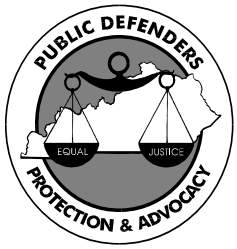
The Advocate



Journal of Criminal Justice Education & Research
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AOC-025 Doc. Code: RS Case No.
Rev. 5-03
Page 1 of 1 Court
Commonwealth of Kentucky
Court of Justice *www.kycourts.net*
CR 45; RCr 7.02

SUBPOENA

SUBPOENA DUCES TECUM

Case No. _____
Court _____
County _____
Date _____

Practice Update on the Use of Subpoenas: What has Happened in the Last Two Years

6th Circuit: The Drug Exception to the Fourth Amendment

California: Review of More than 700 Appeals Finds Problems Throughout the Justice System

Alabama: Capital Cases Often Filed, Yet Only A Third Succeed: Pursuing Such Indictments Costs State Taxpayers Millions

_____ Clerk
Issuing Officer
By: _____ D.C.

_____
Name of Requesting Attorney
Phone # _____

This subpoena was served by delivery of a true copy to: _____
_____
This _____ day of _____, 2_____. By: _____
_____ Title

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1927 - 2006

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

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David Barron – Capital Case Review

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

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FROM THE EDITOR...

Jeff Sherr

Over the last five years, through Supreme Court decisions, rules changes and KBA Ethic Opinions subpoenas have been a hot topic. **In Practice Update on the Use of Subpoenas** J. David Niehaus provides a survey of the recent developments concerning criminal subpoenas.

After an unprecedented three year investigation, San Jose's *The Mercury News* has published a landmark five part series exploring the lapses in the Santa Clara justice system which, in the worst examples, have led defendants being wrongfully convicted. The first article in the **Tainted Trials Stolen Justice,** is reprinted in this edition along with web links to the other related articles.

Sumter Camp, a Federal Public Defender, explores the development of what he has labeled **The Drug Exception to the Fourth Amendment** in an overview of recent fourth amendment decisions from the Sixth Circuit.

Alabama's *Birmingham News* recently published a story regarding the high cost of the pursuit of the death penalty in a state with 18 possible aggravators. The article explains how millions are spent on pursuing capital convictions despite the fact that only a third of these cases succeed.

In this edition's Juvenile Column, Londa Adkins and Dawn Fesmier share their experiences from attending the National Juvenile Defender Leadership Summit. ■

Hate is too great a burden to bear. It injures the hater more than it injures the hated.

— Coretta Scott King

Ethics Column: Practice Update on the Use of Subpoenas: What has Happened in the Last Two Years

By J. David Niehaus, Deputy Appellate Defender, Louisville Metro Public Defender's Office

Most lawyers use subpoenas without even thinking about them. You fill in the blanks and get someone to deliver the AOC form to the witness. But starting with *Anderson v. Commonwealth*, 63 S. W. 3d 135 (Ky., 2001), subpoenas have received a surprising amount of attention from the Kentucky Supreme Court, especially in the last two years. This article is a survey of developments concerning criminal subpoenas, particularly grand jury subpoenas, and some conclusions about the current state of the law.

In 1991, the Supreme Court amended CR 45.01 to make it clear that "[s]ubpoenas shall not be used for any purpose except to command the attendance of the witness and production of documentary or other tangible evidence at a deposition, hearing or trial." But criminal law practitioners knew, or thought that they knew, that CR 45 was inapplicable in criminal proceedings.

RCr 13.04 says that civil rules apply only when there are no criminal rules governing a subject. Since 1963, some form of RCr 5.06 has governed grand jury subpoenas. Variations of RCr 7.02 have governed criminal subpoenas for every other purpose. Prosecutors, apparently concluding that the public policy expressed in CR 45.01 did not make it across the civil/criminal divide, began using grand jury subpoenas (1) to order production of tangible evidence at their offices rather than at grand jury inquests, and (2) to obtain documents from out of state record keepers, bypassing what they considered the cumbersome uniform out of state witnesses act. [KRS 422.250].

But some rather significant problems were overlooked. The first was that RCr 5.06 did not authorize issuance of subpoenas *duces tecum*. (roughly translated "you will bring with you.") Unlike RCr 7.02, which governs subpoenas in criminal prosecutions and which has an explicit *duces tecum* provision in Subsection 3, RCr 5.06 which governs only grand jury subpoenas, appeared on its face to authorize only subpoenas for the appearance of witnesses. This reading is confirmed by Kentucky legal history.

While a subpoena to summon a witness (subpoena *ad testificandum*) has always been considered a process to which a party is entitled "as of right," a subpoena *duces tecum* was considered a prerogative process that could be granted only by order of court. At common law, a party had to apply to the judge for a subpoena *duces tecum*. [*Taylor & Sons v. Thornton*, 178 Ky. 463, 199 S. W. 40 (1917)]. And from 1854 until the adoption of the Criminal Rules in 1963, Section 152 of the Criminal Code required application to the judge. So when RCr 7.08, the first *duces tecum* "as of right" rule, was adopted, it represented a rather significant change in criminal practice.

Under the new rule, a subpoena *duces tecum* would be issued to a party as of right by the clerk. No similar provision was made for grand jury subpoenas. Under ordinary rules of construction, the failure to include *duces tecum* language in RCr 5.06 most reasonably would be read as a denial of authority to demand production of tangible evidence by means of subpoena. The new practices of Commonwealth's Attorneys could not be squared with the language of RCr 5.06.

One possible solution to this problem, a claim that RCr 7.02 also applied to grand jury subpoenas, was precluded by RCr 3.07 because that rule expressly prohibits use of Chapters 6-13 of the Criminal Rules until after a case is lodged in the court with authority to try the charge. [*Commonwealth v. Deweese*, 141 S. W. 3d 372 (Ky. App., 2003)]. The Grand Jury is governed by Chapter 5 of the Criminal Rules and, until it acts, no case may be brought in circuit court. RCr 7.02 could not be incorporated into RCr 5.06.

In addition to problems reconciling their practices with the language of the criminal rules, a second problem for prosecutors developed when the Kentucky Bar Association Ethics Committee responded to inquiries about the proper use of subpoenas. The Committee issued two formal ethics opinions dealing with subpoenas *duces tecum*.

The first, Opinion E-422, dealt with the use of subpoenas *duces tecum* in civil cases. The committee was asked to consider the propriety of lawyers obtaining documents by subpoena without notifying other parties of their receipt and failing to notify adverse counsel when documents were to be produced at trial without the attendance of the custodian to authenticate them. Relying on CR 45.01, which requires a court order if documents are to be produced outside a hearing, deposition or trial, the Committee found that these practices did not conform to the civil rule and therefore violated a number of the Rules of Professional Conduct.

In Opinion E-422, the Committee "expresse[d] no view on whether, as a matter of law, a lawyer in a civil case has the power to 'cancel' a subpoena and relieve the subpoenaed person of his or her obligation to appear." The matter was raised in passing because of *Anderson v. Commonwealth*, 63 S. W. 3d 135 (Ky., 2001).

In *Anderson*, the majority opinion observed that a party could not *sua sponte* release a witness from an RCr 7.02 subpoena because "[w]itnesses are not subpoenaed by parties, but by the circuit clerk." Once subpoenaed, "the witness is answerable only to the court and can only be excused by the court." [p. 142]. The dissent said that even though the clerk "technically" issues the subpoena, "in actual practice, the clerk merely signs the subpoena in blank and gives it to the requesting attorney." Justice Keller's argument was that because the party's attorney does the actual work of getting a witness to court "it is the parties – not the clerk – who , through their attorneys, subpoena witnesses." *Anderson* also played a role in E-423.

Opinion E-423 presented two questions. The first question asked whether an attorney could subpoena a witness to a pretrial proceeding but excuse the witness from appearing at the proceeding after obtaining a statement or affidavit from the witness at the lawyer's office before the date of the hearing. The second question asked:

> "May a lawyer issue a subpoena to a person or entity accompanied by a letter (or by other means) inviting that person or entity to 'certify' requested documents and provide them directly to the requesting lawyer, in lieu of attending a pretrial hearing or trial, without notice to opposing counsel, or a grand jury proceeding where such notice is not required?"

The Committee's answer to both questions was "no." Citing and quoting *Anderson*, the general part of the Opinion held that

> "Generally, a subpoena is a process of the Court, not of the requesting party, and 'once subpoenaed, the witness is answerable to the Court and can only be excused by the Court. Consequently, a lawyer who invites a person under subpoena to forego compliance in the indicated manner violates the Kentucky Rules of Professional Conduct"

by acting dishonestly, by disobeying the rules of the tribunal, by making a false statement of the law to a third person, and, possibly obstructing an adverse party's access to evidence.

Opinion E-423 next dealt with two specific issues, (1) the use of subpoenas to obtain extrajudicial witness statements and (2) the use of subpoenas to obtain documents *ex parte*.

As to the first point, the Opinion noted that the practice had been condemned as long ago as 1976 [KBA Formal Ethics Opinion E-140] and as recently as 2002 when the Kentucky Supreme Court, in *Bishop v. Caudill*, 87 S. W. 3d 1, 4 (Ky., 2002), condemned the use of post-indictment grand jury subpoenas as a means of trial preparation or as a substitute for the discovery process authorized by Chapter 7 of the Rules of Criminal Procedure.

The Opinion also denounced the use of subpoenas to obtain documents by directing production at a time and place other than a court proceeding. In this second part of the Opinion, the Committee noted that "lawyers are not at liberty to alter the terms of a subpoena, once issued, by inviting a witness to comply through document production in lieu of attendance." This statement was reinforced by reference to the language of RCr 7.02(3) which requires that production of tangible items occur in conjunction with testimony by the witness producing the items. The Opinion noted only one exception to this rule, the special statutory provision for production of medical records found in KRS 422.300. But, the Opinion also noted, a provision of the Act required notice to all other attorneys and parties.

Although KBA ethics opinions are advisory only, [SCR 3.530(3)], they created some obvious problems for prosecutors who had been using grand jury subpoenas to route documents directly to their offices and who had been mailing or faxing subpoenas to out of state records custodians on the explicit or implicit understanding that the custodian would treat the subpoena as valid and send whatever was requested directly to the prosecutor's office. As demonstrated in *Megibow v. KBA*, 173 S. W. 3d 618 (Ky., 2005), attorneys get in trouble for using subpoenas to obtain materials that should be obtained by other means.

In the 2004 round of the rules amendment process, there was a proposal to amend RCr 5.06. The amendment was presented as simply "codifying" current practice by Commonwealth's Attorneys. Some defense attorneys, including me, appeared at the rules hearing to point out that "current practice" created problems that could not be addressed by the proposal. Effective January 1, 2005, the Court added a single sentence to the Rule: "RCr 7.02 shall apply to grand jury subpoenas."

This amendment cleared up some questions. It explicitly authorized the issuance of grand jury subpoenas *duces tecum* because RCr 7.02(3) was made applicable to grand jury subpoenas. But it also incorporated the rest of RCr 7.02(3), including the requirement that all documents identified in the subpoena be produced by a witness at a hearing. Even documents to be produced before the scheduled date of the inquest had to be "produced before the court." This amendment did not resolve the problems discussed by Opinion E-423.

Continued on page 6

Continued from page 5

A number of Commonwealth's Attorneys, along with other lawyers and organizations, asked the Supreme Court to review Opinion E-423, but only as to the second question dealing with grand jury practice. [*Stengel v. Kentucky Bar Association*, 162 S. W. 3d 914, 916 (Ky., 2005)]. The resulting Opinion and Order disapproved of the limitations on grand jury practice stated in Opinion E-423, partly because it appeared to put undue limits on the grand jury and partly because it conflicted with the justices' personal experiences. A majority of the Court took the very unusual step of amending RCr 5.06 a second time in the Opinion and Order because "different practitioners in different practices are reading RCr 5.06 and 7.02 in a different light." [p. 921]. The new sentence referring to RCr 7.02 was extended to read:

> "RCr 7.02 shall apply to Grand Jury subpoenas *except that a subpoena issued pursuant to this rule may command the person to whom it is directed to produce the books, papers, documents or other objects designated therein to the foreperson of the Grand Jury or the Commonwealth's Attorney or his agent, without requiring the personal appearance of the witness before the Grand Jury*.

Because the Supreme Court runs the Court of Justice [Constitution § 110(2)(a)], and is the only agency of government authorized to make rules of practice, [Constitution, § 116], there was little to say about the holding of *Stengel* and the unorthodox second amendment of RCr 5.06. Those with the authority to decide how things are done made their decision. The decision makes it appropriate now to restate some black letter do's and don'ts concerning subpoenas.

#1: Do not use subpoenas to summon witnesses or tangible items to your office

The fact that the Supreme Court had to amend RCr 5.06 in an Opinion and Order should be sufficient proof that the words of RCr 7.02(3) mean exactly what they say. In *Megibow v. KBA*, 173 S. W. 3d 618 (Ky., 2005), the Court, in disciplining an attorney, observed that "[t]he use of subpoenas to obtain documentary evidence or tangible things without an accompanying notice of deposition or notice of hearing or trial has been a recurring problem." [p. 619]. The Court stated flat out that "[I]t is improper to use subpoenas in a manner contrary to the rule," and acknowledged that it had amended RCr 5.06 in *Stengel* to permit the use of grand jury subpoenas to obtain documents from out of state firms. However, it cautioned, "*Stengel* does not modify or undermine CR 45.01." [p. 620]. It appears that the policy of CR 45.01 is incorporated into criminal subpoena rules. All lawyers are thus explicitly forbidden to use RCr 7.02 subpoenas for any purpose except obtaining attendance and production at a proceeding of some kind. This means trial, pretrial hearing or conference, or deposition. If this is not enough incentive to follow the law, remember that Opinion E-423 was overruled only insofar as it applies to grand jury practice. Misuse of RCr 7.02 subpoenas can get you an opportunity to see how the KBA disciplinary process works.

#2: Prosecutors – do not use grand jury subpoenas as tools of discovery.

The situation that arose in *Bishop v. Caudill*, 87 S. W. 3d 1 (Ky., 2002), need not have arisen. In that case, the prosecutor subpoenaed witnesses to the grand jury to testify about a homicide even though a grand jury had already indicted the defendant for that homicide. The Court properly noted that once an indictment had issued, RCr 5.02 precluded any further investigation of the offenses charged in that indictment. [p. 3]. A grand jury might investigate new charges on the basis of "additional inculpatory" evidence, but "use of the grand jury proceedings as a guise for trial preparation" requires that subpoenas be quashed. [p. 3]. If the defendant can show that the "sole or dominant purpose" of grand jury subpoenas is to obtain evidence relating to a pending indictment" the defendant has a right to object.

#3: Do serve subpoenas properly.

RCr 7.02(4) authorizes personal service only. There are two categories of persons authorized to serve subpoenas. The first consists of "any officer by whom a summons might be served." This phrase refers to the officers identified in RCr 2.10(2), peace officers and special bailiffs. Obviously, this involves turning the subpoenas over to these officers for delivery. The second category consists of "any person" over the age of 18.

> "Service of the subpoena shall be made by delivering or offering to deliver a copy thereof to the person to whom it is directed."

Proof of service by peace officers is, oddly, not explicitly required by RCr 7.02. Presumably, it is covered by RCr 1.08(2)(c) which mandates submission of an "affidavit of the person who served the papers." Service by persons other than peace officers and special bailiffs consists of an "affidavit endorsed" on the subpoena by the person delivering or offering to deliver it to the person named, or by a written acknowledgement of service on the subpoena by the person served.

The material point is that a person must at least offer to deliver the subpoena to the person named in it and the person who delivered it must submit an affidavit to the court after having done so. There are no other methods of valid service, despite what may be going on in your circuit. You cannot mail or fax a subpoena and expect the court's help if that subpoena is ignored. [RCr 7.02(7)].

