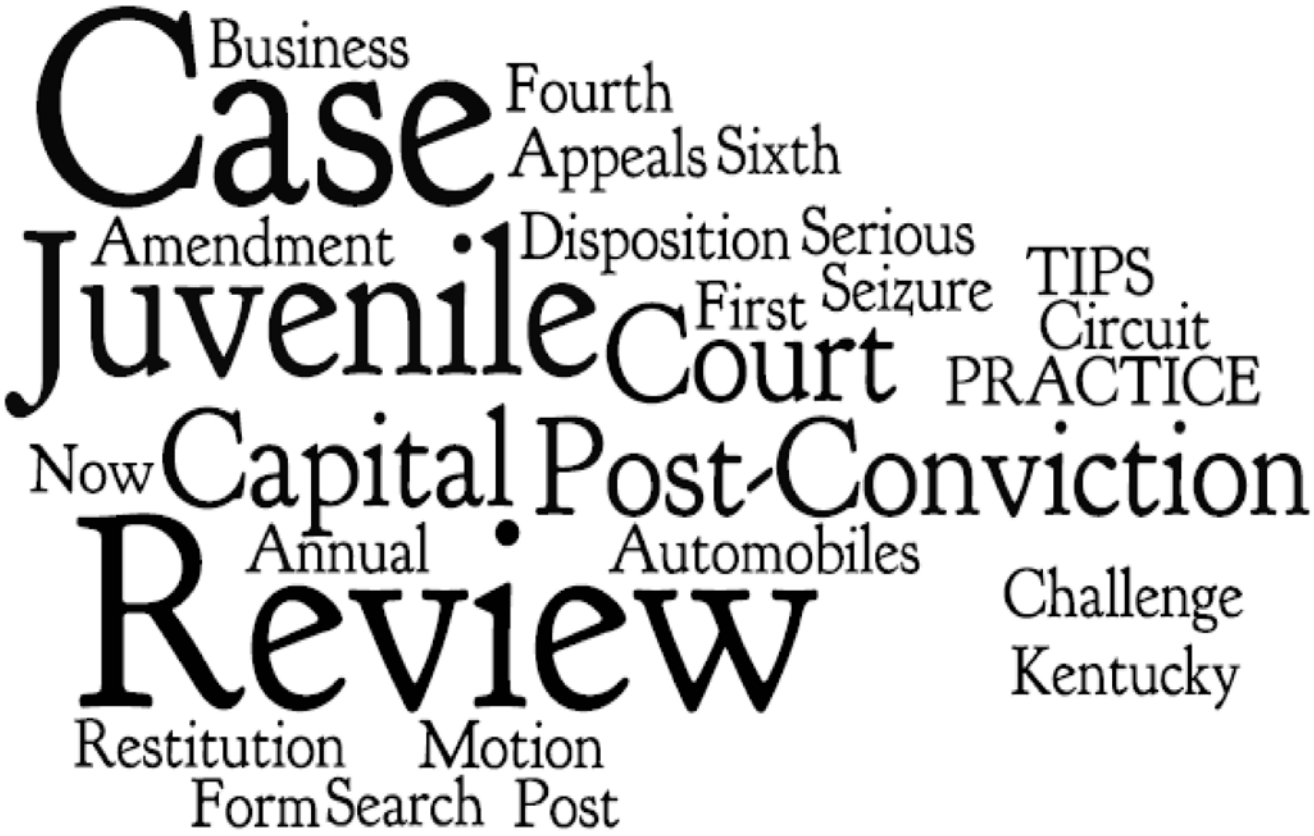
The Advocate

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

Volume 31, Issue No. 2 June 2009



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The National Juvenile Defender Center (NJDC) is pleased to announce that its new publication, *Role of Juvenile Defense Counsel in Delinquency Court,* is now available online at www.njdc.info in the "What's New" section. We would like to acknowledge that the work and publication of this document was truly collaborative and we sincerely hope that it will assist juvenile defenders and others who are tireless in their pursuit of justice and fairness for children.

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

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

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Paid for by State Funds. KRS 57.375

FROM THE EDITOR...

Jeff Sherr

Due to the current budget, 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 Erin Hoffman Yang, **Capital Case Review** by David Barron, **The Sixth Circuit Case Review** by Dennis J. Burke, and the **Fourth Amendment Case Review** by Jamesa J. Drake.

Restitution in Juvenile Court: Now This is Serious Business by Tim Shull, Robert Strong and Adam Broadus track the thought process and strategy development of an attorney representing a juvenile client ordered to make restitution with joint and several liability.

The cover of this edition features a "word cloud," from the article titles 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.■

RESTITUTION IN JUVENILE COURT: NOW THIS IS SERIOUS BUSINESS AND THE FIRST ANNUAL JUVENILE COURT FORM MOTION CHALLENGE

By Tim Shull, Juvenile Post Disposition Branch, Robert Strong, Juvenile Post Disposition Branch, and Adam Broadus[1]

It's the usual again. Your client and three of his best friends decide to "borrow" a double-cab pickup truck for a little joy ride in the neighborhood. The ride results in a police chase. Client ditches the truck by running it into a handy utility pole. After the smash, everybody jumps out and runs. You manage, nevertheless, to negotiate an excellent deal for your client who pleads guilty to a misdemeanor, Unauthorized Use of a Motor Vehicle. Part of the agreement is that the case will be set for a separate disposition under KRS 610.110 and for restitution. The assistant county attorney has told you that she believes the damage to the truck is worth over $16,000.00. At the plea, the judge indicates he will rule that joint and several liability applies to this case. The judge goes on to say that no hearing will be necessary as long as the truck owner can state the value of her loss on the record.

Your client is the oldest boy involved and will be turning 18 a month after the disposition date. He lives with his mother who has a part-time minimum wage job. She receives a small government check every month. Client earned his GED and intends to start community college to earn a welding certificate. He also has a part-time job that pays minimum wage. None of the other boys have jobs or any source of income.

Recently, you read a new Kentucky Supreme Court case, *S.K. v. Commonwealth*, 253 S.W.3d 486 (Ky. 2008). You now know that, after he turns 18, client can be held in contempt and incarcerated for not paying his restitution, potentially over $16,000. You're thinking of filing a pre-disposition motion on behalf of your client. You would like the court to definitely hold a restitution hearing and to:

- Apply an apportioned amount to your client's restitution, instead of using joint and several liability;
- Order that your client will pay less than $4,000.00 by deciding to apportion the total amount of restitution owed (and order volunteer work or another form of reparation if appropriate); and
- Enter a disposition order that helps to rehabilitate your client, and does not set him up to fail by making him responsible for a restitution amount that he cannot realistically pay.

Restitution Hearing Required in Juvenile Court and the Best Interest Standard Means that the Court Should Not Order Restitution in the Full Amount

You start your research. As you open the book to the juvenile code, KRS 635.060(1) draws your attention. It looks like your judge is mistaken on the hearing part. In Kentucky Juvenile Court, a child is entitled to a restitution hearing. KRS 635.060 states that, as part of the dispositional options available, the juvenile court "may":

> Order the child **or** his parents, guardian or person exercising custodial control to make restitution or reparation to any injured person, to the extent, in the sum and upon the conditions **as the court determines.** However, no parent, guardian, or person exercising custodial control shall be ordered to make restitution unless the court has provided notice of the hearing, provided opportunity to be heard, and made a finding that the person's failure to exercise reasonable control or supervision was a substantial factor in the child's delinquency. KRS 635.060(1) (Emphasis added).

Clearly the use of the word "or" means that the child is included in the right to a restitution hearing as well as the parents under KRS 635.060(1). The word "may" in the preamble before sub-section (1) makes the order of restitution within the discretion of the juvenile court, which is another way of saying that the juvenile court doesn't have to order restitution at all – and certainly not the full amount.

As you continue to look through the code, you start thinking about all the times the prosecutor uses the words "best interests of" to justify numerous results not to your clients' liking. Working in conjunction with KRS 635.060(1), KRS 600.010(2)(e) certainly recognizes that the "best interests of the child" include rehabilitation "by advancing the principles of personal responsibility, accountability, and reformation, while maintaining public safety, and seeking restitution and reparation." And you vaguely remember one of your peers at a DPA juvenile court training citing to *Phelps v. Commonwealth*, 125 S.W.3d 237 (Ky. 2004) (holding that the goal of the Kentucky Juvenile Code is rehabilitation not punishment). Moreover, you note that nothing in KRS 600.010(2)(e), KRS 635.060(1), or any other part of the juvenile code, indicates that the "best interest of the child" means that an indigent child should be responsible for a total amount of restitution.

You reason that, under a best interest analysis, the rights given to an adult who owes restitution should represent the floor in terms of a juvenile's rights in the same or similar situation. This includes restitution issues; and that's when you note that in *Clayborn v. Commonwealth*, 701 S.W.2d 413, 415 (Ky. App. 1986), the Court of Appeals ruled that, where it is impossible for an adult to make restitution payments of a set amount, the trial court can replace monetary sanctions with non-financial conditions. All of us are familiar with how new public interest lawyers struggle to make it financially on a public interest salary and punishing student loans. Keeping the best interest standard in mind, isn't the principle at least the same for your client?

In both *Clayborn* and *Fields v. Commonwealth*, 123 S.W.3d 914 (Ky. App. 2003), the Court of Appeals provide guidance for your client's dilemma. Specifically, the Court of Appeals sets out rules that include: a restitution hearing is more than a summary procedure, there has to be evidence to support a restitution claim, and a property owner who gets insurance will not be doubly compensated through restitution. Your motion can cite these cases to help define how your restitution hearing should proceed. Of course, you can also call any number of witnesses to speak to your client's ability to pay restitution, including your client, his family member(s), his teacher(s), his Department of Juvenile Justice (DJJ) worker, and the DJJ court worker.[2]

Joint and Several Liability: An Outdated Concept

While researching and developing your strategy for the restitution hearing, it dawns on you that joint and several liability would be improper in most juvenile cases, given the lack of earning capacity possessed by the average teenager. The Kentucky Juvenile Code does not mention the term "joint and several liability" anywhere, including in KRS 600.010(2) and KRS 635.060(1). If a word, phrase, or concept does not appear in a statute or statutory scheme, it means that the General Assembly did not intend to include the term in the law. *Commonwealth v. Garnett*, 8 S.W.3d 573, 576 (Ky. App. 1999).

Further, the General Assembly enacted KRS 411.182, the comparative fault statute, in 1987, which abolished the joint and several liability in civil tort cases. Now, even intentional tort cases do not allow for joint and several liability. In *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286, 291 (Ky. App.1998), the Court of Appeals followed Kentucky Supreme Court law in holding that under KRS 411.182, there is no joint and several liability in Kentucky and that both negligent and intentional tortfeasors pay an "apportioned" amount. In *Secter*, the jury at trial had apportioned liability for Earl Bierman's sexual abuse to parochial school students on a 75% to 25% basis between the employer, Covington Diocese, and Bierman. *Id*. at 287. The Catholic Diocese appealed in part under a theory that apportionment was improper and the Court of Appeals affirmed the apportionment as proper. *Id*. at 291. It is interesting to note that, at the time of his civil trial, Bierman had already been convicted of 28 counts of sex abuse in the first degree. *Id*. at 287. When you represent your client at his restitution hearing, maybe you won't even have to argue that it would be fundamentally unfair to apply joint and several liability to a juvenile delinquent when the Court of Appeals declined to apply the concept to an adult convicted of sexually abusing dozens of children.

When you consider the mandate "shall" in KRS 600.010(2)(e), requiring decisions in the "best interests of the child," all the authority certainly points to a prohibition to joint and several liability in the Kentucky Juvenile Court. And the outdated joint and several concept gets no help from the Kentucky civil case law and statutes. Not to mention that the Kentucky Juvenile Code doesn't provide for it. So you wonder, does any persuasive authority help your client?

Fortunately it does. In *State v. Christopher G.*, 201 W.Va. 703, 500 S.E.2d 519 (1997), the Supreme Court of Appeals of West Virginia held that the imposition of 6 years probation and $7,947.10 restitution damages joint and several between three juveniles for the vandalism of a vacant mobile home was excessive and improper. The Court said that:

> An order imposing conditions of probation that are unreasonable or beyond the ability of the child to perform, is not an order of probation at all but rather a disguised order of commitment. **The frustration that would arise from the child's inherent inability to comply with an unreasonable condition of probation would negate the purpose of the statutory scheme of rehabilitation.** The result of such a condition would not be rehabilitation. Rather, it would give the probationer a sense of unfairness,

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> injustice and bitterness towards the system because the chance to reform would not be present. *Christopher G* at 521 quoting *State v. M.D.J.*, 169 W.Va. 568, 574, 289 S.E.2d 191, 196 (1982) (emphasis added).

Great!! You find support for your client. In *Christopher G.*, the West Virginia high court recognized that the ultimate goal of rehabilitation must be kept in mind in all situations. In a footnote the court commented "[a] probationary period should be as brief as possible under the facts of the case to help get a child on the right track, and not as a long-term lien or debt collection method." *Christopher G.* at 522.

These Issues in Daily Juvenile Court Practice

On the questions of a fair proceeding and finding a reasonable amount of restitution for our juvenile clients, the Kentucky Juvenile Code explicitly protects children, and the persuasive authority points towards protecting and rehabilitating children. So it seems you might be able to help your client after all. But you begin to wonder how often am I really going to run into these restitution issues in juvenile practice and what's this I hear about some "really big challenge?" Well, before laying down the gauntlet of the "really big Juvenile Court Form Motion Challenge," we too wondered if juvenile court practitioners are seeing these issues on a regular basis.

We submitted surveys to various practitioners across the Commonwealth to gain a juvenile trial level perspective. The survey results confirmed the fears that juveniles in our Commonwealth routinely face restitution orders and that in some instances the restitution amounts are big – Really Big.

The cumulative survey responses found all responding practitioners reporting juvenile cases where their clients received restitution orders. Also, all responding practitioners indicated that they had represented at least one client ordered to pay restitution on a joint and several basis. While the frequency varied from region to region and case to case, many practitioners reported clients receiving restitution orders over $1,000 and in some instances well over $10,000. Finally, some practitioner respondents reported their regional courts' eagerness to bring juveniles back before the court for contempt motions as adults under *S.K. v. Commonwealth*.

The results of the responses, the clear mandates of the Juvenile Code to protect the juvenile's interests, and persuasive authority, combined to produce the need for a written motion. Thus, the really big Juvenile Court Form Motion Challenge emerged.

The REALLY BIG Juvenile Court Form Motion Challenge[3]

For mountain climbers it's Everest and K2, for politicians it's the presidency, and for juvenile practitioners – YES – it's the first annual Juvenile Court Form Motion Challenge!! To apply for a chance at the really big award, all you need to do is submit a form juvenile court restitution motion to us by email.[4] We promise that the winner will receive our nomination and best lobbying efforts for her/him to receive the highly coveted DPA Juvenile Branch Excellence in Advocacy Award.[5] And we will post the motion in the juvenile court motion bank found at the DPA intranet site.

Conclusion

Why saddle a juvenile or young adult with a burden that might propel her or him into even more crime and poverty? Don't settle for a joint and several deal. Have a restitution hearing. The Kentucky Juvenile Code intends to uplift our children through rehabilitation, and family unification. Protect your client and win a prestigious award in the process – take on the really big challenge.

Endnotes:

1. Adam Broadus is a second year law student at the University of Louisville's Brandeis School of Law. Adam used this project to fulfill part of his 30 hours of public service in the Samuel L. Greenbaum Public Service Program, which Brandeis requires for graduation. Adam partnered with us in the research, writing, and editing for submission of this article.
2. DJJ often uses juvenile service specialist (JSS) workers in court. JSS workers typically have a good deal of experience as a front line social worker and in court proceedings.
3. Thank you, Ed Sullivan.
4. Email DPA.JuvenilePostDisposition@ky.gov
5. If you have already won the Excellence Award, we promise to nominate you for a second AND to buy your lunch!! ■

KENTUCKY CASE REVIEW

By Erin Hoffman Yang, Appeals Branch

Raymond Anderson, Jr.
Rendered 1/22/09
___S.W.____
Affirming
Opinion by J. Minton

A Defendant Charged with Being a Felon in Possession of a Firearm May Stipulate to a Prior Felony. Adopting *Old Chief v. United States*, 519 U.S. 172 (1997), the Kentucky Supreme Court held that the trial court abused its discretion by denying the defendant an opportunity to stipulate to prior felonies. Like Anderson, the defendant in *Old Chief* was charged with being a felon in possession of a firearm. Before trial, the defendant moved to prevent the prosecution from entering into evidence the specific nature of his previous felony conviction (assault). "In an argument echoed by Anderson in this case, the defendant in *Old Chief* argued to the trial court that the unfair prejudice from the introduction of the specific nature of his previous felony conviction would substantially outweigh its probative value, thereby making the evidence regarding the specific nature of his previous felony conviction inadmissible under Federal Rules of Evidence (FRE) 403." Like Anderson, the defendant in *Old Chief* offered to stipulate to the fact of the prior felony conviction. Similar to the case at hand, the prosecutor in *Old Chief* refused to join in a stipulation, "insisting on his right to prove his case his own way...." In both cases, the trial court ruled in favor of the prosecutor and refused to let the defendant concede to having a previous felony conviction. *Old Chief* appealed and the case eventually wound its way to the United States Supreme Court.

A majority of the Supreme Court held that the trial court abused its discretion when it rejected the defendant's proposed stipulation. The Supreme Court focused on whether the probative value of the specific evidence of the defendant's previous felony conviction was substantially outweighed by its prejudicial effect. The Court declared that there could be "no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant." The prosecution's usual right to present its evidence as it sees fit "has ... virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him."

Ultimately, therefore, the United States Supreme Court concluded that "there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence." Accordingly, the Court held that when the specific evidence of a defendant's prior conviction's probative value is weighed against its potential for unfair prejudice under FRE 403, it is an abuse of discretion to admit the record when an admission is available.

Erin Yang

Following *Old Chief*, the Kentucky Supreme Court held that "a criminal defendant charged with being a felon in possession of a firearm may stipulate (with the Commonwealth's agreement) or admit (if the Commonwealth does not agree) that the defendant has been previously convicted of a felony. Such a stipulation or admission would mean that the jury would simply be informed that the defendant was a convicted felon, for purposes of the felon in possession of a firearm charge, but would not be informed of the specifics of the defendant's previous felony conviction(s)."

The Court was careful to point out that such a stipulation was only available in felon in possession cases, and defendants cannot stipulate prior felonies in scenarios such as Persistent Felony Offender cases. In addition, the Court affirmed Mr. Anderson's conviction, finding that he was not unduly prejudiced by the introduction of his prior felonies.

Mark Cuzick v. Commonwealth
Rendered 1/22/09
276 S.W.3d 260
Affirming
Opinion by J. Scott

Mark Cusick was discovered driving on the wrong side of the road by an off-duty police officer. A lengthy pursuit ensued, Cuzick was arrested once his car began to smoke and he was forced to pull over.

He was ultimately found guilty of fleeing/evading police, resisting arrest, driving under the influence and of being a first-degree persistent felony offender.

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Evidence of Cuzick's Prior Burglary Conviction Did Not Exceed Scope of Truth in Sentencing Statute. Cuzick argued that the trial court erred by allowing the Commonwealth to read to the jury, from a 1993 uniform citation, the substance of a prior burglary conviction. He claimed that by reading the description of the offense, and in particular mentioning that he used a baseball bat to break the glass on the front door of a commercial building to gain entry, the Commonwealth exceeded the scope of KRS 532.055; requiring a new sentencing hearing. The Court disagreed characterizing the testimony as "merely a general description of the nature of the prior crime, as permitted by the statute."

During his sentencing phase, the Commonwealth introduced a 1993 uniform citation, among others, as a penalty phase exhibit for the purposes of establishing Appellant as a persistent felony offender. In so doing, the Commonwealth read the following from the citation: "1993 burglary third. Fayette County. Subject utilized a baseball bat. Broke the glass of the front door of Autosound in Lexington and took several items of value. Used force to enter a business and steal from that business." Appellant argues that by disclosing this information, the Commonwealth went beyond describing the "nature" of the offense as permitted in KRS 532.055.

KRS 532.055(2)(a)(2) allows the Commonwealth to introduce relevant evidence of "[t]he nature of prior offenses for which he was convicted" during sentencing. The type of evidence which may be admitted during the persistent felony offender stage of a bifurcated trial should serve to establish the elements necessary for demonstrating the statutory requirements of being a persistent felony offender. The Commonwealth's Truth in Sentencing statute has the overriding purpose of providing the jury with information relevant to delivering an appropriate sentence. In that vein, we have held that, generally, this goal can be accomplished while limiting the description of the "nature of a prior conviction" to a "general description of the crime."

The Court rejected the proposition that a bright line rule as to what the permissible limits of a "general description" should be established. "Here, the Commonwealth's description of the nature of the prior offense was limited solely to the information contained on the citation, namely that Appellant utilized a bat to commit the breaking aspect of the burglary. We do not believe such information runs afoul of even the most stringent and limited interpretations of our intent to keep prior convictions from being retried during the penalty phase." So long as information is limited to a fair, accurate, and general description of the nature of the prior offense, it comports with KRS 532.055 and may be considered by the jury. Here, the testimony merely served to provide a general description of the nature of the prior offense as permitted by KRS 532.055(2)(a)(2).

