," the court "closely evaluate[d] whether they exhibited specific deficiencies that were unreasonable under prevailing professional norms." Beuke specifically alleged his attorney's performance was deficient because they unreasonably delayed their mitigation investigation until after the jury issued its guilty verdict and thus failed to conduct an adequate mitigation investigation. The court noted that it "will generally find that an attorney has rendered deficient performance if he waits until after a conviction to begin his mitigation investigation," but then concluded that Beuke has not established that his attorneys did so. Instead, Beuke assumes so based on trial counsel's request for a continuance. According to the court, the trial attorneys testified that they spent an extraordinary amount of hours preparing the case including the sentencing phase, and while counsel's itemized billable hours only mention one day preparing for the mitigation hearing, many other activities mentioned in the itemized hours "could have been focused on the mitigation investigation." The court then held that "Beuke has not provided enough evidence to confirm or deny that conclusion, but because Beuke has the burden of proof, his failure to do so prevents the court from finding counsel's performance deficient. The court also held that Beuke could not satisfy the prejudice prong. "To establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way – in strength and subject matter – from the evidence actually presented at sentencing." Beuke contended that he was prejudiced by counsel's failure to "demonstrate the complexities of his life, which include his family poverty, his oppressive and overprotective parents, his low self-esteem, his history of drug use, and his destructive relationship with Michael Cahill." The court, however, found that evidence mirrors what was presented at trial where Beuke's parents testified about the family's minimal financial resources and that the household was "run on the Ten Commandments," the presentence investigation disclosed Beuke's history of drug abuse, and Cahill testified that he asked Beuke to participate in a fake robbery. The

court also found that the non-cumulative mitigation (low self-esteem and degree of parent's sheltering) "portrays the life of a fairly typical adolescent or young adult growing up in a relatively stable, although imperfect, family environment surround by parents who, while perhaps a little overbearing, have loved, supported, and protected him throughout his life." Thus, the court held Beuke failed to establish prejudice.

Improper prosecution comments during closing argument do not require reversal: Beuke argued that the following comments by the prosecutor during closing argument deprived him of due process: 1) statements indicating that the death penalty sends a deterrent message to criminals and a reassuring message to the law-abiding public ("our society will take a life" in order "to let a message ring out" to "criminals and potential criminals in this community that we won't tolerate this"; where aggravators outweigh mitigations, the death penalty "sends a message of justice to law-abiding people in the community"; "the only way the public can be satisfied is if capital punishment is measured out"); 2) statements where the prosecutor allegedly relied on his own personal experience to persuade the jury ("if there ever was a case for the death penalty, it is this case right here"); 3) statements about the victims of the attempted murders (think about victim's "little babies and little girl who he will never dance with because he is paralyzed"); 4) statements indicating the prosecutors personal fear of Beuke ("scared to death of Bueke"); and, 5) statements warning the jurors that Beuke could be paroled if he did not receive a death sentence (did not "want him out on the street again" and comparing Beuke to a "cancer" on society that needed to be "cut-out" so that it would not "kick back up again and spread"). To require reversal, the prosecutor's comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." The court held the first three types of comments were not improper because they: 1) merely provided general background information on the death penalty; 2) explained that this case was appropriate for the death penalty because of the stark facts and lack of mitigating evidence; 3) discussed the impact of Beuke's conduct on the victims and their families and did not exceed the permissible limits of victim impact testimony. The court found the last two categories of statements improper because they were a prosecutor's personal opinions and were calculated to incite the passions and prejudices of the jurors. But, the court found that the comments did not require reversal because: 1) it was unlikely that the prosecutor's improper statements misled the jury as the comments did not mischaracterize the applicable law or the relevant evidence; 2) the comments were isolated and not pervasive; and, 3) strong aggravating evidence was presented to the jury.

The court also rejected a *Brady* claim and an argument that a jury instruction prohibiting "any consideration of sympathy" violated the Eighth Amendment requirement that a capital jury not be precluded from considering, as mitigation, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

Merritt, J., dissenting: He discussed the allegedly improper prosecutorial comments in detail, laying out exactly what the prosecutor said, and concluded they were all improper and require reversal.

***Bies v. Bagley*, 535 F.3d 520 (6th Cir. 2008)**

Clay, J., concurring in the denial of rehearing en banc: Noting the recognized legal principles that "[w]hen a court enters findings sufficient to establish legal entitlement to the life sentence, the Double Jeopardy Clause bars any retrial of the appropriateness of the death penalty" and "death is not a suitable punishment for a mentally retarded person," Judge Clay wrote to explain why the uncontroversial issue that the Ohio Supreme Court's pre-*Atkins* ruling that Bies was mentally retarded prohibits re-litigating his mental retardation after *Atkins* is not so extraordinary to warrant en banc review, as the dissent urges. According to Clay, the Supreme Court has made two propositions clear with regard to the death penalty and the Double Jeopardy Clause: 1) "the Double Jeopardy Clause prohibits a second capital sentencing proceeding when the first such proceeding results in an acquittal"; and, 2) an acquittal is a "judgment which enters findings sufficient to establish legal entitlement to the life sentence." That conclusion is consistent with the Supreme Court's prior rulings allowing death to be sought at a retrial where at least one aggravating circumstance was previously found and the jury imposed death at the first trial. In Bies case, a state court issued a finding of fact entitling him to a life sentence; a court found Bies mentally retarded, which is now a prohibition against execution. Thus, the finding of mental retardation amounts to an "acquittal" for purposes of Double Jeopardy. While that is sufficient grounds to prevent Bies from having to re-litigate his mental retardation, the panel decision relied on collateral estoppel. The dissent from the denial of rehearing argues that the panel erred in determining Bies' mental retardation was raised and litigated in state court and that determination of his mental retardation was necessary to the state court outcome. Relying on *Turner v. Arkansas*, where the Supreme Court held that a jury's finding that a person was present at a poker game when a murder occurred collaterally estopped the state from then trying that person for robbery at the same poker game, Clay concluded that although the legal theory involving Bies' mental retardation is now different than when he was found mentally retarded prior to *Atkins*, the claim still involves the same facts so *Turner* prevents the state from now contesting Bies' mental retardation. Clay also concluded that because Ohio law forbids a state appellate court from affirming a death sentence unless it first determines which mitigating factors are present and weighs those factors de novo against any aggravating factors, the Ohio court's determination of Bies' mental retardation was

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necessary to its resolution of the case. He also concluded the state had a fair opportunity to litigate the issue because the state could have sought reconsideration of the initial mental retardation determination and could have appealed or cross-appealed the finding that Bies was mentally retarded.

Sutton, J., dissenting from the denial or rehearing en banc: Judge Sutton believes that the Double Jeopardy Clause does not apply to a state court decision that affirms a death sentence. Because no court has found the state failed to prove its case that Bies deserved death, or, in other words, unless an acquittal of the death penalty took place, Sutton believed the Double Jeopardy Clause does not apply to Bies. Sutton also concluded that a finding of mental retardation for purposes of mitigation is not the same as a finding of mental retardation for exclusion of the death penalty. He also found that the state court's mental retardation was not necessary to resolving Bies' direct appeal but was actually an obstacle to affirming the judgment.

***Van Hook v. Anderson*, 535 F.3d 458**
(6th Cir. 2008) (opinion vacated by grant of rehearing en banc on December 18, 2008)
(*Merritt, J., for the Court; joined by, Martin and Moore, JJ.)*

In this pre-AEDPA case, the court held that trial counsel was ineffective during the mitigation phase of the trial for three "basic" reasons: 1) "counsel was deficient for failing to fully investigate and present as evidence all available mitigating factors"; 2) counsel failed "to secure or attempt to secure an independent mental health expert to testify that the crime was the product of a mental disease"; and, 3) counsel mistakenly introduced and failed to object to evidence that was damaging to Van Hook's case. The combined effect of these errors "prejudiced Van Hook, rendered the mitigating hearing unreliable, and led to the imposition of the death penalty." Because the court granted sentencing phase relief, it decided not to address the remaining sentencing phase issues.