#4: Don't try to subpoena witnesses from out the state

RCr 7.02 (5) is pretty straightforward. A subpoena may be served "any place within the Commonwealth of Kentucky." There is no such thing as "long-arm" subpoena jurisdiction. The authority of the Court of Justice to compel the presence of witnesses or the production of documents ends at the borders of Kentucky. The only way to assure the attendance of out of state witnesses is the Uniform Act to Secure the Attendance of Witnesses, found in KRS 421.250 and following sections.

RCr 5.06 as amended does not authorize the Commonwealth's Attorney to subpoena witnesses who are located out of state. Nor does *Stengel*. *Stengel* presumes that the "subpoena" is a polite fiction that both sides know is invalid and that is sent more or less at the request of the out of state records custodian. If the custodian disregards the "subpoena" the prosecutor can't do anything about it. And if the custodian violates a privilege or divulges a confidence mandated by law, both the custodian and the person who sent the "subpoena" may find themselves in serious trouble. Current RCr 5.06 authorizes production at the prosecutor's office. It cannot make a "subpoena" sent across state lines a valid court order.

#5: Do not release a witness from his or her subpoena

The discussion of this issue in *Anderson v. Commonwealth*, 63 S. W. 3d 135 (Ky., 2001), might have been considered *dicta* because the majority opinion refused to reverse on the issue of release of a witness by the prosecutor. However, in *Stengel*, the unanimous court stated that, under the circumstances of *Anderson*, the witness had a continuing obligation to be available as a witness until the trial was finished or "until he was dismissed by the court." [p. 919]. Together, these two opinions establish the principle that only the judge can excuse a properly subpoenaed witness and that all parties to the litigation must be consulted before the judge does so.

The correctness of this statement is also shown by the amendments to RCr 5.06. The first amendment was simply incorporation of RCr 7.02 into the grand jury rule. However, this was not deemed sufficient to authorize prosecutors to dismiss witnesses before they had appeared at the grand jury. The Court had to make a second amendment in *Stengel* that expressly permitted "the requesting party" to excuse the witness or to modify the means by which the witness could comply with the subpoena. Obviously, this language would not have been required if RCr 7.02 authorized the parties to excuse witnesses they had subpoenaed.

Two years ago, it would have been hard to imagine that a humdrum subject like subpoenas would generate so much controversy. Perhaps the lesson to be learned from all of this is that all attorneys should follow the rules strictly when subjects are governed by the Rules of Court. RCr 1.02(2) advises that the Criminal Rules "govern practice and procedure in all criminal proceedings in the Court of Justice." RCr 13.02 allows for some improvisation when a subject is not expressly provided for by rule, but this authority is extended only to judges. Attorneys must follow the applicable rules until the Supreme Court changes them. The Court encourages suggestions for amendments to the rules and, in most instances, a rule change is only a year away. In cases of real necessity, the Supreme Court can act immediately. [SCR 1.010]. In the case of grand jury subpoenas, a lot of time, aggravation and money would have been saved by presentation of a timely rule change proposal instead of pursuit of a free lance practice of dubious validity.■

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Review of More than 700 Appeals Finds Problems Throughout the Justice System

By Fredric N. Tulsky, *San Jose Mercury News*

Tainted Trials Stolen Justice

The below article is part one of a five part series by the San Jose Mercury News.

The Investigation A 3 year study of Santa Clara County Criminal trials
The Finding Questionable conduct mars more than a third of all case
The Failures Mistakes at every phase of a trial tolerated by appellate court
The Fallout In the worst examples, defendants are wrongfully convicted

The other parts of the series and related stories are available at
http://www.mercurynews.com/mld/mercurynews/news/special_packages/stolenjustice/

The Santa Clara County criminal justice system failed Miguel Sermeno.

Sermeno was arrested on felony hit-and-run charges after walking the half-block from his house to the scene of an accident. An overzealous deputy district attorney ignored evidence that pointed to a more likely suspect, instead winning a wrongful conviction.

The system failed Bobby Herrera.

Herrera pleaded guilty to assault for a shooting he did not commit, buckling to pressure from an incompetent lawyer who bled his family for thousands of dollars but never investigated the case. Even after the key witness admitted she falsely accused him, indifferent state appellate court justices let his five-year prison sentence stand without explanation.

The system failed Frederick Brown. Brown was sentenced to 26 years to life for possessing stolen property, after he hauled away a truck that had been stripped of parts as it sat idly near his home for a year. The trial judge refused to instruct the jury on a key point of law: Brown was not guilty if he believed the truck was abandoned.

The three cases are among hundreds examined in an unprecedented three-year Mercury News investigation of the Santa Clara County criminal justice system that shows a disturbing truth:

A dramatic number of cases were infected with errors by prosecutors, defense attorneys and judges, and those errors were routinely tolerated. In dozens of cases, the errors robbed defendants of their right to a fair trial. And in a small number of the very worst cases, they led people to be wrongly convicted.

The study reveals "a basic truth about how the criminal justice system operates," said Laurie Levenson, a former federal prosecutor who teaches criminal law and ethics at Loyola Law School in Los Angeles. Levenson was one of seven experts in criminal procedures and ethics who reviewed the Mercury News findings. "A lot of sausage gets pushed through that machine. Errors that help the prosecution are common. The uneven nature of criminal justice is a serious concern."

The Mercury News began its investigation in late 2002, as concerns emerged about the quality of justice in a series of high-profile cases. To test how the system worked more broadly, the newspaper reviewed the records of five years of criminal jury trial appeals decided by the California 6th District Court of Appeal — 727 cases in all. In addition, the newspaper uncovered about 200 cases of questionable conduct that were not part of the study period, by reviewing files and interviewing lawyers.

The result is an unparalleled look at the extent, nature and impact of errors in a criminal justice system.

A dramatic number of cases were infected with errors by prosecutors, defense attorneys and judges, and those errors were routinely tolerated. In dozens of cases, the errors robbed defendants of their right to a fair trial. And in a small number of the very worst cases, they led people to be wrongly convicted.

The review established that in 261 of the appellate cases reviewed — more than one in every three of the total — the criminal trial had been marred by questionable conduct that worked against the defendant. In only about one in 20 cases did the defendant win meaningful relief — either a new trial or a significantly reduced sentence — from higher courts.

The problems occurred at every phase of a trial, and in every part of the system.

• **Prosecutors.** In nearly 100 cases, the prosecution engaged in questionable conduct that bolstered its effort to win convictions, the examination revealed. Some Santa Clara County prosecutors withheld evidence that could have helped defendants, some defied judge's orders and some misled juries during closing arguments.

But they did not act in a vacuum. In an adversary system in which defense attorneys and judges are responsible for guarding against prosecutors' excesses, the newspaper study found, those checks on the system too often fall short.

• **Defense attorneys.** In 100 cases, defense attorneys acted in ways that harmed their clients. In nearly 50 cases, the attorneys failed to take the most basic of measures, from properly investigating their case to presenting the evidence they gathered. Defense attorneys failed in dozens more cases to object as prosecutors or judges engaged in questionable conduct, in effect excusing the mistakes.

• **Trial judges.** In more than 150 cases, judges made missteps or questionable rulings that favored the prosecution. Violating legal precedents, trial judges allowed evidence that unfairly tainted defendants and prohibited evidence that might have supported their defense. Repeatedly, judges failed to properly instruct jurors on legal principles, instead offering direction that made a guilty verdict more likely.

• **The appellate court.** The 6th District Court of Appeal, the primary court of review for Santa Clara County cases, upheld verdicts in more than 100 cases even as it acknowledged errors had occurred. The appellate court simply concluded those errors made no difference in the outcome of the case. Sometimes those conclusions were appropriate, but a review of the appellate record and consultations with experts established that in more than 50 cases the court misstated facts, twisted logic and devised questionable rationales to dismiss the error.

In nearly all the cases, the 6th District designates its opinions as "not to be published" — a distinction that means they are not to be cited as legal authority in subsequent cases, and thus have little relevance beyond the parties to a case. The Mercury News found that higher courts are extremely unlikely to review unpublished opinions, making the 6th District the final word on most criminal trials in Santa Clara County.
The unpublished designation also has served to shield the cases from outside review. Past academic and journalistic studies of criminal justice, here and elsewhere, have examined published opinions, even though they represent a tiny proportion of court decisions. The Mercury News review is unprecedented in its comprehensive analysis of criminal decisions, published and unpublished alike.

The newspaper study points to a "skewed system that disproportionately bends over backward to help the DA win,"

State court statistics show the 6th District over time has published a smaller portion of its criminal cases — 2 percent — than any other appellate district in the state. The statewide average is 4 percent.

Taken together, the Mercury News findings offer a picture of a system that often turns on its head the presumption that defendants are innocent until proven guilty. Prosecutors, defense attorneys, judges and appellate justices often act in ways that cause defendants' rights to be violated.

The newspaper study points to a "skewed system that disproportionately bends over backward to help the DA win," said Bennett Gershman, a former prosecutor and professor of criminal law at Pace University School of Law who has written on prosecutorial and judicial ethics. "Admitting and excluding evidence unevenhandedly and overlooking serious errors is not a pretty state of affairs if one is concerned about fair trials. Nor if one is concerned about the appearance of justice."

Another outside check on the system — media attention — also has largely failed. The few defendants with money or connections often can command attention for their complaints against the system. But the overwhelming number of cases in the Mercury News examination, even involving the most serious allegations of error or misconduct, have received scant publicity, if any.

To be sure, the review established that the system usually works. Most of the county's more than 300 criminal jury trials annually are marked by judicial rulings that correctly interpret and administer the law, and prosecutors who faithfully follow court rules and judges' rulings. In most appeals, the justices properly apply the law to the facts before them. And even in cases tainted by error, there is rarely reason to doubt the guilt of those convicted.

But Gershman and other experts say the problems exposed in the Mercury News examination are serious and reflect a nationwide trend in criminal justice. The expansion of the rights of the accused identified with U.S. Supreme Court decisions through the term of Chief Justice Earl Warren in the 1950s and '60s has waned in recent years. The public mood, worried about crime and clamoring for more safety, is

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reflected in tougher laws and court decisions. Prosecutors and judges who fail to lock up violent criminals do so at their own political peril.

Defending conduct

• DA reiterates concern for ethics

It was not possible to compare Santa Clara County directly to other areas, because of the lack of similar studies in any other jurisdiction. But this county has long been conservative on law-and-order issues and prides itself on a remarkably low crime rate. The district attorney takes an aggressive approach to charging dangerous criminals, statistics show, and enjoys one of the highest conviction rates in the state. Judges in the county dismiss fewer cases than most of their counterparts elsewhere.

District Attorney George Kennedy and his assistants emphasize their concern for ethics and fairness, and say they have taken many steps to ensure that trial deputies care more about justice than about winning convictions at all costs. "The tenor in the office, for fairness and ethics, is better than anywhere I know," Kennedy said.

His top assistant, Karyn Sinunu, reviewed with the Mercury News more than 100 cases in which concerns were raised about the prosecutor's behavior, and conceded that she was troubled by some of the conduct. But she said that in many instances, proper conduct was wrongly criticized, and that in other cases, the problems amounted to nothing more than honest mistakes.

But the Mercury News review uncovered a series of cases that raised more troubling questions about the conduct of prosecutors and whether the district attorney's office is doing enough to curb questionable behavior. While many errors were isolated incidents, others fell into patterns that suggested broader problems. And certain prosecutors engaged in questionable behavior in multiple cases, suggesting either sloppiness or a deliberate disregard for ethical rules. The Mercury News found repeated instances of troubling conduct in the career of one of the county's highest-profile prosecutors, Benjamin Field, including withholding evidence, making misleading arguments at trial and violating judicial orders.

Instances in which prosecutors, defense attorneys or judges err generally have little impact on the outcome of a case — while any error raises, at least marginally, the likelihood of conviction, few cases go to trial without overwhelming evidence of guilt. But the Mercury News examination shows a number of cases in which the problems seemed to have greater impact.

"The system is built to tolerate errors," said Levenson, the former prosecutor. "One problem is that errors increase the small risk that innocent people can be convicted. And no one can say for sure how often that happens."

In 2003, two men convicted of Santa Clara County murders were set free amid judicial findings that police or prosecutor misconduct helped convict people who were probably innocent. One involved Glen "Buddy" Nickerson, who served 19 years before U.S. District Judge Marilyn Hall Patel overturned his conviction. The second was Quedellis Ricardo "Ricky" Walker, who spent nearly 12 years in prison before top prosecutors acknowledged that improper deals with unreliable witnesses had caused an injustice.

The newspaper probe identified several other cases in which doubts about guilt lingered after trials marred by questionable conduct. Some of those convictions were ultimately overturned in subsequent proceedings, although without the public notice the Walker and Nickerson cases drew. In two of those cases, the decision not to retry the defendant occurred as prosecutors reviewed concerns raised by the Mercury News.

After the Walker case, the district attorney's office took several significant steps, including mandatory training of assistants, to re-emphasize the need to be vigilant against wrongful prosecutions.

Kennedy said he has sought to guard against wrongful prosecutions since he took office in 1990. But, he said, the Walker case was a revelation to him. "I thought before Ricky Walker that it was impossible" for an innocent defendant to be convicted and lose a motion for a new trial. "I thought it was impossible. Now I know that it isn't."

Worst nightmare

• Mistakes lead to jail in hit-and-run case

The case against Miguel Sermeno is the system's worst nightmare: A series of misjudgments and mistakes led to the wrongful conviction of a man who was in the wrong place at the wrong time.

The yearlong ordeal began as Sermeno stood among a small crowd around the scene of an East San Jose hit-and-run in August 1995. A group of three bystanders thought he resembled the driver, and told police.

The investigating officer approached a frightened passenger who remained with the hit-and-run vehicle after the driver fled. He told her she could be locked up if she tried to cover up a crime, and asked whether Sermeno was the driver. She said yes, then quickly recanted.

Prosecutor Terence Tighe developed a theory that the passenger was lying to protect Sermeno because of their "relationship," even though there was no indication the two knew each other. Tighe overlooked evidence suggesting the

registered owner of the car was the driver who fled, and then withheld information that could have helped the defense find the owner.

The assistant public defender chose not to present testimony from the children who also were in the car — and who maintained all along that Sermeno was not the driver.

The trial judge refused to accept as evidence a photograph of the registered owner of the car, and rebuffed the public defender's complaints that he had no opportunity to show the picture to the witnesses and ask whether the owner might have been the driver instead.

After Sermeno was convicted for a felony hit-and-run, evidence emerged casting further doubt on Tighe's theory that the passenger was protecting Sermeno and not the far more logical suspect: The car's registered owner, whom she had denied knowing, was the father of her newborn baby.

The prosecution opposed granting Sermeno a new trial nonetheless. His court-appointed appellate attorney, Sheri Cohen, became baffled by the system's unwillingness to recognize her client's innocence. "When I would go to a party and talk to people about the case, they couldn't believe that this man had been convicted and that officials were fighting to keep him convicted," she recalled.

A 6th District panel affirmed the conviction but ordered a hearing to consider the impact of the public defender's failure to call the children in the car as witnesses.

Finally, supervisors in the district attorney's office elected to drop the charges rather than retry Sermeno. By then, more than two years had passed since Sermeno's conviction and he had long since served his eight-month term in jail.

But the district attorney's office never formally acknowledged his innocence. In a recent interview, after hearing a reporter recount the reasons to question Sermeno's guilt, District Attorney Kennedy responded: "If you have concluded he is innocent, I accept that."

Holding back

• Crucial evidence often withheld from defense

Few cases in the Mercury News' review were as thoroughly twisted by a series of transgressions as Sermeno's. But the review demonstrates that such errors widely infect criminal cases, from before the trial through the appeal.

Perhaps the most contentious area involves the obligations of prosecutors and defense attorneys to exchange evidence promptly before trial, a process called discovery.