Justice Noble voiced a strong dissent, joined by J. Abramson and C.J. Minton. Justice Noble disagreed with the majority view that it was appropriate to read the contents of the citation, noting that it went "far beyond what this Court has previously held to be acceptable when listing prior convictions in truth in sentencing." "Specifically, in *Hudson v. Commonwealth*, 979 S.W.2d 106 (Ky. 1998), a case which cites *Robinson v. Commonwealth*, 926 S.W.2d 853 (Ky. 1996), this Court held as follows: 'In addition to reading the convictions, dates, and sentences, the supervisor read information regarding the factual circumstances of each conviction from the warrants or uniform citations. The amount of information heard by the jury was clearly beyond the limitation set forth in Robinson, and therefore, should not have been admitted.' That was exactly the case here. Then, as now, the witness did nothing more than read the entire warrants or citations."

Since PFO is a status which allows for the enhancement of the sentence in a case that has just been tried, how the prior offenses occurred is not information necessary to the determination that they have occurred, and those details could result in punishment aimed at those offenses rather than in merely establishing a status. The *Robinson* court determined that merely stating the general nature of the offenses would suffice to allow the jury to fix the penalty within the appropriate enhanced penalty range without potential inflammatory influence. Thus, it has been the law in Kentucky for the last ten years that it is inappropriate to read the entire contents of a warrant or citation to the jury during the sentencing phase.

Noble argued the majority is essentially overruling *Hudson* and is inviting this kind of testimony henceforth. The majority's view is that what was read is truthful, and was limited solely to the information contained on the citation-however, it was precisely the kind of information *Hudson* forbids. "Based on this, how can a witness guess when he or she has read too much? The majority blurs what was previously a bright line rule."

Ricky King v. Commonwealth
Rendered 1/22/09
276 S.W.3d 270
Affirming
Opinion by J. Venters

Ricky King was convicted of complicity to murder and first degree robbery. King was at a bar with his brother, Rocky, his father, Harold and his cousin, Danny Bryant. They encountered Morris King (no relation to the Appellant), and believing he was rich, devised a plan to rob him. The group followed Morris King as he left the bar and got him to pull over. Morris, apparently feeling threatened, brandished a gun and fired a warning shot. Rocky King returned fire, killing Morris. The group took Morris' wallet and split the proceeds of a hundred dollar bill.

A Defendant Must Explicitly Preserve Error for Review, Rather than Rely on a Co-Defendant's Objection. King argued that the trial court improperly limited his ability to impeach Bryant's testimony. Prior to trial, Bryant accepted a deal to plead guilty to facilitation to murder and facilitation to robbery and become a witness for the Commonwealth. However, Bryant had not been sentenced for his crimes by the time he testified at Appellant's trial. Co-defendant Dalton attempted to impeach Bryant on this fact. The implication was that Bryant's testimony was tainted in favor of the Commonwealth in an attempt to receive a lower sentence for his crimes. The Commonwealth objected to this impeachment and the trial court sustained that objection. Appellant never attempted to impeach Bryant on the fact that he had not been sentenced. However, Appellant and Dalton both extensively impeached Bryant on his plea agreement in general.

Because King did not specifically object to the trial court's ruling, any error was unpreserved and decided under the palpable error standard. RCr 10.26. The Court found the limits on cross-exam reasonable, noting that King and Dalton certainly were able to develop a "reasonably complete picture" of Bryant's potential motivations to be untruthful. There is no error, much less palpable error here.

The Court's Failure to Strike Prospective Jurors for Cause was Harmless Error Because the Jurors Defense Counsel Would Have Used Peremptories to Remove Did Not Sit. King argued that the trial court abused its discretion in failing to strike two jurors, Juror 12 and Juror 32, for cause. King contends that since he was ultimately forced to use his peremptory strikes to remove those jurors, he is entitled to a new trial pursuant to *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky.2008).

Juror 12 stated during voir dire that he read about the case in the newspaper and that he usually took "for granted" to be true what he read in the paper. Juror 12 stated that when reading the newspaper article on this case he thought the police had caught those who killed and robbed Morris, but he stated that he had not really formed an opinion as to who was guilty. He stated that he did not think what he read would affect his ability to be fair. Appellant's request to strike for cause Juror 12 was denied.

Juror 32 stated during voir dire that she was the wife of a Kentucky State Police trooper. She stated she was good friends with the lead detective in the case, Detective Correll. Her husband and Detective Correll worked together for seven to eight years. She estimated that she had been to Detective Correll's house around ten times. She stated that she had never discussed this case with Detective Correll or her husband and that she did not think her relationship with them would affect her ability to be fair. Dalton's request to strike Juror 32 for cause was denied. Appellant never joined that request or made a request of his own.

Appellant and Dalton were granted twelve peremptory requests according to RCr 9.40. Two of their peremptory strikes were used to eliminate Jurors 12 and 32 from the jury pool. Appellant and Dalton then filed a joint strike sheet in open court stating that if they had not used their two peremptory strikes on Jurors 12 and 32, they would have used them to strike Juror 17 and Juror 41. Neither, Juror 17 or 41 sat on the final jury. The Commonwealth used one of their peremptory strikes to eliminate Juror 41. Juror 17 initially sat on the jury, but due to the trial's interference with his work schedule, was ultimately excused from the jury by the trial judge.

The Court found no error in failing to strike Juror 12. Finding he "displayed no preconceived bias which would warrant his disqualification. The trial judge's failure to strike for cause Juror 32, however, is more troubling." Juror 32 admitted to a close relationship to a detective who testified at trial. She should have been struck for cause due to this relationship.

However, "this presents one of the rare exceptions to our decision in *Shane*. In *Shane*, we held that it is reversible error if a trial court improperly fails to strike a juror for cause and the defendant had to use all of his peremptory strikes to remove that juror from the jury panel. This holding is predicated on the idea that peremptory strikes are a substantial right given to the defendant. Thus, if the defendant had to use all of his peremptory strikes to remove a juror that should have been stricken for cause, a juror that he otherwise would have stricken would have been impaneled on the jury. Because of this, the jury could never be completely fair to the defendant since he was not able to effectively exercise his right to choose jurors."

The Court found the logic of *Shane* only holds true when they do not know if the juror, the defendant would have used his peremptory strike on, sat on the jury. However, this case presented a different scenario. They knew with certainty the jurors Appellant would have used his peremptory strikes on if he did not have to strike Jurors 12 and 32. Those two jurors, 17 and 41, did not sit on the final jury. Therefore, despite not being able to use his peremptory strikes the way he wanted, King received the jury he wanted. Thus, the trial judge's error in failing to strike Juror 32 was effectively cured and Appellant's substantive rights were ultimately not violated. Since Appellant ultimately received the jury he wanted, there is no logical reason to retry the case. Thus, this case presents a very limited distinction to the rule laid out in *Shane*. In the future, defense counsel should be careful to exhaust their peremptories, but decline to make a record of which jurors would have been struck had the for cause motion been granted.

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Affirming
Opinion by J. Scott

After Major's first trial, the Court remanded in part due to introduction of physical weapons that were not shown to be the murder weapon. In Major's second appeal, the Court says it was okay in trial number two to allow testimony about the forbidden weapons, the testimony was relevant because of certain threats made by Major, and allowing the testimony (not the physical weapons) did not violate law of the case.

The second issue raised by Major on retrial involved the introduction of a taped phone call between Major –who was in Massachusetts, which protects such calls—and his father, in Nova Scotia —which does not. The Court approved the call because even though it now recognized Massachusetts would have thrown it out, it did not concede Massachusetts had the most significant relationship with the call, and there was no special Kentucky policy against its admission.

Major also raised a *Faretta* issue. The recent case of *Indiana v. Edwards* allows a court to pick and choose between what a partly competent defendant can control as a pro se (or partially pro se) litigant. Major –who was severely disabled, and whose whisper counsel conducted the case— argued that there was a bottom line to these limits, and that if he was competent to stand trial, he was competent at least to choose the theory of his own defense. Major wanted to put on evidence that the victim, his wife, would habitually have sexual flings with strangers, on the theory that some drifter must have killed her. Major complained throughout his trial that his whisper counsel were not following his direction regarding this trial strategy, that they failed to find and put on several witnesses who could have supported this. The Court rejected this argument, that the judge correctly allowed whisper counsel to overrule Major in this regard.

Eddie Cardine and Michael Curry v. Commonwealth
Rendered 1/22/09
__S.W.___
Reversing
Opinion by J. Noble

Cardine and Curry were both charged in a five-count indictment charging them with complicity to murder, two counts of complicity to attempted murder, complicity to assault in the first degree, and complicity to assault in the second degree.

After a previous confrontation between the Appellants and Deonte Neal, Tyson Gibbs, Otha Burney, and Dejuan Smith, the Appellants picked up a third person and met the other group for a second time. It was at this second meeting that a gunfight ensued, resulting in the death of Gibbs and injury of Neal and Burney, allegedly from shots fired by the Appellants. It was undisputed that Cardine fired a gun.

At the first jury trial, both parties made motions before and after the jury was selected and sworn. The last matter brought to the court's attention by the Commonwealth was a newly discovered witness, a man who claimed Curry tried to sell a gun to him on the day of the shooting. Even though the Commonwealth conceded that it had other witnesses that would testify that Curry had a gun on the day of the shooting, it argued that this new witness was more disinterested than the others.

Each Appellant's defense counsel moved to exclude the new witness, or in the alternative, for a continuance. The Commonwealth claimed the witness was crucial. The Commonwealth argued in favor of allowing the new witness to testify and stated that it preferred a continuance to exclusion. The trial judge denied defense counsels' motions to exclude the witness; determining that the witness was an important factor in obtaining a fair trial and sua sponte declared a mistrial "pursuant to manifest necessity." Neither the defense nor the Commonwealth objected. After the second jury trial in this case, Appellants were both convicted and sentenced to thirty years in prison.

The Court Declared KRS 505.030(4) Unconstitutional. Pursuant to KRS 505.030(4), jeopardy does not attach until the first witness is sworn. However, the Court declared the statute unconstitutional, as it is in direct conflict with federal law. Under *Crist v. Bretz*, 473 U.S. 28 (1978), "the valued right to continue with the chosen jury" underlies "the federal law that in a jury trial jeopardy attached when the jury is empanelled and sworn.... [Therefore,] the time when jeopardy attaches in a jury trial 'serves as the lynchpin for all double jeopardy jurisprudence.'" Thus, Kentucky now follows the federal rule that jeopardy attaches once a jury is sworn.

The Defendants Were Subjected to Double Jeopardy, as there was no Manifest Necessity for a Mistrial. The Commonwealth argued their newly discovered witness was essential, as he would testify that Curry had a gun the day of the shooting. However, the co-defendant and two Commonwealth witnesses were prepared to testify to this fact. The Commonwealth had nearly sixteen months to prepare its case after the court ordered discovery until the jury was sworn. *By proceeding and completing jury selection, the Commonwealth tacitly acknowledged that it had enough evidence to proceed to trial.* Therefore, the witness, whom neither side knew about before the jury was sworn, could not have been essential and had to be cumulative. Otherwise, the Commonwealth would have asked for a continuance before the jury was selected and sworn.

Even if this newly discovered witness was material, there would still not be a basis for a mistrial based on manifest

necessity. The trial court had the option to simply continue the case until the witness was located. The court's reasoning that another case was scheduled to begin the next day, while a very real problem for the trial court, cannot supersede this Appellant's double jeopardy rights, and does not create a manifest necessity for a mistrial.

Commonwealth v. Davidson
277 S.W.3d 232
Rendered 2/19/09
Affirming
Opinion by Special Justice Moore

Gary Davidson was convicted of second degree assault and unlawful imprisonment after an altercation with his ex-girlfriend. The Court of Appeals reversed Davidson's conviction, holding the trial court committed palpable error when it instructed the jury on second-degree assault based on the theory that Davidson's fists were dangerous instruments and further held that the Commonwealth was barred by double jeopardy from retrying Davidson for second-degree assault. The Commonwealth asked the Court to reconsider whether retrying Davidson for second-degree assault is barred by the Double Jeopardy Clause.

Under KRS 500.080(3), "dangerous instrument" means any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury.

Based on the plain meaning of KRS 500.080(3), the court agreed with the Court of Appeals' statutory interpretation that when the dangerous instrument in question is a part of the human body, the Commonwealth bears the burden of establishing that serious physical injury actually occurred as a direct result of the use of that part of the human body. Because there was insufficient evidence to support a finding that Davidson's fists caused serious physical injury to Williams, the Court of Appeals held the trial court erred by instructing the jury on second-degree assault based on the theory that Davidson's fists were dangerous instruments.

Although we find Davidson's conduct extremely offensive and deplorable, the Court of Appeals correctly determined the injuries Williams suffered from Davidson's fists did not amount to serious physical injury under KRS 500.080(15).

While it is true the trial court committed palpable error by instructing the jury on second-degree assault based on the theory that Davidson's fists were dangerous instruments, reversal of Davidson's conviction was ultimately based on the lack of evidence to support a finding that Williams suffered serious physical injury from Davidson's fists. Therefore, Davidson's conviction for second-degree assault was reversed due to insufficiency of the evidence, which is the equivalent of an acquittal for double jeopardy purposes. Thus, the Court affirmed the Court of Appeals' ruling that the Commonwealth is barred by double jeopardy from retrying Davidson on the charge of assault in the second degree.

Depp v. Commonwealth
Rendered 2/19/09
278 S.W.3d 615
Affirming
Opinion by J. Noble

Before Depp was indicted, he wrote a letter to the trial court expressing his wish to represent himself, but recognizing the need for assistance: "[W]ith the hopes in receiving legal rep., for my up and coming jury trial, Judge Patton, I truly intended on representing myself, however I am unable to because of the many motions that need to be filed...."

When Depp appeared for his arraignment, he expressed his desire to "just go it alone." The trial court emphasized that the public defender had a high success rate at trial, but Depp resisted. At that point, the trial court suggested that it appoint standby counsel. However, the only person Depp wanted was a jail inmate, but the trial court explained that the inmate could not represent him. Since Depp still wanted to represent himself, the trial court told him a hearing under *Faretta v. California*, 422 U.S. 806 (1975), was required and set a date for the hearing.

Subsequently, at the *Faretta* hearing, Depp stated that he now wanted a lawyer, but wanted to pick his own attorney, and again asked for the jail inmate. Again, the trial court explained that the inmate was not an attorney and could not represent him. The court offered to appoint the public defender. Depp refused, saying he would rather cross-examine the victim witness himself. The trial court advised Depp that the attorney would ask the questions, but that he could confer with the attorney, was explaining further what Depp could say, when he interrupted, "Well, okay, I don't want no attorney. I'm just going to not have an attorney."

At that point, the Commonwealth Attorney inserted the position that if Appellant represented himself, he would not have a constitutional right to cross-examine the victim witness pursuant to *Partin v. Commonwealth*, 168 S.W.3d 23 (Ky. 2005). The trial court stated that would be dealt with "when the time comes," and proceeded with the *Faretta* hearing, finding that Depp understood he would have to abide by the rules of court and, that he was competent, and not coerced into representing himself. The trial court made Depp put his request to represent himself in writing and sign it in open court.

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While the relinquishment of the right to counsel must be made "knowingly and intelligently," *Faretta* does not require any specific form or magic words for there to be a knowing and voluntary choice to proceed pro se. It only required that the concerns it notes be addressed.

The United States Supreme Court rejected a formulaic approach in *Iowa v. Tovar*, 541 U.S. 77 (2004). The information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.

The U.S. Supreme Court noted that the analysis regarding whether waiver of counsel is adequate at any stage requires a pragmatic approach to right-to-counsel waivers; a waiver is "knowing and intelligent" when the accused is made sufficiently aware of his right to have counsel present and of the possible consequences of a decision to forgo the aid of counsel.

This Court, in *Hill v. Commonwealth*, reiterated the *Faretta* holding that an accused was entitled to self-representation, or in that instance, co-representation. *Hill* took a bright line approach that this right was accompanied by the right to be informed by the trial court of the dangers inherent in doing so. The Court determined that the trial court must hold a hearing at which the defendant must testify that his choice is voluntary, knowing and intelligent; the trial court must warn the defendant of the dangers of relinquishing the benefits of an attorney; and the trial court must make a finding on the record that the waiver is voluntary, knowing and intelligent.

Depp argued that reversible error occurred because the trial court did not use the magic words that it found the waiver of counsel to be done "knowingly and voluntarily." However, the notion that a specific script or "magic words" is required was rejected in *Tovar*, the Court declined to impose more requirements than the U.S. Supreme Court. "To reverse simply because the trial court did not specifically state that the waiver was 'voluntary, knowing and intelligent' does nothing to ensure that the defendant had the opportunity to make such a waiver." Even if the trial court had used those magic words, an appellate court would still have to review the record to determine whether that finding was correct.

The trial court implicitly found the waiver to be done knowingly, intelligently, and voluntarily when, based on the sufficiently developed record, he said he was going to "find" that Depp could represent himself. While it is always preferable to have express findings by the trial court on record, as it usually clarifies issues on appeal, to require that trial courts adhere to a script or be found in error is to elevate form over substance. Thus, *Hill* is modified to the extent no specific words are required for a constitutional waiver.

Robert Dickerson v. Commonwealth
Rendered 2/19/09
278 S.W.3d 145
Affirming
Opinion by C.J. Minton

Dickerson was convicted of one count of first-degree sodomy, one count of possession of a handgun by a convicted felon, one count of violating the Sex Offender Registration Act, and PFO 2nd. The Court reversed Dickerson's convictions in October 2005 because of numerous errors.

After several continuances on remand, Dickerson eventually pleaded guilty to one count of criminal abuse in the first degree, one count of possession of a handgun by a convicted felon, and one count of possession of a "[long gun]" by a convicted felon. Dickerson was sentenced to a term of 25 years. Dickerson appealed.

Dickerson's Issues were "Minimally" Preserved for Appeal. The Court acknowledged that a valid, unconditional guilty plea may constitute a waiver of many of a defendant's appellate rights, and nothing in the final judgments of conviction in question actually reflects that Dickerson's guilty plea was conditional. However, the motion to enter guilty plea form contained the handwritten notation "Conditional" at the top. Similar handwritten notations appeared on the Commonwealth's offer on a plea of guilty and the arraignment order after Dickerson's guilty plea. In fact, at the hearing at which the trial court accepted Dickerson's plea of guilty, there were scant references to the fact that the plea was to be conditional.

The Court rejected Commonwealth's argument that Dickerson waived his right to appeal. Precedent in this area leads to the conclusion that we will consider issues on appeal from a conditional guilty plea only if those issues: (1) involve a claim that the indictment did not charge an offense or the sentence imposed by the trial court was manifestly infirm, or (2) the issues upon which appellate review are sought were expressly set forth in the conditional plea documents or in a colloquy with the trial court, or (3) if the issues upon which appellate review is sought were brought to the trial court's attention before the entry of the conditional guilty plea even if the issues are not specifically reiterated in the guilty plea documents or plea colloquy.

Before he entered his conditional guilty plea, Dickerson had submitted a motion to dismiss the indictments with prejudice because of alleged prosecutorial vindictiveness and a separate motion for a speedy trial. And the trial court was aware, or should have been aware, of the issues raised in this appeal at the time it accepted Dickerson's conditional plea. Thus, the Court held that Dickerson has sufficiently preserved for our review the issues in this appeal. It would have been far better practice, of course, if the issues upon

which Dickerson's guilty plea were conditioned had been identified in the record. Had the issues raised in Dickerson's appeal not been expressly raised in the circuit court, we would not have considered them on appeal. *To avoid these types of situations in the future, we urge the bench and bar of this Commonwealth to specify in the record in conditional guilty pleas the precise issues being reserved for appellate purposes. Such careful preservation should eliminate uncertainty, which would inure to the benefit of everyone involved.*

There Was No Vindictive Prosecution. Dickerson argued that the Commonwealth engaged in vindictive prosecution when it obtained a new indictment against him sometime after the Court vacated his prior convictions. Prosecutorial vindictiveness can manifest itself in two ways: actual vindictiveness and presumed vindictiveness based upon the facts and circumstances of the case. Dickerson did not argue actual vindictiveness, so the Court focused on the presumption of vindictiveness method.

The Commonwealth obtained a new indictment against Dickerson in April 2007. That indictment charged Dickerson with two counts of being a felon in possession of a firearm. Originally, Dickerson was charged with, and found guilty of, one count of being a felon in possession of a handgun, although three firearms were found in his residence at the time of his arrest. Our original opinion mentioned that the trial court had admonished the jury to disregard evidence of two other firearms; but we ultimately concluded that since so much other unfairly prejudicial evidence had been admitted, "the trial court's admonition to disregard all evidence about the .45 pistol and the shotgun did not unring the bell." So, on remand, Dickerson moved *in limine* to exclude evidence of the shotgun and pistol. About two months later, the Commonwealth obtained the indictment charging Dickerson with two more counts of being a felon in possession of a firearm.

Given the peculiar facts of this case, it appears to us that the Commonwealth sought the new indictment to resolve an evidentiary problem the Court had identified in its opinion reversing. So even assuming solely for the purposes of argument that Dickerson has made a prima facie showing of prosecutorial vindictiveness, the Commonwealth has successfully rebutted that presumption that the new charges against Dickerson were a result of prosecutorial vindictiveness by showing that "there exists objective information in the record to justify the ... additional charges." Indeed, our original opinion highlighted the problem inherent to the lack of charges pertaining to the two additional firearms, a problem that the new indictment solved. Therefore, the Court rejected Dickerson's vindictive prosecution claim.