General standard for determining ineffective assistance of counsel: "Since 1984, the standard for whether counsel's ineffectiveness fell below the minimum requirements of the Sixth Amendment contain two components: (1) the deficient performance of counsel and (2) the resulting prejudice of the defendant. To prevail on an ineffective assistance of counsel claim, Van Hook must satisfy both the deficient performance and prejudice prongs of *Strickland*. For Van Hook to prove that his counsel's performance was constitutionally deficient, the performance must have fallen below an objective standard of reasonableness under prevailing professional norms. While the Court in *Strickland* did not lay out a detailed, bright-line set of rules for determining whether counsel's performance is adequate, as it did later in *Wiggins* and *Rompilla*, the Court did require that in normal cases such as this one counsel must investigate fully all aspects of a case. It explained that this duty is of utmost importance in capital murder cases, especially at the mitigation phase where the lawyer's work may be the difference between life and death. Thus, the typical focus of analysis in an ineffective assistance of counsel during mitigation case is whether the investigation supporting counsel's decision not to introduce mitigating evidence was itself reasonable. After *Strickland*, this Court and the Supreme Court made clear in a number of cases that counsel in death cases should follow closely the ABA standards referred to above. We have explained clearly that the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases provide the guiding rules and standards to be used in defining the prevailing professional norms in ineffective assistance of counsel cases."

Minimum requirements for investigation to be reasonable: "Our Court's precedent make clear that a partial but ultimately incomplete mitigation investigation is inadequate. This is particularly true when counsel's investigation failed to reveal any of the significant, potentially mitigating details of the defendant's personal and family history…. The ABA Guidelines explain that this investigation ought to include interviews with family members and all other people who knew the client: 'It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case works, doctors, correctional, probation or parole officers, and others.' Such thorough interviews are necessary to reveal all potential arguments to support a case for mitigation. Both this Court and the Supreme Court have also held counsel's performance deficient when counsel's last-minute investigation resulted in overlooking potentially powerful mitigating evidence. The requirement for counsel to perform thorough, not last-minute, investigations before a mitigation hearing is further reinforced by the ABA Guidelines: 'The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase offenses, decisions about the need for expert evaluations, motions practice, and plea negotiations.' The ABA Guidelines also explain that preparing for the mitigation phase of trial 'requires extensive and generally unparalleled investigation into personal and family history.'"

Trial counsel's failure to investigate mitigating circumstances was deficient performance: Trial counsel did not begin investigating mitigating evidence until after Van Hook was convicted, thereby spending less time preparing for mitigation than the Supreme Court found deficient in *Williams* (counsel began preparing for mitigation a week before the guilt phase began). "By not performing the sort of extensive, thorough investigation that is a minimum requirement of trial counsel in these cases," trial counsel learned little mitigation. The omitted evidence "goes

far beyond the brief details of his parents' alcohol abuse and dysfunctional relationship that were presented at mitigation." Specifically, trial counsel's investigation failed to reveal the following information that would have been available if counsel interviewed or even contacted Van Hook's step-sister, paternal uncle, two paternal aunts, maternal uncle, and the psychiatrist who treated his mother when she was committed to a mental institution: 1) Van Hook's parents repeatedly beat him; 2) Van Hook witnessed his father attempt to kill his mother several times; and, 3) Van Hook's mother was committed to a psychiatric hospital when he was between four and five years old. The court held that counsel's decision to terminate the mitigation investigation before learning of this information cannot be considered a reasonable, strategic decision because the information they had already learned about Van Hook's abusive family background would have given objectively reasonable counsel reason to suspect much worse details existed, because "[f]ailing to complete a mitigation investigation when additional family witnesses are available is not sound trial strategy," and because waiting until four days before the mitigation hearing to bring the investigation is not sound trial strategy. The court also held that trial counsel's decision not to introduce additional family background witnesses cannot be justified under the strategy of attempting to prevent the sentencer from learning about prior criminal convictions because the sentencer was already aware of Van Hook's prior conviction and any additional witnesses that might have been called would have only further developed his case for mitigation.

The failure to seek an independent mental health expert to testify for the defendant was deficient performance: "The ABA Guidelines state what effective death penalty counsel have known and practiced for years: 'In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider are the following: Expert . . . witnesses along with supporting documentation to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or less the client's culpability . . . to otherwise support a sentence less than death . . . and/or to rebut or explain evidence presented by the prosecutor.' These standard for determining prevailing professional norms in death penalty cases highlight the way that an expert witness working closely with counsel can strengthen the defense's case for mitigation. This court has long held that these standards 'represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases. They are 'the clearest exposition of counsel's duties at the penalty phase of a capital case.'" Relying on these standards, the Sixth Circuit concluded that the "complexities of Van Hook's case demonstrate his particular need for an independent mental health expert to assist in the defense": "He pleaded not guilty by reason of insanity and his justification for this was that he had been diagnosed with a mental illness, *i.e.*, 'borderline personality disorder.' Furthermore, after Van Hook was found guilty, one of the few statutory mitigating factors relevant to his case was whether he 'lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law as a result of a mental disease or defect.'" Thus, the court held "[p]resenting a strong case that his psychiatric disorder constituted such a mental disease or defect required the aid of an independent psychiatric expert." **The court also held that an independent defense expert was also "crucial to explain to the sentencer how the details of his upbringing [father beat mother, parents divorced when he was young, father took him to bars starting at age eleven where he was encouraged to consume alcohol] affected him psychologically, thereby reducing his overall culpability for the murder."** The court appointed three mental health experts to evaluate Van Hook, but since they were court appointed, they were not independent. And, their testimony made clear that they were not adequate substitutes. One testified at the sentencing phase that Van Hook had "no remorse," was a "dangerous individual," and did not suffer from a mental illness or defect." However, Van Hook's post conviction expert testified that "it is more likely than not that a reasonable psychiatrist at the time would have concluded that Van Hook's severe borderline personality disorder was indeed a mental disease and met the test of 'mental disease or defect'" under Ohio law. Thus, trial counsel's failure to obtain an independent expert was not only deficient performance but was also not remedied by the experts appointed by the court.

Trial counsel was deficient in not objecting to a presentence report containing victim requests for the death penalty: The presentence report defense counsel requested contained a statement from the victim's mother requesting the "maximum punishment possible," that not executing Van Hook "compounds the offense," and the "maximum punishment would prevent another family from suffering as a result of Van Hook's actions." Even though victim impact statements characterizing or requesting a particular sentence are not admissible in capital proceedings, trial counsel never objected. Because of that and because the victim impact evidence was admitted into evidence only because defense counsel requested a presentence report, the court held trial counsel's performance fell below an objective standard of reasonableness.

Trial counsel's deficient performance cumulatively prejudiced Van Hook: "While it is possible that the panel could have heard the evidence described above, and still have decided on the death penalty . . . that is not the appropriate test. Instead, we must ask whether the available mitigating evidence, taken as a whole, might well have influenced the panel's appraisal of Van Hook's culpability." In ruling that the cumulative deficiencies of trial counsel

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prejudiced Van Hook, the court cited the following: 1) there was only one aggravating factor, thereby making the threshold for finding prejudice less than cases where multiple aggravators had been found; 2) the trial court concluded there was "absolutely no evidence that would suggest that Van Hook suffered from a mental disease or defect"; 3) the sentencer never learned "fully about the two statutory mitigating factors that were the strongest in his case – his traumatic family background and his mental illness"; 4) the sentencer never heard "first-hand accounts from those who knew [Van Hook] best" about how "Van Hook was often beaten by his parents, how he saw his father try to kill his mother, and how his mother was committed to a psychiatric hospital when he was a young child;" and, 5) the sentencer expressly stated that it considered the presentence report, which contained inadmissible victim impact evidence.

***United States v. Young*, 533 F.3d 453 (6th Cir. 2008)**
(*Cook, J., for the Court; joined by, Mills, D.J.; Cole, J., dissenting*)

After voir dire began, the government located nineteen "new" witnesses and sought to add those names to the list of witnesses. When Young objected, the district court sua sponte invoked 18 U.S.C. 3432, which requires the government to provide a capital defendant with a witness list at least before the start trial, to exclude the witnesses. The Sixth Circuit held the district court abused its discretion to exclude relevant testimony on the ground the government failed to conduct a reasonably diligent investigation.

Standard of review: Decisions regarding exclusion of evidence are reviewed for an abuse of discretion while issues of statutory interpretation are reviewed de novo.