These disputes often begin with a complaint from a defense attorney that prosecutors ignored their legal obligation to turn over material needed to prepare the defense case. In

Perhaps the most contentious area involves the obligations of prosecutors and defense attorneys to exchange evidence promptly before trial, a process called discovery.

dozens of cases reviewed by the Mercury News, judges stepped in to order prosecutors to turn over additional evidence; often they chastised the prosecutors for not being more cooperative.

Discovery issues continue post-trial as well; 25 appellate cases reviewed by the Mercury News involved significant concerns that prosecutors withheld evidence that might have cast doubt on the defendant's guilt. Over and over again, defense attorneys learned only after the case was tried that prosecution witnesses had questionable backgrounds that cast doubt on their credibility; that scientific reports were not as conclusive as juries were led to believe; that there was evidence that someone other than the defendant had committed the crime.

To defense lawyers, such issues are especially troubling for two reasons. They complain there is no way to know the number of cases in which evidence that might have changed the outcome was withheld. And they express distrust about prosecutors' motives, suggesting some evidence is intentionally hidden.

But after reviewing the cases raised by the Mercury News, chief assistant district attorney Sinunu said evidence often was withheld not for nefarious reasons, but because of mistakes or because the prosecutor was not aware of its existence. Kennedy said he believes appellate defense attorneys regularly exaggerate claims of withheld evidence, in a desperate effort to overturn convictions. Kennedy and Sinunu both said that their office policy is to err in favor of turning over evidence and that attorneys who fail to do so are warned about such conduct.

Still, problems persist.

Apolonio Solorio spent five months in jail, accused of a February 2003 robbery at a liquor store in San Jose, after the store owner identified him as one of the culprits. It took defense attorney Andy Gutierrez months, and request after request, before a clear copy of a store videotape that captured the robbers was turned over. After the tape was digitally enhanced, the deputy district attorney quickly realized Solorio was the wrong man and moved to dismiss the charges.

It might seem an exceptional situation: A defendant's alleged crime is on videotape, and yet his attorney must fight to get this crucial evidence. But it wasn't exceptional for Gutierrez. Five years earlier, a similar thing happened when he represented Shehabeddin Elmarouk, charged with assaulting officers in the Santa Clara County jail. *Continued on page 12*

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The videotape that was initially provided showed only an inconclusive portion of the incident. Three weeks before trial, after six months of trying, Gutierrez obtained the full videotape, which showed the corrections officers brutally beating his client. A jury acquitted Elmarouk, who later received $110,000 after suing the county over the incident.

But when evidence of importance to the defense does not surface in a timely way, jurors are left with a misleading picture of the case as they deliberate.

Take the case of Mark Crawford, who had five prior drug-related convictions when he was arrested in January 1998. In his house, police armed with a search warrant found a duffel bag containing methamphetamine under a staircase. They also found drug paraphernalia elsewhere in the house and methamphetamine in Crawford's system.

Only one thing complicated the case. Inside the duffel bag were a motorcycle repair receipt and a traffic ticket, both bearing the name Richard Hara.

The prosecutor, Troy Benson, was undeterred. He called a police sergeant at trial to testify that drug dealers often stash false identity papers with their drugs.

The defense presented no evidence. In his closing argument, defense attorney Eben Kurtzman argued to the jury that the drugs belonged to Hara. Benson rebutted that argument by telling the jury, "The fact is, you have no evidence that Richard Hara possessed these drugs. The only evidence that you have are two receipts. You have no evidence that Richard Hara ever lived in this house or was ever in this house."

What Benson never did, he acknowledged to the Mercury News, was conduct inquiries into Hara. Neither did Kurtzman, who, like at least 18 other defense attorneys in cases reviewed by the Mercury News, failed to take simple steps to investigate or prepare for trial. He later said he did not hire an investigator because Crawford had no money for one.

Yet as an appellate attorney discovered after Crawford's conviction, there was plenty of easily obtainable evidence that the drugs may not have been Crawford's.

Witnesses were available to testify that Hara stayed in the apartment and that the duffel bag was his. And at the very time the charges against Crawford were pending, Hara himself was arrested in Santa Clara County for allegedly possessing methamphetamine. Months before Benson would hint to a jury there was no evidence that Hara existed, his office agreed to a deal that sentenced Hara to four months in jail and a required rehabilitation program. Benson said he did not know of Hara's arrest and therefore had no information to provide during discovery.

Asked by the Mercury News to review the case, top officials in the district attorney's office were not perturbed by evidence that Hara existed after all, and offered a new theory of the crime: Hara and Crawford probably were involved in drugs together, so the evidence implicating Hara did not necessarily exonerate Crawford.

To date no court has been willing to say that Crawford was denied a fair trial. He remains in prison, having never had the opportunity to present the evidence on Hara to a jury.

'Again and again'

• Frequency, nature of problems worry experts

Withholding evidence is just one of many types of questionable prosecutorial conduct documented by the newspaper review. In 37 cases, prosecutors or their witnesses revealed evidence that the judge had banned from the trial; in more than 40 cases, prosecutors misstated the law, disparaged the defendant or his attorney, or made other sorts of improper statements during closing arguments; in eight cases, prosecutors took advantage of judicial rulings, telling jurors that no evidence existed to support a defense argument when the truth was the judge had prohibited the defense from presenting the evidence.

In more than 50 other cases, judges endorsed the prosecutors' behavior, making the questionable conduct the judges' own responsibility.

Experts who reviewed the Mercury News findings said the number and nature of the issues involving prosecutors suggest that some of the conduct was deliberate — or at least was not being effectively prevented. Of particular concern was some conduct that occurred in patterns.

"When you see something happening again and again, you have to question if it isn't happening by design," said Gershman, the law professor at Pace.

Prosecutors in nine cases trivialized "reasonable doubt" in ways that drew criticism from the appellate court. Using strikingly similar analogies, these prosecutors sought to convince juries that it was easy to overcome such doubt, comparing it to the minor doubt one might have about the risk of an accident when driving through a green light, or making a left turn, or getting on an elevator, or boarding an airplane.

In 16 cases, prosecutors or their witnesses revealed to juries that defendants were in custody, or on probation, or on parole, generally despite specific orders from a judge not to do so. Judges typically prohibit evidence that could bias the jury against a defendant when it has no direct connection to the crime.

Sinunu, the chief assistant district attorney, admitted that the improper disclosure of evidence does recur. But, she noted, sometimes it is inadvertent — lawyers and witnesses on occasion blunder as they try to follow the rulings. And at times, she said, witnesses — police and victims, especially — wrongly think they are helping the prosecutor when they blurt out information the jury is not supposed to learn.

"When you see something happening again and again, you have to question if it isn't happening by design,"

But after reviewing the Mercury News findings, University of California-Berkeley law Professor David A. Sklansky, a former federal prosecutor, said the number of such improper revelations seemed high. "This is the type of thing that prosecutors should be able to stop if they wanted to, by making it clear to witnesses that it will not help and is improper to say."

Asked about Sklansky's conclusion, Kennedy conceded it was "a fair point."

Another matter of concern, experts said, are cases in which a single prosecutor engages in a series of questionable actions. Such cases suggest, they said, that the deputy district attorney either did not respect ethical boundaries or had, in the heat of the courtroom battle, lost a sense of fair play.

In 2001, Joey Villarreal was charged with possessing methamphetamine for sale after the police found him with a duffel bag of drugs and, when patting him down, a pocketknife. Before trial, Judge Marliese Kim told Deputy District Attorney Sumerle Pfeffer Davis to instruct her witnesses that the knife was not to be mentioned.

Nevertheless, during trial, Davis asked a police officer what he found when he patted down Villarreal. He responded, "I remember locating a large pocketknife in his pocket."

Away from the jury, Davis told the judge she had failed to advise the officer of the judge's order.

But that was not Davis' only mistake. In a sharply critical ruling, the 6th District also found that Davis had failed to provide to the defense statements by Villarreal at the time of his arrest, and that she overstated, in opening and closing arguments, the amount of methamphetamine in evidence. Even as the appellate panel upheld the verdict, it stated that Davis' "repeated failures — to uphold her duties as an officer of the court — were injurious to the dignity and integrity of our criminal justice system and raise questions about her ability or willingness to adhere to the laws of this state."

Sinunu, the chief assistant district attorney, said that although Davis had erred at trial — and had received training on courtroom conduct as a result — officials in her office believed that the 6th District had unfairly exaggerated the error.

Excusing mistakes

• Appeals court routinely justifies alleged errors

Although the court's language in the Villarreal case was unusually sharp, its conclusion was typical. In a system in which errors can lead to disastrous consequences, the ultimate check on most questionable conduct — the 6th District Court of Appeal — routinely excuses it.

The 6th District, which covers Santa Clara, Santa Cruz, Monterey and San Benito counties, was carved more than two decades ago out of the 1st District Court of Appeal, which oversees the rest of the Bay Area. It has long been regarded as the most conservative appellate court overseeing an urban area in California — a reputation stemming in part from the role of law-and-order Gov. George Deukmejian, a former attorney general, in appointing its first eight justices.

California does not routinely release detailed statistics on how its appellate courts handle cases, and the available statistics are difficult to compare because court practices vary. But a Mercury News computer analysis of 20 years' worth of appellate decisions shows that the 6th District upholds convictions in 97 percent of the cases it hears.

To reach that level, the Mercury News determined, the court often went to great lengths to minimize or explain away the errors that were alleged in many of those cases.

For example, the review found 30 cases in which the appellate court misstated the facts or the law in ways that bolstered the decision to affirm the conviction. In one case, the court contended two defendants on trial for assault did not challenge the assertion that they had attacked the victim, when the trial record clearly showed they denied the attack.

The mistakes occurred exclusively in unpublished decisions — suggesting, to experts such as UC-Berkeley law Professor Stephen Barnett, that judges take less care with those cases. But the impact of not publishing may go beyond mere sloppiness.

Arlin Adams, a former federal appellate judge and special prosecutor, said he has "long been concerned" that judges give unpublished opinions short shrift. "Writing an opinion for publication often forces the writer to analyze more carefully alleged errors," he said.

A Mercury News review documented just how powerful the unpublished designation can be in protecting a case from further scrutiny. By examining the opinions of the California Supreme Court over a 15-year period, the newspaper established that the state's highest court rarely reviews appeals in unpublished cases, given that the appellate court's decisions in those cases have no legal authority; during the

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past decade, the court has reversed only about two unpublished opinions of the more than 3,000 defense appeals it receives annually from all six appellate districts.

A rare reversal

• Justices acknowledge a damaging misstep

The case of Darcius Butler is the exception in which the 6th District concluded a single prosecution error was sufficient to order a new trial. In reaching that decision, the court acknowledged a crucial issue about the system: Small errors can lead to the wrongful convictions of people against whom there is not strong evidence of guilt.

A jury concluded Butler was the black man with braids who burst into a San Jose home in 2001 and terrorized Lisa Stuffel and her two children. Police initially came to suspect him after a witness identified Thomas Butler as a member of the robbery team and speculated that a robber she could not identify might have been his brother.

Darcius Butler, Thomas Butler's half-brother, had worn braids just weeks earlier. But neither the driver nor Stuffel's children could pick him from a photo lineup, though the children later identified him in court. Stuffel said the photo of Darcius Butler "looks like" one of the people who came into her home. But there was no physical evidence linking Butler to the crime, and relatives vouched that he had been at a party the night of the robbery.

As the prosecution was making its case in court, a police officer referred in testimony to Butler's parole agent; later, the prosecutor himself reminded the jury of "Agent Houston." That violated a pretrial order from Judge Alden Danner that no references be made to Butler's criminal history — he had been in prison on drug charges — because it might bias the jury.

Danner told the jury to disregard the references, and Butler was convicted and sentenced to 17 years in prison.

But two years later, a 6th District panel overturned the verdict, ruling it was "reasonably probable" that Butler would have been found not guilty without the mention of his parole. In its analysis, the court focused not only on the error, but also on the questionable nature of the witness identifications. And in determining how strong the evidence was, the panel concluded that the jury also considered it "a close case," citing the jury's three days of deliberations and its requests to review testimony. In the end, the trial was "irreparably damaged" by the mention of his parole status, the court said. As prosecutors were considering retrying Butler, the case continued to erode: Butler passed a polygraph examination, the witnesses developed new doubts about their identifications, and two of Butler's co-defendants said he was not part of the robbery team. The Mercury News brought the growing questions about the evidence to supervising officials in the district attorney's office, which undertook a re-examination of the case.

Ultimately, prosecutors offered Butler a deal that he took shortly before Christmas 2004: Plead guilty to false imprisonment and get out of prison immediately.

Supervising Assistant District Attorney David Tomkins said he remains convinced of Butler's guilt, despite the court's ruling and the problems with the evidence. Defense attorney Patrick Kelly is no happier.

Although colleagues offered Kelly congratulations on winning freedom for Butler, he told a reporter, "I feel horrible about it. I believe my client was innocent, and that makes it impossible to feel good about this outcome."

Refusing to act

• Court says most errors are too small to matter

The Butler case stands out as one of the rare instances in which the appellate court was concerned enough about the evidence of guilt to overturn the verdict. More commonly, the court concludes the evidence is so overwhelming that whatever errors marred the trial do not matter.

The Mercury News' analysis of five years of appeals showed that in at least 107 instances, the court agreed that a prosecutor, defense attorney or judge had erred, but it called the errors harmless. In 79 other instances, the appellate court said there was no need to determine whether an error had occurred, because it would have been harmless anyway.

The U.S. Supreme Court has made clear that some level of error is acceptable: Defendants are not entitled to perfect trials, an impossible goal, but to fair trials.

But experts note there are dangers when a court routinely upholds convictions in the face of serious errors. For one thing, the appellate court is doing less than it might to discourage misconduct. If the appellate court, for instance, regularly finds that trivializing reasonable doubt is harmless, prosecutors are not necessarily deterred from doing so.

Even worse is the danger that the justices may wrongly assess the impact the errors had on the case. Not only is it difficult to determine how much an error influenced the jury, but justices also may misjudge the strength of the case themselves because of evidence that was excluded or wrongly included.

Nowhere is the court's tendency to shrug off errors more striking than in cases that involved heinous, high-profile crimes, where a reversal might lead to the release of a dangerous criminal.

One powerful example is the appeal of Sonya Daniels, a Milpitas resident whose young son, Jory, starved to death in 1994. The case was shocking, and created outrage in the community.

Daniels was tried along with her husband, Brian. The two were convicted of second-degree murder and sentenced to 15 years to life in prison. But both the trial and appellate courts reacted contemptuously to Sonya Daniels' argument that her role in Jory's death could not be considered without appreciation for her status as a battered wife.

In a three-month trial in 1998, the jury heard a sordid story of child abuse. Jory, 5, weighed 19 pounds at the time of his death and was so thin that the shape of his bones could be seen through his skin.

The jury heard that Jory and his younger brother often complained of being hungry and were sometimes denied food and water as punishment. They also heard that the abuse had a long history — as an infant, Jory had been removed from his parents because of a fractured skull and leg.

But an equally sordid tale was not told at trial. Sonya Daniels claimed she experienced extreme abuse at the hands of her husband, including rape, sodomy and beatings with a belt. Once, angry over her refusal to have an abortion, she said, Brian Daniels had locked her in a closet and deprived her of food and water for three days.

A 1991 state law encourages judges to admit testimony about Battered Women's Syndrome and its effects on the behavior of victims of domestic violence, but Superior Court Judge Thomas Hastings ruled that law did not apply in this case. He refused to permit a psychotherapist who specialized in family violence to testify that Sonya Daniels had been battered so severely that she was not aware of the danger to her children, and that she lived in fear that made her incapable of protecting them.

In a highly emotional scene, the prosecutor repeatedly asked Sonya Daniels why she failed to protect her son from starvation, knowing she could not mention her claims of abuse. Over and over, Hastings reprimanded her and threatened contempt as she complained that she was not allowed to answer.

Her attorney, James Leininger, continued to complain to Hastings. But Leininger's efforts, which later drew a rebuke from the appellate court for showing "appalling disrespect" to the judge, failed to persuade Hastings to change his ruling.