Hartsfield v. Commonwealth
Rendered 2/19/2009
277 S.W.3d 239
Affirming in part, Reversing in part
Opinion by C.J. Minton

Hartsfield was indicted on charges of multiple sexual crimes involving three separate female victims, one of whom was M.B. The indictment charged Hartsfield with the first-degree rape and the first-degree sodomy of M.B. M.B. died before the indictment came to trial, prompting Hartsfield's motion to dismiss the counts in the indictment relating to M.B. on the ground that M.B.'s statements concerning the alleged crimes were inadmissible hearsay. The trial court denied the motion to dismiss. The Commonwealth then moved *in limine* to establish affirmatively the admissibility of M.B.'s statements. The first of the motions concerned M.B.'s statements to a sexual assault nurse examiner, or SANE nurse; the second motion concerned two statements made to two separate individuals following the incident, which were described as excited utterances.

As for the statements claimed by the Commonwealth to be admissible as excited utterances, the Commonwealth stated that M.B. fled her house immediately after the rape and encountered a passerby named Malcolm Buchanan. M.B. was crying and yelled, "He raped me; he raped me." In addition, the Commonwealth reported that M.B. ran to her daughter's house and told her daughter she had just been raped. The record indicates M.B.'s statement to her daughter was made close in time and proximity to the alleged rape.

Following a hearing, the trial court excluded all of the statements as an abridgment of Hartsfield's right to cross-examine the witnesses against him. The court further ordered the counts regarding M.B. to be dismissed. In light of the rulings *in limine*, the Commonwealth and Hartsfield then reached a plea agreement whereby Hartsfield pleaded guilty to the other amended counts of the indictment. The Commonwealth then appealed from the trial court's order overruling the motions *in limine* and dismissing the counts of the indictment as to M.B. The Court of Appeals reversed the trial court on the belief that all of the statements were covered by hearsay exceptions and, in particular, that the statements to the SANE nurse did not run afoul of the Confrontation Clause because they were not made by M.B. for the purpose of causing the nurse to testify on her behalf. This Court granted review.

The Sexual Assault Nurse Examiner's Questioning was Predominantly for the Purpose of Information Gathering and the Resulting Statement was Testimonial. Hartsfield asserts that the admission of any of these statements would violate his right to confront adverse witnesses under the Sixth Amendment's Confrontation Clause. The United States Supreme Court held in *Crawford v. Washington* that the Confrontation Clause precludes admission of the statements

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of a witness unavailable to testify at trial if the witness' out-of-court statements were "testimonial," unless the accused had a prior opportunity to cross-examine the witness. Before *Crawford*, the Clause had been interpreted to allow admission of an unavailable witness's out-of-court statement if it possessed adequate indicia of reliability. The *Crawford* Court rejected that analysis as incompatible with the Framers' intent in creating the Confrontation Clause.

Since *Crawford*, the threshold examination to determine a Confrontation Clause violation is whether the proffered out-of-court statement was testimonial. For example, statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

In the case at bar, the interview of M.B. by the SANE nurse was to establish facts relevant to prosecution. After the alleged rape, M.B. was taken to the hospital, where she provided the SANE nurse with the details of what occurred. The nurse also utilized a sexual assault collection kit. The SANE nurse was acting in cooperation with or for the police. The protocol of SANE nurses requires them to act upon request of a peace officer or prosecuting attorney. A SANE nurse serves two roles: providing medical treatment and gathering evidence. SANE nurses act to supplement law enforcement by eliciting evidence of past offenses with an eye toward future criminal prosecution. The SANE nurse under KRS 314.011(14) is made available to "victims of sexual offenses," which makes the SANE nurse an active participant in the formal criminal investigation. *The Court held that their function of evidence gathering, combined with their close relationships with law enforcement, renders SANE nurses' interviews the functional equivalent of police questioning*.

Here, the SANE nurse's interview was not to provide help for an ongoing emergency but, rather, for disclosure of information regarding what had happened in the past. M.B. was away from the perpetrator, and the questioning was not for the purpose of resolving a problem. The interview had some level of formality, despite being unsworn. So the statement was virtually the kind of statement that a witness would give at a trial or hearing.

The Excited Utterance Hearsay Statements Were Not Testimonial. The excited utterances at issue, made to lay witnesses, do not fit within the formulation of testimonial statements. Thus, the Court of Appeals correctly reversed the trial court for excluding these statements as violative of the Confrontation Clause.

An excited utterance cannot be introduced into evidence if it is determined to violate the Confrontation Clause because it is a testimonial statement. The statements in the case at bar did not bear a similarity to the testimonial statements at issue in *Crawford*. The statements in the case at hand were spontaneous and unprompted by questioning. These statements were not testimonial because they were not formal, not delivered to law enforcement or its equivalent, and were in the nature of seeking help for an emergency (even though it was not ongoing). We do not regard the excited utterances identified here as testimonial. ■

New Report Focuses on Prosecution and Race

Prosecutors in the United States exercise significant discretion with minimal external oversight. This flexibility allows them to seek outcomes that are just for individual cases, but some believe it may also lead to unfair disparate treatment—particularly toward people of color, who are overrepresented in the criminal justice system. Vera's Prosecution and Racial Justice Program (PRJ) is working with district attorneys in Milwaukee County, Wisconsin; Mecklenburg County (Charlotte), North Carolina; and San Diego County, California, to develop an internal assessment and management procedure that will help them identify and address evidence of racial bias within their offices. PRJ's new publication, ***Using Data to Advance Fairness in Criminal Prosecution***, describes this process and identifies lessons learned as the partner jurisdictions put the procedure in action. The article can be found at:

http://www.vera.org/content/prosecution-and-racial-justice-using-data-advance-fairness-criminal-prosecution

SIXTH CIRCUIT CASE REVIEW

By Dennis J. Burke, Post-Conviction Branch

Here are notable early 2009 cases from the Sixth Circuit that involve neither the death penalty nor the 4th Amendment, which are topics covered in other columns.

***Harris v. Lafler*,**
553 F.3d 1028 (2009), before Rogers, Sutton and McKeague Circuit Judges.

District Court's granting of habeas petition, relying upon *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), is affirmed where prosecution failed to disclose three exchanges between an important prosecution witness and the police, including promises of leniency to the witness if he testified against Harris and, (most egregiously), instructions to the witness to deny any such promise should anyone (read, Harris) ask him if he was promised anything in return for his testimony.

Harris and his friend Richard Ward were arrested for a drive-by shooting of an SUV in which two people were killed and five others were wounded. No one in the SUV could identify the gunman.

Ward gave two statements to the police and testified at Harris's preliminary hearing, stating that he drove the pursuing vehicle on the night of the shooting and that Harris fired an AK-47 at the SUV. At Harris's jury trial, Ward invoked his Fifth Amendment rights, after which the trial court allowed the State to introduce Ward's preliminary hearing testimony. The jury convicted Harris on all counts including two counts of second-degree murder and five counts of assault with intent to murder.

After Harris filed a motion for a new trial, the trial court conducted an evidentiary hearing, where three facts were revealed. First, Ward testified that, after the police officers arrested him, they told him that if he gave a statement about the shooting they would release Ward's girlfriend, who had been arrested along with Harris and Ward. Ward gave a statement, but the officers did not release his girlfriend because they "didn't like the statement." Ward admitted that he had not told "the complete truth" in the first statement, then offered a second statement after which the police released his girlfriend. The key difference between the two statements was that Ward first claimed that someone else was driving the vehicle on the night of the shooting and that he and Harris were passengers, but he later admitted that he was the driver and that Harris was the sole passenger. Ward pegged Harris as the shooter in both statements.

Second, Ward testified that, on the day of Harris's preliminary examination, a police officer told Ward that if he testified consistently with his second statement the police would release him. At the preliminary hearing, Ward testified consistently with his second statement, and the police released him later that day.

Third, the same officer told Ward that if anyone asked him whether he had been promised anything in exchange for his testimony, he should deny that any promises were made. When Ward testified at the preliminary examination, Harris's counsel asked him several times whether the police had promised him anything in exchange for his testimony. Ward denied that any promises had been made.

Under the AEDPA, the federal court may grant relief on Harris's *Brady* claim only if the state-court rulings were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d).

In order to prevail on the *Brady* claim, Harris must prove that: (1) the State suppressed relevant evidence; (2) the evidence was favorable to him; and (3) there is a "reasonable probability" that the outcome of the trial would have been different if the evidence had been disclosed. *See Strickler v. Greene*, 527 U.S. 263, 281-82, 289-90, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (internal quotation marks omitted). The question for the federal court then, "is whether the state courts contradicted or unreasonably applied these requirements in rejecting Harris's *Brady* claim."

Addressing the first two requirements the Court of Appeals wrote:

> There is not much to say about the first two requirements. As to the first, the police made three pertinent statements to Ward….The prosecution did not disclose these statements, and they plainly were relevant to the credibility of Ward's testimony. Contrary to the state court of appeals' assumption, *People v. Harris*, No. 212870, 2001 WL 1004367, at *1 (Mich.Ct.App. Aug. 31, 2001), it makes no difference that the prosecutors did not know about the police officers' statements. The *Brady* obligation applies even to "evidence known only to police investigators" and thus imposes upon prosecutors "a duty to learn of any favorable evidence known to the others acting

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> on the government's behalf ... including the police." *Strickler*, 527 U.S. at 280-81, 119 S.Ct. 1936 (internal quotation marks omitted).
>
> As to the second requirement, these statements amount to favorable evidence. Because *Brady* applies not only to exculpatory evidence but also to impeachment evidence, see *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and because Harris could have used these statements to cast doubt on the credibility of Ward's testimony, *Brady* covers the statements.

The Court of Appeals readily found that Harris satisfied the prejudice requirement of *Brady*. Ward was the key witness for the prosecution. He provided the prosecution with an eyewitness, on-the-scene account of the shooting that "explicitly identified Harris as the gunman and this testimony not only implicated Harris, but it also implicated Ward as an accomplice in the murder, giving the testimony a highly credible veneer."

Importantly, Ward's testimony was the only piece of eyewitness evidence that directly linked Harris to the shooting. No other witnesses could identify the gunman or place Harris at the scene of the shooting and there was "no forensic or physical evidence tying Harris to the crime." Cf. *Strickler*, 527 U.S. at 293, 119 S.Ct. 1936 (noting that failure to disclose impeachment material was not prejudicial in part because "there was considerable forensic and other physical evidence linking petitioner to the crime"). Furthermore, the prosecution stressed the importance of Ward's testimony in closing arguments. *See Strickler*, 527 U.S. at 290, 119 S.Ct. 1936.

The Court also rejected the state court's efforts to dismiss the police statements "as too informal to 'rise to the level of a promise to induce Ward's testimony.'" *Brady* applies not only to formal immunity deals and plea agreements but also to "less formal, unwritten or tacit agreement[s]," so long as the prosecution offers the witness a benefit in exchange for his cooperation, *see Bell v. Bell*, 512 F.3d 223, 233 (6th Cir. 2008) (en banc); accord *Wisehart v. Davis*, 408 F.3d 321, 323-24 (7th Cir. 2005), so long in other words as the evidence is "favorable to the accused," *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375; *see also Giglio v. United States*, 405 U.S. at 152-53, 92 S.Ct. 763.

***Fleming v. Metrish*,**
556 F.3d 520, 2009 WL 454601 before Clay, Gilman and Rogers, Circuit Judges
District Court grant of habeas petition reversed where majority of COA panel found:
(1) state court determination that police officer's comments to prisoner did not amount to an interrogation within the meaning of *Miranda* was not an unreasonable application of federal law;
(2) state court's determination that officers did not actually interrogate prisoner a second time, after he exercised his right to remain silent under *Miranda*, before he voluntarily chose to confess was not an unreasonable application of federal law.

Clay, J. delivered a separate opinion concurring in part and dissenting in part.

Stephen Fleming, a suspect in a murder, was taken into custody, ostensibly on drug charges and placed in the back seat of a police car. When asked if he would talk with police Fleming declined to answer "questions about that [expletive] homicide or homosexual activity." Police, who had previously obtained a search warrant, proceeded to search Fleming's property for evidence related to the murder. Shortly thereafter, Fleming was moved to a police "narcotics van" where he sat for approximately two hours making "small talk" with a police officer until another officer approached all excited because police had supposedly found the murder weapon.

At that point in time, the officer sitting with Fleming urged him to "do the right thing" and speak with an investigating detective. Fleming agreed and the detective climbed into the van. The detective's story is that he did not ask Fleming any questions inside the van. Fleming just started to cry and after asking for a few minutes to "clear his head" Fleming spoke without interruption until he was finished (literally and figuratively speaking). Fleming disputed the detective's version of events and testified that the detective initiated the conversation telling him that he had found the weapon and it was in Fleming's "best interest to cooperate."

Pursuant to the well known holding in *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966), police officers must stop questioning a suspect who invokes his right to remain silent or to have an attorney present. The admissibility of statements obtained after the suspect invokes the right to remain silent depends upon whether his right to stop questions was "scrupulously honored." *Michigan v. Mosley*, 423 U.S. 96, 104 (1975).

In federal habeas corpus proceedings, the federal court may grant relief only if the state-court ruling on the claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d).

The state court of appeals, reviewing Fleming's claim for plain error only,[1] held that his right to remain silent was "scrupulously honored" consistent with the holding in *Michigan v. Mosley*. The majority of the Court of Appeals panel considered whether the state-court ruling involved an unreasonable application of clearly established federal law. To be considered an "unreasonable application of clearly established Federal law," the state court decision on the merits must be "objectively unreasonable," as opposed to merely wrong or erroneous. *Williams v. Taylor*, 529 U.S. 362, 409-411 (2000).

The Court of Appeals panel refused to say whether the police actually did "scrupulously honor" Fleming's constitutional right to stop their questioning. The Court surmised that had it engaged in a *de novo* review of Fleming's claim, it might have disagreed with the state court of appeals. Nevertheless, the majority held that even if the state-court ruling was an erroneous application of *Michigan v. Mosley*, is was not an *unreasonable* application of it. Therefore, it reversed the district court's grant of habeas relief.

In dissent, Judge Clay insists that the federal court should have considered the claim *de novo* and thus not deferred to the state court's possibly erroneous application of federal law. "AEDPA thus requires deference only where the defendant's federal claim was 'adjudicated' on the merits, not, more broadly speaking, whenever a state court merely addresses or, in the parlance of the majority, 'evaluates' the merits of the claim. Conversely, where the state courts do not rule on the merits of a claim, this Court reviews the claim *de novo*. *See Maples v. Stegall*, 340 F.3d 433, 436 (6th Cir. 2003)." Judge Clay asserts that because the state court of appeals only reviewed the claim for plain error, it did not rule on the merits of the claim. "Nothing in AEDPA even remotely suggests that deference is required more broadly where a state court merely addresses merits-related aspects of a defendant's federal claim."

Judge Clay argues forcefully that the majority ignored "a litany of cases" including *Lundgren v. Mitchell*, 440 F.3d 754 (6th Cir. 2006), which "expressly and unequivocally held" that "a state court's plain-error review is not due deference under AEDPA because '[p]lain error analysis is more properly viewed as a court's right to overlook procedural defects to prevent manifest injustice, but *is not equivalent to a review of the merits.' Id.* at 765 (emphasis added)."

Applying *de novo* review for the first time by any appellate judge - state or federal, Judge Clay proceeded to conclude that Fleming's confession should not have been admitted against him at trial because the police did not "scrupulously honor" Fleming's request to halt the police questioning as required by the Supreme Court in *Michigan v. Mosley*, 423 U.S. 96, 104 (1975).

Endnotes:

1. The state appellate court refused to conduct a full merits review because it held Fleming had not properly raised the *Mosley* claim in the state trial court. The Court of Appeals unanimously found, however, and the prosecution conceded, that Fleming had in fact raised the claim in state court.■

Public Defense: Leading the Way to Racial Justice Analysis

In the summer of 2008, the Community Oriented Defender Network ("COD") and the American Council of Chief Defenders ("ACCD") convened *Public Defense: Leading the Way to Racial Justice*. Over 50 individuals from over 20 public defender offices came to New York City to attend the two-day training conference, which was book-ended by a one day COD planning meeting, and a one day ACCD business meeting.

At the conference, attendees discussed the myriad ways in which racial and ethnic bias pervade the criminal justice system, and discussed creative ways in which defenders can confront these issues with an eye toward harnessing the power of government to effect change. In addition to eight plenary sessions—summarized below—attendees broke into small groups to discuss racial injustice in our own jurisdictions and together explored strategies for tackling the problems we identified. The conference ended with an inspiring visit to the Neighborhood Defender Service of Harlem, a pioneer in community-based, client-centered public defense practice, where we heard from defenders, social workers, investigators, and community outreach leaders on the innovative ways in which the Neighborhood Defender Service serves their clients and community. For the article, go to:

http://www.brennancenter.org/content/resource/public_defense_leading_the_way_to_racial_justice

FOURTH AMENDMENT CASE REVIEW
SEIZURE AND SEARCH: AUTOMOBILES

By Jamesa Drake, DPA Appeals

Introduction

Source of Law

The Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution protect citizens from **unreasonable** and **unwarranted** searches and seizures. *See e.g. Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006) (recognizing Ky. Const. § 10 as a corollary to U.S. Const. amend. IV.)

Warrantless Searches And Seizures Are Presumed Unlawful, And The Commonwealth Bears The Burden Of Proving Otherwise

When considering the constitutionality of a warrantless search or seizure, a reviewing court must presume that the police acted **unlawfully**, and **the Commonwealth** bears the "heavy burden" of proving otherwise. *See e.g. Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) (so stating); *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (same).

Seizures: Challenging The Traffic Stop

Depending on the facts of your case, you may need to challenge the *seizure* of the automobile and its occupants, and then argue that the search and subsequent discovery of the evidence in question are "fruits" of the unlawful seizure. Do not overlook the legality of the stop itself or the duration of the stop.

A Traffic Stop Constitutes A "Seizure"

The "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." *See e.g. Whren v. United States*, 517 U.S. 806, 809, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (collecting cases). "An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." *Id.* at 810.

Officer Observes A Violation Or Criminal Activity

A. <u>Open Question</u>: When An Officer Observes A <u>Traffic Violation</u>, Must She Have Probable Cause Or Reasonable Suspicion To Seize A Vehicle And Its Occupants?

In *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), the United States Supreme Court remarked that, "[a]s a general matter, the decision to stop an automobile is reasonable where the police have **probable cause** to believe that a traffic violation has occurred." (Emphasis added).

However, a majority of the federal circuit courts of appeal have held that **reasonable suspicion** will suffice. *United States v. Stewart*, 551 F.3d 187, 192 (2d Cir. 2009), is illustrative: "[T]raffic stops are reasonable when they arise from the reasonable suspicion of a traffic violation. The *Whren* Court did not state that a decision to stop an automobile is reasonable *only* when the police have probable cause to believe that a traffic violation has occurred. The Court noted instead that probable cause was *sufficient* to render the stop reasonable. Whether reasonable suspicion would also permit the stop to satisfy the Fourth Amendment's requirement of reasonableness was not addressed by the Court. Accordingly, we identify nothing in *Whren* that casts doubt on our understanding that *either* probable cause *or* reasonable suspicion of a traffic violation can support a stop." (Emphasis in original).

The Sixth Circuit is currently divided on this issue. *See United States v. Blair*, 524 F.3d 740, 748 n.2 (6th Cir. 2008) ("[w]hether the police may stop a vehicle based on mere reasonable suspicion of a civil traffic violation is the subject of conflict in our case law.") However, it appears that the prevailing rule – in the Sixth Circuit – is that a stop for a traffic violation can be justified only by probable cause. *See United States v. Simpson*, 520 F.3d 531, 539 (6th Cir. 2008).

Kentucky has yet to recognize the controversy over *Whren*. Case law suggests that the **probable cause** standard applies. *See e.g. Wilson v. Commonwealth*, 37 S.W.3d 745, 749 (Ky. 2001) (the court cited *Whren* and commented that "an officer who has probable cause to believe a traffic violation has occurred may stop a vehicle regardless of his or her subjective motivation in doing so."); *Green v. Commonwealth*, 244 S.W.3d 128, 133 (Ky. App. 2008) ("An officer with probable cause to believe that a traffic violation has occurred may stop the vehicle.")

Professor LaFave has this to say: "An express limitation upon *Terry* stops on reasonable suspicion to those instances in which the suspected offense is one involving danger of forcible injury to persons or of appropriation of or damage

to property, so that probable cause would be required for most traffic stops (except, *e.g.* driving under the influence), would be one significant step toward enhancing the Fourth Amendment rights of suspected traffic violators, especially in light of the now well-established police practice of using traffic stops to seek out drugs. … When it comes to such common criminal offenses as burglary, theft and assault, the quantum-of-evidence requirement for making a seizure alone serves as a reasonably effective means of ensuring that only those who should be apprehended are seized. But when it comes to traffic violations, the same statement cannot be made, considering (i) that stops purportedly for such violations are often made for purposes of drug interdiction; (ii) that this can result in stops for extremely minor and technical violations; and (iii) that, in any event, very few drivers can traverse any appreciable distance without violating some traffic regulation." W. LaFave, Wayne R., *Search and Seizure*, § 9.3(a), p. 366 (4th ed. 2004) (internal citations omitted).

B. When An Officer Observes Ongoing Criminal Activity (Felony Or Misdemeanor), She Must Have Reasonable Suspicion To Seize A Vehicle And Its Occupants.

When an officer has **reasonable suspicion** that the occupants of a vehicle are engaged in ongoing criminal activity, she may briefly stop the vehicle to investigate. *See e.g. United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) (so stating); *Gaddis v. Redford Twp.*, 364 F.3d 763, 769-70 (6th Cir. 2004) (so stating); *Greene v. Commonwealth*, 244 S.W.3d 128, 133 (Ky. App. 2008) (so stating).

