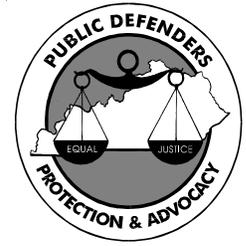


# The Advocate



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

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## **ABA FINDS SIGNIFICANT PROBLEMS WITH INDIGENT DEFENSE NATIONWIDE**



**UPDATING APPROACHES TO CLIENT COMPETENCE:  
UNDERSTANDING THE PERTINENT  
LAW AND STANDARDS OF PRACTICE**

**DISTRICT OF COLUMBIA DEFENDERS  
COMMISSION A SURVEY OF POTENTIAL  
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*The Advocate:*  
Ky DPA's Journal of Criminal Justice  
Education and Research

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

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**FROM  
THE  
EDITOR...**



*Jeff Sherr*

**Gideon's Broken Promise.** A new report released in February of 2005 by the American Bar Association Standing Committee on Legal Aid and Indigent Defendants found that, 40 years after the landmark Supreme Court decision in *Gideon v. Wainwright*, which established the constitutional right to counsel in state criminal proceedings, the American legal system still fails to protect the rights of the nation's poorest defendants by not providing properly trained and prepared defense counsel. These failings largely stem from inadequate funding of indigent defense systems nationwide, and result in the risk of wrongful convictions. In this edition of *The Advocate*, Public Advocate Ernie Lewis reviews the highlights of the report and compares the findings to the current state of indigent defense in Kentucky.

**Competency to Stand Trial.** In an article republished with permission from *The Champion*, John T. Philipsborn uses the extensive ruling in a recent federal district court case from Louisiana as a starting point in analyzing the law and science of determining competency. The article concludes with a practical checklist for the lawyer with a case in which competency must be raised.

**Eyewitness Identification Reform** is sweeping the country. In March of this year, the Virginia State Crime Commission announced it will ask police there to use techniques similar to those detailed in the U.S Department of Justice guide for law enforcement. Also in March, Wisconsin Attorney General Peg Lautenschlager announced a new statewide model policy for police conducting eyewitness identification procedures. This edition of *The Advocate* features a review of a survey commissioned by the District of Columbia Public Defender System. The survey demonstrates that jurors assess the reliability of eyewitness identification through a series of mistaken assumptions.

**Defining Homelessness.** Marianne Chavelier of the Children's Law Center provides an example of how understanding the federal definition of "homelessness" can lead to a vast increase in the ability to access services for these clients.

**Contact with the Outside.** In part III of his series describing policies and programs that impact our incarcerated clients, Bob Hubbard focuses on the rules affecting an inmate's ability to maintain contact with the outside world.

## ABA FINDS SIGNIFICANT PROBLEMS WITH INDIGENT DEFENSE NATIONWIDE

by Ernie Lewis

“Ours is a government of laws, not men, John Adams said. American society is founded on the commitment to law, binding the rulers as it does the ruled. Our willingness to assure the least among us the guiding hand of counsel is a test of our American faith.”

*Anthony Lewis,  
from the Foreword to Gideon’s Broken  
Promise (December 2004)*

The American Bar Association Standing Committee on Legal Aid and Indigent Defendants issued a significant report in December 2004 entitled *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice*. This report was written after a series of public hearings on the right to counsel in criminal proceedings conducted around the nation throughout 2003. The conclusion: “Overall, our hearings support the disturbing conclusion that thousands of persons are processed through America’s courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation.”

The report is lengthy and thorough. I will attempt only to highlight some of it, rather than to summarize all of it.

### Importance of Innocence

Central to the report is the finding that in many instances public defender systems nationwide are failing at their fundamental mission, that of ensuring that innocent persons are not being convicted of crimes. “That effective lawyers can actually protect innocent persons from being wrongfully convicted also was stressed in the Final Report of the 2000 National Symposium on Indigent Defense sponsored by the U.S. Department of Justice... “There are many ways that innocent people may be drawn into the criminal justice system... But there is one overarching way that innocent indigent people can be extricated from the system: by furnishing competent legal representation.”

### Lack of Adequate Funding

One of the primary findings of the Report is that “[f]unding for indigent defense services is shamefully inadequate.” The Report states unequivocally that “a significant funding crisis persists today.” Interestingly, the Report notes that in England and Wales, the government spends \$34 per person

on public defender services annually. In comparison, only \$10 per person is spent on public defender services in the United States. Further, much of the funding for indigent defense comes not from the states, as recommended by national standards, but rather by a variety of other sources, usually county government.