Trial begins with the commencement of jury selection: Recognizing the "obvious importance of voir dire to litigants' trial strategy," the court held that trial begins with the start of jury selection for purposes of the statute requiring witness lists be disclosed before trial

Trial court abused its discretion in excluding after-discovered- witness testimony in absence of bad faith: In deciding whether to exclude after-discovered-witness testimony, the Sixth Circuit applied a three part balancing test: 1) the government's good faith; 2) the government's diligence in pretrial investigations; and, 3) any prejudice to the defendant caused by unfair surprise that could not be cured by the brief adjournment. Applying that standard, the Sixth Circuit held that the district court's finding that the prosecution did not exercise due diligence in attempting to locate the witnesses because the case had been pending for nearly six years, no evidence showed the new witness that led to other witnesses was uncooperative, and the government could have done a more thorough job of questioning him during prior interviews, and excluding the witnesses' testimony for those reasons was an abuse of discretion. The Sixth Circuit so held because: 1) the case arose out of a highly complex investigation that involved interviews with more than 200 people and co-ordinations with law enforcement agencies in several states; 2) interviews with bystanders to the crime did not reveal the new witnesses; 3) the prior interviews with the witness who led investigators to new witnesses was thorough (four interviews where the witness was required to reveal everything he knew, and testimony before the grand jury) so the prosecution cannot be faulted for that witness failing to disclose the crucial information that led to additional witnesses until the last minute, as contrasted to a case where the prosecution failed to pursue a promising lead; and, 4) when the prosecution learned of the new information/ witnesses, they followed it up and provided the information to Young within two weeks. But, because the district court never reached the issue of whether "exclusion would be proper upon a showing of irreparable prejudice to Young," the Sixth Circuit remanded to the district court since "it is in the best position to consider this claim in the first instance." The Sixth Circuit then instructed the district court to determine on remand if allowing the testimony would frustrate the purpose of the statute requiring pretrial disclosure of witness testimony - - "to inform the defendant of the testimony which he will have to meet, and to enable him to prepare his defense" - - and should exclude the testimony only if a brief adjournment would not cure the defendant's prejudice.

Cole, J., concurring: Judge Cole first took issue with the majority's ruling that after-discovered witnesses must be allowed to testify as long as the prosecution demonstrates reasonable diligence and good faith and defendant cannot demonstrate irreparable prejudice. Cole believes the proper approach should presume the following: "1) that after-discovered witnesses may be admitted only in a narrow, rare set of case, and 2) that the decision to do so is left to the discretion of the trial court. In other words, there should be no balancing test nor should the burden be shared equally between the parties; courts should presume the after-discovered witnesses are not allowed unless the government shows by clear and convincing evidence that it acted in good faith and that it exercised reasonable diligence in its investigation. Even then, the discretion to apply such an exemption lies solely within the province of the trial courts." Cole also believes the trial judge did not abuse its discretion in excluding the after-discovered witnesses, noting that the prosecution provided the defense with a list of 162 witnesses and then attempted to provide the names, but no addresses, of nineteen additional witnesses after jury selection began, and also noting the majority's willingness to substitute its own view of reasonable diligence for that of the trial judge who has presided over the entire conspiracy case since 1998 and thus has intimate knowledge of the ongoing investigation.

***Lott v. Bagley*, 2008 WL 3165866 (6th Cir. 2006)**
(*Merritt, J., for the Court; joined by, Boggs, C.J. and Cole, J.)*

A claim presented in a successive habeas petition must be dismissed unless it relies on a new law that applies retroactively or the "factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." In an attempt to satisfy that requirement, Lott relied on prosecutorial misconduct. Lott, however, conceded that his prior attorney "intentionally committed malpractice by deciding to deliberately bypass Ohio's courts" under the "old school strategy of deliberate bypass" by which an attorney "hid [the] evidence from state courts for fear that he would lose in what was perceived as a hostile forum, hoping instead to play this winning hand in federal court." The court construed that as an admission that Lott's previous attorney did not satisfy the due diligence requirement to be able to go forward with a successive habeas petition. But, even if he could establish due diligence, the court also held, for the reasons expressed in the district court's opinion, Lott was unable to advance facts which showed that it is more likely than not that he is actually innocent of the murder for which he was convicted, which is prerequisite, under *Schlup v. Delo*, 513 U.S. 298 (1995), to reviewing a procedurally defaulted claim where cause and prejudice to excuse the default has not been shown. Thus, the court held that Lott is not entitled to proceed on the merits of his procedurally defaulted *Brady* claim.

***House v. Bell*, 287 Fed.Appx. 439 (6th Cir. 2008)**
(*Norris, J., for the Court; joined by, Merritt, J; Siler, J., dissenting)*

House sought release into expanded federal custody pending the court's ruling on whether Tennessee has complied with the terms of the conditional writ of habeas corpus and whether the state should be barred from re-prosecuting House because of: 1) the delay in appointment of counsel to represent House in the re-prosecution; 2) ex parte communications by the prosecution with the trial court; and, 3) the destructive testing of evidence by the state in violation of prior orders of the federal court. Because "[i]t is axiomatic that this Court cannot resolve appeals on the representation of the parties" - - "review is confined to the record developed in the district court" - -, the court remanded the case for further findings, concluding that the record before the court is inadequate to determine if Tennessee has "commenced" a new trial against House or whether it violated House's due process rights during the conditional period. In so ruling, the court noted that the district court must further develop the record since House was unrepresented by counsel in the state court proceedings at the time of the district court's decision. But, the court held that, for the reasons expressed in its April 7, 2008 opinion, House is entitled to release pending the resolution of further proceedings.

Siler, J., dissenting: Judge Siler would deny the pending motions without prejudice because House had not met his burden of showing at the time his motion was filed that he is entitled to relief and because the appropriate court for seeking relief was the Tennessee state courts.

***Brown v. Bradshaw*, 531 F.3d 433 (6th Cir. 2008)**
(*Siler, J., for the Court; joined by, Batchelder and Sutton, JJ.)*

When the jury was deadlocked on whether to impose death, the trial judge gave an *Allen* instruction to which defense counsel objected as coercive. The jury later returned with a death sentence, but when the jury was polled, a juror indicated her verdict was a compromise. The trial judge reread the jurors the sentencing phase instructions, minus the *Allen* charge. The jury then returned with a death sentence. In state post conviction, Brown submitted an affidavit from a juror saying the other jurors yelled and screamed at her in the jury room, pounded the table with their fist, isolated her, accused her of holding things up, blamed her for keeping the other jurors from returning to their families, and bullied her into changing her vote to death. The state courts, however, held the affidavit to be inadmissible under Ohio law prohibiting impeaching the verdict with information from deliberations. In federal court, a certificate of appealability was granted on "whether clearly established Federal law was violated when the trial court gave an instruction during the penalty phase that allegedly coerced the jurors to agree to recommend a death sentence." Brown relied on *Lowenfield v. Phelps*, 484 U.S. 231 (1988), but the court found it unavailing because *Lowenfield* approved of giving an *Allen* charge in a capital case with a deadlocked jury that instructed the jurors to consider each other's views and ask themselves whether their own views were reasonable under the circumstances. The court then held that the instruction given to Brown's jury was not different than the instruction given in *Lowenfield*, and thus did not violate clearly established federal law. The court also found that Brown's argument that the alleged coercion instruction precluded the consideration of mitigating factors to be procedurally defaulted by the failure to raise it in state court.

***D'Ambrosio v. Bagley*, 527 F.3d 489 (6th Cir. 2008)**
(*Rogers, J., for the Court; joined by, Gibbons, J.,; Boggs, C.J, dissenting*)

The district court granted the writ of habeas corpus on a *Brady* claim that was discovered during habeas proceedings and never presented in state court. On appeal, the state argued failure to exhaust for the first time. Finding that the state waived the exhaustion requirement, the Sixth Circuit

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reached the merits of the *Brady* claim and affirmed the district court's grant of relief. The court then summarily denied all other claims D'Ambrosio raised.