C. When An Officer Has Reasonable Suspicision Of A Completed Felony, She May Seize A Vehicle And Its Occupants.

"[I]f police have a **reasonable suspicion**, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a **completed felony**, then a *Terry* stop may be made to investigate that suspicion." *United States v. Hensley*, 469 U.S. 221, 226, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (emphasis added).

D. Open Question: May An Officer Seize A Vehicle And Its Occupants To Investigate A Completed Misdemeanor?

The U.S. Supreme Court has yet to answer this question. The Sixth Circuit has answered the question in the negative. *See United States v. Roberts*, 986 F.2d 1026, 1030 (6th Cir. 1993) (*Hensley* does not apply to completed misdemeanors); *Gaddis v. Redford Twp.*, 364 F.3d 763, 771 n. 6 (6th Cir. 2004) ("Police may…make a stop when they have reasonable suspicion of a completed felony, though not of a mere completed misdemeanor.")

Administrative Seizures: Checkpoints

Suspicionless stops of all vehicles are permitted at police checkpoints to check for sobriety, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), and citizenship at the border, *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3047, 49 L.Ed.2d 1116 (1976). In *Illinois v. Lidster*, 540 U.S. 419, 124 S.Ct. 885, 157 L.Ed.2d 843 (2004), the Court held that a checkpoint designed to seek information regarding a recent hit-and-run crime did not violate the Fourth Amendment because the purpose of the checkpoint was not to find evidence of crimes committed by the drivers and because the scope of the stop was reasonable in context.

Scholars sometimes categorize "checkpoint stops" as part of an expanding area of warrantless searches and seizures justified by "special needs." Generally, to qualify as a "special need," the program for suspicionless searches or seizures must satisfy a government interest beyond "ordinary criminal wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 41, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000).

The Kentucky Court of Appeals has instructed that "[f]or a checkpoint to be constitutional, it must be executed pursuant to a systematic plan, and the officers conducting the stop should not be permitted to exercise their discretion regarding specifically which vehicles to stop." *See Smith v. Commonwealth*, 219 S.W.3d 210, 214 (Ky. App. 2007) (a case concerning a sobriety checkpoint where, the court suggested that because the checkpoint complied with O-EM-4, the checkpoint *ipso facto* complied with the Fourth Amendment); *compare Monin v. Commonwealth*, 209 S.W.3d 471, 474 (Ky. App. 2007) (holding that a checkpoint failed to pass constitutional muster).

The Kentucky Supreme Court discussed the constitutionality of police roadblocks in *Commonwealth v. Buchanon*, 122 S.W.3d 565 (Ky. 2003) (also collecting cases). The case sets out a four-part test for determining whether a roadblock is "reasonable." It is unclear whether the court's four-part test is intended as part of a constitutional analysis (state or federal) or whether it is intended to provide guidance for the establishment of internal police procedures. Again, whether a roadblock complies with police policy and whether a roadblock passes constitutional muster are two entirely different questions.

Kentucky courts may be conflating two distinct concepts: the validity of a police roadblock and the validity of an inventory search. In any case, the analysis that Kentucky appears to employ is circular, *i.e.* the search is constitutional because it complies with police procedure. The constitutional validity of an action undertaken by a police officer does *not* depend on whether the officer complied with police policy. Plenty of police actions comply with police policy and, nevertheless, violate the state and federal constitutions.

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Pretextual Stops And Racial Profiling

So-called "pretext stops" are constitutionally permissible. Racial profiling is not. A "pretext stop" occurs when "the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop." *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988) (*Guzman*, which is critical of pretextual stops, pre-dates *Whren* and is now overruled; however, its definition of a pretext stop is accurate). The "classic example" of a pretext stop is an officer stopping a motorist for a minor traffic violation in order to investigate the officer's "hunch" that the individual is engaged in other illegal activity. *Id.* at 1515.

Racial profiling is *impermissible* under the Fourteenth Amendment. Racial profiling "occurs when a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating. The essence of racial profiling is a global judgment that the targeted group – before September 11, usually African Americans or Hispanics – is more prone to commit crime in general, or to commit a particular type of crime, than other racial or ethnic groups." Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 Colum. L. Rev. 1413, 1415 (2002); *compare with United States v. Waldon*, 206 F.3d 597, 604 (6th Cir. 2000) ("Common sense dictates that, when determining whom to approach as a suspect of criminal wrongdoing, a police officer may legitimately consider race as a factor if descriptions of the perpetrator known to the officer include race.") The U.S. Supreme Court has recognized that racial profiling occurs. *See e.g. Illinois v. Wardlow*, 528 U.S. 119, 135 n. 7-10, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (Stevens, J., concurring in part and dissenting in part).

In *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), the Court held: "We * * * foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree * * * that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813.

In *Wilson v. Commonwealth*, 37 S.W.3d 745 (Ky. 2001), the Kentucky Supreme Court cited to *Whren* and remarked that "an officer who has probable cause to believe a civic traffic violation has occurred may stop a vehicle regardless of his or her subjective motivation in doing so." *Id.* at 749. Inexplicably – and inaccurately – the Kentucky Court of Appeals has held that *Wilson* stands for the proposition that, "Kentucky has specifically adopted the reasoning of *Whren* in upholding traffic stops for violations as permissible under Section 10 of our state constitution." *Stigall v. Commonwealth*, 2008 WL 4182363, *3. In actuality, the Kentucky Supreme Court has done no such thing; the question remains open for state constitutional purposes.

License, Proof Of Insurance, Warrant And NCIC Checks

A. License Inspection

The police *may* inspect a driver's license, registration, proof of insurance, etc., in connection with, and during the course of, an ongoing traffic stop. *See Delaware v. Prouse*, 440 U.S. 648, 659, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) ("The foremost method of enforcing traffic and vehicle safety regulations * * * is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day; and on these occasions, licenses and registration papers are subject to inspection and drivers without them will be ascertained."); *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177, 186, 124 S.Ct. 2451 (2004) ("Our decisions make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops.") (also collecting cases). This is a *per se* rule.

Hiibel also strongly suggests that a suspect may lawfully refuse to produce identifying documents if doing so would violate the privilege against self-incrimination. *Id.* at 190-91.

The police *may not* conduct spot checks for drivers' licenses, etc. *See Prouse*, 440 U.S. at 662 ("[E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.") Similarly, so-called "stop and identify" statutes (Kentucky does not have one) are constitutionally infirm. *See Hiibel*, 542 U.S. at 183-84 (collecting cases).

B. License Retention

Although a "totality of the circumstances" test applies, counsel should strenuously argue that a person remains seized for as long as the police officer retains his or her license. *See United States v. Place*, 462 U.S. 696, 709 n. 8, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) ("At least when the authorities do not make it absolutely clear how they plan to reunite the suspect and his possessions at some future time and place, seizure of the object is tantamount to seizure of the person. This is because that person must either remain on the scene or else seemingly surrender his effects permanently to the police."); *Florida v. Royer*, 460 U.S. 491,

501-2, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) ("Asking for and examining Royer's [airplane] ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purpose of the Fourth Amendment. These circumstances surely amount to a show of official authority such that a reasonable person would have believed he was not free to leave.") (internal citation omitted). To be clear, this is *not* a *per se* rule.

C. Open Question: Warrants Check

The United States Supreme Court has yet to consider the constitutionality of a warrants check during a traffic stop. Recently, the Tenth Circuit has been active in this area, and has held that the police may lawfully conduct a warrants check during the course of a valid, investigatory traffic stop based on reasonable suspicion of criminal activity or legitimate officer safety concerns. *See e.g. United States v. Villagrana v. Flores*, 467 F.3d 1269, 1275-78 (10th Cir. 2006) (relying on officer safety concerns as a justification); *see also United States v. Contreras-Diaz*, 575 F.2d 740 (9th Cir. 1978) (A warrants check is permissible if it does not "significantly extend" the period of detention). However, it remains an entirely open question whether the police may conduct a warrants check during the course of a traffic stop for a **traffic violation**. For more information, *see* LaFave, § 9.3 (c), p. 381-84 (collecting cases).

D. Open Question: Criminal History Check

The United States Supreme Court has yet to consider the constitutionality of a criminal history check during a traffic stop. Criminal history information is readily available to law enforcement agencies and officers through the National Crime Information Center (NCIC). Obtaining a criminal history check can add to the total length of a traffic stop because "often criminal history checks take longer to process than the usual license and warrant requests, and after a certain point meaningful additional time could…constitute an unreasonable detention of the average traveler." *United States v. Finke*, 85 F.3d 1275, 1280 (7th Cir. 1996). Professor LaFave argues that "the criminal history inquiry may itself produce a substantial extension of the traffic violator's seizure without reasonable grounds of more serious criminal activity. A record, even if previously denied by the violator, counts for very little, but yet may lead to interrogation that is intense, very invasive and extremely protracted." LaFave, § 9.3(c), p. 384-85 (internal citation omitted). Professor LaFave also cautions that "it is to be doubted whether there is any valid reason for automatic warrant checks on mere passengers." *Id.* at 388-89.

Passengers

A. Passengers Are Seized During A Traffic Stop.

During a traffic stop, an officer seizes everyone in the vehicle, not just the driver. *See Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 2406, 168 L.Ed.2d 132 (2007) (so stating). CAUTION: there is no seizure without actual submission. *California v. Hodari D.*, 499 U.S. 621, 626 n.2, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) (so holding).

B. Police May Initiate A Traffic Stop To Investigate The Passenger.

The police may lawfully stop a car solely to investigate the passenger's conduct, *e.g.* the passenger's violation of the local seatbelt law, the passenger's violation of the littering ordinance, etc. *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 2407, 168 L.Ed.2d 132 (2007) (so stating).

C. Reminder: Passenger's Mere Presence In A Vehicle Does Not Give Rise To Reasonable Inference Of Criminal Activity.

A person's mere presence in the same car with a criminal offender does not authorize an inference of participation in a conspiracy. *See United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948) (so holding). The probable cause requirement is not satisfied by one's mere propinquity to others independently suspected of criminal activity. *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979); *see also Paul v. Commonwealth*, 765 S.W.2d 24 (Ky. App. 1988) (same).

Ordering The Occupants Out Of The Vehicle

"It is…reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety." *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 2407, 168 L.Ed.2d 132 (2007). During a lawful traffic stop, an officer may order the driver or the passenger out of the car as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk. *Maryland v. Wilson*, 519 U.S. 408, 414-15, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997) (so stating); *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1997) (*per curiam*) (driver may be ordered out of the car as a matter of course). This *per se* rule exists because "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Wilson*, 519 U.S. at 414 (quoting *Michigan v. Summers*, 452 U.S. 692, 702-3, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981)).

Of course, "unquestioned police command" is "at odds with any notion that a [driver or] passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission." *Brendlin*, 127 S.Ct. at 2407.

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The Duration Of A Traffic Stop

A. Stop To Investigate Criminal Activity

"The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a **limited intrusion** on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of the case. This much however, is clear: an investigative detention must be **temporary and last no longer than is necessary to effectuate the purpose of the stop**. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (emphasis added); *Illinois v. McArthur*, 531 U.S. 326, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001) (a suspect's temporary detention must be "limited in time and scope.")

"In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. … The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *United States v. Sharpe*, 470 U.S. 675, 686-87, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). NOTE: *Sharpe* gives the police leeway in "swiftly developing situations," but not otherwise.

B. Stop To Investigate A Traffic Violation

"[A] seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete the mission." *Illinois v. Caballes*, 543 U.S. 405, 407-8, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005); *see also Meghoo v. Commonwealth*, 245 S.W.3d 752, 755-56 (Ky. 2008) (reiterating *Caballes* and *Royer*).

Professor LaFave writes passionately on this issue: "[I]n strict accordance with *Terry* and its progeny, questioning during a traffic stop must be limited to the purpose of the traffic stop and thus may not be extended to the subject of drugs [or anything else]." LaFave at § 9.3(d), p. 391. Restated: "[A]n investigation during a *Terry* stop violates the Fourth Amendment if directed at an offense other than one as to which there is reasonable suspicion upon which the *Terry* stop itself could be based." *Id*. at 2008-2009 Pocket Part, p. 63.

Authority To Arrest

A. The Police May Arrest For Misdemeanor Traffic Crimes. The Police May <u>Not</u> Make A "Physical Arrest" For A Violation (Except In Certain Circumstances).

The United States Supreme Court has weighed-in on this issue. Note that the holding in *Atwater*, which follows, is highly dependent on the Court's understanding of the Texas Transportation Code and the fact that one's failure to wear a seatbelt is a "crime" in that jurisdiction. In *Atwater*, the Court held: "[T]he standard of probable cause applies to all arrests, without the need to balance the interests and circumstances involved in particular situations. If an officer has probable cause to believe that an individual has committed even a very minor **criminal offense** in his presence, he may, without violating the Fourth Amendment, arrest the offender. … There is no dispute that [the arresting officer] had probable cause to believe that [the defendant] had committed a crime in his presence. She admits that neither she nor her children were wearing seatbelts, as required by [the Texas Transportation Code]. [The officer] was accordingly authorized (not required, but authorized) to make a custodial arrest without balancing the costs and benefits of determining whether or not [the defendant's] arrest was in some sense necessary." *Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001).

Atwater has limited application in Kentucky, which distinguishes between "misdemeanors" and "violations." "Offenses punishable by confinement other than in the penitentiary, whether or not a fine or other penalty may also be assessed, are misdemeanors." KRS 431.060(2). "Offenses punishable by a fine only or by any other penalty not cited herein, whether in combination with a fine or not, are violations." KRS 431.060(3).

In Kentucky, a peace officer may arrest a suspect for a violation, but he may *not* make a "physical arrest" unless: "there are reasonable grounds to believe that the defendant, if a citation is issued, will not appear at the designated time or unless the charge is a violation of KRS 189.223 [truck of excess weight], 189.290 [careful operation], 189.393 [complying with traffic officer's signal], 189.520 [operating a vehicle not a motor vehicle under the influence], 189.580 [duty in case of an accident], 235.240 [boating while intoxicated], 281.600 [repealed?], 511.080 [third-degree trespass], or 527.070 [possession of a weapon on school property] committed in his presence or a violation of KRS

189A.010 [DUI], not committed in his presence, for which an arrest without a warrant is permitted under KRS 431.005(1)(e)." KRS 431.015(2); *see also* KRS 431.005(1)(e).

That curious distinction – between an arrest and a physical arrest – has not been explored in case law. In *Clark v. Commonwealth*, 868 S.W.2d 101, 108 (Ky. App. 1993), *overruled by Henry v. Commonwealth*, 275 S.W.3d 194 (Ky. 2008), the court recognized the distinction. The Court of Appeals mentioned – in passing – that "both *Belton* and *Ramsey* involved arrests for criminal offenses (possession of marijuana and DUI, respectively) as opposed to this appeal, where the arrest was only for traffic violations (speeding and absence of a licensed driver), which normally do not involve custodial arrest."

The Kentucky Attorney General has issued two interesting opinions on the subject, one of which provides that KRS 431.015 "is designed to eliminate arrests in mere traffic violations and other minor misdemeanors." 1980-1981 Ky. Op. Atty. Gen. 2-253; OAG 80-330. The other of which provides that "a law enforcement officer may arrest *without a warrant* an individual who in the officer's presence commits a misdemeanor, an offense punishable by confinement other than in the penitentiary whether or not a fine or other penalty may be assessed. KRS 431.005; KRS 431.060." 1984 Ky. Op. Atty. Gen. 2-284; OAB 84-258.

The upshot: If your client has committed a "violation," then except in certain circumstances, the police may *not* effectuate a *custodial* arrest. The police must issue a citation and permit your client to leave.

Searching The Automobile

The Commonwealth must identify which justification the police relied on for searching the automobile. The options are: (a) search pursuant to the automobile exception to the warrant requirement; (b) search incident to arrest; (c) officer safety; (d) inventory or impound "search;" and (e) search pursuant to the consent exception to the warrant requirement.

Automobile Exception To The Warrant Requirement In A Nutshell: Probable Cause As To The Car

If the police have probable cause to believe that a "mobile" car contains contraband, the police may search the car, either at the scene or at a later date, without a warrant.

Police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search.

***** PRACTICE TIP *****

The warrant requirement – but not the probable cause requirement – is relaxed. The police must have probable cause to believe that the car contains contraband.

A. The Court's Evolving Justification for the Automobile Exception to the Warrant Requirement

In *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Court established an exception to the warrant requirement for moving vehicles. It held that a warrantless search of an automobile, based on probable cause to believe that the vehicle contained evidence of crime, and in light of an **exigency** arising out of the likely disappearance of the vehicle, did not contravene the Warrant Clause of the Fourth Amendment. *Id.* at 158-59.

The Court refined the exigency requirement in *Chambers v. Maroney*, 399 U.S. 42, 51-52, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), when it held that the existence of exigent circumstances was to be determined at the time the automobile was seized. Accordingly, following *Chambers*, if the police have probable cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct either an immediate or a delayed search of the vehicle." In other words, a car retains its "mobility" even at the police station and regardless of whether the car's owner is in custody.

In *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), the Court began to back away from the exigency-mobility rationale. The *Cady* Court recognized that it had upheld warrantless searches in cases, such as *Chambers*, where mobility was "remote, if not non-existent." *Id.* at 442. Instead, it offered a new justification: "Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office." *Id.* at 441.

In *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), a plurality of the Court noted the mobility of cars rationale and added that "there is still another distinguishing factor" which is that "one has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels thoroughfares where both its occupants and its contents are in plain view." *Id.* at 590.

In *California v. Carney*, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), the Court explained that even when an automobile is not "immediately mobile, the lesser expectation of privacy resulting from its use…justifie[s] application of the vehicular exception." The Court explained: "When a vehicle is being

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used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes – temporary or otherwise – the two justifications for the vehicle exception come into play. First, the vehicle is obviously readily mobile by the turn of a switch key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling. At least in these circumstances, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable." *Id.* at 392-93.

Lastly, in *Maryland v. Dyson*, 527 U.S. 465, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999) (per curiam), the Court held that the Maryland Court of Special Appeals incorrectly interpreted the warrant requirement when it concluded that in order for that exception to the warrant requirement to apply there must not only be probable cause to believe that evidence of a crime is contained in the automobile, but also a separate finding of exigency precluding the police from obtaining a warrant. To the contrary, the Court remarked, "the 'automobile exception' has no separate exigency requirement. … If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment…permits the police to search the vehicle without more." *Id.* at 466-67 (internal citations omitted).

B. <u>Open Question:</u> Vehicles Parked In Private Driveways

There may be a warrant requirement for vehicles parked in private driveways. Argue that such vehicles are exempt from the automobile exception, and rely on Justice Stewart's plurality opinion in *Coolidge v. New Hampshire*, 403 U.S. at 458-62 ("a good number of the containers that the police might discover on a person's property and want to search are equally mobile, *e.g.* trunks, suitcases, boxes, briefcases, and bags. How are such objects to be distinguished from an unoccupied automobile…sitting on the owner's property?") *and Cardwell v. Lewis*, 417 U.S. at 593 (distinguishing between the automobile-exception-search of a car found on public property and a car found on private property); *see also Florida v. White*, 526 U.S. 559, 565-66, 119 S.Ct. 1555, 143 L.Ed.2d 748 (1999) (distinguishing between seizures that take place in public versus private places).

C. Searching Closed Containers

"When there is probable cause to search for contraband in a car, it is reasonable for police officers…to examine packages and containers without a showing of individualized probable cause for each one." *Wyoming v. Houghton*, 526 U.S. 295, 302, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999). "[P]olice officers with probable cause to search a car may inspect passengers' belongings found in the car **that are capable of concealing the object of the search**." *Id.* at 307.

D. <u>Open Question:</u> Containers Attached To A Person

In his concurring opinion in *Wyoming v. Houghton*, Justice Breyer remarked: "Less obvious, but in my view also important, is the fact that the container here at issue, a woman's purse, was found at a considerable distance from its owner, who did not claim ownership until the officer discovered her identification while looking through it. Purses are special containers. They are repositories of especially personal items that people generally like to keep with them at all times. So I am tempted to say that a search of a purse involves an intrusion so similar to a search of one's person that the same rule should govern both. However, given this Court's prior cases, I cannot argue that the fact that the container was a purse *automatically* makes a legal difference, for the Court has warned against trying to make that kind of distinction. But I can say that it would matter if a woman's purse, like a man's billfold, were attached to her person. It might then amount to a kind of 'outer clothing,' which under the Court's cases would properly receive increased protection. In this case, the purse was separate from the person, and no one has claimed that, under those circumstances, the type of container makes a difference." *Houghton*, 526 U.S. at 307 (Breyer, J., concurring).

To be clear, the police may not search an occupant's person for crime evidence or containers that could conceal crime evidence – under this or any other exception to the warrant requirement – without a warrant. *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed.2d 210 (1948).

Search Of An Automobile Incident To Arrest

In A Nutshell: Probable Cause As To Defendant

Police may search a vehicle and any containers therein incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the ***time of the search*** *or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police can obtain a warrant or show that another exception to the warrant requirement applies.*

A. The Origins Of The Search-Incident-To-Arrest Exception As It Relates To Automobiles

In *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the Court held that a search incident to an arrest may include only "the arrestee's person and the area within his immediate control," meaning the area from within which the arrestee might gain possession of a weapon or might destroy evidence. *Id.* at 763. This "wingspan" limitation ensures that the scope of a search incident to arrest is true to its dual justifications: protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. *Id.* at 773. Accordingly, if

there is no possibility that an arrestee could reach into an area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply. *Id*. at 773.