In addition, compensation for individual public defenders was found to be woefully inadequate nationwide. “[W]itnesses confirmed that inadequate compensation for indigent defense attorneys is a national problem, which makes the recruitment and retention of experienced attorneys extraordinarily difficult.”

There are also funding difficulties nationwide in regard to expert, investigative, and support services. “National standards ... have long recognized that indigent defense counsel must be provided with necessary resources such as office equipment, technology, legal research, support staff, paralegals, investigators, forensic services, and experts. However, witnesses testified that attorneys are denied access to these basic tools essential to mounting an adequate defense.”

### Excessive Caseloads

One of the biggest problems found in the report is that of excessive caseloads. “[T]estimony during the hearings revealed that oftentimes caseloads far exceed national standards, making it impossible for even the most industrious of attorneys to deliver effective representation in all cases.” For example, the report noted that in Rhode Island, public defender felony caseloads exceeded national standards by 35%, while misdemeanor caseloads were 150% of national standards.

### Lack of Contact with Clients and Continuity in Representation

Another significant problem found in the report is the absence of adequate contact between public defenders and their clients. “A witness testified that, although Louisiana by statute requires the appointment of public defenders at a hearing to be held within seventy-two hours of arrest, in Calcasieu Parish public defenders rarely meet with clients in felony cases prior to arraignment, which occurs an average of 315 days after arrest.”

### No Independence

The report found that the primary ingredient of an effective public defender system, independence, is missing in many places across the nation. The lack of independence focused on pressure from the judiciary, although some testimony was taken regarding executive branch pressure. Testimony was taken that Texas judges have retained unregulated discretion to appoint the attorney of their choice. The same is true in Michigan. “Another witness reported that, in one Nevada county, judges punish attorneys who request funds to hire experts or ‘raise ugly issues that make judges unhappy.’”

### Failures to Provide Counsel

Most distressingly, the report indicated that in many places in the United States, there is a failure to provide any attorney at all for many indigents accused of crimes. “Despite the clear mandate imposed by relevant Supreme Court decisions and additional guidance provided by national standards, the hearings confirmed that many poor persons accused of crime either do not receive counsel early enough in the process or, in some cases, at all.”

Equally problematic, the report also found places where indigents wait long periods of time prior to seeing their attorney. “Several witnesses reported that, in some places throughout the country, poor persons accused of crime are arrested and detained in local jails for months or even years before they have a chance to speak with a lawyer...As an example, the witness cited a defendant who was arrested for loitering and spent thirteen months in jail without seeing a lawyer or judge—or even being formally charged—before local civil rights advocates ultimately secured his release. In Mississippi, a woman arrested for stealing \$200 from a casino slot machine spent eight months in jail because she was unable to afford bail.”

### Seven Recommendations

The Report concludes by making seven recommendations for improving indigent defense in the United States. These recommendations are as follows:

**Recommendation #1: “To fulfill the constitutional guarantee of effective assistance of counsel, state governments should provide increased funding for the delivery of indigent defense services in criminal and juvenile delinquency proceedings at a level that ensure the provision of uniform quality legal representation. The funding for indigent defense should be in parity with funding for the prosecution function, assuming that prosecutors are funded and supported adequately in all respects.”**

**Recommendation #2: “To fulfill the constitutional guarantee of effective assistance of counsel, the federal government should provide substantial financial support for the provision of indigent defense services in state criminal and juvenile delinquency proceedings.”**

**Recommendation #3: “State governments should establish oversight organizations that ensure the delivery of independent, uniform, quality indigent defense representation in all criminal and juvenile delinquency proceedings.”**

**Recommendation #4: “Attorneys and defense programs should refuse to continue indigent defense representation, or to accept new cases for representation, when, in the exercise of their best professional judgment, workloads are so excessive that representation will interfere with the rendering of quality legal representation or lead to the breach of constitutional or professional obligations.”**

**Recommendation #5: “Judges should fully respect the independence of defense lawyers who represent the indigent, but judges should also be willing to report to appropriate authorities defense lawyers who violate ethical duties to their clients. Judges also should report prosecutors who seek to obtain waivers of counsel and guilty pleas from unrepresented accused persons, or who otherwise give legal advice to such persons, other than the advice to secure counsel. Judges should never attempt to encourage persons to waive their right to counsel, and no waiver should ever be accepted unless it is knowing, voluntary, intelligent, and on the record.”**