But Sonya Daniels' difficulties in presenting her defense were just beginning. After both she and her husband were convicted of second-degree murder, Leininger introduced her parents to another attorney, Brenda Malloy, who Leininger contended would be a good choice for the appeal. She would turn out to be a better choice for Leininger than for Sonya Daniels.

Malloy told her it would cost $25,000 for the appeal, and months later, according to court records, the first $10,000 was countersigned and deposited in Leininger's account.

Malloy filed an appellate brief on Sonya Daniels' behalf that was thoroughly lacking in legal research, offering only the barest indication of past court decisions that would normally be the heart of any appeal. The attorney general, in a rare step, argued that the appeal's discussion of the battered-woman issue was not coherent enough to warrant a response.

Then, on July 21, 2001 — the day that the case was scheduled for oral argument before a panel of justices — Malloy failed to show up altogether, and the argument went ahead without Sonya Daniels being represented.

Malloy was out of the country at the time, and was being investigated by the State Bar of California concerning allegations of shoddy representation of other Santa Clara County defendants. She eventually gave up the practice of law, state records show, after the state bar disciplined her as a result of its investigation.

Reached in Ireland, Malloy twice hung up when a reporter asked about the Daniels case. Leininger did not return phone calls.

Sonya Daniels found a new attorney days after the oral argument, but the 6th District would not permit her to file a new brief.

Seven weeks later, the appellate court issued its opinion, one that stands out even for a court that has routinely dismissed appeals. Even as it sharply criticized the work of Leininger and ridiculed the appeal of Malloy, the three-justice panel rejected the idea that better legal work might have made a difference.

The court said it would consider the question of whether Hastings improperly restricted Daniels' defense even though Malloy's brief was below "the standards of competent appellate counsel," because at least she had "presented some discernible arguments."

But it rejected other issues Malloy sought to raise, saying her woeful submission did not merit consideration on those issues.

The court went on to endorse Hastings' ruling barring the battered-woman defense, and to affirm the convictions of Brian and Sonya Daniels. Sonya Daniels appealed without success to the California Supreme Court and has now turned to federal court.

The 6th District rulings "completely distorted the process," said Janice Lagerlof, who now represents Sonya Daniels. "Instead of hearing the issues properly argued, they made up what the arguments should have been, and then answered those arguments. Sonya Daniels was kept from defending herself at trial, and then 6th District denied her the chance to present her case on appeal."

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THE DRUG EXCEPTION TO THE FOURTH AMENDMENT

By Sumter Camp, Federal Public Defender, Nashville, Tennessee

Justice is incidental to law and order.
- J. Edgar Hoover

As we are all aware, over the years there have developed a number of exceptions to the mandates of the Fourth Amendment which have been described by the courts. There is one exception, however, that is at work in the cases, but which has not yet been specifically identified by the courts. I call it the Drug Exception to the Fourth Amendment. It is a Get-Out-of-Your-Constitutional-Obligations-Free card for law enforcement and prosecutors. The Sixth Circuit's opinions of the last year show the extent to which the drug exception to the Fourth Amendment has become not only entrenched, but also so accepted as to be without comment.

Terry - The Start Down The Path

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court for the first time approved an intrusion on individual liberty on a standard lower than the Constitutional "probably cause" standard.

[It may be worth noting that Justice Douglas dissented in *Terry* stating, "To give the police greater power than a magistrate is to take a long step down the totalitarian path." If he only knew.]

The standard was explained as, "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others", 392 U.S. at 24, and, "there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." 392 U.S. at 26.

The holding was stated as follows: "We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." 392 U.S. at 30.

Several principles emerge here that seek to limit this rush down the totalitarian path: 1) the investigating officer must observe "unusual conduct" that leads him to believe (a) that criminal activity may be afoot, and (b) that the persons under suspicion may be "armed and presently dangerous," 2) he must identify himself as a police officer and make "reasonable inquiries," 3) only if these steps fail to dispel his reasonable fear may he search, and 4) the search is limited to (a) the outer clothing for (b) weapons which might be used to assault him.

The Drug Exception to Weapons Searches

Although, as we have seen, the holding in *Terry* requires that the investigating officer must observe "unusual conduct" that leads him to believe that the person is armed and presently dangerous, recent drug cases have done away with this requirement, instead creating a presumption that any person in a drug investigation is armed and dangerous.

In *United States v. Jacob*, 377 F.3d 573 (6th Cir. 2004), as part of an ongoing drug investigation, drug interdiction agents at gunpoint pulled over a Toyota Camry with three individuals in it. All three were searched (producing "a small amount of marijuana and $1,000" on one of them), handcuffed and put into the back of a patrol car. Although the defendants complained about being unconstitutionally searched and handcuffed, the Court held, "officers who stop a person who is 'reasonably suspected of carrying drugs' are 'entitled to rely on their experience and training in concluding that weapons are frequently used in drug transactions' and to take reasonable measures to protect themselves." Id. at 579. (citing *U.S. v. Heath*, 259 F.3d 522 (6th Cir. 2001). No guns were found.

Despite the fact that *Terry* requires, before a pat-down search can be conducted, that the officer observe unusual conduct and has a reasonable belief that the person with whom he is dealing is presently armed and dangerous, the Sixth Circuit has now relieved prosecuting authorities of the necessity of proving the facts that might support the officer's reasonable beliefs by creating a presumption of dangerousness for all drug cases. Rather than have to prove that the officer complied with the mandates of the Supreme Court in *Terry*, the prosecution now simply waves the "drug case" talisman and the Fourth Amendment and its protections evaporate.

Such was the case in *United States v. Foster*, 376 F.3d 577 (6th Cir. 2004), where police stopped a man and then said that he smelled of PCP. The officers handcuffed the defendant before searching him, but, after finding neither guns nor contraband, they continued to keep him handcuffed. The officer testified "previous dealings with people under the influence of PCP led him to feel that Foster posed a potential threat of violence,

thereby warranting a pat-down for any concealed weapons." 376 F.3d at 586 n. 7. The Court of Appeals accepts this blanket statement finding that the officer "had reason to think that Foster could be dangerous, based on his experience in dealing with people under the influence of PCP." Id. at 587. So now the standard is not whether this defendant could be armed or dangerous, but whether he is in a group of people that may be dangerous. The *Terry* standard of individualized suspicion based on specific facts has disappeared in the face of the drug case talisman.

In *United States v. Montgomery*, 377 F.3d 582 (6th Cir. 2004), the defendants were pulled over by a Highway Patrol trooper at 8:00 at night for speeding. She observed a "one-inch long" stem on the driver's floorboard. Deciding it was marijuana, the trooper advised the occupants that she was going to search the car for drugs. All were removed from the car, searched and put in the back of a patrol car. Although the troopers found marijuana seeds and a small scale with green leafy and white powder residues on it, no firearms were found. In upholding the search and justifying the troopers actions, the Court holds, "Based on the nervousness of all of the occupants, the marijuana stem in plain view, Simpson's and Richardson's attempts to conceal the marijuana stem and an unknown object, respectively, it was reasonable for the troopers to believe that defendant may have been armed and dangerous so as to justify patting him down for weapons after he exited the vehicle." 377 F.3d at 586. Aside from the fact that the case involves drugs (barely), the Court provides no explanation of how nervousness and a marijuana stem equate to being "armed and dangerous", but there doesn't have to be if the standard is simply that it is a drug case.

Search Warrants

A similar presumption has been created for dealing with search warrants issued in drug cases [are there any other kinds?]. Generally speaking, to be valid, a search warrant must issue upon probable cause supported by oath or affirmation, and may not rest upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances. *Nathanson v. United States*, 290 U.S. 41, 46-47, 54 S.Ct. 11, 13 (1933). Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. *Illinois v. Gates*, 462 U.S. 213, 239, 103 S.Ct. 2317, 2333, 76 L.Ed.2d 527 (1983). "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556, 98 S.Ct. 1970, 1976, 56 L.Ed.2d 525 (1978).

In *United States v. Newton*, 389 F.3d 631 (6th Cir. 2004), however, after arresting the defendant in a marijuana case, the drug agents discovered that he owned four different addresses. (Only one location had been used during the course of the investigation.) Application was made to a magistrate for warrants to search all four residences. "Included in the affidavit was information from a previously reliable informant stating a belief that Newton was engaged in drug dealing. However, the informant provided no facts in regard to drug dealing, but generally stated a series of beliefs." 389 F.3d at 634. In upholding the challenge to the sufficiency of the search warrants the Court of Appeals held, "'[I]n the case of drug dealers, evidence is likely to be found where the dealers live.'" Id. at 635. Not only have we relieved police officers of having to prove that someone they wanted to search was "armed and dangerous" because it is a drug case, now we have relieved police officers of the constitutional requirement that they show probable cause (generally viewed as a fairly low burden) to believe that there are illegal items one the premises the officer wishes to search. Instead, if it is a drug case, we will grant the officer a presumption that contraband is present and not require any proof from him or her.

Judge Moore concurred in this part of the *Newton* decision because she felt bound by precedent, but she noted that "this comes dangerously close to creating a special rule for drug-related search warrants ... and to eliding the distinction between probable cause to believe an individual guilty of a crime and probable cause to search property owned by that individual in contravention [of Supreme Court precedent]." 389 F.3d at 639-40.

Search Incident to Lawful Arrest That Hasn't Occurred Yet

In *United States v. Montgomery*, the Court gets even more creative in stretching the Fourth Amendment to accommodate drug searches. After having done a *Terry* pat-down of the defendant, one of the troopers gets him out of the patrol car and searches him for drugs. Unable to stretch even *Terry* so far as to uphold this search, the Court announces that "the search-incident-to-a-lawful-arrest rule also permits an officer to conduct a full search of an arrestee's person before he is placed under lawful custodial arrest". 377 F.3d at 586. That is, in this drug case the troopers were allowed to make a search-incident-to-arrest before the defendant was actually arrested so long as they made sure to arrest him later.

As Exception to Knowledge

Perhaps the most insidious use of the drug exception is in the creation of a presumption of knowledge that allows detention of anyone around drugs without regard to whether or not there was even a reasonable suspicion of that person's involvement. Following the Supreme Court's lead in *Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct. 795 (2003), the Court of Appeals applied *Pringle* to uphold the convictions of the passengers in *Montgomery* (above) because the one-inch stem

What this trend shows is that it is time for us to go back to *Terry* (and other bedrock criminal procedure cases) and remind the courts of the principles on which those cases were decided and how far we have strayed from them.

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was in plain view on the driver's floorboard and "the troopers had probable cause to believe that defendant was violating various state drug laws – whether singly or jointly." 377 F.3d 591. [Although it is hard to understand how the passengers could be convicted if defendant was "violating various state drug laws" singly!]

In *Jacob* (above), when one of the passenger/defendants argued that he couldn't be held responsible for the driver lunging the car forward as the police were trying to stop it, the Court finds that "[t]he Supreme Court, however, has noted that 'a car passenger ... will often be engaged in a common enterprise with the driver,' and that it is reasonable for an officer to infer such a common enterprise." 377 F.3d at 580 n. 3. The drugs in *Jacob* were found in a duffel bag in the trunk of the car. Aside from his mere presence, there was no proof that the passenger was aware of the drug dealing. The drug presumption relieves the prosecution from having to make such a showing.

Likewise, in *United States v. Carter*, 315 F.3d 651 (6th Cir. 2004) (en banc), where the issue was whether or not the defendant had consented to the entry of his motel room by simply stepping back from the door, the Court finds that "nothing in the record indicates that he was unaware of well-known right to refuse entry." Instead of requiring the prosecution to prove that the defendant was aware of his right to refuse entry, in this drug case the Court simply presumes it. [Based on the number of reported decisions every year where defendants don't seem to understand that they have a right to "just say no," one could question just how "well-known" such a right is.]

Carryover Effect

One of the problems with creating exceptions to the Fourth Amendment for drug cases is that, as we have seen in other contexts, exceptions rarely remain in the narrow context for which they were created. *United States v. Marxen*, 410 F.3d 326 (6th Cir. 2005), is a robbery case, not a drug case. Marxen's car matched the description of a car leaving the scene of a robbery, but Marxen himself did not match the description of the robbers. Nevertheless, after following him around for a week and not observing any illegal conduct or conduct related to the robbery the police pulled his car over to search it. Marxen was handcuffed and placed in a police car, even though there was not even reasonable suspicion that he had committed any crime. In upholding this action by the police, the Court of Appeals cited to *U.S. v. Foster* for the proposition that using handcuffs does not exceed the bounds of a *Terry* stop. *Foster*, of course, was a drug case that relied for its holding on the drug nature of the offense.

Conclusion - Goose-stepping Down the Path

Nor are these all of the cases in this Circuit dealing with the drug exception, simply some of those from the last year. The trend has been on-going for years and shows no signs of slowing, let alone stopping. While the war on drugs has had many casualties, one of the more significant may be the Fourth Amendment. This is not to suggest that the Sixth Circuit is alone in this move away from *Terry*. If I had the time (and the constitutional fortitude), I'm sure that I could find similar cases in all Circuits. And let's not forget that the Supreme Court leads, at least in this forum. [A perhaps more interesting discussion is the extent to which state supreme courts have, in the last decade or so, refused to follow where the Supreme Court has led, insisting instead on finding that their citizens have more rights under their state constitutions than under the federal constitution; a situation that reverses those days when the Warren Court led and the states followed.] While some courts have certainly rushed to follow the Court's lead in *Pringle*, there would not have been such a rush if the Court had ruled with more respect for the rights of the citizens than the police.

Lest we get too depressed at this point, let me just say that it is not my intention to send criminal defense attorneys rushing out to find a building to jump off of or a new country to move to. A lot of wrong exists simply because no light has been shone on it. What this trend shows is that it is time for us to go back to *Terry* (and other bedrock criminal procedure cases) and remind the courts of the principles on which those cases were decided and how far we have strayed from them. *Terry* was viewed as a major victory by law enforcement (witness the plaque that the Cleveland Police Historical Society has erected on the site from which Detective Marty McFadden launched us down this path [thanks, Dennis, for the tour]), but it is time for us to use it as a sword of our own. We must always remember that in every case we have two clients - the man or woman at our side in the courtroom and the Constitution. As we have seen, we are the only ones in the courtroom who will be arguing to protect those freedoms that are guaranteed there. We must remember that when The Founders (as they have been sanctified) sent the new constitution to the people, the people sent it back saying, we refuse to give this kind of power to any executive, legislative or judicial body without certain protections. The people, who are most often on the receiving end of The Law, knew that even the checks and balances built into this unique document were not enough to protect them from the abuse of power that comes from government of any stripe. The Bill of Rights is truly the work of the people and we are the ones who must constantly fight to protect it for, as we have seen, no one else will. As Winston Churchill said, "What is the use of living if it be not to strive for noble causes and to make this muddled world a better place for those who will live in it after we are gone?" [thanks, Dean] With that in mind, let us name the Drug Exception for what it is and work to oppose its spread. Keep up the good fight!

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Capital Cases Often Filed, Yet Only A Third Succeed: Pursuing Such Indictments Costs State Taxpayers Millions

By Carla Crowder, *Birmingham News*

Despite high costs, long trials and slim chances for death sentences, Alabama prosecutors continue to routinely seek capital murder indictments. Most don't end in capital convictions.

Of 1,965 people indicted for capital murder since 1990, one third were convicted of the offense. Nearly half were convicted of murder, manslaughter or another lesser felony, crimes that usually cost a fraction to prosecute, defend and appeal. Another 18 percent of cases were dismissed or the defendant was acquitted, according to an analysis from the Alabama Sentencing Commission.

Alabama taxpayers have spent more than $14 million in capital defense costs since 2000. Costs for prosecutors, judges, juries and court staff run millions more. But because courts do not separate the cost of capital cases from other cases, exact expenses for such trials are unknown.

"The whole system is taxed and taxed and taxed," said Birmingham defense lawyer John Lentine.