In *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the Court applied *Chimel* to the automobile context. The Court held that when an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile" and any containers therein. *Id*. at 460. That bright-line rule was based on the assumption "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, if not inevitably, within the area into which an arrestee might reach." *Id*. at 460.

In *Thornton*, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), the Court held that *Belton* applies even when an officer does not make contact until after the person arrested – the driver or the passenger – has left the vehicle: "In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle." *Id*. at 621.

In *Arizona v. Gant*, __ U.S. __, 129 S.Ct. 1710, __ L.Ed.2d __ (2009), the Court clarified: "To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would…untether the rule from the justification underlying the *Chimel* exception…. Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." Moreover, "[a]lthough it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe [that] evidence relevant to the crime of arrest may be found in the vehicle.' In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. But in others…the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." (Internal citations omitted).

The *Gant* Court emphasized: "A rule that gives police the power to conduct…a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals."

The *Gant* opinion was entirely forecast – and now adopts – Justice Scalia's concurring opinion in *Thornton*. Commenting on Justice Scalia's concurring opinion in *Thornton*, Professor LaFave wrote: "There is reason to be hesitant about embracing the Scalia proposal, considering that as a general matter the Fourth Amendment has been construed not to permit a search for evidence (as compared to a search for a weapon or for a person in the interest of officer safety) merely upon reasonable suspicion, at least absent special needs beyond the normal need for law enforcement." *LaFave*, at § 7.1(c), p. 534-35; internal citations omitted.

Before *Gant*, the search-incident-to-arrest exception to the warrant requirement, as applied to automobiles, was **limited** by *Chimel*'s twin exigencies: a threat to either officer safety or to the destruction or concealment of evidence. After *Gant*, the search-incident-to-arrest exception to the warrant requirement applies whenever officer safety or the destruction or concealment of evidence is at risk **AND** whenever it is "reasonable to believe [that] evidence relevant to the crime of arrest may be found in the vehicle."

B. Open Questions: When Must The Search Commence? How Near Must The Arrestee Be To The Vehicle?

In *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980), the Court held that: "Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa." To date, the Court has not considered the constitutional validity of an automobile search that preceded the "recent occupant's" arrest. However, every federal circuit court except the Seventh Circuit has, relying on *Rawlings*, held that the search **may** precede the arrest. *See e.g. United States v. Powell*, 483 F.3d 836 (D.C. Cir. 2007) (so holding and collecting cases).

The *Gant* Court has recognized the question as open: "Courts that have read *Belton* expansively are at odds regarding how close in time to the arrest and how proximate to the arrestee's vehicle an officer's first contact with an arrestee must be to bring the encounter within *Belton's* purview and whether a search is reasonable when it commences or continues after the arrestee has been removed from the scene." *Id*. at 1720-21 (collecting cases, including *Rainey v. Commonwealth*, 197 S.W.3d 89, 94-95 (Ky. 2006) (applying *Belton* when the arrestee was apprehended 50 feet from the vehicle)).

In *Preston v. United States*, 373 U.S. 364, 367, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), the Court held that the police may not search a vehicle pursuant to the incident-to-arrest exception if the search occurs at the police station. The *Preston* Court explained: "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime – things which might

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easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to arrest." *Id.* at 367.

ARGUE that if a person is simply near her unoccupied automobile when the police arrive, and she is never observed inside the car, the ordinary search-incident doctrine, and not the *Belton* bright-line should apply. *Compare Thornton v. United States*, 541 U.S. at 620 (Police observed a traffic violation, the defendant pulled over and exited his car of his own volition, then the police made first contact).

ARGUE that if the justification for the search is to prevent the arrestee from grabbing a weapon or destroying evidence, then the search probably must occur "contemporaneously" with the arrest. *See Gant*, 129 S.Ct. at 1723-24 ("Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment **at the time of the search** or it is reasonable to believe that the vehicle contains evidence of the offense of arrest.")

ARGUE that if the justification for the search is a "reasonable basis" to believe that the vehicle may contain evidence of the crime of arrest, then the search must occur "contemporaneously" with the arrest. If the police delay the search or if no exigency requires an immediate search, then the police have time to – and must – obtain a warrant.

C. Open Question: Is The Standard Probable Cause Or Reasonable Suspicion?

Recall that the automobile exception to the warrant requirement applies when the police have probable cause to believe that the vehicle contains crime evidence. In *Gant*, however, the Court held that the police are authorized to search an automobile and any containers therein so long as "it is reasonable to believe that the vehicle contains evidence of the offense of arrest." Justice Alito, in dissent, believes that "reasonable to believe" means something other than probable cause. *See Gant*, 129 S.Ct. at 1731 (Alito, J., dissenting) ("Why, for example, is the standard for this type of evidence-gathering search 'reason to believe' rather than probable cause?")

D. Open Question: Closed Vs. Locked Containers

Under *Belton*, the police may open a closed container regardless of whether it could contain either a weapon or evidence of the crime for which the arrest was made. *See Belton*, 453 U.S. 461 n. 4 (defining a "container" as "any object capable of holding another object.") Again, it is unclear whether that rule survives *Gant* under the "reasonable to believe [that] evidence relevant to the crime of arrest may be found in the vehicle" rationale. It may not.

May the police open locked containers? ARGUE that it strains credulity to believe that an arrestee would be able to grab a weapon in a *locked* container.

E. Open Question: May The Police Search The Trunk?

Under *Belton*, the answer is clear: the police may search the passenger compartment, but not the trunk. That reasoning should apply if the justification for the search is to prevent the arrestee from grabbing a weapon or destroying evidence, then the search probably must occur "contemporaneously" with the arrest.

Officer Safety Justification For Searching An Automobile

In A Nutshell: *Terry* Search Of An Automobile

The search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief, based on specific articulable facts, that a suspect is dangerous and may gain immediate control of weapons.

A. The U.S. Supreme Court Is Convinced – And Rightly So – That Traffic Stops Are Unusually Dangerous. Don't Argue Otherwise.

The Court recognizes that traffic stops pose unique risks to police officers. *See e.g. Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (police may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed or dangerous. There is an "inordinate risk confronting an officer as he approaches a person seated in an automobile."); *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) Police, acting on an informant's tip, may reach into the passenger compartment of an automobile to remove a gun from the driver's waistband even where the gun was not apparent to police from outside the car and the police knew of its existence only because of the tip.

B. Police May "Frisk" An Automobile.

In *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the Court first held that "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Id.* at 1049-50.

However, the Court was careful to note that the police may not conduct automobile searches whenever they conduct an investigative stop (although the "bright line" rule from *Belton* authorizes a search whenever an officer makes a custodial arrest because "[a]n additional interest exists in the arrest context, *i.e.* preservation of evidence, and this justifies an 'automatic' search.") *Id.* at 1050 n. 14. The "sole justification" of a search of an automobile based on officer safety grounds "is the protection of police officers and others nearby." *Id.* Also, the Court was careful to remind that any automobile search must be "strictly circumscribed by the exigencies which justified its initiation." *Id.*

"In evaluating the validity of an officer's investigative or protective conduct under *Terry*, the touchstone of [the] analysis is always the reasonableness in all circumstances of the particular governmental intrusion of a citizen's personal security." *Id.* at 1051. Accordingly, the police may conduct "an area search of the passenger compartment to uncover weapons, as long as they possess an articulable and objectively reasonable belief that the suspect is potentially dangerous." *Id.*

Kentucky's appellate courts have not utilized *Long* to uphold a search of an automobile. The most interesting commentary on *Long* is in *Pitman v. Commonwealth*, 896 S.W.2d 19, 21 (Ky. App. 1995): "We do not believe that *Long* expands the scope of the *Terry* exception to include a broad, undefined area in which a suspect is located over which he has no particular domination or control."

C. *Long* Does Not Apply When The Suspect Is Stopped For A Traffic Offense.

In *Knowles v. Iowa*, 525 U.S. 113, 114, 119 S.Ct. 484, 142 L.Ed.2d 491 (1998), the defendant was stopped after having been clocked driving 43 miles per hour on a road where the speed limit was 25 miles per hour. The police officer issued a citation to the defendant (although, under Iowa law, the officer could have arrested defendant) and then conducted a full search of the car. The Court explained: "A routine traffic stop…is a relatively brief encounter and is more analogous to a so-called *Terry* stop than to a formal arrest. That is not to say that the concern for officer safety is absent in the case of a routine traffic stop. It plainly is not. But while concern for officer safety in this context may justify the 'minimal' additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify that often considerably greater intrusion attending a full field-type search. Even without the search authority Iowa urges, officers have other, independent bases to search for weapons and protect themselves from danger. For example, they may order out of a vehicle both the driver and any passengers, perform a 'patdown' of the driver and any passengers upon reasonable suspcision that they may be armed and dangerous, [and] conduct a *Terry* patdown of the passenger compartment of a vehicle upon reasonable suspicion that an occupant is dangerous and may gain immediate control of a weapon[.]" *Id.* at 117-18 (internal citations omitted).

The Court flatly rejected a "search incident to citation" exception to the warrant requirement: "Iowa…argues that a 'search incident to citation' is justified because a suspect who is subject to a routine traffic stop may attempt to hide or destroy evidence related to his identity (*e.g.* a driver's license or vehicle registration), or destroy evidence of another, as yet undetected crime. As for the destruction of evidence relating to identity, if a police officer is not satisfied with the identification furnished by the driver, this may be a basis for arresting him rather than merely issuing a citation. As for destroying evidence of other crimes, the possibility that an officer would stumble onto evidence wholly unrelated to the speeding offense seems remote." *Id.* at 118.

Inventory Or Impound "Searches"

In A Nutshell: Police Must Follow State Law

The government is free to promulgate policies for the inventory of the contents of a vehicle, and the police may inventory the contents of a vehicle without a warrant. However, the failure of police to correctly follow state law on inventory "searches" or local inventory policies requires the suppression of evidence uncovered during the "search."

A. Even If An Inventory Is Characterized As A "Search," The Intrusion Is Constitutionally Permissible, As Long As It Complies With State Law.

In *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), the Court held that an inventory policy that is reasonably related to the protection of an individual's property and the state's interest in being free from false claims of theft and damage is not "unreasonable." Even if an inventory is characterized as a "search," the intrusion is constitutionally permissible." Inventories "pursuant to standard police procedures are reasonable."

In *Florida v. Wells*, 495 U.S. 1, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990), the Court held that an inventory search that did not conform to state law was "unreasonable": "[T]he Supreme Court of Florida found that the Florida Highway Patrol had no policy whatever with respect to the opening of closed containers encountered during an inventory search. We hold that absent such a policy, the instant search was not sufficiently regulated to satisfy the Fourth Amendment and that the [evidence] which was found in the suitcase, therefore, was properly suppressed by the Supreme Court of Florida." *Id.* at 4-5.

In *Gray v. Commonwealth*, 28 S.W.3d 316 (Ky. App. 2000), the Kentucky Court of Appeals commented: "A warrantless search is presumed to be both unreasonable and unlawful,

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and the prosecution has the burden of proving the warrantless search was justifiable under a recognized exception to the warrant requirement. One of these exceptions is the inventory search, which must be conducted for purposes other than investigation, and based upon a standardized policy, which provides standardized criteria to restrict or eliminate an officer's discretion in deciding whether to search and what to search. When there is no policy of record, as in this case, then as a matter of law the inventory search has not been sufficiently regulated to pass Fourth Amendment muster." *Id.* at 318-19.

WATCH OUT: As a "catch-all" of sorts, the Commonwealth is fond of arguing that a particular piece of evidence would "inevitably" have been discovered pursuant to an inventory search. That argument will not work unless the Commonwealth can identify the applicable inventory policy or establish that impounding the vehicle would have been lawful.

B. The Scope Of An Inventory "Search"

An inventory "search" may include closed containers, provided that the inventory is not a pretext to search indiscriminately for incriminating evidence. *See Wells*, 495 U.S. at 4 ("[S]tandardized criteria or established routine must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of crime.")

Search Pursuant To The Consent Exception To The Warrant Requirement

A. Voluntary Consent Versus Consent Tainted By A Prior Illegality

There are, generally speaking, three ways to challenge a consent search: (1) argue that the consent was involuntarily given (*i.e.* a product of compelling or coercive police tactics); (2) argue that the search exceeded the scope of consent; and (3) argue that the consent was a non-attenuated "fruit" of a preceding illegality. What follows, concerns the third option.

Recall that a valid traffic stop may become invalid if the scope of police questioning or the temporal duration of the stop are unlawfully extended and unsupported by reasonable suspicion. If defendant's consent to search occurs *after* either a seizure that was invalid at its inception or a seizure that was valid at its inception but has been unlawfully extended and has become invalid, then his consent is a non-attenuated "fruit" of a preceding illegality.

The Sixth Circuit has held that the "refusal of consent to search * * * is clearly not an appropriate basis for reasonable suspicion." *United States v. Smith*, 263 F.3d 571 (6th Cir. 2001). The other federal circuit courts of appeal agree. *See* LaFave § 8.1, p. 6, n. 10. However, the "revocation of consent may contribute to reasonable suspicion." *United States v. Yang*, 345 F.3d 650 (8th Cir. 2003).

CAUTION: The voluntariness analysis and the attenuation analysis operate independently. You may make both arguments, but make them as alternatives. Avoid confusing the concepts. Consent is involuntary if it is the product of coercion. Consent is a non-attenuated fruit of a prior illegality if it fails the *Wong Sun* et al., analysis. A prior illegality can render consent involuntary. And, consent that is voluntary can, nevertheless, be inadmissible if it is a non-attenuated fruit of earlier illegal police action. *See e.g. United States v. Arias*, 344 F.3d 623 (6th Cir. 2003) ("if consent is given after an illegal seizure," "not only must the consent be valid, *i.e.* voluntary, * * * but the causal chain between the illegal seizures and the consent must be broken."); *United States v. Jaquez*, 421 F.3d 338 (5th Cir. 2005) ("Even if given voluntarily, * * * consent does not validate a search that is the product of an unlawful stop.")

B. The Federal Attenuation Analysis

There are three exceptions to the exclusionary rule: (1) independent source; (2) inevitable discovery; and (3) attenuation. In the right case, the attenuation analysis is a powerful tool for challenging consent searches. The "right case" is a case that involves some initial illegality, followed by the defendant's consent to search.

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), instructs that a court must determine "whether, granting the establishment of the **primary illegality**, the evidence to which instant objection is made has come at **by exploitation** of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488. The dispositive question is whether the defendant's consent was "sufficiently an act of free will to purge the primary taint." *Id.* at 416-17. For a full discussion of the attenuation analysis as applied to the traffic stop context, *see* LaFave, § 8.2(d).

In determining whether the defendant's consent was "obtained by exploitation of" a prior illegality a reviewing court considers three factors: (1) the temporal proximity between the illegal police action and the defendant's consent; (2) the presence or absence of any intervening circumstances; (3) the purpose and flagrancy of the police misconduct. *Brown v. Illinois*, 422 U.S. 590, 603-4, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

C. Temporal Proximity Between The Illegal Police Action And The Defendant's Consent

Whether there exists a close temporal proximity between the initial police illegality and the defendant's consent to search (or confession, incriminating statement, etc.), is sometimes described in terms of a factual nexus, *i.e.* was there a factual nexus between the unlawful extension of the traffic stop and the defendant's consent to search? In *Brown v. Illinois*, the Court found a sufficient factual nexus because the initial illegality and defendant's confession were "separated * * * by less than two hours, and there was no intervening event of significance whatsoever." *Id.* at 604. Professor LaFave collects cases in § 8.2(d), p. 82, n. 140. Of particular note is *United States v. Gregory*, 79 F.3d 973 (10th Cir. 1996), where the court held that defendant's consent was tainted by the unlawful extension of a traffic stop where defendant's consent came within 35 seconds after defendant was given back his license and registration and the officer did not inform defendant that he was free to leave. *See also United States v. Johnson*, 427 F.3d 1053 (7th Cir. 2005) ("the unlawful seizure was ongoing when [the defendant] voiced his consent, foreclosing the possibility that the consent was sufficiently attenuated"); *United States v. Washington*, 387 F.2d 1060 (9th Cir. 2004) ("temporal proximity * * * weighs heavily in favor of suppressing the fruits," because only 15-minutes lapsed between the illegality and defendant's consent).

D. Presence (Or Absence) Of Intervening Circumstances

A defendant's consent to search is not *per se* untainted because *Miranda* warnings were first given. *See Brown*, 422 U.S. at 603 ("the *Miranda* warnings, alone and *per se*, cannot always * * * break, for Fourth Amendment purposes, the causal connection between the illegality and the confession [or consent, etc.]. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited.") Likewise, however, the failure to give *Miranda* warnings does not automatically mean that the defendant's consent is a non-attenuated fruit of a prior illegality.

One factor to consider is whether the defendant was made aware that he could decline to consent to a search. *See e.g. United States v. Ramos*, 42 F.3d 1160 (8th Cir. 1994) (emphasizing that defendant's consent was not tainted because the officer "both orally and in writing" told the defendant "that he did not have to sign the consent form."); *United States v. Valdez*, 931 F.2d 1148, 1452 (11th Cir. 1991) (the court characterized a significant intervening event as whether the defendant was "afforded an opportunity to consult with an attorney" or whether the defendant was given "any appreciable time in which to reflect upon whether to give or not to give his consent to search the vehicle.")

E. Purpose Or Flagrancy Of Police Misconduct

This factor derives from the good-faith exception to the warrant requirement. However, courts are generally loathe to excuse misconduct in this context. Again, Professor LaFave collects cases at § 8.2(d) n. 142. Of particular note are: *United States v. McSwain*, 29 F.3d 558 (10th Cir. 1994) (flagrancy of illegal detention shown by questioning of the defendant on matters unrelated to the reason for the stop); *United States v. Sandoval*, 29 F.3d 537 (10th Cir. 1994) (defendant's consent to search was tainted because the officer's questions were part of a "fishing expedition"); *United States v. Fernandez*, 18 F.3d 874 (10th Cir. 1994) (the police illegally extended the traffic stop by questioning defendant about guns and drugs, and the illegality was "sufficiently egregious that it tainted [the defendant's] consent"); *United States v. Miller*, 146 F.3d 274 (5th Cir. 1998) (the purpose of the illegal traffic stop "was to seek consent of drivers to search for drugs," therefore, consent was tainted). ■

Bulletin Examines Transfer of Juveniles to Criminal Courts

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) has published "Juvenile Transfer Laws: An Effective Deterrent to Delinquency?"

In an effort to strengthen sanctions for serious juvenile crimes, most states enacted laws expanding the types of offenders and offenses eligible for transfer from juvenile courts to adult criminal courts.

This bulletin provides an overview of research on the deterrent effects of such transfers, focusing on OJJDP-funded studies on the effect of transfer laws on recidivism. The information it provides should help inform public discussion and policy decisions.

Resources:
"Juvenile Transfer Laws: An Effective Deterrent to Delinquency?" is available online only at http://ojjdp.ncjrs.gov/publications/PubAbstract.asp?pubi=242419.

CAPITAL CASE REVIEW

By David M. Barron, Capital Post-Conviction Branch

Supreme Court of the United States

***Jimenez v. Quarterman*, 129 S.Ct. 681 (2009)** (non-capital) (*Thomas, J., for a unanimous Court*)
This case dealt with when the statute of limitations for filing a federal habeas action restarts when the state court grants leave to file an out-of-time appeal. When interpreting a statute, the plain language must be enforced according to its terms. 28 U.S.C. §2244(d)(1)(A) defines the starting date of the one-year statute of limitations as "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Under Supreme Court law, direct review does not conclude until for purposes of 2244(d)(1)(A) until the availability of direct appeal to the state court and to the United States Supreme Court has been exhausted. "Until that time, the process of direct review has not come to an end and a presumption of finality and legality cannot yet have attached to the conviction and sentence." Applying that law, the Court held that, under 2244(d)(1)(A)'s definition, once a court reopens direct review of a petitioner's conviction, the pendency of the direct appeal is restored. Thus, the conviction is no longer final for purposes of the 2244(d)(1)(A). The Court also noted that this conclusion furthers AEDPA's "goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review the claim and to correct any constitutional violation in the first instance."

Certiorari Grants

***Smith v. Spisak*, No. 08-724**, decision below, 512 F.3d 852 (6th Cir. 2008)

1. Did the Sixth Circuit contravene the directives of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and *Carey v. Musladin*, 127 S.Ct. 649 (2006) when it applied *Mills v. Maryland*, 486 U.S. 387 (1988), to resolve in a habeas petitioner's favor questions that were not decided or addressed in *Mills*?

2. Did the Sixth Circuit exceed its authority under AEDPA when it applied *United States v. Cronic*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing argument instead of deferring to the Ohio Supreme Court's reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

***McDaniel v. Brown*, No. 08-559**, decision below, 525 F.3d 787 (9th Cir.) (non-capital)


David M. Barron

1. What is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)?

2. Does analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), under 28 U.S.C. 2254(d)(1), permit a federal habeas court to expand the record or consider non-record evidence to determine the reliability of testimony and evidence given at trial?

***Bobby v. Bies*, No. 08-598**, decision below, 519 F.3d 324 (6th Cir. 2008)

1. Did the Sixth Circuit violate the Anti-Terrorism and Effective Death Penalty Act of 1996 when, in overruling an Ohio post-conviction court on double jeopardy grounds, it crafted a new definition of "acquittal" that conflicts with this Court's decisions?