The state waived the failure to exhaust defense: The state failed to raise lack of exhaustion before the district court, which refused to address the issue sua sponte although acknowledging it had the authority to. Specifically, the district court noted, "because a motion for post-conviction relief would be untimely, that because 'throughout this rather lengthy habeas proceeding, the [warden] has never asserted an exhaustion defense,' and that because the State was responsible for suppressing *Brady* evidence, 'the State cannot now assert D'Ambrosio's failure to exhaust this claim as a bar to this Court's review of it.'" Under the AEDPA, the writ of habeas corpus cannot be granted unless "the applicant has exhausted the remedies available in the courts of the State"; or, "there is an absence of available State corrective process"; or "circumstances exist that render such process ineffective to protect the rights of the applicant." Also, under AEDPA, the "State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." The Sixth Circuit then held that the State expressly waived the exhaustion requirement "because [the state's] counsel's conduct during the district court proceedings manifested a clear and unambiguous intent to waive the requirement. In response to D'Ambrosio's motion to amend his habeas petition in order to add the *Brady* claim, the warden stated that she took no position on the motion, but requested the opportunity to file a response if the district court granted the motion to amend." In granting the motion to amend the habeas petition, the district court "stated that its understanding was that the warden would not argue that the *Brady* claim was unexhausted." Further, "in her Amended Return of Writ, the warden argued that D'Ambrosio's petition contained procedurally defaulted claims because the claims were 'never presented in state court' and 'if now [were] presented, would be found untimely by the state courts.'" From that, the Sixth Circuit concluded that "[t]his is an extraordinary case in which the district court stated it understood exhaustion be a non-issue and that the warden would not later assert it, the warden failed to correct what the district court clearly viewed as the warden's position during the almost four years of litigation before that court, and the warden went on to state to the district court that D'Ambrosio's claims would be untimely in the state courts." The court then noted, "[w]e are aware of no binding authority that says that such conduct by the State is not an express waiver of the exhaustion requirement. . . . It is no answer to say that the warden did not expressly waive exhaustion because the warden did not verbally state that she was waiving the requirement. AEDPA does not require 'magic words' in order for a state to expressly waive exhaustion. The touchstone for determining whether a waiver is express is the clarity of the intent to waive." Finally, the court noted while neither the failure to raise exhaustion nor participation in discovery and moving to expand the record expressly waives the requirement, "this is not a case in which the State simply failed to raise the exhaustion requirement in the district court." Rather, "it is the statements made and actions take by the warden, in addition to these facts, that constitute an express waiver."

A *Brady* violation took place: "The evidence that the district court concluded was *Brady* material falls mostly within two broad categories. First, there is evidence that would have contradicted or weakened the testimony of the prosecution's only eyewitness to the murder, Edward Espinoza. This included (a) the unrecorded conclusions of Detective Hayes and Goldsten, who investigated the crime scene and concluded that [the victim] was not murdered there; (b) a police report describing a tape in which a third party implicated unnamed other individuals in the murder; (c) a police report that noted that [the victim] was not wearing shoes or undershorts when his body was discovered; and, (d) a police report stating that [someone] saw [the victim] alive the night after events that the prosecution claimed happened the night that [the victim] was murdered. Second, there is evidence that demonstrates a motive on the part of another individual, Paul Lewis. The prosecution failed to disclose that Lewis was being investigated, and had earlier been indicted, for a rape to which [the victim] was a witness. Consistent with Lewis's motive to kill [the victim] was undisclosed evidence that (a) Lewis anonymously called the police and revealed non-public facts about the murder; (b) Lewis first led the police to suspect D'Ambrosio; (c) Lewis requested police assistance with respect to an unrelated DUI in exchange for testimony against D'Ambrosio; and, (d) Lewis fabricated a burglary to implicate D'Ambrosio in the murder. The district court was correct that the first category of evidence would have further challenged the prosecution's version of events, whereas the second category of evidence would have revealed Lewis as a legitimate suspect. Together, this evidence would have substantially increased a reasonable juror's doubt of D'Ambrosio's guilt. Because the evidence that the prosecution suppressed would have had the effect of both weakening the prosecution's case and strengthening the defense's position that someone else committed the murder, there is a reasonable probability that the outcome of D'Ambrosio's trial would have been different." In so ruling, the Sixth Circuit rejected the state's argument that the "opinion of a police detective can never be *Brady* evidence if the detective never put that opinion in writing."

Boggs, C.J., dissenting: Boggs believes that the state's silence was nothing more than a "tacit" or "implicit," or "deceitful" action. Because that does not rise to the level of "express" waiver, as required under AEDPA, despite recognizing that "[f]rom the point of view of judicial economy and efficiency, to say nothing of good practice, returning to

state court at this point is probably not the best course," Boggs believed the federal courts could not address the *Brady* claims. Boggs also noted that "the potential for gamesmanship exists on both sides here. It is true that the warden can be seen, knowingly or unwittingly, to have 'hidden in the weeds' by neither raising nor waiving exhaustion, and then raising it on appeal. On the other hand, counsel for the petitioner, undoubtedly aware of the AEDPA requirement, also refrained from bringing the matter to a head. Petitioner could have demanded that the waiver be made 'express' and thus nail the matter down in the district court. Of course, this would have run the risk that the warden might then have declined to waive and the court would then have been required to rule explicitly on the point, with the possible result that the federal proceedings would have been derailed awaiting such actual exhaustion. Thus, the weeds involved in this case may well have contained counsel for both Petitioner and Respondent."

United States District Courts for Kentucky

***United States v. Green*, 2008 WL 4000943 (W.D. Ky.)** *(Russell, J.)*

The district court rejected the argument that the Federal Death Penalty Act is unconstitutional because the death penalty: 1) is infrequently sought and imposed, therefore operating in an arbitrary, capricious, and unusual manner; 2) violates evolving standards of decency under the Eighth Amendment, mainly because of the declining number of death sentences; and, 3) violates fundamental fairness because federal juries impose the death penalty without consistency or predictability as shown by a list of cases suggesting no discernable basis for why relatively few defendants receive the death penalty while others do not. In denying the latter argument, the court noted that the defendant "presents no evidence and makes no argument that the FDPA's procedures are unfair or inconsistent."

***United States v. Green*, 2008 WL 4000916 (W.D. Ky.)** (Russell, J.)

The defendant alleged the "special findings" in the indictment and notice of intent to seek death are insufficient to apprise him of the nature of the gateway intent and aggravating factors upon which the government will rely or enable to him to prepare his defense to those allegations. The FDPA provides a defendant is only subject to a death sentence if the prosecution serves on the defendant a reasonable time before trial a list of the aggravating factors it intends to rely on as basis for seeking death, and then only if the jury first determines beyond a reasonable doubt that the defendant had the mental state described in at least one of four gateway intent factors (eligibility for death penalty). The prosecution provided the defendant with the list of aggravators, but did not provide the factual basis supporting them. Relying on cases from the Fourth and Eighth Circuit, the court rejected the argument that prosecution was required to do so, noting that the FDPA does not mention providing specific evidence that will prove the factors. The court also rejected the argument that the prosecution must select one of the four gatekeeping factors rather than rely upon them all, which includes all possible mental states in the statute and the argument that "especially heinous, cure, and depraved manner, in that it involved torture and serious physical abuse" and that the killings were "substantially planned and premeditate" are overly vague and fail to narrow the category of defendants who are eligible for death because the government did not provide evidentiary detail.

***United States v. Green*, 2008 WL 4000902 (W.D. Ky.)** (Russell, J.)

Weighing of aggravating and mitigating factors at selection stage is not fact that must be found beyond a reasonable doubt: Under the Federal Death Penalty Act, at the sentencing phase, the jury's duties are divided into two stages: eligibility and selection. During the eligibility phase, the defendant becomes death-eligible only if the jury finds unanimously and beyond a reasonable doubt that: 1) the defendant was 18 years old or more at the time of the offense; 2) the defendant had the requisite mental state when he committed the offense; and, 3) at least one statutory aggravating factor exists. If the jury finds all three exist, the selection phase begins at which the jury weighs the statutory and non-statutory aggravating factors against the mitigating factors to determine whether to impose death. If at least one mitigating factor is found, the jury then decides whether all the aggravating factors sufficiently outweigh the mitigating factors. The jury then unanimously recommends the sentence. Green argued that the selection stage weighing is a finding of fact that increases the maximum punishment which means the FDPA violates the Sixth Amendment because it does not require the jury to apply the reasonable doubt standard in deciding whether the aggravating factors outweigh the mitigating factors. The district court held that the decision that aggravating factors outweigh the mitigating factors is not a finding of fact that enhances a sentence because the jury has already made all necessary findings to enhance it to a death sentence and thus it does not need to be found by a jury beyond a reasonable doubt.

Relaxed evidentiary standard does not render death eligibility phase unreliable:

When determining death eligibility under the FDPA, the Federal Rules of Evidence do not apply. The district court held this does render the sentencing phase unreliable as it actually provides more protection to the defendant by "providing for the most individualized sentence possible" by allowing more evidence to be introduced and because the Supreme Court's rulings in *Williams v. New York* and *Gregg v. Georgia* reject the notion that stringent evidentiary rules should apply at capital sentencing hearings.

Jury instruction if case reaches sentencing phase: The court found that a sentencing phase jury instruction

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informing the jury that the defendant is presumed innocent would confuse the jury and necessitate further instructions explaining what it means for a guilty person to be considered innocent, all of which would likely confuse the jury. To avoid that, the court decided that if the case reaches the sentencing phase: "the jury will be instructed in no uncertain terms that it is the government's burden to prove, if it can, to a unanimous jury beyond a reasonable doubt everything required to make defendant eligible for the death penalty, and everything required for the jury to return a recommendation of death, as contemplated by both the FDPA and the Constitution. The jury will also be instructed in unequivocal terms that defendant has no burden or duty to prove anything (unless, of course, defendant elects to present evidence in mitigation, in which case the jury will be instructed on the preponderance standard, lack of a unanimity requirement to consider mitigating factors, etc.)."