Jefferson County District Attorney David Barber said he knows some of the defendants he pushes to indict on capital charges will never be convicted of a capital offense. But if the crime meets any of the 18 criteria described in the state's capital murder laws, he handles the case that way. "When you start picking and choosing, you run the risk of having to defend the selective prosecution charge down the road," Barber said.

Under Alabama law, it's as easy to secure a capital indictment for fatally shooting someone in a car as it is for a mass murder. Other aggravating circumstances that can elevate a crime to a capital offense, meaning a conviction carrying a mandatory sentence of either death or life without parole, include murder of a police officer; murder during a robbery or burglary; murder-for-hire and murder of someone younger than 14.

"We have a death penalty statute that's as broad as any in the world, any in the country, and any prosecutor who wants to make a crime capital can do it," said Montgomery lawyer Bryan Stevenson, executive director of the Equal Justice Initiative, which represents poor people on Death Row.

A Domino Effect

The resulting capital trials bog down court dockets and create a domino effect, delaying progress on other cases, Lentine said. "It's one of the dirty little secrets that we all know but nobody wants to talk about," he said.

Experts on both sides of the courtroom agree that capital cases take longer to resolve. Trials take more time, and fewer defendants plead guilty to capital murder than to lesser felonies.

State Finance Department records since 2001 show that capital murder cases cost on average five times as much as other serious felonies in defense bills. Last fiscal year, the average payment for capital murder indigent defense was $8,694. Class A felonies, which include murder, cost $1,323.

Prosecutors face pressure from victims' families to go after the maximum penalty. Compared to the soft-on-crime label that could come from pressing lesser charges, there is no downside for prosecutors who seek maximum penalties, even if juries later turn them down, Stevenson said.

"What we've seen for a lot of years is many counties where prosecutors over-indict on capital charges, use the death penalty as a control mechanism for getting pleas and managing their dockets even when there's no reasonable theory of capital murder," Stevenson said. "And because there is no cost consequence for them or the counties, this goes unreviewed and unchecked."

Several district attorneys disagree. As they see it, their staff is paid the same whether prosecuting drunken driving or capital murder. "We don't get paid by numbers of trials," said Montgomery County District Attorney Ellen Brooks.

Depiction Denied

Mobile County District Attorney John Tyson bristled at the suggestion DAs purposefully enhance charges. "If we don't have evidence in a case, we don't make up a charge or force someone to enter into a lesser-included charge or some other charge," he said.

"I don't know of any prosecutors who do that but, if they do, they should reconsider their positions because I think

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they have a very heavy legal and ethical responsibility and I think overcharging is out of bounds," he said.

Tyson pointed out that, for the 10 years he's been head prosecutor in Mobile County, the capital conviction rate there is 44 percent, higher than the state average.

Car shootings are the toughest to sell to juries, Barber and other officials said. Juries don't always agree that a life taken from or in a vehicle is more valuable than one taken in a kitchen or backyard. "I tell them, 'Folks, I didn't make any of these laws. This is what the Legislature tells me a capital case is,"' Barber said.

The law was amended during the anti-gang fervor of the 1990s to curb drive-by shootings. However, the Legislature allowed capital charges whether the shots are from inside or outside of a car, elevating some homicides lawmakers likely did not intend to, Barber said. As a result, the slaying of someone buying cocaine inside a car becomes capital. The same crime in a house is not.

Jeffco's Tab is Highest

Defense costs are highest in Jefferson County - topping $3.3 million for the past five years - because the county has so many cases. In the past 15 years, only a quarter of more than 700 capital defendants have been convicted of capital murder. Five percent have gone to Death Row. Six people from Jefferson County have been executed since 1976, the modern era of capital punishment.

When Victoria "Tori" Monette, 2, was scalded to death in 2003, her mother, Barbara Kristin Reid, and Reid's boyfriend, Michael Myers, were charged with capital murder. Prosecutors offered both deals if they would plead guilty to manslaughter. Myers took the deal and received a 25-year sentence. Reid refused the plea, saying Myers caused the fatal injuries.

Witnesses testified Reid was at work when Tori was burned during a bath. The jury believed the alibi and returned a reckless manslaughter verdict. Reid was sentenced to 20 years in prison and could be out in much less.

Her trial took two weeks.

"Why would they proceed with a capital murder trial, when the perpetrator, the actual person who caused the injuries to the child, was given a manslaughter plea prior to the trial?" asked Brett Bloomston, one of Reid's attorneys.

A few months later, a Bessemer jury found Calvin Burns not guilty in the killings of two young women during a shootout. The women were sitting in the back seat of a car as a friend in that car and Burns exchanged gunfire.

Burns' attorneys did not dispute he was there, or that he fired shots, but they were able to convince the jury that he fired in self-defense.

Juries hard to predict

Barber said it's futile to try to predict or explain jury verdicts. "We call juries the 8th wonder of the world," he said.

His best guess for Jefferson County's low capital conviction rate: "Maybe large, metropolitan areas are a little more liberal."

But some smaller circuits show even lower conviction rates. In the past 15 years, 22 people have been indicted on capital murder in the 1st Circuit, which comprises Choctaw, Clarke and Washington counties in southwest Alabama. None of them has been convicted of capital murder. Most of the cases ended in acquittals or manslaughter convictions, state records show.

In the past five years, the state has paid more than $150,000 for capital defense costs in the 1st Circuit.

The average capital defense cost in 2005 was $20,416. Six cases ran more than $100,000 each in defense costs, according to state comptrollers's figures provided in 130 cases that were resolved in 2005.

If those cases had been prosecuted as simple murders, which are Class A felonies, defense costs would have been capped at $3,500 per case.

In an attempt to rein in court spending, state officials this year discontinued a portion of payments for defense lawyers' office overhead. But defense lawyers began dropping cases, saying the complex ones such as capital murders aren't worth taking without the extra pay. A judge has restored the payments, but while the state is appealing, the payments remain frozen.

State Law Mandates

With death or life without parole at stake, state law requires two defense lawyers, an investigator and a mitigation specialist - someone who can make a case for life without parole instead of a death sentence.

"You've gotten certain criteria the Supreme Court has mandated," said Lentine, the Birmingham defense lawyer. Defending a client on the cheap will only wind up more costly because of the risk of reversals and retrials, he said.

More than money is at stake in capital cases, though.

Three mentally retarded people in Choctaw County were charged with capital murder in 1999 for the death of a

newborn. All three pleaded guilty to manslaughter. Instead of death or life in prison, they received 15-year prison sentences.

On appeal, a defense attorney found that the alleged mother had a tubal ligation in 1995, making claims she'd had a baby highly dubious. Even after the fertility test, prosecutors refused to back down for more than a year, and the attorney general's office defended the conviction.

Stevenson said those cases are prime examples of the immense bargaining power prosecutors levy when death is on the line.

"In some of these cases you've been in jail for two years awaiting trial and so somebody comes to you and says, 'If you say you're guilty, you'll get this sentence, which means in two years you'll go home. Or if you say you're not guilty, you'll go to trial in another year and if you're convicted you end up on Death Row,"' he said. "It becomes not so unreasonable to say, 'Let me just say I'm guilty because at least I know what's going to happen to me."'

Index References:

NEWS SUBJECT: (Violent Crime (1VI27); Crime (1CR87); Judicial (1JU36); Legal (1LE33); Social Issues (1SO05); Criminal Law (1CR79))

REGION: (USA (1US73); Americas (1AM92); Alabama (1AL90); North America (1NO39))

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New Resource Available for Advocates Addressing the Growing Numbers of People with Mental Illness in the Criminal Justice System

The Criminal Justice / Mental Health Consensus Project is pleased to announce the release of a new resource for advocates addressing the increasing numbers of people with mental illness involved in the criminal justice system: *The Advocacy Handbook: A Guide for Implementing Recommendations of the Criminal Justice / Mental Health Consensus Project.*

The *Advocacy Handbook*, the result of a joint effort among the Consensus Project, NAMI, the National Mental Health Association, the National Association of State Mental Health Program Directors, and the Bazelon Center for Mental Health Law, is available online at the Consensus Project web site: www.consensusproject.org/advocacy.

In recent years, there has been a growing chorus of advocates-whether individuals with mental illness, family members with loved ones who have mental illness, or simply concerned citizens-urging policymakers to "do something" about the increasing numbers of people with mental illness involved in the criminal justice system.

"This step-by-step guide helps advocates translate their energy into effective strategic plans. Equipped with recommendations that are constructive, bipartisan, practical, and reasonable, advocates can be effective partners to policymakers generally and leaders in the criminal justice and mental health systems specifically," said Representative Mike Lawlor (D - CT), co-chair of the Consensus Project.

The *Advocacy Handbook* represents unparalleled consensus among distinct and independent national mental health organizations. It is designed to show advocates how to implement recommendations from the landmark *Criminal Justice / Mental Health Consensus Project Report*, released in 2002 by the Consensus Project on behalf of an extraordinary, bipartisan group of leaders in the criminal justice and mental health systems. Consensus Project staff are grateful to the leaders and contributors from each of these groups for their commitment to this issue and their determination to speak with one voice on these topics.

http://consensusproject.org/advocacy/

Criminal Defense Advocates Honored by Kentucky Association of Criminal Defense Lawyers

By Tasha K. Scott, Covington, KY

Criminal defense advocates are engaged in the continual battle to preserve the rights of the accused. Some of our clients are wrongfully accused, some are tragically misunderstood, and others possess poor decision making skills, to their legal detriment.

We represent these people because we believe it is right, proper and just. Not because it is easy.

Often society does not understand our passion for preserving the rights of the criminally accused, especially if they are, in fact, guilty of a crime. As advocates, the value of socializing with other criminal defense attorneys should not be underestimated. We gain energy and inspiration from taking the time to attend events like KACDL's annual seminar, and learning from other criminal defense attorneys.

One source of inspiration at this year's seminar was the awards luncheon. KACDL strives to publicly honor those who have pursued justice above and beyond the call of duty.

Frank Mascagni III received the KACDL Frank E. Haddad, Jr., Award. This award is presented to a criminal defense lawyer in recognition of exceptional professional achievement which has had a profound effect and sustained impact on the protection of the constitutional rights of citizens accused or convicted of a criminal offense. Frank Mascagni embodies all the best qualities of Frank Haddad as a litigator – a complete knowledge of the law; a keen sense of strategy; effective negotiating skills; thorough and exhaustive trial preparation; excellent trial skills; and a unique style and persuasive way with juries. He is also "old school" in the best sense – a fearless advocate for his clients who always places their interests first and never wavers in their defense no matter what the odds. No challenge is too great, no law enforcement agency too powerful, no prosecutor or judge too intimidating.

Mr. Mascagni's recent work, resulting in a remarkable suppression order in federal court, is just one example of why Mascagni was chosen to receive this award. In a major drug conspiracy prosecution involving 11 co-defendants and a seizure by DEA agents of nearly 50 pounds of cocaine with a street value of more than $2 million, along with expensive gold and silver jewelry, a quarter million in cash, and loaded assault weapons, Frank's client not only avoided a possible life sentence, but won a suppression ruling that may result in a complete dismissal. The U.S. District Court's ruling is believed to be the first time a federal judge in Kentucky has excluded evidence gained from wiretaps. It also represents a triumph of the rule of law and a relatively unique demonstration of judicial courage and independence that should be a source of pride and inspiration to every judge and lawyer, not just the criminal defense bar.

Hon. Kathryn G. Wood received the KACDL Distinguished Service Award. This award is presented to a member of KACDL whose service to the organization and contributions to its mission have resulted in significant improvement of the criminal justice system. Prior to the expiration of her tenure as President of KACDL, she was appointed Judge of the 28th Judicial District.

Ms. Wood represented the first of the younger generation of lawyers, within KACDL, to take on the enormous commitment of running the organization. With her typical grace, she spear-headed multiple projects within KACDL, resulting in improved membership, a strengthened relationship with DPA, and increasing the camaraderie of the membership. She went out of her way to ensure that all points of view were accepted and that all members felt comfortable to express their views to the organization.

Through her actions, Hon. Ms. Wood set an example for members as a younger attorney, as a female attorney, and through her professional demeanor. Now she continues to act as an example of fairness and impartiality while dispensing justice on the District Court bench.

Peter L. Schuler, Chief Juvenile Defender, Louisville Metro Public Defender, received the KACDL Juvenile Justice Award. Presented to a member of the bar in recognition of outstanding contributions to and exceptional achievement in the development of juvenile law and the representation of children in delinquency and transfer proceedings, as well as in matters involving status offenses and detention. Mr. Schuler's remarks show his dedication to the defense of juveniles:

> "If we are to successfully deal with some of our more serious social problems, we must put a priority on **all** of our Commonwealth's children. Poverty, mental illness, drug and alcohol addiction, physical and sexual abuse, poor parenting and neglect have a

significant negative impact upon our children and in a large measure explain why many children find themselves before the Juvenile Court. The historic mission of the Juvenile Court has been, under the rubric of due process, to identify, treat, and hopefully rehabilitate young people who have run afoul of the law.

In the last few years, our juvenile justice system has been under attack from those who tend to lump all juvenile defendants into ruthless and violent media-created stereotypes. Offenders as young as 14 in Kentucky now are routinely bound over for trial as adults and face draconian sentences with no hope for probation or parole until 85% of their sentence is served. "Zero tolerance" policies and local police stationed in our public schools have substituted juvenile jails for in-school suspension. Some judges are making truant teens spend a day in jail for each day they are absent, as well as ordering their parents to pay for the cost of their confinement and to reimburse the local school board for the loss of state tax revenue due to the child's unexcused absences.

Our clients need our services now more than ever. Our voices need to be heard in the halls of the Kentucky General Assembly, and in our communities to educate and hopefully enlighten the public, as well as in the courtroom. I know that every day we face a difficult fight. But we must never give in. If not us, who else will defend the young, the needy, and the unpopular?"

Hon. Thomas B. Russell received the KACDL Fair Administration of Justice Award. This award is presented to a member of the judiciary who has served and advanced the interests and cause of justice by fairly applying constitutional principles and impartially presiding in criminal proceedings. Judge Russell was appointed to U.S. District Court in the Western District of Kentucky by President Clinton in 1994. Lawyers who routinely appear before him describe him as well-liked, respectful and patient, while showing thoughtfulness, consideration and a sense of justice and fair play. The combination of his intellect, ability and desire to do the right thing as a presiding judge has served him well in dispensing justice to all parties before him.

Frank Mascagni III described his recent experience with Judge Russell as one of the most remarkable things he has witnessed in his nearly thirty years of practicing law. Mr. Mascagni represented one co-defendant that was part of a twelve member criminal indictment pending in the US District Court, WDKY. The Defense Bar challenged the evidence obtained by the government, procured by two federal wire tap orders. Judge Russell patiently allowed counsel to prepare written pleadings, allowed a fact testimonial hearing and oral arguments. After deliberation, and his personal research, Judge Russell had the courage to suppress evidence obtained by the FBI, with full knowledge of the consequences of his Opinion. Mascagni stated, "It takes a principled man with a true sense of right and wrong to author an Opinion knowing it will be subject to criticism potentially by the prosecutors, law enforcement, and the general public."

In addition to being honored by KACDL, Judge Russell was named 2005 Judge of the Year by the Louisville Bar Association.

Hon. Robin L. Webb received the KACDL Public Policy Award. This award is presented to a member of the legislative or executive branches of government who has established and/or implemented public policy that protects individual liberties, ensures a fair process, and guarantees reliable results in criminal cases.

As a criminal defense attorney, Robin Webb is an advocate who focuses on the interests of her clients with precision, vigor and passion. As a state legislator, she is an advocate who focuses on the common sense needs of people and what advances the Commonwealth. She is especially sensitive to insuring that public policy protects individual liberties. Ed Monahan described Ms. Webb by saying, "She is a fighter who you always want on your side in the courtroom, the committee room, and on the floor of the House."