2. Do the Double Jeopardy Clause's protections apply to a state post-conviction hearing on the question of a death-sentenced inmate's mental retardation under *Atkins v. Virginia*, 536 U.S. 304 (2002), that does not expose the inmate to the risk of any additional criminal punishment?

3. Did the Sixth Circuit violate AEDPA when it applied the Double Jeopardy Clause's collateral *estoppel* component to enjoin an Ohio post-conviction court from deciding the issue of a death-sentenced inmate's mental retardation under *Atkins* even though the Ohio Supreme Court did not actually and necessarily decide the issue on direct review?

United States Court of Appeals for the Sixth Circuit

***United States v. Lawrence*, 2009 WL 321631 (6th Cir. 2009)** (*McKeague, J., joined by Rogers, J., and Boggs, C.J.)*
Lawrence was charged with bank robbery, attempted bank robbery, murder and firearms charges. The jury found Lawrence guilty of all charges and found him eligible for the

death penalty on two charges that could carry a death sentence. The jury also found that Lawrence proved the existence of 47 mitigating factors for each death-eligible offense. On one of the death eligible offenses, the jury found the aggravating factors did not outweigh the mitigating factors and imposed life without parole. On the other death eligible offense, the jury found the aggravating circumstances outweighed the mitigating circumstances and imposed death. Lawrence moved for a new trial under the Federal Rules of Criminal Procedure, alleging the jury's sentencing verdicts were inconsistent. The judge agreed, vacated the jury's death sentence, and ordered a new sentencing hearing on that charge take place before a different jury. The United States appealed, arguing the verdicts were not inconsistent. Lawrence moved to dismiss the government's appeal. And, Lawrence cross-appealed the district court's order that a new sentencing hearing shall be held rather than ordering a life sentence be imposed. The Sixth Circuit denied Lawrence's motion to dismiss the government's appeal, vacated the district court's order granting the motion for a new trial, and reinstated the death sentence.

Standard of review for a district court's decision to grant or deny a new trial: It is review under the abuse of discretion which requires reversal if the district court relied on clearly erroneous findings of fact, uses an erroneous legal standard, or improperly applies the law.

Reviewability of inconsistent verdicts: Inconsistent verdicts are generally unreviewable. Inconsistent verdicts, however, are cognizable error if the inconsistency shows "the jury has not followed the court's instructions" or "the jury did not speak their real conclusions." Relying on *Getsy v. Mitchell*, 456 F.3d 575 (6th Cir. 2006), the federal district court held inconsistent verdicts are reviewable if the inconsistency is the "product of irrationality." The Sixth Circuit held that the district court's reliance on *Getsy* was problematic for two reasons: 1) *Getsy* vacated one week after the district court vacated Lawrence's death sentence, and the en banc court went on to reject Getsy's inconsistent-verdicts argument, reaffirming the principle that inconsistent verdicts are generally not reviewable; and, 2) *Getsy* involved two codefendants, charged with the same offenses stemming from the same murder being tried separately, with one being convicted of all charges, and being sentenced to death while the other was convicted of only some of the charges, and was sentenced to life in prison. The Sixth Circuit then held that "inconsistencies among individual jurors pose no cognizable problems; it is only when jury verdicts are marked by such inconsistency as to indicate arbitrariness or irrationality that relief may be warranted. Because the charge for which death was imposed required the jury to find malice aforethought while the other death eligible offense did not, because the instructions did not tell the jury to not consider the elements of the underlying offense for which the asserted mitigating circumstances allegedly mitigated the defendant's culpability, because jurors must determine whether the facts alleged to be mitigating were properly considered as mitigating the defendant's culpability, and because the instructions told the jurors to consider the mitigating factors qualitatively, the jury's verdicts were not inconsistent. In that respect, the Sixth Circuit held that the district court "ignored the recognized prerogative of each juror to determine the weight to be given each asserted mitigating factor, which necessarily included determining, in the context of the given offense conduct, whether and to what extent the factor was in fact mitigating of culpability." The court, however, noted that "protection from demonstrated jury irrationality is still available through appellate review of the sufficiency of the evidence."

***Henley v. Little*, 2009 WL 233283 (6th Cir.)** (*per curiam; Siler, Cole, and Cook, JJ.)*
Henley requested that the court declare a certificate of appealability unnecessary to appeal the denial of a Fed.R.Civ.P. 60(b) motion, or in the alternative, to grant a certificate of appealability pending the disposition of his appeal of the denial of 60(b) relief. In *United States v. Hardin*, 481 F.3d 924, 926 (6th Cir. 2007), the Sixth Circuit held that a certificate of appealability is necessary to appeal the denial of a 60(b) motion in a habeas proceeding. Noting that *Hardin* is binding law, the court held a certificate of appealability was necessary to appeal and then denied one, without a substantive analysis, because reasonable jurists could not disagree with the district court's resolution of Henley's claims or that the issues presented warrant encouragement to proceed further. As a result, the court dismissed Henley's appeal and denied his motion to stay his execution.

***Henley v. Little*, 2009 WL 233027 (6th Cir.)** (*per curiam; Siler, Cole, and Cook, JJ.)*
Henley, a Tennessee death row inmate, sought a stay of execution pending the Sixth Circuit's disposition of a similar challenge to Tennessee's lethal injection protocol. Relying on the Sixth Circuit's decision in *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), the district court held the claim was barred by the statute of limitations. According to the Sixth Circuit in *Henley*, *Cooey* held that a §1983 action challenging a lethal injection protocol "accrues upon the conclusion of direct review in state court or at the expiration of time for seeking such review." Tennessee adopted lethal injection as its presumptive method of execution on March 30, 2000. Under Tennessee law, a person has one year to bring suit. Tennessee, however, substantially revised its execution protocol in June 2007. Henley filed his suit on November 26, 2008. Thus, regardless of whether March 30, 2000, or June 2007 is considered the accrual date, Henley filed suit more than one-year after its accrual. Thus, the Sixth Circuit held that Henley's suit was barred by the applicable statute of limitations so the district court correctly dismissed the suit.

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***Keith v. Bobby*, 551 F.3d 555 (6th Cir. 2009)**

(*Boggs and Gibbons, JJ. for court; Clay, J., dissenting)*

Keith sought authorization to file a successive habeas petition, asserting that newly discovered evidence shows the State failed to disclose a statement from a witness at Keith's trial saying that witness had been paid to cripple the man Keith was convicted of killing, and failed to disclose notes from an interview with the witness' accomplice confirming that Keith also claimed that a detective testified at trial to an incorrect name of the nurse to whom one of the surviving victims identified Keith. The nurse, whom Keith claims the detective should have been referring to, signed an affidavit after trial saying the victim never told her who attacked him and that she never told a detective that the victim gave her a name. In order to file a successive habeas petition, a petitioner must make a prima facie showing that the factual predicate for the claim could not have been discovered earlier through the exercise of due diligence and that the facts underlying the claim would establish by clear and convincing evidence that no reasonable fact-finder would have found the applicant guilty of the underlying offense. In this context, prima facie means "sufficient allegations of fact together with some documentation that would warrant a fuller exploration in the district court." The Sixth Circuit held that Keith's first proposition establishes only that another person had a possible motive to kill the victims, and his second propositions establishes only that an eyewitnesses' original identification may have occurred during a police interview and not independent of it. Notably, to the court, neither of these facts contradict any evidence that directly proved Keith's guilt, which included eyewitness testimony by the surviving victim identifying Keith; partial imprint of the license plate made from where the getaway car crashed matched the license plate of a car Keith was known to have access to, eyewitness identification of Keith as the man driving the getaway car when it crashed, a spent bullet cartridge casing matching the ones recovered from the scene of the murders was found where Keith later picked up his girlfriend, and testimony that Keith had been indicted as a result of the drug raid precipitated by the victims' relative. Because neither of these facts could constitute clear and convincing evidence that no reasonable fact-finder could have returned a guilty verdict, the Sixth Circuit denied Keith's application to file a successive habeas petition.

***Murphy v. State of Ohio*, 551 F.3d 485(6th Cir. 2009)**

Cole, J., for the court; joined by, Norris and Gilman, JJ.)

Trial counsel was not ineffective for failing to obtain the services of a sexual-abuse expert for the sentencing phase to explain the impact of the sexual abuse evidence presented at trial: At the sentencing phase, Murphy provided an unsworn statement saying, beginning at age five, various relatives, family, and friends sexually abused him; and an officer at a children's psychiatric hospital forced him to disrobe and photographed him posing in sexually suggestive positions. Trial counsel retained the services of a psychologist to evaluate Murphy's mental ability, criminal responsibility, and competency based on her review of Murphy's past hospitalizations and interviews of Murphy and his family. The psychologist diagnosed Murphy as having either a borderline personality disorder or a mixed personality disorder. She testified that Murphy's disorder was severe, chronic, and disabling. She also testified that the type of disorder Murphy's suffers from usually develops in response to the environment in which one grows up in and that Murphy's early experiences in life were very influential in his personality assets expressed today. Murphy argued that trial counsel rendered ineffective assistance by presenting evidence of sexual abuse without offering accompanying expert testimony to explain the impact of that evidence on Murphy's mental health. Because the expert in sexual abuse Murphy presented in post conviction reached a similar conclusion as the trial expert on Murphy's mental state resulting from his traumatic upbringing and because his post conviction expert could not isolate the effects of the sexual abuse from the other troubling aspects of Murphy's life, the Sixth Circuit held there is no reasonable likelihood that the outcome of Murphy's sentencing would have been different if testimony from an expert in sexual abuse had been presented.

Trial counsel was not ineffective for failing to retain a mental retardation expert to explain to the jury the impact that Murphy's mental incapacities had on his daily functioning: At trial, Murphy presented expert testimony that he functions in the "moderately mentally retarded" or "low range of average abilities." In habeas proceedings, Murphy presented evidence from a mental retardation expert that Murphy has a full scale IQ of 74 and is within the borderline mentally defective range. Because the post conviction mental retardation expert's testimony was not materially different from that presented at trial and adds nothing more than evidence previously offered at trial, the Sixth Circuit held that Murphy failed to establish prejudice from trial counsel's failure to retain a mental retardation expert.

Murphy procedurally defaulted his claim that trial counsel provided ineffective assistance by disclosing to the prosecution documents and evidence gathered in the preparation of the mitigation phase showing past antisocial behavior: The State argued that Murphy's claim was procedurally defaulted because he first presented it in his traverse. A petitioner seeking habeas relief must first exhaust available remedies in state court by fairly presenting his federal claims to the highest state court to which an automatic appeal is allowed. Because the claim was first presented in federal court, the Sixth Circuit agreed with the State that the claim was unexhausted and, as a result, procedurally defaulted from review by the federal court. Even if the claim was not defaulted, the court held the claim must fail on the merits because the prosecution was most likely entitled to

the information under Ohio Rules of Criminal Procedure and because the documents produced were "merely cumulative of potentially damaging information about Murphy that was already presented at trial in support of Murphy's claim that he had a mental illness." Specifically, on direct examination, "Murphy's mother testified that when Murphy was enrolled in Headstart at the age of five, his teachers contacted her to discuss his habit of starting fires, the fact that he did not get along well with other children and sometimes abused them, and that he generally badly behaved. Moreover, Murphy's mother testified that Murphy was institutionalized after he had set fire to a house in which he was being tutored by a Caldeonia school system representative. Murphy's mother also added that Murphy had served eighteen months in prison for convictions of auto theft and arson." Further, the State's cross-examination of the defense expert concerning the allegedly erroneously disclosed information only elicited that Murphy's behavior "reinforced her diagnosis that he suffered from an antisocial personality disorder." Thus, the information contained in the allegedly erroneously disclosed information could not be prejudicial because it merely reiterated information already presented at trial.

The jury was not improperly precluded from considering Murphy's psychological age as mitigation: During the sentencing phase of Murphy's trial, Murphy's attorney presented evidence that Murphy's development had been hampered such that his actual age in years did not represent his psychological age. Murphy asserts the trial court erred in failing to properly instruct the jury that it could consider his psychological age to be a mitigating factor at sentencing. During deliberations, the jury asked the court if "youth" in the mitigating circumstances instruction referred to "chronological age" or "psychological age." The judge told the jury that particular mitigating factor refers to chronological age. Defense counsel objected and argued the judge should have instructed the jury that they could still consider psychological age as a mitigating factor. After noting that the Eighth and Fourteenth Amendments "dictate that the sentencer in a capital case may not be precluded from considering any relevant circumstance as a mitigating factor" and that a mitigating factor is "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," the Sixth Circuit held there is no reasonable likelihood that the jury applied the instruction in an unconstitutional manner since the instruction did not preclude the jury from considering Murphy's psychological age under the other subsections of Ohio's mitigation statute.

The Ohio court's determination that Murphy is not mentally retarded is neither an unreasonable application of federal law nor an unreasonable determination of the facts: The Sixth Circuit held that Murphy's *Atkins*-based mental retardation claim does not warrant habeas because, prior to age nineteen, Murphy received I.Q. scores of 86, 76, 54, 83, 76, and 82; both experts who testified at the *Atkins* hearing considered the 54 to be an outlier; and, "there was no indication that the other evaluations had not already considered the impact that an out-of-date test or some other measurement of error could have had on Murphy's full-scale IQ." The court also noted that the lack of clarity as to possible deficits in Murphy's adaptive skills also undermines his mental retardation claim. Specifically, the court noted that Murphy's expert acknowledged that Murphy's adaptive skill deficits could be attributed to something other than mental retardation, and she had relied on information culled from third parties' assessment of Murphy's abilities 25 years earlier.

Murphy's Sixth Amendment right to counsel was not violated by the admission into evidence of numerous statements Murphy made to the police after allegedly being coerced in violation of *Miranda*: The court held that mental deficiencies alone do not automatically make a confession or waiver of *Miranda* rights invalid. The court also noted that Murphy was advised of his *Miranda* rights, waived those rights, was 21 years old, was familiar with the procedures associated with police interrogation and the criminal justice process, and sought out the police before making four of the five statements he sought to suppress. Because of that and because Murphy did not present any other reason why his statement was involuntary or unknowing, the Sixth Circuit denied his claim. In doing so, the court disregarded the fact that the Grisso test, which is designed to assess a defendant's comprehension of the *Miranda* warnings, showed Murphy was incapable of understanding the warnings. According to the court, the results of that test were inapposite to the district court's factual finding that Murphy's testimony at the suppression hearing indicated he was simply trying to work out a deal with the prosecution. The court, however, noted that it has "expressed concern about the voluntariness of a confession made by mentally impaired criminal defendant when the impairment is known to the police," noting that under that situation, a "lesser quantum of coercion is necessary to all a confession into question."

United States District Courts for Kentucky

***Woodall v. Simpson*, 2009 WL 464939 (W.D. Ky.)**
(*Russell, C.J.*)
(granting sentencing phase habeas relief)

Woodall was entitled to a no adverse inference instruction at the sentencing phase: Woodall pled guilty but had a sentencing phase before the jury at which he did not testify. Woodall requested the jury be instructed that no adverse inference could be drawn from his failure to testify. The Commonwealth did not object. The trial judge, however, refused to give the instruction because Woodall had already been found guilty: it is "not appropriate to instruct the jury that the failure of the defendant to take the stand when he stands convicted of these very serious crimes is in keeping with the law." The Kentucky Supreme Court affirmed the trial courts ruling, distinguishing United States Supreme

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Court case law on the ground that Woodall did not contest any of the facts or aggravating circumstances, and one of the cases involved statements by an expert. The Kentucky Supreme Court also found any error was harmless because Woodall admitted the crimes and the evidence of guilt was overwhelming. The federal district court held that the Kentucky Supreme Court's ruling was an unreasonable application of clearly established federal law. In so holding, the district court recognized that United States Supreme Court law entitles a defendant to a no adverse inference instruction at the guilt phase and then quoted the portion of *Estelle v. Smith*, 451 U.S. 454 (1981), saying there is "no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned," and the portion of *Mitchell v. United States*, 526 U.S. 314 (1999), noting that it is well-established that "in a bifurcated proceeding the Fifth Amendment right against self-incrimination survives even though guilt has already been determined" and holding "the Fifth Amendment applies in the sentencing phase even if the defendant has pleaded guilty." In sum, a trilogy of cases from the Supreme Court hold: 1) a defendant has the right to receive a no adverse inference instruction if one is requested; 2) a capital defendant retains the Fifth Amendment right to remain silent during sentencing, even if guilt has already been established; and, 3) the Fifth Amendment right to remain silent, including the prohibition against negative inference, remains intact through sentencing, even where a defendant pleads guilty to the substantive offense." Based on that, the district court held Woodall was entitled to a no adverse inference instruction and that the state court's ruling otherwise was an unreasonable application of the clearly established Supreme Court law discussed above.

The trial court's refusal to provide a no adverse inference instruction is not subject to harmless error analysis and could not be harmless if it was: In federal habeas proceedings, a constitutional error that implicates trial procedures shall be considered harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict." If "the judge has grave doubts as to whether a trial error for federal law had substantial and injurious effect or influence in determining the jury's verdict, the judge must treat the error as if it did and grant the habeas writ." But, structural defects, which "affect the framework within which the trial proceeds" rather than being "simply an error in the trial process itself," require automatic reversal. Noting that it is doubtful that an error concerning the failure to give a no adverse inference instruction could ever be considered harmless, the district court concluded the error was structural. But, out of an abundance of caution, the district court also engaged in a harmless error analysis and found the error was not harmless because: 1) the jury was free to reject the death penalty even if it found the existence of aggravating circumstances beyond a reasonable doubt; 2) "in the absence of a no adverse inference instruction, the jury may have based its decision to sentence Woodall to death in part on his failure to testify, particularly since the trial judge believed the jury could consider Woodall's failure to testify against him.

The Kentucky Supreme Court unreasonably applied *Batson*: When the prosecution exercised a peremptory challenge against an African-American potential juror, Woodall raised an objection that, under *Batson v. Kentucky*, his constitutional rights were being violated by exercising peremptory challenges on the basis of race. The trial judge noted Woodall is white, that he is unaware of whether the law prohibiting exercising peremptory challenges on the basis of race applies when the defendant is white, and then summarily denied Woodall's objection to the excusal of the African-American juror. Although the trial court never ruled on the legitimacy of the prosecution's reason for the peremptory challenge and defense counsel was never given an opportunity to show that reason was a pretext, the Kentucky Supreme Court affirmed the trial court because its examination of the record shows that the prosecutor's reasons for the strike was not a pretext for racial discrimination. As the federal district court noted, the United States Supreme Court made clear, in *Powell v. Ohio*, 499 U.S. 400 (1991), that white defendants have standing to argue that a peremptory challenge was exercised on the basis of race. Under *Batson*, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination in jury selection, the burden shifts to the other party to come forward with a race-neutral explanation. If a race-neutral reason is provided, the trial court must then decide whether the allegedly race-neutral reason is a pretext. Further, under the United States Supreme Court's recent decision in *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008), "in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." In doing so, "the evaluation of a prosecutor's state of mind based on demeanor and credibility lies peculiarly with a trial judge's province." Applying this law, the district court found, "it is clear from a review of the transcript that the trial court did not undertake the required *Batson* analysis or even allow the parties the opportunity to adequately develop the record with respect to this objection. The failure was apparently due to the fact that the trial court doubted that Woodall, a white defendant, had the right to make a *Batson* objection. The trial court's failure to articulate any meaningful finding on the record is significant." As the United States Court of Appeals held in *United States v. Harris*, 192 F.3d 570 (6th Cir. 1999), "a district court's failure to engage in any type of analysis of the prosecutor's motivation constituted reversible error justifying a remand for further inquiry on the *Batson* question." Recognizing that a *Batson* claim presented a mixed question of law and fact, the district court then held that the Kentucky Supreme Court's adjudication of the claim

was an unreasonable application of *Batson* and its progeny because "the Kentucky Supreme Court ignored the fact that the trial judge did not conduct the required *Batson* analysis or even recognize that Woodall had the right to make a *Batson* objection. The trial court's failure to do so was based on its incorrect belief that Woodall was not entitled to rely on *Batson* because he was white. This Court concludes that any other reading of the transcript is unreasonable." The district court also held that the Kentucky Supreme Court unreasonably applied clearly established law when "it excused the trial court's failure to conduct a *Batson* analysis and attempted to undertake a post hoc review of the objection with only the written transcript before it." Because the writ of habeas corpus is being granted on other grounds, the district court determined it would be futile to direct the state court to conduct a *Batson* hearing and thus granted an unconditional writ on this claim.

Woodall's claim that jurors were improperly excused for cause is not procedurally defaulted: In denying Woodall's claim, the Kentucky Supreme Court noted that the defense did not object but then immediately held that the juror was properly struck for cause. Although the Kentucky Supreme Court noted Woodall did not object, the district court found that statement to not constitute a state court application of a procedural bar to review since the Kentucky Supreme Court then quoted from the potential juror's voir dire, analyzed the claim substantively without relying on the lack of a trial objection to support its holding, and found that the juror was properly struck for cause. Thus, the district court held that the Kentucky Supreme Court did not actually enforce the state procedural sanction so the procedural default doctrine does not bar review of the claim.

The Kentucky Supreme Court correctly ruled that the trial court did not err in removing two jurors for cause: One of the jurors said she "thinks" she would automatically vote for life without parole for 25 years over the death penalty, and she does not like capital punishment. She did say she could consider the entire range of punishments, but said she "couldn't go for the chair." The other juror at issue said he did not think he could consider the death penalty. Defense counsel had no response when the prosecution moved to excuse that juror for cause. Finding that the voir dire "reveals that both veniremen expressed grave and considerable objections to the death penalty," the district court held that the Kentucky Supreme Court properly denied this claim.