**Recommendation #6: “State and local bar associations should be actively involved in evaluating and monitoring criminal and juvenile delinquency proceedings to ensure that defense counsel is provided in all cases to which the right to counsel attaches and that independent and quality representation is furnished. Bar associations should be steadfast in advocating on behalf of such defense services.”**

**Recommendation #7: “In addition to state and local bar associations, many other organizations and individuals should become involved in efforts to reform indigent defense systems.”**

### The Kentucky Experience

Reading this report was both heartening and distressing for me as Kentucky Public Advocate. First, it was a cause for celebration because I know that our system of indigent defense is in much better shape than that found in the report in many parts of the United States.

Kentucky is blessed by having a statewide administered and funded public defender system. DPA is an independent state agency attached to the Justice and Public Safety Cabinet.

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net for administrative purposes. DPA is presently experiencing the most independent status in recent memory. DPA has an experienced and effective oversight commission that has as one of its statutory responsibilities the maintenance of independence. Indigent defense is primarily funded by the state, as recommended by national standards, rather than by county governments. In FY05, under the Governor's Spending Plan, \$25 million of the \$32.5 million budget came from the state's General Fund. DPA is independent from the judiciary, and typically judicial interference with the appointment process or the individual representation of clients is rare indeed.

Further, salaries for Kentucky public defenders, while modest, are on a par with counterparts in the prosecutorial system. State public defenders make the same as their counterparts in the Attorney General's Office. Assistant Commonwealth's and County Attorneys typically start at several thousand dollars below that of the state public defender or assistant attorney general; on the other hand, prosecutors are able to offer more to experienced assistants than the state system is able to offer. Elected Commonwealth and County Attorneys typically earn far more than the typical directing attorney of a DPA field office.

Kentucky is also blessed by having resources for experts and investigators. KRS 31.185 has worked superbly well since its inception in 1994, and has provided a decent system for supplying experts for indigents. A DPA field office is typically staffed with one investigator. While this is sufficient for the smaller field offices, there are field offices where one investigator is clearly not sufficient for the numbers of attorneys and the caseload there.

The problems found with inadequate training in other states are not present in Kentucky. Kentucky's public defender system is well known as having one of the best public defender training programs in the United States.

However, Kentucky does continue to have significant problems. The most pervasive and chronic problem is the continued lack of adequate funding. While the United States averages \$10 per capita on indigent defense spending, Kentucky spent only \$7.31 per capita in FY04.

Another way to look at the inadequate funding is the lack of resource parity between indigent defense and the prosecution function. In FY04, Kentucky funded its public defender system at \$32.5 million. In comparison, the prosecution function was funded at approximately \$72 million. Interestingly, the report notes that nationwide, \$2.8 billion is spent on indigent defense compared to \$5 billion on prosecuting criminal cases. Kentucky is far below this 56% ratio.

The biggest problem in Kentucky's public defender system remains that of excessive caseloads. In FY04, caseloads of the average trial level public defender were 489 new open cases per lawyer per year. This represented 185% of national standards. Kentucky's public defenders had fewer than 4 hours to spend on each case, despite the fact that 23% of their cases were in circuit court.

Kentucky is not able to fund sufficient numbers of support staff at either the trial or post-trial level. At present, 1 support staff person supports 3 attorneys in our field offices. There are no paralegals. There are only 2 public defender social workers in the entire state. Clearly, Kentucky's funding has been insufficient to provide public defenders with the support they need to do their complete job.

### Conclusion

This report is well worth reading for every defender, judge, prosecutor, and public policy maker. It can be found at <http://www.indigentdefense.org>. ■

**In last year's November issue of *The Advocate*, we reported on the Kentucky Court of Appeals' holding that payment for an indigent jail inmate's psychotropic medications is the responsibility of the local jail, not the state. We noted, however, that a motion for discretionary review had been filed in the Kentucky Supreme Court. We can now report that, on March 9, 2005, the Supreme Court granted review. The case is now pending in that Court, *David Osborne v. Commonwealth*, 2004-SC-000566.**

# UPDATING APPROACHES TO CLIENT COMPETENCE: UNDERSTANDING THE PERTINENT LAW AND STANDARDS OF PRACTICE

By John T. Philipsborn

In 2000, a federal district court in Louisiana wrote one of the most extensive and thoughtful rulings on trial competence available today. The court's ruling in *U.S. v. Duhon* responded to a government agency recommendation for a finding of restoration to competence of an accused who had undergone extensive evaluation, had been found mildly mentally retarded, and had undergone competence "training" while in federal custody.<sup>1</sup>