***United States v. Green*, 2008 WL 4000901 (W.D. Ky.)** (Russell, J.)

The defendant argued that the following findings of the Capital Jury Project render the application of the Federal Death Penalty Act unconstitutional: 1) premature decision-making which renders the penalty phase meaningless; 2) the failure of the jury selection to remove large numbers of death-biased jurors, and the overall biasing effect of the selection process itself; 3) the pervasive failure of death qualified jurors in actual cases to comprehend and/or follow penalty instructions; 4) the wide-spread belief among jurors who sat on capital trials that death is required; 5) the wholesale evasion of responsibility for the punishment decision; 6) the continuing influence of race discrimination on juror decision-making; and, 7) the significant underestimation of the alternative to death. Noting that the findings of the Capital Jury Project are not precedent and that the defendant has neither attempted to connect the findings of the CJP to the FDPA nor shown that the FDPA produces any of these seven characteristics, the court held that the CJP findings do not undermine the constitutionality of the FDPA.

***United States v. Green*, 2008 WL 4000873 (W.D. Ky.)** (Russell, J.)

The court denied, as premature because the defendant has not yet been convicted or sentenced to death, the motion to find the lethal injection per se unconstitutional as violating the evolving standards of decency because it causes the purposeless and needless imposition of pain and suffering.

***United States v. Green*, 2008 WL 4000870 (W.D. Ky.)** (Russell, J.)

"Substantial" in substantial planning and premeditation aggravator is not unconstitutionally vague and the aggravator narrows the category of death eligible defendants: Green argued that the aggravator is unconstitutional because "planning and premeditation" does not guide the jury as to how much or what kind of planning and premeditation are necessary to rise to the level of substantial. Finding that it can only be understood to have a higher degree of planning that anything not modified by "substantial" and that "substantial" is a commonly understood word, the court denied this claim.

Heinous, cruel, or depraved manner of committing offense aggravator is not vague: Although this aggravator is limited by the statutory requirement that it also involve serious physical abuse to the victim, Green argued that does not narrow the class of murderers to which it applies for all murders involve serious physical abuse. The court held that instructing the jury that the aggravator means inflicting significant damage to the victim beyond what the defendant thought was necessary to cause death, *i.e.*, the defendant intended to do more than kill, resolves any possible risk that the aggravator fails to narrow the class of death eligible offenders.

The court also rejected arguments that the use of non-statutory aggravating factors constitutes an unlawful delegation of legislative authority and violates the Ex Post Facto Clause, the victim impact aggravator is unconstitutional, and the witness elimination aggravator fails to narrow the class of defendants eligible for the death penalty. But, the court required the prosecution to provide more information on the victim impact evidence so the defense can adequately address it at trial.

Kentucky Supreme Court

***Chapman v. Commonwealth*, No. 2005-SC-00070 (Nov. 19, 2008) (denying stay of execution)**

The court denied a request to stay Chapman's execution, against his wishes, pending the filing of a petition for a writ of *certiorari* and pending the Kentucky Supreme Court's ruling on whether Kentucky's lethal injection protocol must be adopted as an administrative regulation. In a concurring opinion, Justice Noble said "I have concurred in this Order only because it is the law, and I am sworn to uphold the law of the people. If state executions are not the will of the people, then they must demand a different approach. I would welcome such legislation."

***Johnson v. Commonwealth*, 2008 WL 4270731 (Ky.) (unpublished)**

The trial court erred in not holding an evidentiary hearing on Johnson's claim that his guilty plea was involuntary because he pled under a belief he would not be sentenced to death: A guilty plea must be a knowing, intelligent, and voluntary choice among the alternative courses of action open to the defendant. The voluntariness of a plea can be determined only by considering all of the relevant circumstances surrounding it. An evidentiary hearing is necessary only when "there are material issues of fact that cannot be determined on the face of the record. . . . Generally, an evaluation of the circumstances supporting or refuting

claims of coercion and ineffective assistance of counsel requires an inquiry into what transpired between attorney and client that led to the entry of the plea, *i.e.*, an evidentiary hearing. Where the court below denies the motion for evidentiary hearing on the merits, as in this case, review is limited to whether the motion 'on its face states grounds that are not conclusively refuted by the record, and which, if true, would invalidate the conviction.' If material issues of fact exist that could not be conclusively proved or disproved upon the face of the record, the circuit court erred by denying the movant's RCr 11.42 motion without an evidentiary hearing."

Johnson alleged that his guilty plea was induced by trial counsel's assertion that he had a secret understanding with the judge to sentence him to less than death. He supported that allegation with an affidavit from one of his trial attorneys that said the trial judge inquired about or suggested the possibility of settling the case in an off-record conversation in chambers with all counsel present. The trial attorney's opposition to Johnson taking a blind guilty plea changed after an off-record meeting between defense counsel and the judge at which the judge asked Johnson if he would accept LWOP for twenty-five years. After that, Johnson entered a guilty plea at the advice of counsel because they believed the judge was offering a deal of less than death. A mitigation specialist also stated by affidavit that she understood the judge would not sentence Johnson to death and that Johnson would be allowed to withdraw his plea if sentenced to death. And, Johnson submitted an affidavit alleging trial counsel told him he had a deal and that he had to say in court that he had not been coerced or influenced to plead in order for the plea to be accepted and that he pled guilty because he thought a deal for less than death was in place. Once Johnson's plea was accepted, the Commonwealth appealed its right to insist on jury sentencing. The Commonwealth later agreed to forgo jury sentencing if Johnson agreed to LWOP for twenty-five years. Johnson rejected the deal and was sentenced to death. In his post conviction affidavit, Johnson said he rejected the Commonwealth's plea offer because: 1) he believed he already had a deal with the judge; 2) he wanted to go ahead with a sentencing trial so he could see his family; and, 3) if he was going to get a life sentence, he wanted the judge to give it to him rather than "do it myself."

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After saying "plea bargaining is left to the prosecutor and defense without active involvement from the bench" and "[t]rial judges are not to become involved in the plea bargaining process so as to supplant the roles of the prosecuting attorney and defense attorney," the court ruled that "where a plea of guilty is alleged to have been induced by promise, the essence of those promises must in some way be shown." Here, the judge denied that the off-the-record conversation about the plea took place, and Johnson's sworn statement in open court that he was not promised or coerced to plead guilty is contradicted by his present allegation that trial counsel required him to say that to obtain the secret bargain. Thus, despite "solemn declarations in open court carry[ing] a strong presumption of verity," the court held that an evidentiary hearing must be held to determine if "advice of counsel amounted to duress or created an involuntary plea at the plea hearing," at which the court must determine what was said at the allegedly off-record communication with the judge along with the "communications of defense counsel with Johnson that may have influenced his understanding of his prospects upon a plea of guilty." The court also held that the hearing should resolve the issue of whether Johnson was coerced when his attorney allegedly threatened to withdraw from the case if Johnson refused to accept the plea.

The trial judge cannot preside over the evidentiary hearing: Although the Chief Justice had previously denied a motion to disqualify the trial judge under K.R.S. 26A.015, the court held that it is now necessary for a special judge to preside over the evidentiary hearing because "the claim of an understanding with the court may require participation by the trial judge as a witness."

Ineffective assistance of counsel standard when guilty plea entered: Counsel's actions must be shown to have affected the outcome of the plea process and "but for counsel's deficient performance, there was a reasonable probability that the defendant would not have pleaded guilty but would have insisted on proceeding to trial."

Trial counsel was not ineffective: The court held that trial counsel was not ineffective for not attempting to withdraw the guilty plea on the basis that Johnson had relied on the assumed deal to less than death since the judge had already rejected an attempt to withdraw the plea on other grounds, withdrawal of a plea is within the trial judge's discretion, and the alleged secret deal was an unenforceable agreement.