The Kentucky Supreme Court's ruling that the trial court did not err in failing to excuse a juror who briefly worked where the abduction took place was not unreasonable: Woodall argued one of the jurors should have been excused because she worked at the convenient store where the victim was abducted. But, she did not begin working there until about seven months after the abduction and she only worked there for about a month. She also said she never specifically discussed the case with anyone, did not know any of the individuals involved, had not formed an opinion about the case, and could consider the entire range of penalties. Because Woodall had pled guilty thereby eliminating any possibility that knowledge of the convenient store's layout might be relevant to determining guilt, the district court held the convenient store was irrelevant to the issue before the jury - - the appropriate sentence. Thus, the district court held there was no error in failing to excuse the juror since she indicated she did not know the people involved and had not prejudged the case.

A juror who expressed hesitation about imposing the minimum sentence: One of the jurors said she could not consider imposing a sentence of 20 years for intentional murder. But, when asked if she would consider it if instructed to do so and felt it was warranted under the evidence, she said she would. She then said she cannot make a determination when a person's life is at stake without hearing all the evidence. The federal district court found that this juror unequivocally said she could consider the minimum sentence if she felt it was warranted by the evidence and that she wanted to hear all the evidence. Thus, the district court held that record supports the Kentucky Supreme Court's conclusion that the juror "was able to fairly consider mitigating and aggravating circumstances as well as the entire range of penalties."

The jury instructions did not improperly lead the jurors to believe they had to unanimously find any mitigating circumstance and did not specifically instruct them otherwise: After being instructed on consideration of aggravating and mitigating circumstances, the jury was instructed that its verdict must be unanimous. The instruction did not clarify that the jury did not have to be unanimous in its consideration of mitigating evidence. Under United States Supreme Court law, it is unconstitutional for a state to require jurors to unanimously agree on mitigators, and an instruction cannot imply that mitigation must be found unanimously. The standard for reviewing a claim that a sentencing instruction is ambiguous is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Noting that the Sixth Circuit has rejected Woodall's unanimity argument in cases involving a similar set of instructions (*Cone v. Bell*, 161 F.3d 320 (6th Cir. 1998) and (*Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990)), the district court held that the state court's rejection of this claim was not an unreasonable application of clearly established federal law. But, given the dissent in *Kordenbrock* and dicta in another case, the court granted a certificate of appealability on this issue.

Woodall's improper prosecution closing argument claim was not procedurally defaulted: The district court concluded that "a close reading of the Kentucky Supreme Court's opinion reveals that while the failure to object was mentioned by the court, it did not actually rely on procedural default to

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support its decision. Instead, the Kentucky Supreme Court based its holding entirely on the merits. Because procedural default was only noted, and not relied on, by the Kentucky Supreme Court," the district court held that Woodall's claim was not procedurally defaulted.

The Kentucky Supreme Court's denial of Woodall's improper prosecutorial closing argument claim was neither an unreasonable application of clearly established law nor an unreasonable determination of the facts: Woodall argued that the prosecutor improperly: 1) argued that Woodall's guilty plea was simply part of his defense "strategy"; 2) commented on Woodall's silence; 3) appealed to the jurors' sense of responsibility to the community; 4) extolled the goodness of the victim and included victim impact arguments regarding the loss suffered by her family; 5) sensationalized the night of the crimes and labeled Woodall as "evil"; 6) went outside of the record to quote a book by John Walsh about the evil of killers; and, 7) misstated the law on mitigation. To prevail in habeas proceedings on an improper prosecution argument claim, the comments "must have so infected the trial with unfairness as to make the resulting conviction a denial of due process. In this respect, the touchstone of the due process analysis is the fairness of the trial, not the culpability of the prosecutor. If the court determines that a statement or action is improper, it must then weigh the following factors: 1) whether the conduct or remarks of the prosecutor tended to mislead the jury or prejudice the defendant; 2) whether the conduct or remarks were isolated or extensive; 3) whether the conduct or remarks were deliberately or accidentally made; and, 4) whether other evidence against the defendant was strong." Rejecting the first allegedly improper argument, the district court held it is permissible for a prosecutor to comment on defense strategy. With regard to the comment on silence, the district court held that the comment on Woodall's demeanor in the courtroom was not improper. The court also held that the prosecutor's comments about the jury as being representative of the citizens of the county were not improper because the comments did not ask the jury to send a message to other potential murderers or rapists. The district court summarily rejected the victim impact portion of the claim and the discussing John Walsh's book portion of the claim. The district court then held that the prosecutor's comment that Woodall was "evil" was improper but did not deprive Woodall of a fair trial since the evidence in favor of the death penalty was strong and nothing suggests the jury was misled by the statement. Finally, the district court held that any error in the prosecutor misstating the law on mitigation was harmless because the jury was accurately instructed by the court on mitigation.

Woodall's incompetency at trial and in post conviction proceedings claim was not procedurally defaulted but was correctly denied on the merits: The Kentucky Supreme Court said the claim should have been raised on direct appeal but then went on to discuss the claim on the merits and said the allegations supporting the claim are speculative. The federal district court held this was insufficient to establish the claim was denied for failure to comply with a state procedural rule: "It is unclear, however, that the Kentucky Supreme Court decided to reject the claim because of a procedural error. To preclude review by this Court, there must be unambiguous state-court reliance on a procedural default. It is the opinion of this Court that the Kentucky Supreme Court did not clearly hold that procedural default was the basis of its rejection of the claim. Rather, a plausible interpretation of the opinion is that while the Kentucky Supreme Court noted the procedural default, it based its rejection of the claim entirely on its substance." Thus, the district court held the procedural default doctrine did not bar it from reviewing the merits of Woodall's claim. The district court then denied the claim on the merits, noting Woodall has not presented any evidence that should have caused the trial court or Woodall's trial counsel to question the validity of the competency finding at trial, Woodall appeared cooperative during Dr. Johnson's evaluation, Woodall seemed to understand the questions and gave responsive answers during his plea. The court also held that "Woodall has not made any credible showing that his competency is directly at issue in these habeas proceedings."

The state court's conclusion that Woodall failed to prove his mental retardation by a preponderance of the evidence was not contrary to *Atkins*: Dr. Johnson placed Woodall's I.Q. between 70 and 79. Woodall argued, with the margin of error, that places him in the mental retardation range. Woodall also claimed to have previously scored a 68 on an I.Q. test but, as the district court pointed out, the report of the 68 I.Q. score is not in the record and Woodall has not chronicled any efforts he has taken to attempt to locate the report. The district court held that Kentucky's bright-line 70 I.Q. cut-off does not violate *Atkins* and that a single I.Q. score below 70 would not automatically preclude execution, particularly where three other I.Q. tests placed Woodall at or above 70. Thus, the district court concluded the state court's ruling denying Woodall's mental retardation claim was not contrary to *Atkins*.

The law on a certificate of appealability: In order to appeal the denial of a claim, a petitioner (but not the State) must obtain a certificate of appealability (COA). A district court must issue or deny a COA for each claim and can do so even though the petitioner has yet to make a request for such a certificate. A COA must issue "only if the applicant has made a substantial showing of the denial of a constitutional right." When a district court denies a claim on procedural grounds without addressing the merits of the claim, a COA can issue only if "jurists of reason would find it debatable

whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Other claims: The district court also denied the following claims: 1) Kentucky's proportionality review is unconstitutional because it does not consider similar crimes where the death penalty was not imposed and because the Kentucky Supreme Court refuses to disclose the data it relies on in conducting proportionality review; 2) the trial court considered the non-statutory aggravating circumstances of lack of remorse and the heinous nature of the crimes; 3) Woodall's constitutional rights were violated when the jury considered the Bible - - the district court found the state court explicitly found the claims were defaulted, enforced the default, and Woodall has not shown good cause to excuse the default so the claim is not properly before the court; 4) trial judge abused his discretion by denying Woodall's motion for funding to conduct a PET scan and other psychological testing after two weeks of psychological testing had been conducted at the state correctional psychiatric center; 5) the trial court's refusal to grant a third continuance violated Woodall's Sixth Amendment right to a fair trial - - the district court held Woodall failed to show prejudice from the denial of the continuance since, without explaining why, any additional witnesses or testimony counsel would have been able to present with more time would have merely been cumulative to the already-presented mitigation; 6) the trial court's use of statements Woodall made during a sex offender evaluation was unconstitutional; 7) trial court impermissibly curtailed Woodall's ability to ask relevant voir dire by prohibiting questions on a) whether jurors would consider evidence of Woodall's borderline mental retardation; b) juror's feelings concerning Woodall's right to remain silent; and, c) the fact the jury does not have to unanimously find on mitigating factors, and the fact the mitigating circumstances did not have to be proven beyond a reasonable doubt; 8) the verdict form was erroneous in that it prohibited the jury from considering the lowest two sentences because the only place on the verdict sheet form to designate the finding of an aggravating circumstance was for a sentence of death, life without the possibility of parole, or life without the possibility of parole for 25 years; 9) Woodall's guilty plea was not knowing, voluntary, and intelligent because of his low intelligence, the impairment of counsel, and the trial judge's failure to adequately establish the factual basis of the plea; 10) ineffective assistance of counsel for: a) failing to request a competency hearing, b) failing to argue Woodall is mentally retarded, c) bullying and coercing Woodall to accept an open guilty plea, d) failing to present additional mental health expert testimony in support of their motion for a third continuance, e) failing to present an insanity defense, f) failing to link Woodall's mental condition to his genetic history, g) failing to have a PET scan performed, h) failing to fully explain the conditions of Woodall's upbringing including his fecal incontinence, and i) failing to elicit additional testimony concerning the sexual abuse Woodall's mother inflicted upon him when she placed soap into his rectum; and, 11) cumulative error requires reversal, noting that the Sixth Circuit has held that cumulative error claims are not cognizable in habeas proceedings.

Kentucky Supreme Court

***Wheeler v. Commonwealth*, 2008 WL 5051579 (Ky.)**
(*unpublished memorandum opinion*; *Abramson not sitting*)
The court denied numerous case specific ineffective assistance of counsel claims at the guilt phase because either the record refuted them, or for a failure to show prejudice, including the failure to: 1) suggest the defendant's blood on the victim was a result of cross-contamination; 2) call a witness to refute a prosecution witness' testimony that when he arrived at a grocery store, Wheeler looked like blood had been poured on him; 3) have Wheeler testify as to whether he wore a particular pair of shoes that were a different size than the ones that made the shoeprint in the victim's home; 4) call Wheeler's cousin to testify that Wheeler told her he had "run into a nightmare of a situation"; 5) request DNA testing on a piece of latex found in the victim's mouth despite Wheeler claiming he encountered a man in the victim's apartment who was wearing latex. The court also denied Wheeler's direct error and ineffective assistance of counsel claims involving testimony from one of Wheeler's witnesses, on prosecution cross-examination, that murderers have been granted furloughs in the past and that current policy that murderers are not granted furloughs could change was not error since it accurately reflected the state of law and was merely rebuttal of Wheeler's mitigation evidence. Finally, the court held that peremptory challenges exercised because of potential jurors' discomfort did not become discriminatory solely because their discomfort was born out of their religious beliefs. The court, however, noted that it remains an open issue whether peremptory challenges can be exercised on the basis of race.

***Parrish v. Commonwealth*, 272 S.W.3d 161 (Ky. 2008)**
(*Noble, J. for a unanimous court; Abramson, J., not sitting*)
Standard for granting an evidentiary hearing: The Kentucky Supreme Court reiterated the familiar two-part test for determining whether to grant an evidentiary hearing on claims in a RCr 11.42 motion. "First, the movant must show that the alleged error is such that the movant is entitled to relief under the rule. In other words, the court must assume the factual allegations in the motion are true, then determine whether there has been a violation of a constitutional right, a lack of jurisdiction, or such a violation of a statute as to make the judgment void and therefore subject to collateral attack. If that answer is yes, then an evidentiary hearing on a defendant's RCr 11.42 motion on that issue is only required when the motion raises an issue of fact that cannot be determined on the face of the record. To do this, the court

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must examine whether the record refuted the allegations raised (and not whether the record supported the allegations, which is the incorrect test)."

Parrish's mental retardation claim should have been raised on direct appeal even though *Atkins* had yet to be decided: The Kentucky Supreme Court noted that "[t]hough [Parrish] did not then have the benefit of *Atkins*, Kentucky already had in place a statutory mechanism for dealing with mentally retarded individuals facing the death penalty" that was sufficient to raise mental retardation as a bar to execution. Thus, the court held that Parrish should have raised his mental retardation as an exemption from the death penalty claim on direct appeal and cannot raise it now under the auspice of *Atkins*.

Parrish's mental retardation is refuted by the record: Although the Kentucky Supreme Court found Parrish's mental retardation should have been raised on direct appeal, the court then reached the merits of it and concluded that it is refuted by the record which shows substantial evidence indicating Parrish's I.Q. was at least 70 - - the "cut-off recognized in *Atkins* and required by Kentucky's statutory scheme." The "substantial evidence" was testimony from a KCPC expert that Parrish's I.Q. was 79 and testimony from a defense expert that the tests administered by the KCPC expert were properly administered and scored. The court then noted that Parrish's I.Q. score of 68 from when he was younger does not allow the court to overturn the factual findings by the trial court that Parrish is not mentally retarded (that finding was made before trial but not raised on direct appeal).

Constitutionality of Kentucky's mental retardation definition and procedures: The court declined Parrish's request to revisit its ruling in *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005), that Kentucky's definition of mental retardation and procedures for determining mental retardation violate *Atkins* and due process.

Note: Atkins does not create a 70 or below I.Q. cut-off, as the Kentucky Supreme Court claims.

Trial counsel was not ineffective for failing to present mitigation evidence of Parrish's diminished culpability: The Kentucky Supreme Court held that the record reveals Parrish's lawyers conducted a reasonable investigation into his intellectual capacity and introduced sufficient evidence of that limited capacity in mitigation. In support of that conclusion, the court noted the following testimony from trial: 1) Parrish suffered a head injury at age five; 2) Parrish held only fast food and factory jobs; 3) Parrish had low IQ and reading test scores and was in classes for the educationally mentally handicapped, as testified to by the Oldham County Director of Special Education; 4) psychiatric testimony that Parrish had a low IQ; and, 5) defense expert's testimony that Parrish suffered from a learning disability as noted by the disparity in Parrish's scores on different parts of the KCPC-administered IQ test.

Mitigation instructions did not limit the jury's ability to consider Parrish's low IQ as a basis to impose less than death: Immediately after the instruction informing the jury that the "capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of retardation," the jury was instructed to consider "any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value." Parrish argued that trial counsel was ineffective for failing to object to the instruction because the use of the word "other" in this latter instruction after the jury had already been instructed on mental retardation limited the use of mental retardation as a mitigating circumstance to only if it impacted his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Rejecting Parrish's claim, the Kentucky Supreme Court held that the first part of the mitigation instructions mandated the jury consider all mitigating circumstances while the rest of the instructions merely listed examples of mitigating factors. Thus, the court held that no error took place with the instruction given to the jury.

Sentencing phase instructions did not require unanimity in the jury's finding of mitigation: Parrish's jury was instructed that "the verdict of the jury must be in writing, must be unanimous, and must be signed by one of you Foreperson." Parrish argued that instruction violated United States Supreme Court law holding that a state may not require unanimity in the jury's finding on mitigation or unanimity on a mitigating circumstance before a juror can consider it as a basis to prohibit death, and that trial counsel was ineffective for failing to object to the instruction. Rejecting this argument, the Kentucky Supreme Court held that "the unanimity instruction here specifically referred only to the verdict, not the jury's consideration of mitigating factors, and was a separate instruction from that on mitigation."

The sentencer must be allowed to consider and actually consider any mitigating evidence, including lack of future dangerousness: Quoting United States Supreme Court cases, the Kentucky Supreme Court held that "Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstance of the offense that the defendant proffers as a basis for a sentence less than death." Likewise, the court reiterated that United States Supreme Court law also holds that "just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Applying that to evidence of future dangerousness, again citing United States Supreme

Court law, the court held, "such evidence may not be excluded from the sentencer's consideration," as mitigation even where the prosecution does not focus on future dangerousness. Where the prosecution focuses on future dangerousness, evidence of lack of future dangerousness is admissible not just under the basic Eighth Amendment principles of mitigation but also on the due process basis that a person must be allowed the opportunity to rebut evidence used against him to seek a death sentence.

Trial counsel was not ineffective for failing to introduce evidence of Parrish's lack of future dangerousness: Parrish's trial attorneys intended to present testimony from a psychologist with expertise in an "actuarial approach to determining future dangerousness in prison." The expert was unable to attend trial because of a last-minute illness. Trial counsel did not seek a continuance so the expert could testify nor did they seek to introduce the expert's report in his absence. In post conviction, Parrish argued his trial attorneys were ineffective for failing to seek a continuance, failing to introduce the expert's report, and failing to find a guard who had worked at the jail where Parrish was incarcerated while awaiting trial who would have testified that he had no trouble with Parrish. At trial, Parrish's attorneys introduced some evidence concerning lack of future dangerousness through the testimony of a jail chaplain and a Catholic priest. The chaplain testified that he had known Parrish for the entire period of his incarceration, that he had regular interactions with Parrish, Parrish had been involved in a Bible study group, and that Parrish was a leader whom other inmates looked up to. The Kentucky Supreme Court held that, "[g]iven the chaplain's testimony and the need to consider whether a continuance to obtain the retained expert's testimony would be more beneficial than avoiding further delay, [Parrish's] trial lawyers were forced to make a strategic decision of the moment, not as a matter of hindsight." The court also held that "the chaplain's testimony undercuts any prejudice that [Parrish] can claim here since it was sufficient to put the mitigation factor of future dangerousness before the jury." The court, however, noted that "[p]erhaps the results would be different if the prosecution had claimed [Parrish] would pose a danger in the future, but that is not the case here."

Trial counsel was not ineffective for failing to adequately investigate or introduce sufficient evidence of Parrish's mental deficiencies to show, at the hearing to suppress his confession, that his *Miranda* waiver was not knowing, intelligent, and voluntary: Because the law at the time of Parrish's trial focused on police coercion, not whether a person's low intelligence rendered a waiver of *Miranda* rights invalid, the Kentucky Supreme Court held "it is not at all clear that [Parrish's] lawyers were unreasonable in not litigating [the] issue with regard to his confession." The court also held Parrish failed to establish prejudice because the evidence Parrish claims his attorneys should have discovered would not establish severe mental retardation and thus would not have established sufficient mental litigations that the trial judge would have been compelled or even likely to have decided the matter in a different way.

Trial counsel was not ineffective for failing to investigate the circumstances of the alleged jailhouse confession: The court recognized that counsel can be ineffective for failing to investigate the circumstances surrounding a jailhouse confession, but distinguished Parrish's situation from that in the case Parrish cited on the basis that, unlike that case, the testimony at Parrish's trial was that the confession occurred at night when the noise level was low; Parrish's "trial counsel was prepared to confront the informant on cross-examination and drew out facts to demonstrate his motive to lie, namely that the informant's own capital murder charge in another case had been reduced to manslaughter with a 15-year sentence, that he was now parole eligible, and that the Commonwealth would be expected to give a recommendation to the parole board; and, Parrish's own confession to the police and the testimony of the surviving child were the heart of the case against him, not the informant's testimony. Thus, the court held that Parrish's factual allegation that distance between Parrish's cell and the informant's cell was more than testified to at trial was not neither sufficient to establish trial counsel's deficient performance for failing to investigate the circumstances of the jailhouse confession nor sufficient to establish prejudice from failing to investigate it.

Parrish suffered no prejudice from trial counsel's failure to obtain an expert witness to attack the credibility of the child victim who testified against him: Evidence at trial showed that the five-year-old child witness identified Parrish as his attacker as soon as police and paramedics arrived, "thus undercutting any claims that his subsequent identification of [Parrish] was the result only of suggestion or confusion." And, "trial counsel did impeach the child by drawing out inconsistencies in his statement on cross-examination." Because of these facts, the Kentucky Supreme Court held Parrish cannot show prejudice from the failure to use an expert to attack the reliability of the child witness' testimony.

Universal Declaration of Human Rights and the International Covenant on Civil Rights do not apply in the United States: The Kentucky Supreme Court held that the Universal Declaration of Human Rights has no effect because it is merely a "statement of principles and not a treaty or international agreement and thus it does not of its own force impose obligations as a matter of international law." The court also held the International Covenant on Civil and Political Rights is not binding because it is neither self-executing nor has been implemented by way of domestic legislation. Even if it was self-executing, the court would deny relief on any claim alleging a violation of the International Covenant because the court has previously

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held the "United States has agreed to abide by the covenant only to the extent that the 5th, 8th, and 14th amendment ban cruel and unusual punishment."

Effective assistance of appellate counsel is not recognized in Kentucky: The Kentucky Supreme Court reiterated its prior rulings that ineffective assistance of appellate counsel is not cognizable in Kentucky unless the basis of the ineffectiveness claim is that trial counsel failed to file a notice of appeal or failed to perfect an appeal. In so holding, the court distinguished United States Supreme Court cases recognizing the right to effective assistance of appellate counsel on the basis that those cases involving trial counsel filing no merits brief or incorrectly claiming any appeal would be frivolous.