*Duhon* is notable in at least two ways. First, the court discussed at length the fabric of the case law that defines the meaning of competence to stand trial, and also what it means to be truly restored to competence. Second, the court detailed the various categories of evidence that might be considered in a competence assessment. These ranged from the specific testing processes, to the meaning of the data obtained in testing, through the role played by lay persons' observations, and to the value of an attorney-expert's views on an accused's competence. The discussion includes consideration of the strengths and limitations of the various approaches taken by mental health professionals in assessing and "treating" Duhon.

From NACDL's point of view, the case is distinguished by the fact that the district court chose to rely, in passing, on an article published in *The Champion* describing the limitations inherent in a mental health expert's capabilities of assessing the ability to assist counsel.<sup>2</sup> It is nice to know that a federal district court judge may have been impressed enough by a piece in *The Champion* to have relied upon it – no doubt at the urging of a thorough and imaginative defense lawyer.

On the other hand, the citation is symptomatic of a problem in the competence assessment process. There are few authoritative guides on the standards of practice for both mental health experts and defense counsel in approaching competence assessment.

The dearth of published and accepted standards of practice for lawyers in competence assessments is arguably one of the many causes of the unevenness in the approaches to competence issues.<sup>3</sup> There are few sources to assist lawyers in deciding when, how, and with what approach to raise (or to choose not to raise) a competence to stand trial question in a given case.

Indeed, the courts have been extremely uneven in dealing with the definitions of competence (particularly where state statutes are far afield from U.S. Supreme Court decisions); what categories of evidence should be deemed reliable and valid where competence is at issue; what type of expertise should be relied upon by the trier of fact; what role the appointed or retained trial counsel should play in informing the court (and/or the experts) of the bases for a competence (or incompetence) adjudication; and how the approaches to competence assessments accepted in the mental health community can, and should, be integrated into the judicial findings about an individual's trial competence.

This article discusses some of the approaches experienced criminal defense lawyers have used in dealing with competence issues, especially since the previously mentioned article was published in *The Champion* in June 1998.<sup>4</sup>

Insofar as competence questions are among the "standard" mental health questions that arise in criminal cases, an effort is made to review the discussion of these questions offered in the current mental health literature on competence to stand trial questions.<sup>5</sup> This article also urges the leading criminal defense organizations to be more attentive to the development of standards of practice, and to provide more training and continuing education for criminal defense lawyers on trial competence issues. This is not only so that we, as a group, can do a better job in performing our duties, but also so that we can encourage the courts to do a better job of showing the fundamental respect for persons charged with crimes that is the basis for the requirement that a person be competent to stand trial.

### Competence And Incompetence Revisited

[If] a Man in his Sound Memory Commits a Capital Offense. . . [a]nd if, After he has Pleaded, the Prisoner Becomes Mad, he Shall not be Tried, for How can he Make his Defence?" Blackstone, *Commentaries* XXIV

In 1960, the United States Supreme Court announced in a simple, one-page opinion what is generally considered the modern statement of the requirement of competence in *Dusky v. United States*.<sup>6</sup> The requirement of competence to stand trial is "rudimentary," and it must be clear that ". . . the trial of an incompetent defendant violates due process."<sup>7, 8</sup> *Dusky*

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set out what are today generally considered the three basic elements of competence. The accused must: (1) be rational; (2) have a sufficient present ability to consult with counsel with a “reasonable degree” of rational understanding; and (3) have both a rational and factual understanding of the proceedings.<sup>9</sup> Fifteen years after *Dusky*, the Supreme Court decided *Drope v. Missouri*, which added what some commentators consider to be the fourth element of the competence test. This additional element requires that the accused have the ability to assist counsel in preparing his or her defense.<sup>10</sup>

In the years that followed *Dusky* and *Drope*, the techniques and approaches to assessing trial competence were of continuing interest to a specific community of mental health and legal scholars who focused on mental health issues in the criminal courts generally. As has tended to be true about issues involving the intersection of mental health and the law, the “line” defense bar seems to have given the development of standards of practice surrounding the evaluation, assessment, and litigation of competence a fairly wide berth. A review of the draft “ABA Standards on the Prosecution Function and Defense Function,” dating back to the decade after the decision in *Dusky*, reveals no specific discussion about competence *per se*.