KACDL President Mark Bubenzer described Representative Webb by saying, "As a member of the House Judiciary Committee Robin has provided a strong voice for the underdog and fought attempts to increase penalties under the penal code and to limit the rights of accused persons. She has been an important supporter of many of our positions on criminal justice legislation. In addition to her work in the legislature she maintains a very active criminal practice in eastern Kentucky."

Kay Stewart received the KACDL Media Award. This award is presented to a reporter or editor who has informed Kentucky citizens about the critical constitutional roles of criminal defense lawyers, public defenders or criminal defense organizations in ensuring the individual liberties guaranteed by our Bill of Rights. Ms. Stewart reports for the Louisville *Courier-Journal*, and was nominated as a result of the unbiased articles she wrote covering the suppression hearings involving Mr. Mascagni and Judge Thomas B. Russell, U.S. District Court Judge, Western District of Kentucky. In the court of public opinion, many journalists tend to paint the picture of justice from a prosecutorial perspective. Ms. Stewart was commended for the manner in which she honestly and courageously wrote about a controversial suppression matter.

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Ms. Stewart remarked, "The story about the judge throwing out crucial wiretap evidence in a major federal drug case basically told itself through the judge's Opinion and hearing transcripts. It's clear from those records that the defense lawyers presented a passionate, thorough and persuasive case. But we're finding more and more that records in federal court cases are being sealed for a variety of reasons - everything from motions seeking a defendant's release on bond to affidavits filed by law enforcement that resulted in arrests. In our opinion this secrecy runs counter to the best interests of justice. If we are to understand and have confidence in our justice system, case records need to be accessible."

Tasha K. Scott received the KACDL Clarence Darrow Prodigy Award. This award is presented to a member of KACDL who has been practicing law for less than five years and has demonstrated precocious legal knowledge and trial skills as a criminal defense advocate, as well as an uncompromising commitment to aggressively defending clients in the spirit and best tradition of Mr. Darrow. Ms. Scott joined KACDL as a board member in 2003. At this same time, she opened her solo practice in Covington, KY, after practicing less than a year as a public defender. She came into the organization manifesting hope for the future. Ms. Scott attended the Litigation Persuasion Institute in Faubush, KY, in 2002, followed by the National Criminal Defense College in Macon, GA, in 2003.

She has consistently shown a willingness to take on difficult cases. Her most memorable trial involved the representation of a defendant charged with Murder following a shooting death in Covington. Though she had signed on to be second chair in the case, she ended up trying the case alone. It was her first felony trial, which she tried after having practiced two and a half years. She carried the case through to a hung jury, even though it devastated her private practice. The case was eventually retried by two other attorneys, the client was convicted and received a 35 year sentence. Ms. Scott's willingness to stand in the face of challenging situations in front of a presiding Judge who was, at times, quite difficult, is noteworthy, commendable and shows her commitment to aggressively defending clients in the spirit and best tradition of Clarence Darrow.

Prof. Robert G. Lawson, UK College of Law, received the KACDL Special Recognition Award. This award is presented from time to time at the discretion of the KACDL President and/or Board of Directors for singular accomplishment or career achievement. Prof. Lawson was recognized for his efforts to reform sentencing laws and practices in Kentucky. His recent article, *Difficult Times in Kentucky Corrections – Aftershocks of a "Tough on Crime" Philosophy* has proved seminal in this regard – it has raised consciousness among the media and public, and influenced the thinking of policy makers, legislators and the judiciary. Moreover, his continued research, advocacy and leadership to spur much-needed action in this area of law has been truly inspiring. The commitment he has shown to reason, equity, efficiency and justice in our approach to sentencing and corrections is emblematic of his lifetime dedication to law and our criminal justice system.

Prof. Lawson was involved in the original creation of the Kentucky criminal code, which was, at its inception, a well-balanced and well crafted piece of legislation. He has been a defender of the idea that the code should make sense as a whole and not contain inconsistencies. Professor Lawson has continually made himself available to legislators in regard to consideration of aspects of criminal law.

In response to learning he had been chosen to receive this award, Prof. Lawson had the following remarks, "[I] encourage each of you to join me in my new crusade to promote the very badly needed criminal law reform about which I have recently written. The Penal Code (most of which I drafted 35 years ago) has been wrecked over time and no longer serves either the Commonwealth or criminal law offenders. I am trying my best to draw attention to this undeniable fact to members of the public and to public officials of all types (in the justice system, in the courts, in the general assembly, and beyond). I believe, however, that the best hope for reform rests on the shoulders of lawyers and judges, who can join forces to publicize loudly and clearly the injustice that now flows from our obsession with incarceration of our fellow citizens. I have been asking my friends in the profession to get interested in this immensely important problem and I hope you will do the same at every opportunity." ■

Kentucky Association of Criminal Defense Lawyers

The cost to join is as follows:
- $200.00 KACDL Attorney member
- $250.00 non-member attorney
- $100.00 KACDL non-attorney member
- $125.00 Full-time Public Defender
- $ 50.00 Law Student

Contact:

KACDL
Charolette Brooks
Executive Director
Tel: (606) 677-1687/(606) 678-8780
Fax: (606) 679-3007
Web: kacdl2000@yahoo.com

LBA: Chastity Beyl and Misty Clark received the Frank E. Haddad, Jr. Young Lawyer Award

Chastity Beyl and Misty Clark received the Frank E. Haddad, Jr. Young Lawyer Award at the 2006 Louisville Bar Association's Annual Bench and Bar Dinner on Jan. 19, 2006.

The Frank E. Haddad, Jr. Young Lawyer Award is presented to attorneys who have been practicing as trial lawyers for less than five years and who have during that time garnered the respect and admiration of both the judiciary and their colleagues. This year, the award will be presented to Chastity Beyl and Misty Clark, both of the Louisville Metro Public Defender's Office.

Chastity Beyl

Chastity is a deputy chief in the Adult Trial Division of the Public Defender's Office. She graduated *cum laude* in 2001 from the University of Louisville Brandeis School of Law. Her felony trial work is has been praised by her peers, and she has won several Walker Awards for excellence in advocacy.

She graduated *magna cum laude* with a Bachelor of Arts degree and Honors in History from Western Kentucky University in 1998. She then attended the Brandeis School of Law at the University of Louisville, graduating *cum laude* in 2001. Since graduation, Ms. Beyl has been a trial attorney with the Adult Trial Division of the Louisville Metro Public Defender's Office, successfully handling numerous difficult felony trials. She was selected to attend the Trial Practice Institute at the National Criminal Defense College in Macon, Georgia in 2004, and is currently a member of the Louis D. Brandeis American Inn of Court. She has received several Walker Awards for excellence in advocacy.

Misty Clark

Misty is also a deputy chief in the Adult Trial Division, a 2001 graduate of the University of Louisville Brandeis School of Law, and the recipient of several Walker Awards. She has been praised for training seminars she has presented to staff attorneys on topics ranging from jury selection to sentencing issues.

Originally from Fulton, Kentucky, she received her BA from Murray State University. While at Murray, she received a Presidential Scholarship, completed an all honors curriculum, studied abroad in the United Kingdom, and graduated *summa cum laude*. After leaving Murray State in 1998, she attended the Louis D. Brandeis School of Law in Louisville. She graduated in 2001 and began the practice of law at the Louisville Metro Public Defender's Office in the Adult Trial Division. In 2003, she was selected to attend the Trial Practice Institute at the National Criminal Defense College in Macon, Georgia. Currently, she is an Associate member of the Louis D. Brandeis American Inn of Court. During her time at the Louisville Metro Public Defender's Office, she has represented numerous adult clients on both misdemeanor and felony charges, many of which involved jury trials. She has received several Walker Awards for excellence in advocacy. Within the office, she has presented training seminars for staff attorneys on a wide range of topics including jury selection, cross-examination, and sentencing issues. She also assists the Adult Trial Division Chiefs in the supervision of the staff attorneys. ■

If there is anything that a man can do well, I say let him do it. Give him a chance.

—Abraham Lincoln

6TH CIRCUIT CASE REVIEW

By David Harris, Post-Conviction Branch

***Lakin v. Stine*,**
431 F.3d 959 (6th Cir. 2005)

Leg irons at trial violative of due process where case-by-case determination of necessity for shackles not made by trial court; however, state met its "beyond a reasonable doubt" burden that this error was harmless due to overwhelming evidence of guilt

Petitioner was charged with kidnapping, prison escape, assault of prison employees and unlawfully driving away an automobile. Petitioner represented himself at trial, but was forced to wear leg irons throughout. Petitioner was convicted and sought federal *habeas corpus* relief on this issue. The district court found that the state court violated petitioner's due process rights but determined the error to be harmless due to the overwhelming evidence of guilt presented at trial.

After citing the proper standard for *habeas* review, the 6th Circuit noted that the recent U.S. Supreme Court case of *Deck v. Missouri*, ___ U.S. ___, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), did not create new law but merely acknowledged and refined "clearly established" legal precedent. Thus, while petitioner's case took place before *Deck* was decided, that opinion's analysis provides instruction applicable to the instant case.

In *Deck*, the Supreme Court found that the use of shackles visible to the jury during the penalty phase of trial was unconstitutional unless "justified by an essential state interest—such as the interest in courtroom security—specific to the defendant on trial." *Deck* at 2009. Though the *Deck* case dealt with penalty-phase shackling, the court also noted the issues implicated in guilt-phase visible shackling: 1) the presumption of innocence, 2) hindrance of the assistance of counsel, and 3) that "judges must seek to maintain a dignified judicial process including respectful treatment of defendants." *Deck* at 2013. Where the record lacks a proper finding of the necessity for shackles by the trial court, the harmless error analysis applies—the State must prove "beyond a reasonable doubt" that the shackling error did not contribute to the verdict obtained.

The 6th Circuit then applied the *Deck* rationale to the instant case. In this case, the record did not demonstrate a proper inquiry and finding by the trial court that shackles were necessary. Thus, petitioner's due process rights were violated. As such, the Court next looked to see whether the State could prove beyond a reasonable doubt that this violation did not affect petitioner's verdict. After a review of the evidence presented at trial, the 6th Circuit noted that this was not a "close case based purely on circumstantial evidence" as it was in the unconstitutional shackling case of *Ruimveld v. Birkett*, 404 F.3d 1006 (6th Cir. 2005). The court instead found that the evidence of petitioner's guilt was overwhelming: many witnesses testified seeing petitioner and his co-defendants outside the prison; the guards that were kidnapped testified against him; petitioner was observed in the getaway vehicle, and was arrested from the vehicle when it was finally stopped. The 6th Circuit determined that, in light of the overwhelming evidence of petitioner's guilt demonstrated at trial, the shackling of petitioner during trial amounted to harmless error. The district court's denial of relief was affirmed.

David Harris

***Ali v. Tennessee Bd. of Pardon and Paroles*,**
431 F.3d 896 (6th Cir. 2005)

Abela v. Martin's *holding that the 28 U.S.C. § 2241 (d)(1) statute of limitations for federal habeas corpus filing is tolled during the 90 days a petitioner has to seek a writ of certiorari from the U.S. Supreme Court from the denial of the state's highest court, even if petitioner does not actually file for a writ of certiorari, is not limited to habeas petitions challenging state court convictions, but is also applicable to habeas petitions challenging administrative decisions*

Tennessee prisoner was denied parole on August 24, 2000. Claiming that the standard used to deny his parole was an *ex post facto* application of parole rules that were not in place when he was sentenced, he appealed this decision. Petitioner first sought review through the parole board's administrative procedures. His requests were denied on December 12, 2000. Petitioner next sought relief in the Tennessee state courts. The Tennessee Supreme Court ultimately denied his request to appeal on July 8, 2002. Petitioner did not seek a writ of *certiorari* from the U.S. Supreme Court.

Petitioner next sought a writ of *habeas corpus* under 28 U.S.C. § 2254. The district court interpreted this petitioner as having been brought under 28 U.S.C. § 2241, because it appeared to challenge the "execution of the sentence or manner in which the sentence was being served." However,

as petitioner's motion was filed on July 16, 2003, the district court then dismissed the petition as untimely, because it was not filed within the one (1) year statute of limitations provided in 28 U.S.C. §2241 (d)(1). Petitioner appealed to the 6th Circuit.

Citing *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc), the 6th Circuit held that, even though petitioner did not seek a writ of *certiorari*, the statute of limitations for his *habeas* petition was tolled during the 90 days following the Tennessee Supreme Court's denial of his case. The court specifically did not decide when his time began running, *i.e.*, from the denial of parole or from the Tennessee Supreme Court's denial of his claim. Even if the time ran from the denial of parole, his subsequent appeals from that decision (*i.e.*, the factual predicate underlying his claim) tolled the statute of limitations per 28 U.S.C. § 2241 (d)(2). Either way, petitioner's claim was timely; the 6th Circuit reversed and remanded the case for consideration on the merits.

***King v. Bobby*,**
___ F.3d ___, 2006 WL 44220 (6th Cir. 2006)

A defendant may not refuse to hire and retain a lawyer while simultaneously refusing to represent himself; where repeated opportunities to retain counsel are sabotaged by the client himself, the defendant may, in effect, "choose" to proceed pro se

Petitioner was indicted on several charges in Ohio. After pleading not guilty, petitioner hired and fired several attorneys over the next year. The trial court finally told petitioner's counsel at the time that he would not permit him to withdraw from the case, regardless of nonpayment of fees, etc. Nonetheless, counsel asked to withdraw claiming nonpayment of fees, distrust of counsel by client, a conflict of interest in representing both petitioner and his wife, and petitioner's request that counsel perform unethical acts. The trial court refused to allow counsel to withdraw from petitioner's case, though did allow him to withdraw from the wife's case. Counsel asked the court to reconsider because petitioner had fired him. The trial court held a hearing in which petitioner claimed he just inherited money, that his new car was right outside the window, and that he wanted to go back to a previous attorney. The trial court informed petitioner that he believed petitioner was never going to retain counsel, but would indefinitely continue hiring and firing attorneys as long as he was allowed. The trial court denied the motion to continue, and informed petitioner he was going to trial on the factually uncomplicated counts. Counsel was required to be present and available as "standby counsel," and the choice to use him was petitioners. Petitioner stated on the record that he felt he was being denied his constitutional right to the effective assistance of counsel.

After this hearing, petitioner met with the prosecutor, without counsel, and agreed to plea terms. Petitioner entered a guilty plea without counsel, and signed a waiver indicating that he wanted to waive counsel. Petitioner also indicated to the court that he had not inherited any money or bought a new car, at which point he was held in contempt for his prior lies. Petitioner was sentenced according to the agreement, and without counsel.

On appeal, petitioner claimed that he did not waive his right to receive effective assistance of counsel, and that the trial court did not advise him of the dangers of self-representation. The appellate court rejected his claims, noting that the trial court held a hearing regarding his problems retaining counsel, and that petitioner waived his right to counsel orally in open court. Further, the court required counsel to remain available for him. Ultimately, the court found that petitioner "continually precipitated his own problems," and affirmed his conviction.

The 6th Circuit reviewed this case in light of the clearly established precedent of *Faretta v. California*, 422 U.S. 806 (1975). *Faretta* held that a defendant has a right to represent himself and forego counsel, as long as the waiver of counsel is knowing and intelligent. The 6th Circuit determined that though petitioner did not ask to represent himself, he necessarily did so in rejecting all of his other options—*i.e.*, failing to go ahead with his attorney, or getting another attorney to represent him in time for trial. Moreover, petitioner waived his right to an attorney orally and in writing during his guilty plea. The remaining inquiry, therefore, was whether the waiver was knowing and intelligent.

The 6th Circuit found that the trial court was stuck "reining in a defendant who was attempting to manipulate the system by first refusing to retain an attorney, then by refusing to work with his attorney. Under those circumstances, the trial court was justified in letting King proceed *pro se*." The district court's decision denying *habeas* relief to petitioner was affirmed.