Mental illness is not grounds to exclude the death penalty:

***Hilbert v. Seay*, 2008 WL 3890410 (Ky.) (unpublished)**

At the sentencing phase of Hilbert's trial, the jury failed to find a statutory aggravating circumstance for one of the murders and found the "the defendants acts of killing was (sic) intentional" with regard to the other murders, which was only part of the statutory aggravator that the "offender's act or acts of killing were intentional and resulted in multiple deaths." But, the jury imposed less than death for each murder. Hilbert's successfully appealed and the prosecution announced it would seek death at the retrial. The trial court prohibited seeking death for one of the murders because no statutory aggravating circumstance had been found at the first trial. When the trial judge allowed the prosecution to seek death for the other murder, Hilbert sought a writ of prohibition in the Kentucky Supreme Court arguing that seeking death at the retrial violated the Double Jeopardy Clause for two reasons: 1) "the jury gave meaningful

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consideration and effect to mitigating evidence, as required by the Eighth Amendment, and decided that the balance of the aggravating and mitigating circumstances did not justify imposing a death sentence; "and, 2) "the only aggravating circumstance found by the jury was an aggravating circumstance that did not exist under state law." After determining it had jurisdiction to decide the writ, the court denied prohibition.

The Kentucky Supreme Court has original jurisdiction to decide a writ involving the death penalty but when is it proper to exercise that authority?: The Supreme Court is vested with authority to entertain writs of prohibition under both the Ky. Const. 110(2)(a) and the rules of civil procedure. As a threshold matter, for the court to exercise its discretion in hearing a writ, the underlying decision must be reviewable by the court as a matter of right. Cases where death has been imposed are such cases and the court has previously held that double jeopardy in a capital case is an appropriate subject for a writ of prohibition directly to the Kentucky Supreme Court. Thus, the court held that a petition for a writ of prohibition may be filed in the Supreme Court when it involves death penalty matters but all other prohibition actions should be filed in the Court of Appeals unless they are against the Court of Appeals itself because until any other sentence is imposed, it is not known if the length of the sentence will make the case automatically appealable directly to the Kentucky Supreme Court. "Having determined that the facts of this particular case frame a significant issue very well, *i.e.*, the application of the Double Jeopardy Clause in Kentucky capital cases and the sufficiency of a finding of an aggravating circumstance within the KRS 532.025 requirements, [the court] exercise[d its] discretion and substantively address[ed] the merits of Petitioner's argument."

Standard of review: Legal issues are reviewed de novo. Findings of fact are reviewed under the clearly erroneous standard and will not be found erroneous unless the finding is not supported by substantial evidence, which is defined as "when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." Sufficiency of the evidence claims are reviewed in the light most favorable to the prosecution.

Jury's finding of a partial aggravator was sufficiently close to the statutory aggravator to make Hilbert eligible for death: In order to impose a death sentence, the jury must find one of the statutory aggravating circumstances. Here, the only aggravator submitted to the jury was that the "offender's act or acts of killing were intentional and resulted in multiple deaths." On the penalty phase verdict form, the jury wrote as an aggravating circumstance only that "the defendant's acts of killing was (sic) intentional." Hilbert argued that this incomplete finding is the equivalent of failing to find a statutory aggravating circumstance, thereby making him ineligible for death. The trial court rejected Hilbert's argument without hearing any testimony for the following reasons: 1) the jury attempted to state an aggravating circumstance; 2) the jury foreman wrote the incomplete aggravating circumstance on the corresponding empty line on the verdict form for the aggravating factor to be written; 3) the words the jury foreman wrote on the verdict form were words contained in the one aggravating factor available to the jury as set out in the court's instruction to the jury; and, 4) it believed that if the error had been noticed upon the return of the verdict, and if the court had provided the jury with an opportunity to correct the finding, the circumstances indicate the jury would have revised what it had first written to conform to the aggravating factor set out elsewhere in the instructions. On appeal, the Kentucky Supreme held that the intention of the jury on the penalty phase verdict is a finding of fact subject to clearly erroneous standard. Without explaining why (merely repeating the trial court's findings), the court found the trial court's ruling was supported by substantial evidence.

Seeking death when the jury found an aggravating factor but did not impose death at the first trial does not violate Double Jeopardy: The Kentucky Supreme Court interpreted the United States Supreme Court's decision in *Bullington v. Missouri* to mean that a "jury verdict that sentences a defendant to less than the statutorily authorized maximum penalty of death does serve as an 'implied acquittal' of the death penalty and, as such, the prosecution is precluded from reseeking the death penalty upon retrial." In *Eldred*, the Kentucky Supreme Court held that Kentucky's statute is different from Missouri's in a way that means imposing less than death is not a finding that the prosecution did not prove the defendant deserved death and thus not an implied acquittal of the death penalty for purposes of the Double Jeopardy Clause. Specifically, unlike in Missouri, Kentucky's death penalty statute: 1) does not limit the jury's sentencing options to only two choices; and, 2) does not require the jury to determine whether death is the appropriate sentence but instead requires the jury to determine merely what is the appropriate sentence. The court saw no reason to overrule *Eldred*, and thus maintains its opinion that as long as a statutory aggravating circumstance was found by the first jury, the Double Jeopardy Clause does not bar seeking death at a retrial.

Note: Double Jeopardy issues are cognizable in a pretrial federal writ of habeas corpus under 28 U.S.C. 2241, to which the Anti-Terrorism and Effective Death Penalty Act does not apply so the federal court reviews the claim de novo. Hilbert's federal habeas petition on the Double Jeopardy issues is pending.

***Mills v. Messer*, 268 S.W.3d 366 (Ky. 2008)** (*Lambert, C.J.)* In *Soto v. Conrad*, No. 06-SC-924, the court held that a post-conviction litigant is entitled to funds, under K.R.S. 31.185, for expert assistance upon: 1) a finding that the post-

conviction petition sets forth allegations sufficient to necessitate an evidentiary hearing regarding a particular issue; and, 2) showing that a witness is "reasonably necessary for a full presentation of the petitioner's case." The *Soto* court then ruled that a writ of mandamus on the issue is appropriate without a showing of irreparable injury because the writ aids "the interest of judicial economy, as it would be inefficient to raise the funding issue for the first time on direct appeal after the post-conviction proceeding because if the petitioner was found to be entitled to funding, the entire proceeding would be held again and the administration of justice would be delayed." Relying completely on *Soto*, the court granted the writ and remanded the case for a determination of whether the requested experts are reasonably necessary at the evidentiary hearing that the Kentucky Supreme Court had previously ordered to take place.

***Mills v. Messer*, 254 S.W. 3d 814 (Ky. 2008)**
Mills sought mandamus to compel the circuit court to provide funds for travel expenses of out-of-state witnesses for a post conviction evidentiary hearing. In *Hodge v. Coleman*, 244 S.W.3d 102 (Ky. 2008), the court held that indigent post conviction petitioners are entitled to funds for the travel expenses of out-of-county witnesses where the post conviction petition raises an issue that cannot be resolved without any evidentiary hearing and the proposed out-of-county witnesses' live testimony at the evidentiary hearing is necessary for a full presentation of the petitioner's case. Having already remanded Mills' case for an evidentiary hearing, the court held that he satisfied the first prong of *Hodge* and remanded the case for consideration of whether the live testimony of the witnesses Mills identified is necessary for a full presentation of the issues before the circuit. The court also held that the interest of judicial economy made the writ of mandamus appropriate without a showing of irreparable harm. Quoting *Hodge*, the court said "[a] finding that [petitioner] should merely raise these issues on a direct appeal seems an unreasonable burden on the proper administration of justice in that denying the writ would prevent [petitioner] from presenting witnesses on their behalf at the post-conviction hearing that we have already ordered."

***St. Clair v. Coleman*, 2008 WL 2484715 (Ky.) (unpublished)**
St. Clair sought a writ prohibiting retrying him on the grounds that the trial would violate both the Interstate Agreement on Detainers and the right to a speedy trial. Because St. Clair presented no evidence of a lack of an adequate remedy on appeal, defined as an "injury suffered that could not thereafter be rectified in subsequent proceedings in the case," the court held that St. Clair's claims were not the proper subject of a writ.

***Furnish v. Commonwealth*, 267 S.W.3d 656 (Ky. 2007)**
On remand from the Kentucky Supreme Court for a new sentencing hearing, a factual narrative of the evidence of guilt was read to the jury who was not required to finding aggravating circumstances since the original jury had done so. Furnish was again sentenced to death.

Because Furnish stipulated to the existence of aggravating circumstances, the previous jury's finding of aggravators was sufficient: At Furnish's initial trial, the jury designated in writing that it found a statutory aggravating circumstances. At resentencing Furnish agreed to a narrative of facts that that included the previously found aggravating circumstances being read to the jury. On appeal, Furnish argued that due process prohibited the sentencing jury from relying on the previous jury's finding of aggravating circumstances rather than making its own independent findings and that the *Apprendi* line of cases required jury findings of all facts that enhance a sentence including aggravating circumstances. Construing the agreement to a narrative of facts as a stipulation and interpreting *Apprendi* to only bar nonconsensual judicial findings of enhancing factors, the court rejected Furnish's argument. The court, however, said that "without the stipulation, the outcome of the issue could be different."