By 1986, however, the ABA *Criminal Justice Mental Health Standards* addressed a wide variety of mental health and criminal case issues, including competence to stand trial. Anecdotal evidence suggests that these ABA standards were not regularly covered during continuing education programs for the criminal defense bar until the increase in sophistication in the training for death penalty defenders took hold over the last 25 years. Indeed, some otherwise extremely skilled and knowledgeable defense lawyers informally polled during the writing of this piece indicated that they have never received any training on competence assessments.

Since 1986, the United States Supreme Court has decided several cases of importance to our current understanding of competence. Two of these rulings occurred in the early 1990s. The first is *Medina v. California*.<sup>11</sup> There, the Court affirmed a decision of the Supreme Court of California, which had noted in language that has made all too little of an impression on the criminal defense bar that “. . . one might reasonably expect that the defendant and his counsel would have better access than the People [prosecution] to the facts relevant to the court’s competency inquiry.”<sup>12</sup> In additional language that was anointed by the United States Supreme Court’s affirmation, the California Supreme Court had noted that with respect to the “. . . defendant’s possible inability to cooperate with his counsel in establishing his incompetence: Counsel can readily attest to any such defect or disability.”<sup>13</sup>

This state court *dicta* underscores the value of information possessed by the criminal defense lawyer. This lawyer-based information is something that mental health professionals

have integrated into their published approaches to competence assessments — at least at the high end. The assessment of an accused’s competence is not a task that should be undertaken without the participation of that client’s lawyer — and the *dicta* quoted above supports this view. This truism has been commented on both in published decisions and in the professional literature, in part because only defense counsel in a given case can provide a description of how the lawyer and client are actually interacting, in contrast to what interaction is actually needed in the case context. “One of the most evident issues is whether the assessing professional, usually a psychiatrist or psychologist, really knows what would normally go into the defense of the case.”<sup>14</sup>

Indeed, without finding out from counsel of record what the nuances of the charges and available defenses are, and how the accused is interacting with counsel, how does a mental health professional gauge both situational awareness of rights and procedures, and the ability to assist counsel in conducting the defense? Yet, even today, anecdotal evidence suggests that neither mental health experts nor defense counsel participate in this recommended interaction — often out of sheer ignorance of the case law and literature.

Where the question of competence involves the nature, quality, and characteristics of communication (or lack of communication) between counsel and client, defense counsel will often be the best source of information.<sup>15</sup> In a standard work on mental health and the courts, the authors make a succinct point. “The clinician also needs to obtain information from the attorney. . . more important, only the attorney can provide the clinician with information about the length, substance, and nature of previous attorney-client contacts.”<sup>16</sup> This practice note should be emphasized to the criminal defense bar and mental health experts.

The second significant U.S. Supreme Court case from the early 1990s was the 1993 decision in *Godinez v. Moran*.<sup>17</sup> For practitioners who want real familiarity with the Court’s definition of competence, *Godinez* is a “must read.” *Godinez* is really the only case in which the Court has discussed the combination of the characteristics of competence to stand trial and the attributes of the accused who is competent. The *Godinez* court sets out its expectations of the situational awareness that the accused should have of his or her procedural rights, as well as the decisional abilities that are expected to flow from the accused’s understanding of the case, and interaction with counsel.

In *Godinez*, the Supreme Court ruled that there was no difference between being competent to plead guilty and being competent to stand trial. The Court emphasized that there are certain decisions that any competent accused will be assumed to have the ability and capacity to make, regardless of whether that person is going to plead guilty or stand trial. The breadth of the abilities and capacities that the court attributes to a competent accused come as a surprise to numerous lawyers and mental health professionals:

“In sum, all criminal defendants — not merely those who plead guilty — may be required to make important decisions once criminal proceedings have been initiated . . . these decisions include whether to waive the privilege against self incrimination, whether to take the witness stand, whether to waive the right to trial by jury. . . whether to decline to cross-examine certain witnesses, whether to put on a defense, and whether to raise one or more affirmative defenses.”<sup>18</sup>

Some of the sophisticated recent mental health literature covering competence acknowledges the importance of *Godinez*.<sup>19</sup>

There are other significant trial competence rulings from the U.S. Supreme Court handed down beginning in 1996. In *Cooper v. Oklahoma*, the Court decided that the standard of proof placed on the accused who is attempting to prove his incompetence cannot be so high as to violate the Due Process Clause of the U.S. Constitution.<sup>20</sup> Oklahoma’s “clear and convincing” standard proved too high. The *Cooper* opinion reviews the history of the requirement of competence in the Anglo-American legal tradition, and the court rejects a burden of proof by clear and convincing evidence based in part on what it found to be the vagaries of the competence assessment process, on the one hand, balanced against the need for courts to be assured that they are only trying competent people, on the other.