***In re: Bowen*,**
___ F.3d ___, 2006 WL 146200 (6th Cir. 2006)

Note: this opinion is only applicable to petitioners filing a numerically second habeas corpus petition due to the fact that they had unexhausted claims they could not present in their first petition, filed subject to ***Austin v. Mitchell****, and filed prior to the holding of* ***Cowherd v. Million****.*

In *Austin v. Mitchell*, 200 F.3d 391 (6th Cir. 2000), *overruled by Cowherd v. Million*, 380 F.3d 909 (6th Cir. 2004) (en banc), the 6th Circuit held that claims not raised in a state post conviction procedure did not receive tolling from AEDPA's one year statute of limitations during the post conviction actions. In other words, for claims exhausted and decided on direct appeal, a post conviction motion raising only

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ineffective assistance of counsel (IAC) would not toll the AEDPA time limit for the direct appeal issues already decided by the state courts.

Cowherd v. Million, *supra*, straightened this out. Under *Cowherd*, the statute of limitations remained tolled as long as a claim (which would become a federal *habeas* claim) was still being decided in a proper post conviction action.

Petitioner was caught between these two decisions. Pursuant to *Austin*, petitioner filed a federal *habeas corpus* on his exhausted issues within one year of receiving a decision on them from the appellate court. Had petitioner filed a mixed petition at this time within the 6th Circuit, his entire petition would have been dismissed per *Rose v. Lundy*, 455 U.S. 509 (1982). Moreover, the 6th Circuit had not, at this time, approved a "stay and abeyance" procedure. Petitioner went to federal court on these claims, and was denied *habeas* relief.

Petitioner also sought relief on his post conviction claims of IAC in state court. When his IAC claim was finally rejected by the state courts, petitioner filed another *habeas corpus* petition. The district court viewed this petition as a second or successive petition, and transferred it to the 6th Circuit for petitioner to seek authorization to proceed, per 28 U.S.C. § 2244 (b)(3)(A).

The 6th Circuit found that, while numerically second, the instant petition was not "second or successive" per 28 U.S.C. § 2244 (b). In this action, petitioner neither presented a claim that had been abandoned or sought to re-litigate issues from his first claim. Specifically, the 6th Circuit determined that petitioner "was not motivated to withhold his unexhausted claim from his first *habeas* petition out of a desire to vex, harass, or delay, but was rather barred as a matter of law from bringing his ineffective assistance claim in his first habeas petition through no actions of his own." The 6th Circuit denied petitioner's motion to file as unnecessary, and transferred his petition back to the district court for consideration on its merits. ■

Public Advocate Message to DPA Staff on Martin Luther King, Jr. Day

Staff, in the early morning hours of this holiday, I wanted just to drop you a line regarding this day. After the last few holidays, replete with eating and gift giving and arguing over whether something should be called a holiday tree or not, it is interesting to contemplate the meaning of this day. I grew up at the time of the civil rights movement. I vividly recall visiting my grandma and grandpa in west Texas and seeing separate drinking fountains and signs in restaurants reserving the right to exclude certain customers. I attended a college that was only in its second year of integration when I arrived. I watched TV as the nation's cities exploded in anger in Watts and Harlem and elsewhere. I learned of Dr. King's assassination while in college, and drove through the night with my brother and others to march in the streets of Memphis to honor him and his legacy. So it was with great pride when years later a day was set aside to honor Dr. King, and to honor what he stood for. We as a nation are now trying to figure out how to honor him, how to remember him, how to hold up what he stood for. Certainly all recall the dream, and the speech that he gave calling us to come together as one people. But we should also remember his courage as a young pastor in the late 50's who answered an inner call to stand up for people when to do so meant to put his life on the line. We should remember the number of times he was jailed for fighting for equal rights. We should remember the vilification when he expanded his message beyond civil rights to calling for peace in Vietnam. We should remember the Poor Person's March. We should remember his going to Memphis to stand up for the least of these, the garbage workers, in their fight for dignity. We should remember this leader, but also remember all those others—Dr. Abernathy, Dr. King's wife Coretta, Julian Bond, Rosa Parks, Jesse Jackson, Rep. Lewis, who followed Dr. King in establishing equal rights for African-Americans in this nation that even now is only 50 years from apartheid. We as public defenders and disability rights advocates have much to draw on from the civil rights struggle. This should be a day when we feel pride in what has occurred in our nation. We too stand up for equal rights for poor people, for people with disabilities and mental illness, for the least among us. I hope that today you find a way to both remember Dr. King, to recall what this nation has gone through in the struggle for equal rights, and to take pride in continuing the struggle in your work as public defenders and equal rights advocates.

Ernie Lewis
Public Advocate

The greatness of a community is most accurately measured by the compassionate actions of its members, ... a heart of grace and a soul generated by love.

— Coretta Scott King

KENTUCKY CASE REVIEW

By Astrida Lemkins, Appeals Branch

Commonwealth v. Michael Kelly
— S.W.3d ——, 2005 WL 3500285, Ky.,2005.
Reversed and Remanded
December 22, 2005
To Be Published

The Appellee was indicted on three counts of trafficking in a controlled substance and one count of driving under the influence. He moved to dismiss the counts based on the federal and state constitution's prohibition against unlawful searches and seizures, arguing that no reasonable suspicion existed from which to conduct the investigatory stop, and that the tip was "anonymous." The trial court sustained Appellee's motion and the Commonwealth appealed to the Court of Appeals. In a 2-1 decision, the Court of Appeals upheld the lower court's decision to suppress the evidence obtained from the illegal search. The Kentucky Supreme Court granted discretionary review and reversed and remanded.

On October 12, 2002, Lexington police received a 911 call from two employees of the Waffle House. They told the dispatcher that a man who was leaving the restaurant was intoxicated. They described the suspect as a white male and the vehicle was described as being a red, older model Camaro with Tennessee plates. The dispatcher sent an "attempt to locate" broadcast on all police scanners.

An officer arrived at the Waffle House where he saw two people standing outside the restaurant pointing across the street to a red Camaro. The officer drove across the street and followed the Camaro to a hotel next door. The officer then turned on his flashing lights and proceeded to conduct an investigatory stop of the vehicle and the driver.

The officer admitted that prior to stopping Appellee's vehicle, he did not personally observe any criminal or suspicious activity by the Appellee. Once the vehicle was stopped, the officer did detect a strong smell of alcohol. He conducted several field sobriety tests that the Appellee failed. The officer searched the person of the Appellee and found 38 oxycontin pills, $2800 in cash, and another pill bottle. A search of the vehicle yielded more pills and a gun.

The circumstances and setting of this case do not support the conclusion that the tip was truly "anonymous." The tipsters did not give their names but they did: 1) identify themselves as employees of the Waffle House Restaurant where they worked; and 2) provided the location of the restaurant where they worked. The fact that the two individuals were standing outside the restaurant and were pointing to the vehicle they had described when the officer arrived also supports the conclusion that the tips were made by identifiable informants as opposed to anonymous informants.

Astrida L. Lemkins

Cases involving identifiable informants are entitled to a greater presumption of reliability. The reliability and veracity of the tip was corroborated by the officer to the extent that 1) he was able to verify most of the details given in the tip, including the identity of the tipsters, and 2) he was able to personally observe the tipsters.

Darrell Wayne Morgan v. Commonwealth
— S.W.3d ——, 2006 WL 140564, Ky., 2006
Affirming in Part and Reversing in Part
January 19, 2006
To Be Published

Appellant was convicted of first-degree burglary, second-degree stalking, two counts of kidnapping, first-degree sexual abuse, terroristic threatening, and first-degree criminal trespass. He was sentenced to thirty-five years imprisonment. The Kentucky Supreme Court affirmed all convictions except the conviction for stalking in the second degree.

Appellant was an admitted voyeur who watched a couple engaging in sexual intercourse through the bedroom window of their trailer. After a few hours, he cut a telephone line and then entered the residence by cutting a window screen. The couple, who were now asleep, were ordered by Appellant to lie on their stomachs. He told them if they did not do exactly as he said, he would blow both of their heads off and burn down the trailer. One of the victims asked Appellant how he had found her gun, and Appellant told her that he had been in the trailer numerous times and knew where everything was. He also bragged about entering hundreds of other homes in the county.

Appellant forced the female victim to remove her clothes and told her to get her vibrator, while keeping the gun against the male victim's head. She said she did not own a vibrator but Appellant told her he knew that she owned one. When she went to the dresser drawer to retrieve it, she dialed 911 on a telephone that was on a different line than the one

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Appellant had cut before entering the trailer. Appellant forced the female to touch herself sexually while he rubbed her foot and leg.

A few minutes later a car pulled up and Appellant told the female to get rid of whoever was at the door. It was the police. The female victim was able to tell the police that Appellant had a gun. She was whisked outside. Appellant then fled the trailer.

Peremptory Challenges Are Not Substantial Rights, Overruling *Thomas v. Commonwealth*. The court agreed that it was error for the trial court to not dismiss one of the jurors for cause. But, because Appellant used one of his peremptory strikes to remove this juror, the court held that no harm was done. The court stated that the end result was that Appellant was tried by a fair and impartial jury, making reversal unwarranted.

References to Appellant's statement that he had been in hundreds of other houses did not violate KRE 404(b.) An admonition would have been appropriate but Appellant waived his right to an admonition, thus no error occurred.

No violation of KRE 404(c) occurred because it was not the intent of the Commonwealth to introduce the statements as evidence. The references to Appellant being in "hundreds of other houses" were non-responsive comments made by the victim as she testified. There was no intent by the Commonwealth to introduce these prior bad acts.

No violation of KRE 403 occurred. The probative value of the victim's statements outweighed any prejudical effect to Appellant.

The trial court's refusal to include a definition for "course of conduct" in the second-degree stalking instruction was reversible error. Appellant orally made a motion to include the definition of stalking in the instruction but the trial court refused. The court did allow Appellant to argue this in closing argument, which Appellant did do. However, the Commonwealth told the jury in closing that if it was not in the instruction, it was not part of the law, thereby eviscerating Appellant's argument. *Coopers Instruction's* state that a definition of "course of conduct" must be included in the jury instructions. Therefore, failure to do so was reversible error.

Appellant was entitled to a directed verdict of acquittal on the stalking charge. Two or more incidents that cause mental distress to the victim are required to prove stalking. The Commonwealth was unable to show that the victim was aware and was mentally distressed by any previous behavior of Appellant. Therefore, the Commonwealth did not meet its burden of proof, therefore, Appellant was entitled to a directed verdict of acquittal.

Voyeurism is not a lesser included offense of first-degree burglary. Voyeurism requires proof that the defendant entered or remained unlawfully for the purpose of viewing another individual's body or sexual conduct. Proof of this fact is not required to prove burglary in the first-degree, and therefore, is not a lesser included offense of burglary.

Timothy Marteves Taylor v. Commonwealth
— S.W.3d ——, 2006 WL 140567, Ky., 2006
Affirming
January 19, 2006
To Be Published

Appellant pleaded guilty to one count of trafficking in a controlled substance and one count of possession of marijuana, saving for appeal the issue of whether the statements made by Appellant and the evidence found on the person of Appellant should be suppressed. He was sentenced to five years imprisonment. Appellant appealed to the Court of Appeals as a matter of right. The Court of appeals affirmed. The Kentucky Supreme Court granted discretionary review.

Police received information via a confidential, reliable source that Appellant was in possession of crack cocaine. The informant gave a detailed description of Appellant's physical appearance, clothing, and whereabouts. The officers saw Appellant and believed he matched the description given to them by the informant. As the officers began to approach Appellant, he began walking in the opposite direction, occasionally looking back at the officers. Eventually, the officers confronted Appellant and handcuffed him.

The area they were in was known for its drug-activity. One officer said Appellant was restrained because he was considered a flight risk. After handcuffing him, he was told he was not under arrest, and that the police had been told that he had drugs on his person. At that point, Appellant stated that he had cocaine and marijuana in his pockets. He was then arrested and searched. Afterward, he was read his *Miranda* rights and refused to answer any questions.

During pre-trial motions, Appellant moved to suppress his statements and the evidence found on his person. The trial court held that the police officers had a sufficient basis for initiating contact with Appellant and securing him for his protection as well as their own. Further, the court held that the officers were not interrogating the Appellant.

The Appellant entered into a conditional guilty plea and appealed to the Court of Appeals, which affirmed the conviction. The Kentucky Supreme Court granted discretionary review.

Even though Appellant was handcuffed, he was not subject to custodial interrogation. Appellant was not in custody for Miranda purposes merely because he was handcuffed and detained in order to prevent his flight until the

investigation was completed. Telling an individual the reason he was stopped by police is not an interrogation. The statement made by police informing him as to why he was being detained was not reasonably likely to elicit an incriminating response.

Nathaniel Wood v. Commonwealth of Kentucky
178 S.W.3d 500 (Ky. 2005)
Affirming
November 23, 2005
To Be Published

Appellant was convicted of capital murder, capital kidnapping, kidnapping, first-degree criminal trespass, second-degree assault, and violation of a protective order. He was sentenced to the following: life without parole for the capital murder and capital kidnapping charges, twenty years for the kidnapping charge, twelve months for the trespass charge, five years for the assault charge, and twelve months for violation of the protective order.

Appellant assaulted his ex-girlfriend causing bruising to her ribs and a cut lip. She petitioned the district court for an emergency protective order (EPO.) The district court issued the EPO and set a hearing date ten days later.

Before the hearing date, the ex-girlfriend was driving down the road with a friend in the passenger's seat. Appellant was also in the vicinity and saw his ex-girlfriend. He cut off her vehicle, effectively blocking her path. Appellant exited his vehicle and began waiving a gun. He shot his ex-girlfriend through the driver's side window. She fell silent. The friend seated in the passenger side could not exit his door because it was jammed and he had to crawl out the driver's side window. After he got out, he saw Appellant crouched beside the rear driver's side door with his gun drawn. A struggle ensued, with the friend being shot in the forearm as Appellant attempted to remove his ex-girlfriend from the vehicle. At some point during the altercation, Appellant was shot twice in the abdomen and once in the leg. The friend went to get help. Meanwhile, Appellant was able to remove his ex-girlfriend from her vehicle and placed her into his vehicle, with her legs hanging out the back driver's side door and dragging on the ground. He took off, with law enforcement in hot pursuit. He ended up in the yard of Ms. Burldean Summers.

Appellant ran into Summers' home, leaving the body of the ex-girlfriend in the vehicle. Summers thought Appellant had been in an accident, and showed him to the bathroom. When law enforcement arrived, he locked himself and Summers in a spare bedroom. After three hours, he released Summers. The stand-off continued for approximately twenty-four hours, after which he was finally arrested.

The language of KRS 532.025(2)(a)(1) is constitutional. The language is not so broad or vague as to leave the jury unfettered in what it might consider a "substantial history of serious assaultive convictions." Nor is the language so undefined that the jury is left to speculate as to what circumstances would satisfy the aggravating circumstances. The language is not so conclusive that the circumstance would apply to any death-eligible defendant.

An EPO may be used as an aggravating circumstance in a capital murder case. The validity of an EPO is not a proper subject of inquiry when it is offered as proof of an aggravating circumstance in a capital murder prosecution or to prove violation of the EPO. Adverse parties to an EPO are not denied due process of law because they have available to them a route by which to directly challenge the order.

John Williams v. Commonwealth of Kentucky
178 S.W.3d 491 (Ky. 2005)
Affirming In Part and Reversing and Remanding in Part
November 23, 2005
To Be Published

Appellant was convicted of four counts of use of a minor in a sexual performance. He was sentenced to ten years on each count, to run consecutively for a total of forty years.

Appellant allegedly had taken six digital photographs of his eight-year old stepdaughter. Of the four photographs that resulted in Appellant's conviction, two of the photographs showed the stepdaughter in various stages of undress, one depicted her sitting naked on the side of the bathtub and another revealed her standing naked in the shower.