A conviction obtained after the original trial is admissible at a sentencing phase retrial: After Furnish's conviction in this case, he pled guilty to another murder. At the retrial, that murder conviction was introduced at the penalty phase. On appeal, Furnish argued that the guilty plea to murder was inadmissible because it did not exist at the time of his initial trial in this case and thus punishes him for pursuing an appeal. The Kentucky Supreme Court recognized this was an issue of first impression, but ruled that the term "prior" conviction under Kentucky law refers to the "status of the defendant at the time of sentencing, not at the time of the commission of the charged crime," and that the jury was entitled to hear all relevant evidence including that of a prior crime. Thus, the court held that a conviction that did not exist at the time of the first trial can be admitted at a retrial.

Use of the words "evil," "animal," and "wolf" to refer to Furnish were improper: In closing argument, the prosecutor called Furnish an "animal," "evil," and a "wolf." In reference to these words, the court said "[t]here is no place in a courtroom for such personal vilification of a defendant, no matter how vile the charges against him. We strongly caution prosecutors throughout this Commonwealth to refrain from such personal attacks against defendants." Yet, the court held reversal was not required, given the strong evidence against him.

There is no federal or state constitutional right to allocution but a trial court does not abuse its discretion by allowing allocution at the sentencing phase of a capital case.

Lethal injection on its face is constitutional but challenges on direct appeal are premature: Furnish raised a general challenge to lethal injection that the court denied after discussing specifics of the chemicals and procedures used

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in lethal injections. In do so, the court noted that Furnish's "contention is somewhat premature because KRS 431.220(b) allows the accused to elect the method of execution until twenty days prior to its imposition. If no election is made the method will be lethal injection. Here, no such election has been made."

***Willoughby and Halvorsen v. Commonwealth*, 2007 WL 2404461 (Ky.) (unpublished)**

Willoughby and Halvorsen filed a CR 60.02 motion seeking relief from judgment based on an affidavit alleging one of the jurors brought a Bible into the jury room and read Bible passages to the jurors and led them in prayer during deliberations. The trial court found the CR 60.02 motion untimely because it was filed 22 years after the trial. The Kentucky Supreme Court affirmed. In so ruling, the court noted that two of the jurors were interviewed in 1985 and the trial record shows the trial judge allowed a juror to lead the rest of them in prayer after returning a death sentence. From that, the court concluded that Halvorsen and Willoughby "could have learned of any alleged jury misconduct approximately twenty years before they filed their CR 60.02 motion," and thus, the circuit court did not abuse its discretion in finding the CR 60.02 motion untimely. The court also held that because the affidavit occurred before Willoughby's RCr 11.42 petition was denied, he could have sought leave to amend it to include juror misconduct claims. The failure to do so also meant the claim was barred from review in a CR 60.02 motion by the rule that issues that could reasonably have been raised in an RCr 11.42 motion are not cognizable in a CR 60.02 motion filed later in time.

***Chapman v. Commonwealth*, 265 S.W.3d 156 (Ky. 2007)**

(*Minton, J., for the court; Lambert, J., concurring, joined by Noble, J.)*

After being found competent to stand trial, Chapman sent a letter to the court asking to fire his attorneys, plead guilty, and be sentenced to death. The judge ordered another competency evaluation, resulting in an expert conclusion that Chapman's decision could change if he received mental health treatment. Chapman was then sent to the state mental health facility where he was prescribed Zoloft to treat his depression. A subsequent competency hearing ensued at which the trial court found Chapman competent and removed Chapman's attorneys but required them to act as standby counsel. At final sentencing, the prosecution presented brief testimony to establish the essential elements of the crime. The judge then said that he would not consider the mitigation trial counsel proffered, because Chapman did not want to present mitigating evidence. The judge then imposed two death sentences on Chapman. By state law, a mandatory direct appeal ensued.

Proportionality review and cases where death not imposed: The court held that its proportionality review of death sentences is constitutional even though the court refuses to consider cases where death was not imposed.

An indictment does not have to describe the aggravating circumstances making a defendant eligible for death: The court once again held that aggravating circumstances need not be described in the indictment when the prosecution files a notice of intent to seek death that sets forth the applicable aggravating circumstances.

Trial counsel fired by the defendant can be appointed standby counsel: After holding that a trial court can appoint standby counsel over the defendant's wishes and after noting it could find no cases where a recently fired attorney was appointed standby counsel over the defendant's wishes, the court held that the trial judge did not err in appointing Chapman's fired attorneys as standby counsel. In so ruling, the court cited the following reasons: 1) the attorneys were already familiar with the case, meaning that the case could have gone forward quickly if Chapman later withdrew his request to proceed pro se; 2) Supreme Court Rule 3.130(1.2)(a)-(b) says an attorney must defer to the client's choice of whether to plead guilty and that an attorney's representation of a client does not constitute an endorsement of that client's social or moral viewpoint; 3) "a newly-appointed standby counsel would have been similarly obligated to assist Chapman in carrying out his stated objective of seeking the death penalty regardless of whether that attorney believed that objective to be either legally or morally misguided"; 4) "appointment of 'fresh' counsel may have worked to Chapman's disadvantage since that counsel would not have been as familiar with the facts and circumstances of the already two-year old case, meaning the likelihood of that attorney seeking a continuance would have been greater, thereby thwarting Chapman's stated aim of being sentenced to death simply and quickly"; and, 5) "the alleged communication breakdown and irreconcilable differences between Chapman and his attorneys is belied by the fact that Chapman continued to confer with them during the sentencing hearing-after they had become standby counsel." Yet, the court "recognize[d] that appointing a recently-fired attorney to act as a defendant's standby counsel may not be wise or proper in all cases."

The trial court did not err by refusing to consider mitigating evidence tendered by standby counsel: Hours before sentencing, Chapman's standby counsel delivered to chambers, under seal, a document they asked the trial court to consider as mitigating evidence. The trial judge, however, refused to consider it because Chapman did not want to present mitigating evidence. On appeal, Chapman argued that the refusal to consider mitigating evidence is contrary to Kentucky law saying a trial court "shall" consider mitigation evidence in death penalty cases and that amicus counsel should be appointed to present mitigating evidence

in cases where a defendant does not want mitigation presented. Although the court ruled the word "shall" is mandatory, that "mitigation evidence in a capital murder case is a matter of great importance" that a trial court is "obligated to consider," and that "perhaps the mitigation evidence tendered by Chapman's counsel would have been beneficial in the trial court's difficult decision about whether to sentence Chapman to death," the Kentucky Supreme Court held that the trial court did not err in refusing to consider the proffered mitigating evidence, because that evidence was not "properly submitted mitigation evidence. Once the trial court allowed Chapman to proceed pro se, Chapman himself became arbiter of what, if any, evidence he wanted to offer, including a right to waive his right to present mitigation evidence. It is clear that a defendant may refuse to present mitigation evidence, even if his counsel advices him to the contrary. And a pro se defendant proceeding with standby counsel has the right to determine what role, if any, standby counsel will perform. In other words, once a defendant has validly waived his right to counsel and is proceeding pro se, standby counsel may not override that pro se defendant's wishes as to what evidence, if any, will be presented on behalf of the defense. After all, it is the defendant 'who suffers the consequences if the defense fails.' This presupposes that the pro se defendant has been given all the warnings regarding the waiver of presentation of mitigation evidence set forth in *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004)." Because that took place here, standby counsel exceeded their authority by tendering mitigating evidence, meaning the mitigation was not properly before the court so the trial judge correctly refused to consider it. In other words, the court "will not compel a competent capital defendant to present mitigation evidence against the defendant's wishes," even though doing so may have aided the court in deciding the appropriate sentence: "Society does have an interest in executing only those who meet the statutory requirements and in not allowing the death penalty statute to be used as a means of state-assisted suicide. However, society's interest in the proper administration of justice is preserved by giving a defendant the right freely to present evidence in mitigation, by requiring the sentencing body to find aggravating factors before imposing the death penalty, and by requiring that a sentence of death be reviewed by this court. These practices are to assure that the death penalty will not be imposed arbitrarily."