One can read into the *Cooper* decision the view that the mental health assessment sciences have not yet reached a point at which it makes sense to require high standards of proof. Because of the premium put on competence, requiring only proof by a preponderance of the evidence of incompetence will decrease the risk of erroneous findings of competence.

In 2003, the Court reconsidered psychoactive medication and competence in *Sell v. United States*, a decision that builds on the Court’s first such decision, *Riggins v. Nevada*.<sup>21, 22</sup> These two decisions will continue to be of great importance, particularly as the mental health professions in state and federal institutions administer psychotropic medications with accuseds facing trial. These cases guide the discussion in any case in which a client facing trial has been administered psychotropic medications, and particularly anti-psychotic drugs that are known, in the literature and/or in the case law, to have extensive side effects. Indeed, there is an entire body of federal and state court case law discussing the level of due process that attends the administration of anti-psychotic medication to persons in custodial settings, some of which serves as a useful backdrop to the litigation of concerns about the effects of anti-psychotics generally.<sup>23</sup>

A secondary but extremely important reason for defense counsel to be familiar with the body of law that regulates the administration of psychotropics to potentially incompetent accuseds is to ensure that trial courts properly consider all factors required by *Sell* before allowing the trial of a person medicated with, or in need of, certain classes of psychotropics to go forward.

One additional recent ruling warrants comment here. It is from the U.S. Court of Appeals for the Ninth Circuit, and involved a non-communicative death row inmate. In *Rohan ex rel. Gates v. Woodford*, the Ninth Circuit decided, first, that an accused must be competent when pursuing federal habeas relief. Second, the Court noted that the competence element requiring the ability for rational communication now has an expanded definition.<sup>24</sup>

As the Court noted, it is no longer only the capacity to communicate rationally that characterizes the competent defendant — it is also, in a larger sense the ability to assist in one’s own defense. This is a point worthy of consideration since few competence evaluations are based on examination of the latter ability. Many examiners would not know (without being informed) what goes into the defense of the case at issue. The change in the case law’s focus is a subtle elaboration. For example, a mentally retarded or disordered person may have the ability to communicate rationally on basic subjects without having a real ability to assist counsel in the conduct of the defense of a complex case. The same may be true of persons with a wide range of disorders. More generally, this means that competence assessments that focus merely on the *ability to interact* do not measurably advance an understanding of an accused’s trial (or post conviction) competence.

#### Case Law Yields Variable Assessment Practices

One is hard pressed to find the United States Supreme Court making reference to the many scholarly articles on the competence assessment protocols, tools, techniques, and instruments available. The reason for mentioning the value of the ruling in *U.S. v. Duhon* in the introduction is that it is one of the very few cases reflecting judicial commentary on what seemed defensible, or indefensible, in a particular competence assessment process. The exception is where the courts discuss questions of “medication into competence” under *Riggins* and *Sell* by urging a combination of methodical fact finding and caution — making note of the literature on the effects of certain classes of psychoactive medications that have yet to be fully understood in the mental health sciences.

However, we have yet to read a decision from the Court dealing with competence issues that goes as far as the Court’s 2002 landmark decision in *Atkins v. Virginia* in referring to what might be considered authoritative mental health literature and standards that lower courts and legislatures might consider when establishing statutory requirements for competence adjudications.<sup>25</sup>

In several respects, requiring trial competence without providing anything but a legal definition of the concept has resulted in the absence of precise guidance on how to evaluate and adjudicate competence. This means that there are numerous options open, and the quality of practice has suffered as a result. In essence, the state of the law is such that,

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at the low end, the litigation practice embodies the *dictum* that “if you don’t know where you’re going, any road will get you there.” The California Supreme Court indirectly acknowledged this problem in commenting on the value of expert testimony specific to competence:

“The chief value of an expert’s testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion . . . it does not lie in his mere expression of conclusion.”<sup>26</sup>