Appellant's wife found her husband looking at internet pornographic sites and became concerned that he may have downloaded these images to the family computer so she enlisted the help of a neighbor who was a computer expert. The neighbor "saved" the hard drive to his own computer. While viewing the contents, he found the photographs of the stepdaughter and numerous deleted images of child pornography. The neighbor notified the sheriff and turned over the contents of the hard drive.

Person who generates differing and multiple prohibited photographs or causes a child to engage in the creation of such photographs commits multiple offenses of KRS 531.310 even though each such differing photograph involves the same subject captured in a narrow timeframe. KRS 531.300(5) provides "a performance includes any play, motion picture, photograph or dance." The plain language used in the definition of "performance" focuses on "any photograph." The singular form of "photograph" read in conjunction with the term "any" clearly indicates that the Legislature intended prosecution for each differing photograph.

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Reversible error occurred in the penalty phase when reference to a prior conviction that was on appeal was introduced as evidence. Appellant had been convicted of three counts of third-degree rape; however, at the time that this conviction was introduced, the convictions were on direct appeal. Appellant had no other admissible prior convictions. Therefore, the error was not harmless and Appellant is entitled to a new sentencing phase.

Kenneth White v. Commonwealth of Kentucky
178 S.W.3d 470 (Ky., 2005)
Affirming
November 23, 2005
To Be Published

Appellant was found guilty of complicity to murder. The jury found an aggravating circumstance in that the murder was an intentional act and that the victim had been "a local public official or sheriff engaged at the time of the act in the lawful performance of his duties." Appellant was sentenced to life without the possibility of parole. He appealed to the Kentucky Supreme court as a matter of right.

Danny Shelley shot the local sheriff, Sam Catron, at a fish fry and killed him. Shelley shot the sheriff as he brought two cakes to place in his police cruiser The shot came from approximately seventy-five feet away. Immediately after, a motorcycle was heard leaving the scene. A citizen pursued the motorcycle, caught up to him, and contained him until police arrived. The man riding the motorcycle was Shelley.

The last phone number Shelley called on his cell phone was to Appellant. Jeff Morris, Catron's political opponent who also attended the fish fry, was the owner of the motorcycle. The police considered these two men as persons "of interest." Appellant was Morris' campaign manager. Meanwhile, Shelley quickly admitted to his involvement and that of Morris. Later he also implicated Appellant.

Appellant's residence was searched the next day and Appellant gave police a micro-cassette on which he had recorded some of his phone conversations the previous evening.

After the search, Appellant was driven to the Commonwealth Attorney's office for a second interview where Appellant offered to assist the police in gathering information against Morris, but the offer was declined. On the ride home, Appellant stated that he heard Shelley say that the only way to beat Catron was "to blow off his head." Appellant further remarked that Shelley boasted of his marksmanship skills.

The next day, both Appellant and Morris were arrested. Shelley, Morris, and Appellant were indicted for murder and the Commonwealth gave notice of its intention to seek the death penalty. Morris and Shelley entered guilty pleas sentencing them to life without the possibility of parole for twenty-five years in exchange for testifying against Appellant.

Both Morris and Shelley testified that Appellant was extensively involved in the planning and preparing of Catron's murder. Morris also stated that Appellant was heavily involved in the drug trade. Other witnesses also testified to Appellant's heavy involvement in the drug trade.

Evidence of Appellant's uncharged drug crimes was admissible under 404(b). A major portion of the Commonwealth's witnesses, 9 of 22, depicted Appellant as a drug dealer. The Commonwealth argued that this was evidence of motive for participating in the murder conspiracy, and therefore admissible under KRE 404(b.) The court stated that the law only requires that there be a direct connection between the uncharged drug offenses and the murder. The court held there clearly was a sufficient inferential connection to allow the introduction of the drug evidence to show motive.

Aggravating factor, as it applies to "sheriff," was submitted to jury appropriately. Sheriff's attendance at public fish fry while in uniform and driving his police cruiser is ample evidence that he was performing a law enforcement function and was thus "engaged . . . in the lawful performance of his duties." Therefore, the aggravating factor was correctly submitted to the jury.

"Duty condition" requirement under KRS 532.025(2)(b)(7) must be proved in order for jury to find aggravating factor when the victim is a "public official." That public officials and various law enforcement officers are listed in the same subsection supports the conclusion that the General Assembly intended the duty condition requirement be applicable to both groups. Thus, the fact that the victim was a public official is not enough to submit the aggravating factor to the jury. The public official must be engaged in his or her official duties at the time the official is killed to have the aggravating factor submitted to the jury.

Appellant was not entitled to a jury instruction on criminal facilitation. The evidence presented allowed for no middle ground. Either Appellant was guilty of actively participating in the murder plot, and he intended for it to be carried out, or he was an innocent bystander who happened to present when some of the instruments used in the crime were acquired. To give a facilitation instruction in this case would require that a facilitation instruction be given in all cases where a defendant is charged with complicity. ■

JUVENILE COLUMN

JUVENILE DEFENDER LEADERSHIP SUMMIT

By Londa Adkins and Dawn Fesmier

On October 20, 2005, Londa Adkins and Dawn Fesmier headed out to Los Angeles, California to attend the 3-day Juvenile Defender Leadership Summit. The National Juvenile Defender Center sponsors this event annually in various locations. The Center's mission is "To ensure excellence in juvenile defense and promote justice for all children." These annual events draw juvenile defense attorneys from across the United States and provide the latest information on juvenile defense.

The highlight of the summit was the *Roper v. Simmons* decision. Jennifer Herndon, the attorney of record in the United States Supreme Court discussed the impact of this decision today and in the future. Obviously, this was a historic victory for juveniles throughout the United States and had reason to be celebrated at this conference. The language of *Roper* and the promise of its impact on every aspect of juvenile defense excited the crowd and seemed to breathe promise into the summit.

The plenary sessions covered a variety of regional and national issues facing the youth of today. A favorite was the Los Angeles based Homeboy Industries founder Father Gregory Boyle. Father Boyle started Homeboy Industries in 1992 and today is the largest gang intervention program in the country.1 The program involves job development, currently a silkscreen business, employment referral center and restaurant. Rival gang members are welcomed to work side-by-side with the understanding of the three golden rules: "No Hanging, Banging or Slanging." The tattoo removal is considered a critical decision to a gang member and is included in the program. The waiting list is tremendous and signifies a break from the gang life.

Londa attended the breakout session "Strategies for Working with Young Gang Members." Even though Los Angeles is the gang capital of the world, there are direct similarities to the issues facing poor, urban juveniles in the Commonwealth. Father Boyle is an incredible speaker and has many mottos, one of particular meaning is NOTHING STOPS A BULLET LIKE A JOB. The repeated message is that juveniles join gangs because they have lost hope. They see no future or self-worth based on poverty, family issues, and society's perception that their lives are not as valuable as others. Gang violence is irrational and has devastated communities in Los Angeles. Father Boyle stated that it is easier to condemn the youth rather than understand the issue. Boyle explained the value of communicating with all members of society and respecting each other. One humorous anecdote involved his new venture, Homegirl Café. The restaurant employs ex-gang members and had only been opened a short while. Father Boyle explained that females in gangs "may be a little *harsh* when dealing with the public and although the food is getting rave reviews, the temperament of the wait staff may need some fine tuning." Father Boyle related that although the employees of both ventures came from rival gangs, they begin to share common experiences and develop empathy based on similar experience and struggle.

Juvenile sexual offenders are being treated quite differently around the country. One session presented volumes of fascinating research regarding juvenile sexual offenders and the probabilities of their recidivism as adults. The research presented did not correlate with the message of our own juvenile justice program. However interesting, we had no idea how relevant and important the information would be in just a short few months. A portion of the discussion centered on the studies that showed that the vast majority of juvenile sexual offenders do not become adult sexual offenders. Moreover, the vast numbers of adult sexual offenders were not juvenile sexual offenders. Instead, many juveniles labeled as juvenile sexual offenders were merely exploring their own sexual identity and curiosities, rather than having any criminal intent. With this evidence it is disturbing to think of the consequences of juveniles in the Commonwealth being labeled as sexual offenders for their entire lives when the studies do not support the belief that these juveniles will re-offend as adults. Here in the Commonwealth, the legislature is deciding critical bills related to the treatment of juvenile sexual offenders. This presentation delineated the negative effects of a future juvenile sexual offender registry based on clinical research. Several sessions dealt with the defense of juvenile sex charges. The most valuable to current juvenile practice is the criminalization of adolescent sexual behavior. The very real practice of prosecuting consensual, peer sexual conduct is apparent in the Commonwealth. The sexual offender statutes are being misapplied throughout the nation without regard to the legislative intent of registration programs, DNA collection, and clinical polygraph testing. The mandatory sexual offender statutes do not accommodate individual treatment options without prosecution. This session described the psychological issues that may be addressed with a juvenile client when treatment.

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Routinely, competency is discussed in various venues throughout the summit. A session on juvenile brain development, conducted by Dr. Mark Cunningham, related the physiology of juvenile brains. This information is vital to all attorneys practicing juvenile law primarily because of the juvenile brain, not yet fully developed, and does not have the capacity to behave or understand like adults. For example, when charged with a public offense, juveniles do not fully understand the consequences of pleading guilty. Whereas adults, when deciding if they should plead guilty or not guilty, look at the long term consequences of such plea. Adults have the brain development to weigh the consequences of this plea with potential future offenses. Most adults understand that offenses are statutorily defined and the Commonwealth must establish all elements in order to convict them of the crime charged. Conversely, juveniles often think "not guilty" is lying to the court and usually cannot understand the difference between legal standards and moral issues. The presentation changes the way of questioning clients. It is amazing how the information is reinforced by juveniles' statements. A majority relate that they pled simply because they did the offense and it was the "right" thing to do. The juveniles are scared and learn from an early age that lying is bad. Most want to tell the truth and go home. Usually juveniles believe an admission will allow them to go home that day. Juveniles are at a natural disadvantage in the court system on many occasions because they do not have the mental maturity to weigh consequences that may impact their future.

In a breakout session, the discussion highlighted the legal strategies and techniques used to litigate extended juvenile jurisdiction (EJJ). *Apprendi v. New Jersey* and related cases were discussed to reaffirm the crucial role of the jury and proof beyond a reasonable doubt in findings of facts that impact youthful offenders. The participants discussed vast differences throughout the country regarding the treatment of serious offenders.

Often, the summit covers novel legal strategies or current events. *Legal Strategies to Support LGBTQ* (lesbian, gay, bisexual, transgender or questioning) *Youth* highlighted the complexities of defending this group of juveniles. Frequently, these individuals are subject to verbal and physical harassment and abuse. The session provided insight into the struggles these juveniles face as well as techniques to advocate for your client. In 2002, staff members at Legal Services for Children2 and the National Center for Lesbian Rights3 launched the Model Standards Project. The Project is a national, multi-year project to develop and disseminate model professional standards for serving LGBTQ youth in out-of-home placement. This program focuses on education and the development of professional standards to provide responsive and improved services to these juveniles. The information provided valuable information to better serve our juvenile clients.

Both Londa and Dawn found this conference extremely practical and informative. Many of the issues discussed and lessons learned have been successfully incorporated in the ways we handle the representation of juvenile clients.

Endnotes:

1.November, 2005, *Our Gang*, Oprah Magazine, 263.

2. Legal Services for Children, Inc (LSC), founded in 1975, provides direct legal representation and social work services to children and youth in the San Francisco Bay area. LSC's mission is to provide free legal and social services to children and youth in order to stabilize their lives and help them realize their full potential.www.lsc-sf.org

3. The National Center for Lesbian Rights (NCLR) was founded in 1977 and serves more than 3,000 lesbian, gay, bisexual and transgendered clients-including youth clients-in all 50 states and several countries each year. NCLR's mission is to create a world in which every lesbian can live free from discrimination. http://www.nclrights.org ■

Public Advocacy Seeks Nominations

We seek nominations for the Office of Public Advocacy Awards which will be presented at this year's 34th Annual Conference in June. An Awards Search Committee recommends two recipients to the Public Advocate for each of the following awards. The Public Advocate then makes the selection. Contact Lisa Blevins at 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; Tel: (502) 564-8006 ext. 236; Fax: (502) 564-7890; or Email: Lisa.Blevins@ky.gov for a nomination form. **All nominations are to be submitted on this form by March 31, 2006.**

- ***GIDEON* AWARD: TRUMPETING COUNSEL FOR KENTUCKY'S POOR**
- ***ROSA PARKS* AWARD: FOR ADVOCACY FOR THE POOR**
- ***NELSON MANDELA* LIFETIME ACHIEVEMENT AWARD**
- ***IN RE GAULT* AWARD: FOR JUVENILE ADVOCACY**
- **PROFESSIONALISM & EXCELLENCE AWARD**
- ***ANTHONY LEWIS* MEDIA AWARD**

PRACTICE CORNER
Litigation Tips & Comments

"Practice Corner" is brought to you by the staff in DPA's Post Trial Services Division.

Courtroom use of PowerPoint

Can an attorney use a PowerPoint demonstration to support his/her argument? Apparently yes, but no opinion has yet been published in Kentucky on the subject. In an unpublished opinion, the Court of Appeals agreed that PowerPoint is essentially a "high-tech blackboard." *Compton v. St. Elizabeth Medical Center, Inc.*, 2005 WL 327116 (Ky.App., 2005). "The use of blackboards or other visual aids rests in the sound discretion of the trial court." *See Meglemry v. Bruner*, 344 S.W.2d 808, 809 (Ky.1961), *overruled in part by Nolan v. Spears*, 432 S.W.2d 425 (Ky.1968). In *Compton*, the objecting party could identify no slide of the presentation that was not an accurate depiction of evidence or an accurate summary of an argument made by counsel.

In a published opinion in Arizona, an appellate court approved the use of a PowerPoint presentation in a prosecutor's opening statement. *State v. Sucharew*, 66 P.3d 59, 63 (Ariz.App. Div I, 2003). Key to that court's decision was that the presentation was essentially a slide show of photographs that were going to be (and later were) introduced at the trial. The court did distinguish such a presentation from one that included simulations or other computer-generated graphics.

How to Respond to Prosecutor's Intended Use of PowerPoint

1. Review in Advance - The common thread of these two opinions (and others that deal with visual aids in general) is that the presentation must be an accurate reflection of the evidence or, in closing, the arguments. Counsel should be given the opportunity to review the presentation in advance to make sure it complies with this requirement. You can't unring the bell after the jury has heard it.

2. Object to Prejudicial Effects – What makes a PowerPoint entertaining for a business meeting can be unduly prejudicial in a criminal trial. The presentation should not include computer-generated sound effects or animations. Visual aids are permitted when they "assist" counsel's statement, not when they make the statement. Sounds like crashing cars, screaming people, or even Homer Simpson have no place in a courtroom demonstration.

3. Depending on local practices, raise discovery objections – Because the demonstration is not evidence, there is no requirement that it be disclosed in advance. However, some local discovery orders may include visual aids intended to be used at trial. If so, make sure to object on that basis.

4. Make Sure PowerPoint is In the Record for Appeal – If the prosecutor simply projects the PowerPoint from his personal laptop to a screen or wall in front of the jury, that presentation is not going to be in the record for appeal. In video jurisdictions, the cameras are pointed at the judge, attorney tables, and witness box, not at the walls or screens. In order to preserve the PowerPoint for appeal, it must be affirmatively placed in the record. Counsel should ask the court for an order that the Commonwealth provide an electronic and paper copy of the presentation to the clerk to include in the record.

5. Turn the tables! – DPA has the resources available for any attorney to do PowerPoint presentations to support their trial advocacy. Throughout DPA, there are trained personnel that can assist in preparing a PowerPoint and classes are available for attorneys or support staff who want to learn. Even if your prosecutor has not yet started this practice, the proper use of computer technology can greatly enhance your effectiveness at trial.

Practice Corner is always looking for good tips. If you have a practice tip to share, please send it to Damon Preston, Appeals Branch Manager, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601. ■

Struggle is a never ending process. Freedom is never really won you earn it and win it in every generation.

— Coretta Scott King

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