Chapman was competent to stand trial and to plead guilty: Kentucky applies the same standard to determinations of competency to stand trial and competency to plead guilty: a trial court's competency determination will be disturbed only if the trial court's decision is clearly erroneous, defined as "not supported by substantial evidence." Because the state psychiatric expert found Chapman competent despite a history of substance abuse and suicidal thoughts, the Kentucky Supreme Court held that the trial court's competency ruling was supported by substantial evidence. Because the same standard applies to determining competency to plead guilty, the court likewise found that Chapman was competent to do so.

A defendant may plead guilty to a capital offense in order to seek the death penalty, but the court can impose less than death: Finding that "[a]dhering to a defendant's choice to seek the death penalty honors the last vestiges of personal dignity available to such a defendant," the court held a "competent criminal defendant" can seek to plead guilty to a capital offense and seek to receive the death penalty. But, the trial court is not obligated to accept the plea. "[A]ny guilty plea in a capital case in which a defendant seeks to receive the death penalty must be closely scrutinized to ensure that it protects the constitutional rights of the defendant, as well as the Commonwealth's interest in ensuring that the death penalty is not used to further a defendant's suicidal motives." To ensure that, the trial court must make a "particularized and case-specific determination that the plea is legally permissible and, considering all the underlying facts and circumstances, appropriate for the offense(s) in question."

Standard for determining competency to plead guilty and seek death: The Court adopted the *Rees* standard for determining competency to abandon post conviction proceedings: "whether [the defendant] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." Applying that to trials, the finding is in regard to "pleading guilty, waiving jury sentencing, waiving mitigating evidence, and seeking the death penalty." The court then found that the factual findings the trial court made satisfied *Rees*, even though the trial court appeared to not be aware of *Rees*.

Chapman was sentenced to death because death was appropriate not because Chapman requested a death sentence: The court reached this conclusion because, before sentencing Chapman to death, the trial court: 1) informed Chapman of the entire range of punishment for his offenses; 2) informed Chapman of the consequences if it rejected Chapman's plea agreement; 3) engaged in several patient and thorough colloquies with Chapman in order to determine that Chapman was not incompetent and was not seeing to plead guilty to expedite the proceedings against him for an improper or irrational reason; 4) found both orally and in writing that numerous statutory aggravating factors were present; and, 5) wrote in the final judgment that it took into account the testimony of doctor who found Chapman competent, Chapman's history and character, and the nature and circumstances of the crime.

A defendant requiring the defendant to personally recite the factual basis of a plea is not necessary for the plea to be valid.

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Note: The Kentucky Supreme Court noted that the Supreme Court of the United States has rejected the notion that competency to plead guilt and competency to waive the right to counsel, both of which are based on a preponderance of the evidence standard, are measured by a standard higher than the one used to determine competency to stand trial. The United States Supreme Court, however, recently ruled in Indiana v. Edwards that state courts can apply a higher standard to determining competency to represent oneself than competency to stand trial.

Lambert, C.J. concurring: "Imposition of the death penalty is the ultimate expression of state outrage for criminal conduct. The wishes of a defendant, whether motivated by sincere remorse, desire to escape life imprisonment, or to assert control should play no part in a death penalty determination. The death penalty should be imposed only at the conclusion of the litigation process, after every possible legal claim available to the defendant has been explored and determined to be without merit."

***Halvorsen v. Commonwealth*, 258 S.W.3d 1 (Ky. 2007)**
(*Lambert, C.J., for unanimous court)*

Affidavits executed after RCr 11.42 hearing can be properly entered into the record: The Commonwealth asked the court to strike affidavits attached to Halvorsen's brief because they were executed after the RCr 11.42 motion and only attached to a request for an additional hearing and to supplement the record and Halvorsen's motion for reconsideration of the denial of RCr 11.42 relief. Because it appeared that the trial court granted Halvorsen's motion to supplement the record with most of the affidavits and merely found they did not change its ruling or merit an additional hearing, the Kentucky Supreme Court denied the Commonwealth's motion to strike the exhibits and held that its "review will include the items attached to Appellant's brief that were also included in his motion to supplement."

Trial counsel was not ineffective for allegedly failing to consult with Halvorsen, which allegedly resulted in a failure to investigate and present evidence supporting the defenses of intoxication, duress, and EED: In a highly fact-intensive analysis, the court found that Halvorsen presented no evidence at his RCr 11.42 hearing that would have supported a finding of EED, no evidence of duress that was not already presented at trial through the Halvorsen's own testimony, and no evidence of intoxication that was not already before the jury through the testimony of Halvorsen's codefendant. Thus, regardless of the sufficiency of trial counsel's investigation, Halvorsen suffered no prejudice. The court also held that Halvorsen did not overcome the presumption that trial counsel's decision to not have Halvorsen testify so counsel could argue innocence was "sound trial strategy" since no one witnessed Halvorsen shoot anyone and the codefendant made statements taking responsibility for the shootings.

Trial counsel was not ineffective for failing to obtain an independent psychologist or pharmacologist: The court "fail[ed] to discern" how Halvorsen's statements that he felt "panicked" and "scared" on the night of the murders and had ingested copious amounts of drugs should have "reasonably alerted trial counsel of the need for additional experts." The court also held Halvorsen failed to show prejudice because the expert testimony at the RCr 11.42 hearing was that "more evaluation and testing were warranted," and no expert testified that the toxic solvents to which Halvorsen had been exposed were in his body on the day or the murders. ■

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PRACTICE TIPS

By the Appeals Branch

PF O, or PLEASE FREQUENTLY OBJECT!

We all know what to do after the prosecutor closes her case and at the close of all the evidence during the guilt phase- approach the bench and move for a directed verdict of acquittal because the prosecutor has failed to prove all the elements of the offense.

So, the same should be done in the PFO or subsequent offense portion of the trial. KRS 532.080 sets out very specific elements that must be proven beyond a reasonable doubt before your client's sentence can usually be greatly enhanced. But often proof of some of these elements is missing.

One of the most frequent is that the defendant must be 18 on the date any prior offense was committed. KRS 532.080 (2)(b) and (3)(b). Prosecutors use certified copies of judgments or clerks testifying from documents to tell the jury the case number, the charge, the sentence and the date of final conviction but often forget evidence of the date the prior was committed. The jury can put two and two together, if it has the defendant's birth date and the date the prior was committed; but it cannot assume the defendant was 18 simply because the indictment or conviction occurred on any certain date. *Howell v. Commonwealth*, 163 S.W.3d 442 (2005); *Hayes v. Commonwealth,* 698 S.W.2d 827 (Ky. 1985).

So listen carefully, and if the prosecutor fails to introduce the date of the prior offense, or the defendant's birth date, move for a directed verdict! The prosecutor may not have the indictment or the witness to correct this error in proof and object if she moves to re-open her case.

Another element missed is that the defendant was either on probation or parole or that he was released from service of the sentence within 5 years of the commission of at least one prior offense. KRS 532.080 (2)(c) and (3)(c). Again, the jury is allowed to draw reasonable inferences but cannot convict based on speculation. Compare *Davis v. Commonwealth*, 899 S.W.2d 487, 489-490 (Ky. 1995), overruled on other grounds, *Merriweather v. Commonwealth*, 99 S.W.3d 448 (Ky. 2003), holding the jury cannot assume the defendant was probated, paroled or served out simply because he was convicted in 1989 and the new offense was committed in 1993; with *Shabazz v. Commonwealth*, 153 S.W.3d 806, 812-5 (Ky. 2005), where the Commonwealth presented the jury with a certified copy of an order placing the defendant on probation in 1997, and the new offense was committed in 2001.

A directed verdict motion on this ground may win the day if the prosecutor has not called a probation officer or obtained certified documents to prove the defendant's status.

The last error that is sometimes missed is a PFO instruction which parrots alternative theories, including those that cannot be proven for this defendant. For example, the instruction lists all the ways under KRS 532.080 (2)(c) or (3)(c) that the PFO can be proven, even that the defendant escaped from custody while still serving the prior felony when the new offense was committed. The proof is clearly insufficient if in fact that is not true. But there is no way to tell which section the jury found to be true, and it could have been the escape section which the prosecutor never proved. So the instruction has invited a non-unanimous verdict. *See Commonwealth v. Whitmore*, 92 S.W.3d 76 (Ky. 2002); *Burnett v. Commonwealth*, 31 S.W.3d 878 (Ky. 2000).

An objection on the record to the instructions coupled with a directed verdict motion, and a request for your own instructions, may win your client a reversal on appeal! Hopefully, busy prosecutors will find it less than cost-effective to retry a PFO phase and your client will end up with a better result.■

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