Reviewing courts rarely address competence questions by expressing concern either at the inadequacy of the lawyering related to a competence issue or on the poverty of an expert’s approach that compromised the integrity of proceedings. It is understood that lawyering that is measurably departing from the ABA standards, and what is locally accepted as effective lawyering, may cause reversal of a conviction or death sentence.<sup>27</sup> Since the court’s ruling in *Strickland v. Washington*, it has generally been understood that while not controlling, the ABA standards will be viewed as indicative of the standard of practice for lawyers defending criminal cases.<sup>28</sup>

While the federal courts have not issued notable decisions in which ineffective lawyering was viewed as the cause for the poor handling of the accused’s possible incompetence to stand trial, there have been a few cases in which the courts were presented with sufficient post-conviction evidence of incompetence that cases have been remanded for a retrospective competence assessment. These are cases in which the question is not whether there was ineffective representation that caused a prejudicial error warranting reversal, but rather whether there is sufficient evidence of incompetence of the accused in the record that there might have been a violation of due process in that an incompetent person was subjected to trial and punishment. These retrospective competence cases give us a type of backward description of what post-conviction courts have viewed as useful sources of information on competence.

The retrospective competence inquiry process first appeared to be disfavored by the United States Supreme Court, which warned that there would be “the difficulty of retrospectively determining an accused’s competence to stand trial. . .”<sup>29</sup> However, over time, federal and state reviewing courts have remanded so that trial courts could revisit competence questions. For example, when the Ninth Circuit remanded *Odle v. Woodford* for a retrospective competence hearing, it did so with instructions to the state trial court to determine whether “the record contains sufficient information upon which to base as reasonable psychiatric judgment” the accused’s competence to stand trial many years before.<sup>30</sup> Because neither the trial judge nor defense counsel had raised a competence question, the *Odle* court’s “recipe” for the determination was ex-

remely basic, encouraging inquiry into the availability of information from the record, any experts, and the lawyers, or investigators who might still be available.

Other courts have issued similarly basic orders for a retrospective competence assessment hearing, noting the expectation that lawyers and examining experts may have useful material available to assist in the retrospective assessment.<sup>31</sup> Significantly, while trial competence standards are described as exclusively legal, in retrospective competence assessment cases, courts have used the “reasonable psychiatric judgment” test to gauge the existence of post-conviction evidence of trial incompetence.<sup>32</sup>

### Understanding of Law Necessary To Comprehend Literature

Because competence to stand trial is a legal requirement, an understanding of the case law and statutes that make up the legal framework of competence is itself an essential foundation for a criminal defense lawyer’s reading of the pertinent mental health literature. Dr. Thomas Grisso, one of the leading scholars on the subject of evaluating legal competencies, has written several works that confirm the value of knowing the legal framework of competence to stand trial as a basis for planning, and indeed evaluating, a competence assessment process.

In his recently updated *Evaluating Competencies: Forensic Assessments and Instruments*, Dr. Grisso begins the discussion of the evaluation of competence to stand trial by reviewing the legal standards.<sup>33</sup> This recent discussion of the legal construct of competence is much more extensive than the one contained in his well-known early work on the subject.<sup>34</sup>

Drs. Melton and Poythress, who are mental health experts, joined law professors Petrila and Slobogin to publish their well-known *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, which is in its second edition.<sup>35</sup> These authors also set out certain key legal definitions as part of their discussion of legal competencies, including the competency to stand trial.<sup>36</sup> They set forth useful but very brief discussions of the controlling law to introduce legal concepts of importance.

The same is true, though in a different way, of the ABA/SJI *National Benchbook on Psychiatric and Psychological Evidence and Testimony*, which was published in 1998.<sup>37</sup> As with *Melton, et al.*, the *Benchbook* covers a great many topics in the intersection between the mental health sciences and the law. The *Benchbook* also offers some discussion of the salient cases, while not dwelling on the textual analysis of significant United States Supreme Court opinions. The practitioner needs to understand what these good sources of information offer, and what he or she needs to have sought elsewhere.

What emerges from a review of the analysis of the law offered to us by these well-known experts in the field of competence assessments, and forensic mental health assessments generally, is the understanding that they opt for synthesis and a succinct statement of their views on the legal structure and definition of competence. They do not offer a lawyer preparing a case a detailed dissection of the law.