Note: *The Kentucky Supreme Court has granted discretionary review to determine if ineffective assistance of counsel should be recognized as a constitutional claim in Kentucky and, if so, whether it should be raised in an RCr 11.42 proceeding or some other type of proceeding.*

Note: *Federal courts have recognized that ineffective assistance of appellate counsel is a cognizable claim even when appellate counsel has filed a brief. The United States Court of Appeals for the Sixth Circuit has laid out a specific test for determining if appellate counsel rendered ineffective assistance. Because Kentucky courts refuse to address the merits of any ineffective assistance of appellate counsel claim, federal courts review the issue de novo.*

***Fields v. Commonwealth*, 2008 WL 4691534 (Ky.)** (*Cunningham, J., for a unanimous court; Scott, J., not sitting*)

The trial court did not improperly limit the scope of voir dire: Fields argued that his due process rights were violated when the trial judge: 1) denied Fields' motion to use an expanded juror questionnaire that posed open-ended questions such as what are your feelings and beliefs about the death penalty, and what type of cases come to mind as appropriate for the death penalty; 2) denied Fields' request to ask the jurors if they have any feelings or belief on the death penalty, have you discussed your feelings regarding the death penalty with your friends, family, or co-workers; 3) denied Fields' motion to allow the Commonwealth and defense to ask alternate questions on voir dire; and, 4) failed to grant Fields additional peremptory challenges. The court denied each claim, holding: 1) the use of a juror questionnaire that poses substantive questions defeats the central purpose of voir dire, which is to allow the trial court the opportunity to visually observe the demeanor and affect of a potential juror; 2) Fields was allowed to meaningfully question potential jurors about the death penalty by being allowed to ask follow-up questions specifically concerning the death penalty and mitigation after the judge inquired whether the potential jurors could consider the entire range of penalties (the court does not say what follow-up questions Fields was allowed to ask); 3) RCr 9.38 does not set forth an order in which prospective jurors should be questioned; and, 4) whether to grant additional peremptory challenges is within the discretion of the trial court.

The trial court did not err in prohibiting voir dire questions on whether the jury could consider intoxication as mitigation: Because defense counsel was allowed to ask open-ended questions on intoxication during general voir dire that allowed counsel to learn the jurors' feelings about intoxication as a defense, the Kentucky Supreme Court held the trial court did not err in refusing to allow defense counsel to ask potential jurors if intoxication is something they could consider in imposing punishment.

The Kentucky Supreme Court also ruled that the trial court did not err in excusing certain jurors because of their death penalty viewpoints or refusing to excuse jurors, including one who was employed as a paralegal in a different Commonwealth Attorney's Office than the one that prosecuted Fields.

Trial court's improper definition of aggravating circumstances was harmless: During voir dire, the trial judge instructed the jury that "aggravating evidence is evidence about a person's character, background or circumstance that may be considered as a reason for imposing a more severe punishment than might otherwise be imposed." The Kentucky Supreme Court held that this instruction was, "at best, nebulous," because the jury was instructed only on the aggravating circumstance of burglary. But, the court held the error was harmless because the jury unanimously found Fields committed the murder during the commission of a burglary - - a finding that was supported by substantial evidence, including that Fields was arrested in the victim's home with her valuables in his pockets.

Trial court did not abuse its discretion in limiting cross-examination of an officer and an EMT who had been criminally charged in connection with unrelated activity: Office Lindeman discovered Fields in the victim's home, arrested him, and heard his confessions. After Fields' first trial, Lindeman was charged with misdemeanor counts of official misconduct, unlawful transaction with a minor, and harassment. James Dobson was an EMT who treated Fields for abrasions immediately after his arrest. After Fields' first trial, Dobson pled guilty to fourth degree assault of a patient in police custody. Fields sought to impeach these witnesses with their criminal conduct. The trial court refused to allow it. On appeal, the Kentucky Supreme Court held that the trial court did not abuse its discretion in limiting the cross of Lindeman because the allegation that he testified favorably for the prosecution in order to receive favorable treatment from the Commonwealth "is purely speculative and supported by no evidence," and undermined by the fact that the

testimony did not differ from the testimony given at the first trial. The court held that no abuse of discretion took place in limiting the cross of Dobson because assault is not a crime that reflects upon a witness' truthfulness and because, unlike at the first trial, the jury did not hear Fields' allegation that Dobson physically accosted him and baited him into a confession.

Evidence concerning contents of victim's car was irrelevant: To suggest someone else killed the victim, Fields sought to introduce testimony that car keys, beer cans, and marijuana seeds were found in the victim's vehicle, which was not tied to the crime. The Kentucky Supreme Court found that the testimony was irrelevant because trial testimony showed multiple people had access to the victim's car and no other evidence had been proffered to prove that a particular person was the last person to drive the victim's car or that the beer cans and marijuana seeds belonged to a particular person.

Trial court did not abuse its discretion in excluding testimony of a person who claimed another person confessed to the murders but was not available for cross: Vince Kimmel was an acquaintance of Burton and Fields. Kimmel claimed Burton once confessed to him that she committed the murder. Prior to trial, Kimmel was in a serious car accident that rendered him incompetent to testify. Defense counsel sought to introduce a recorded statement Kimmel made to defense investigators. The trial court would not allow the statement into evidence because Kimmel had not been subject to cross examination and his statement contained hearsay. On appeal, Fields argued that ruling restricted his right to present a defense, thus violating due process. "The Sixth Amendment guarantees a criminal defendant's right to present a defense, which includes evidence that someone else committed the crime. However, evidence is not admissible simply because it would tend to prove that another person was the perpetrator; and criminal defendants' due process rights are not violated by every limitation placed on the admissibility of evidence. Rather, the exclusion of evidence violates a defendant's constitutional right when it significantly undermines fundamental elements of the defendant's defense." The Kentucky Supreme Court held that was not the case here because "the evidence sought to be introduced contained inadmissible hearsay" and because the "Commonwealth indicated that it would have cross-examined him regarding his criminal background, mental health issues, and substance abuse. Because the recorded statement was not subject to cross-examination, it bore little indicia of reliability." The court also noted that Fields' ability to suggest Burton committed the murders was not fully foreclosed as evidenced by the fact that Burton's supposed confession was elicited from two other testifying witnesses.

Any error in prohibiting Fields from impeaching a witness with prior inconsistent statement was harmless: Following the victim's murder, Sexton was interviewed by the police and revealed a conversation she had with Fields and Burton in which they discussed robbing the victim. Later, Sexton was interviewed by another officer and said Fields and Burton discussed physically harming or killing the victim. At trial, Sexton testified that the conversation related only to robbing the victim and that she had given "pretty much the same story" to both officers. Fields wanted to introduce an investigative report to impeach Sexton, but the court prohibited counsel from doing so since the report contained inadmissible hearsay. Defense counsel, however, was allowed to recall the officer who then testified that Sexton told him that the conversation involved discussions of killing the victim. The Kentucky Supreme Court held that any error in not admitting the investigative report as substantive evidence was harmless because "the jury was aware that Sexton gave slightly differing statements to [different officers]" and the substance of the investigative report was fully revealed through testimony.

A missing evidence instruction was not required: The storm window was removed from the victim's home and later lost by the police after fingerprint testing had been performed on the window and prints were recovered. Fields requested a missing evidence instruction, which the trial court denied. A missing evidence instruction is required under the Due Process Clause "when the failure to preserve or collect evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed." The Kentucky Supreme Court held that neither condition was satisfied because no evidence established intentional destruction or bad faith and because any exculpatory nature of the window could not have been evident at the time it was lost as no fingerprints were found on the window.

Prosecution did not argue lack of remorse as an aggravating circumstance and any consideration of lack of remorse was harmless because the jury already found Fields death-eligible: Without specifying what the prosecution said about Fields demeanor and criminal history that urged the jury to consider those factors as non-statutory aggravating circumstances, the Kentucky Supreme Court summarily concluded that the prosecutor's reference to Fields demeanor in the courtroom was permissible and that any consideration of Field's lack of remorse was harmless because the jury already found him eligbile for the death penalty.

There was no error in failing to instruction the jury at the sentencing phase on numerous things: The Kentucky Supreme Court held the trial court did not err in failing to instruct the jury as follows: 1) it could impose a term of imprisonment even if it also found the presence of an aggravating circumstance; 2) it need not find the existence of mitigating circumstances unanimously; 3) about parole eligibility; 4) on standard of proof, such as beyond a reasonable doubt, concerning mitigation (the court noted Kentucky juries are not required to make findings concerning

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mitigating evidence but merely required to consider mitigating evidence; 5) it must not be influenced by passion or prejudice; 6) no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors; and, 6) a "stand-alone instruction regarding residual doubt." The court also found "there is no requirement that the jury make written findings with respect to mitigation."

The prosecution did not make an improper sentencing phase closing argument: In rejecting Fields' argument that the prosecution's sentencing phase closing argument was improper, the Kentucky Supreme Court held: 1) "The Commonwealth was entitled to refer to [Fields] entire criminal history, even though some of his prior convictions are outside of the statutory list of aggravating circumstances rendering him eligible for the death penalty"; 2) "the Commonwealth did not use [Fields'] escape conviction as a nonstatutory aggravating circumstance amounting to a claim of future dangerousness"; 3) "the Commonwealth did not minimize the jury's responsibility in sentencing [Fields]. Nor did it inform the jury that its decision was only a recommendation"; 4) "it is not error for the Commonwealth to ask the jury to 'fix a punishment that fits the crime.'"; 5) the prosecution's comment on Field's demeanor "was not improper, nor was it a comment on [Fields'] exercise of his right to remain silent: 6) "the Commonwealth's very brief statement that the jury 'speak[s] for the community' was undoubtedly harmless. The comment was fleeting and did not appeal to the jurors' fears or prejudices"; and, 7) "the Commonwealth did not make a 'Golden Rule' argument to the jury, nor did it attempt to use sensationalizing tactics."

The trial court did not err in excluding statistical evidence about parole: At the sentencing phase, Fields sought to introduce statistical evidenced about parole success and parole criteria. The Kentucky Supreme Court held the trial court properly excluded that evidence because "it had little relevance or direct relationship to [Fields'] case."

Other claims: The court also denied numerous claims involving: 1) the police not thoroughly investigating the case; 2) witnesses giving opinion testimony they were allegedly not qualified to give; 3) the trial court allegedly improperly admitted evidence of prior bad acts, finding that either no error took place or the error was harmless; 4) guilt phase instructions concerning the wording of the intoxication and intentional murder instruction, actually instructing the jury on wanton murder, and the failure to instruct on second-degree burglary, criminal trespass, and first-degree manslaughter. In ruling that the trial court properly denied the manslaughter instruction, the Kentucky Supreme Court held that there was no evidence of extreme emotional disturbance or a triggering event because: a) substance abuse alone does not constitute a triggering event; b) after Fields' fight with Burton, Fields smoking cigarettes with his brother for half an hour, demonstrating an interruption of the supposed triggering event; and, c) no explanation was provided as to why a fight so enraged Fields. ■

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PRACTICE TIPS

By The Appeals Branch

Can a defendant be convicted of a sexual assault if the alleged victim dies before trial, but has given a complete statement to a Sexual Assault Nurse Examiner (SANE nurse) soon after the assault occurred? A recent Kentucky Supreme Court case ruled in favor of the defendant in a recent case. *Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009), decided February 19, 2009.

Attorneys in Fayette County and some other counties are very familiar with SANE nurses. They generally testify in every sexual assault case to every detail uttered to them by the victim, and courts have routinely upheld such testimony as an exception to the hearsay rules because the nurse was ostensibly obtaining the information for the purpose of treatment. This was always successfully argued by the Commonwealth to make it admissible under KRE 803(4) whether the victim was present or not.

Then along came *Crawford v. Washington*, 541 U.S. 36 (2004), and the hearsay rules got a little jolt from the United States Constitution. It seems there is what is called a Confrontation Clause, not quite hidden in the 6th Amendment but noticeably missing in action and virtually ignored for a time, now suddenly freed (loosened, at least) from its heavy burden of moth balls. It can now trump hearsay rules under certain circumstances.

Crawford changed the rules in instances where the witness is not available for trial but has given a prior statement to someone, where that statement can be deemed "testimonial" in nature and the accused has not had a prior chance to cross examine that witness. Before *Crawford*, admissibility was determined strictly by hearsay rules or other adequate indicia of reliability.

Crawford deemed such a limited analysis incompatible with the aforementioned Confrontation Clause, and set up a threshold examination of the proffered statement to determine if it is "testimonial." If so, it is precluded from introduction unless the accused has had a previous chance to cross examine the unavailable witness concerning the statement.

Unfortunately, no comprehensive definition of "testimonial" was provided by the *Crawford* court, but it gave examples of statements that an objective witness would reasonably expect to be available for use at a later trial. These included affidavits, depositions, and other testimonial materials.

Two later United States Supreme Court cases (in one opinion) dealt with police interrogations and shed some light on how to interpret *Crawford*. In *Davis v. Washington*, 547 U.S. 813 (2006), the Court decided that statements in a 911 call from a victim of domestic violence were non-testimonial, even though she was questioned by the 911 operator, and was therefore not subject to the Confrontation Clause. In *Hammon v. Indiana*, joined in the same opinion as *Davis, supra*, the court held that a police interview of a victim of domestic violence at her home contained testimonial statements that were subject to the Confrontation Clause.

The court based its distinction between the two similar situations on the primary purpose of the interrogation. It is non-testimonial, and NOT subject to the Confrontation Clause, if objective evidence shows that the primary purpose of the interrogation is to enable the police to deal with an ongoing emergency. If there is no such ongoing emergency and the objective evidence shows that the primary purpose is to establish or prove past events potentially relevant to a later prosecution, the interrogation is testimonial and thus IS subject to the Confrontation Clause,

With that distinction in mind, the Kentucky Supreme Court has recently dealt with both aspects of the issue in one case. *Hartsfield v. Commonwealth*, *supra*, concluded that the intent of the SANE nurse is for the purpose of information gathering for future purposes, and thus IS testimonial. Thus, it is subject to the Confrontation Clause and is precluded from admission if the declarant is unavailable for trial.

On the other hand, spontaneous utterances by a subsequently deceased victim made to a bystander immediately after the former ran out the door, and another made very shortly thereafter to her daughter, were more closely related to the 911 call to the operator in *Davis*, and were NOT testimonial, and thus NOT subject to the Confrontational Clause.

The SANE nurse in *Hartsfield* was acting in cooperation with the police, the court said. She interviewed the alleged victim at the hospital at an unspecified time after the emergency had concluded. She used a sexual assault kit, and was acting at the request of the police department as she is required by law to do.

Since KRS 314.011(14) makes a SANE nurse available to victims of sexual offenses, a SANE nurse, by definition, is an active participant in a formal criminal investigation. The *Hartsfield* court concluded that questioning by a SANE nurse is the functional equivalent of police questioning, and is for the gathering of evidence of something that has already been completed, rather than dealing with an ongoing emergency. Therefore, since the accused had never had the chance to cross examine the victim, her statements to the SANE nurse were testimonial and were barred by the Confrontation clause.

So, object to the admission of out of court statements you can argue are testimonial under the Confrontation Clause, regardless of what the hearsay rules dictate! ■

THE JUSTICE POLICY INSTITUTE RELEASES COST-CUTTING RESEARCH BRIEFS

WASHINGTON: States could improve public safety and save millions of dollars by investing in community-based alternatives, according to two new research briefs released today by the Justice Policy Institute (JPI). With states facing serious budgetary constraints, these reports offer policymakers more effective juvenile and criminal justice frameworks to guide them in making difficult budget decisions.

"There's no magic formula for saving money and protecting public safety," said Tracy Velázquez, executive director of JPI. "Rather, policymakers can use the tools we already have and reduce correctional populations through incremental changes based on existing, evidence-based strategies. Expanding access to treatment, improving parole policies and practices, and reducing the number of nonviolent youth and adults that are incarcerated can help states cut costs in the short-term, and also increase the long-term economic productivity and health of communities."

The Costs of Confinement: Why Good Juvenile Justice Policies Make Good Fiscal Sense finds that states spend about $5.7 billion each year imprisoning youth, even though the majority are held for nonviolent offenses. The brief concludes that most youth could be managed safely in the community through alternatives that cost substantially less than incarceration and could lower recidivism by up to 22 percent. These alternatives are also more cost-effective in reducing crime than incarceration, yielding up to $13 in benefits for every dollar spent.

According to **Pruning Prisons: How Cutting Corrections Can Save Money and Protect Public Safety**, similar benefits can be found in the adult system through investments in treatment and parole services. States could save a combined $4.1 billion by increasing the availability of parole by shifting 10 percent of the prison population into the parole system, and improving parole support and services so that fewer people are returned to prison for technical (rule) violations. Additionally, the report finds that community-based drug treatment provides bigger crime reduction returns than prison—for every dollar spent on drug treatment in the community, the state receives $18 in benefits.

"For several decades, policymakers have tried to spend their way to public safety via 'cops, courts and corrections.' This strategy has made the United States the leader in imprisoning its residents, and has failed as a public safety approach. Without a change in direction states could end up spending more than $50 billion on corrections by 2010," said Velázquez.

"These reports inform policymakers that there are better options for improving public safety options that build stronger, healthier communities instead of more prison cells." The Justice Policy Institute recommends the following changes to improve public safety and save money:

- States and the federal government should re-examine policies that drive increases in incarceration, such as recommitment for technical violations of parole conditions, and incarceration for low-level drug offenses and many nonviolent offenses. Non-incarcerative, community-based alternatives should be explored.
- States and the federal government should implement policies that can safely increase releases from prison through parole and other community-based programs.
- As closing prisons realizes the largest financial savings, policymakers should scale their reforms to enable the closure of a facility or, at a minimum, a wing or other discrete portion of a facility.
- To achieve long-term public safety gains, money saved on incarceration should be invested in community-based services that improve both public safety and the life outcomes of individuals, and in social institutions that build strong communities, including education, employment training, housing, and treatment.

Other recommendations to improve the juvenile justice system include:

- Incentivize counties to send fewer youth to residential care facilities by shifting the fiscal architecture of the state juvenile justice system to reward increased utilization of community-based options.
- Invest in intermediate interventions, not secure facilities that don't improve public safety and interfere with youth development and the chances of future success.
- Invest in proven approaches to reduce crime and recidivism among young people.

Fund evaluations of effective programs and policies in juvenile justice, and support the development of new and different approaches to reduce delinquency and recidivism among young people.

The Cost of Confinement can be found at http://www.justicepolicy.org/images/upload/09_05_REP_CostsOfConfinement_JJ_PS.pdf

Pruning Prisons can be found at http://www.justicepolicy.org/images/upload/09_05_REP_PruningPrisons_AC_PS.pdf ■

RESEARCH SHOWS AN INCENTIVE TO SNITCH PRODUCES FALSE INFORMATION

FAYETTEVILLE, Ark. – The secondary confession – also known as snitching – is widely accepted as valid evidence in criminal prosecution. Yet, the first behavioral study to investigate whether people will provide false secondary confessions has raised significant concerns about the use of such evidence when informants are offered incentives, according to University of Arkansas psychology researchers Jessica K. Swanner and Denise R. Beike.

"The results of our study were interesting but discouraging," Beike said. "With the use of incentives, we should have seen an increase in true secondary confessions. But an incentive actually did the opposite. It brought forward not the reluctant informant, but the opportunistic."

Swanner and Beike reported the results of their research in the *Journal of Law and Human Behavior* in an article titled "Snitching, Lies and Computer Crashes: An Experimental Investigation of Secondary Confessions."

"Because secondary confessions are so important to criminal investigations, it is essential that investigators as well as jurors understand the circumstances that are likely to lead to true secondary confessions, and those that might lead to false secondary confessions," the researchers wrote.

In the psychology lab, participants engaged in a computer exercise that ended in a simulated crash of the computer and a purported loss of data. Data was analyzed from 129 participants who were paired with confederates of the researchers. After the crash, confederates either denied or "admitted" that they had caused the crash.

Some participants were given an incentive to tell whether the confederate had admitted to causing the problem. They were told that the faculty adviser would be informed and that the person who had caused the problem would be required to come back for a second session.

Participants were asked to sign a statement affirming a secondary confession of guilt. That is, they stated that the other person – the confederate – had admitted crashing the computer. Not surprisingly, participants were more likely to sign when the confederate had admitted to causing the crash. In these cases, the offer of an incentive did not increase the rate of signing. In fact, with an incentive, the rate of signing increased only when the confederate had denied causing the crash. In other words, an incentive increased the rate of false rather than true secondary confessions.

Not only did incentives increase the rate of false secondary confessions, but also participants were less likely "to see freely admitted misdeeds as unintentional." That is, some of those who signed statements also amended the statements, excusing the crash as a mistake due to external factors such as the speed of the test. The researchers found that offering an incentive for secondary confessions "eliminated this 'honest mistake' pattern."

In their conclusion, Swanner and Beike discussed the implications of the use of incentives with informants.

"The concern is partly based on confessions being assumed to be the end-all and be-all of trial evidence, when at least in the case of secondary confessions they should be treated as hearsay," Swanner said.

She and Beike suggested several safeguards, including video recordings of all interviews and interrogations of informants and suspects as well as pretrial hearings and expert testimony to allow jurors to better assess the validity of secondary confessions entered as evidence.

"It is essential for jurors, prosecutors and judges to be informed about the potentially biasing nature of incentives to confess," they concluded. "Snitches may indeed lie or come to believe a falsehood about another to be the truth. Jurors must be able to consider this possibility as they make their verdicts."

Denise R. Beike is an associate professor of psychology in the J. William Fulbright College of Arts and Sciences at the University of Arkansas. Jessica K. Swanner is a doctoral student in psychology. ■

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