Thus, there is no substitute in this area for a thorough reading and understanding of the pertinent case law. This is not to attack the mental health literature — the manuals written exclusively for lawyers present similar problems. This holds true even though a different approach has been taken in some of the practice manuals that have been developed for the capital defense bar. For example, in the long published *California Death Penalty Defense Manual*, the emphasis tends to be on an updating of the case law related to mental health cases. In a section on mental health experts, the *Manual* offers a discussion of recent decisions pertinent to certain mental state mitigation, mental state defense, and competence issues in conjunction with a discussion of some of the pertinent scientific literature.<sup>38</sup>

Admittedly, death penalty defense publications may not be a useful *litmus* of the practice guides available for the criminal defense bar, as death penalty defense is highly specialized. However, death penalty defenders in general are expected to have greater expertise on mental health issues than many of their colleagues. But even a knowledgeable reader of the *Death Penalty Manual* will need to review the relevant cases in approaching a competence inquiry.

A knowledge of the case law exposes those areas in the mental health literature that may need to be reviewed carefully with an examining expert. For example, *Melton, et al.*, discuss “competency to plead guilty” under the rubric of “criminal competencies.” As they point out certainly in enough detail to remind the knowing lawyer (and expert), in *Godinez v. Moran* the Supreme Court held “. . . with the majority of federal courts that a person who is competent to stand trial is also competent to plead guilty.”<sup>39</sup>

But then, they point out that not all jurisdictions follow *Godinez*.<sup>40</sup> That observation on their part might shock some experts on criminal procedure, in that it is not at all clear that the United States Supreme Court decision in *Godinez* allows the states to require differing standards in the definition of competence to plead guilty versus competence to stand trial. Moreover, the mental health expert who has relied upon *Melton, et al.* to define competence to plead guilty as a separate category from “competence to stand trial,” may be open to cross-examination on this point.

This remark is not meant as a criticism of *Melton, et al.*, whose works are well-respected and much cited. However, it is meant to illustrate that in the absence of the acquisition of a good working knowledge of the case law, a lawyer seeking a quick fix of overall competence knowledge might accept as com-

pletely defensible a viewpoint stated by authors whose analysis of the law might, at least in the respect just used as an example here, be taken as a minority view.

Therefore, the practice note here is that lawyers approaching a competence assessment should review the applicable case law, concentrating on decisions that cover both the big picture and case specific issues.<sup>41</sup>

### Leading Mental Health Literature Addressing Competence

When the United States Supreme Court concluded that it is not constitutionally acceptable for the mentally retarded to be executed in *Atkins v. Virginia*, the Court relied in part on the definition of mental retardation found in Sadock and Sadock’s, *Comprehensive Textbook of Psychiatry* (7th ed.).<sup>42</sup> That work is cited here because it is an example of a useful text for lawyers seeking to learn about a variety of mental health issues. Its editors deal with competency in a relatively brief section of the book, correctly noting that “legal criteria, not medical or psychiatric diagnoses, govern competency.”<sup>43</sup> Their book is filled with cross-references, and the editors steer readers towards well-known sources in the mental health literature on competence to stand trial, including Dr. Thomas Grisso, and Melton, *et al.*<sup>44</sup>

Sadock and Sadock outline the diagnostic criteria for various mental disorders, conditions and issues, while also covering the basic treatment approaches. The book is written as a reference work for mental health professionals. Importantly, since part of what lawyers are concerned about in understanding the mental health professional’s approach to competence assessment are the various protocols and guidelines for forensic examinations, the editors provide brief but useful references to the literature, including the guidelines for forensic psychiatric examinations.<sup>45</sup>

*Melton, et al., Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* (2d. ed.) has previously been mentioned. This book covers a lot of territory in addition to competence to stand trial. However, it specifically provides a series of useful observations and bits of information that should be known to lawyers approaching competence assessments.

The authors dissect the definition of competence in such a way as to allow a lawyer to understand what a qualified mental health examiner should know about competence. For example, they make the point that “With respect to the first prong of the competency test, for instance, a level of capacity sufficient to understand simple charges. . . may be grossly insufficient when a more complicated offense is involved....”<sup>46</sup> This is a significant point, since many competence examiners do not appear to consider that the nature and complexity of the charge is a consideration in a competence assessment. Lawyers approaching competence assessments need to be thoroughly familiar with literature such as this, which sup-

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ports the notion that competence assessments are conducted in a context — a point also made by Dr. Grisso, as will be further noted below.

Helpfully, *Melton, et al.* review what is now a somewhat dated list of the various structured evaluation formats and testing protocols available for use by mental health professionals in competence assessments. *Id.* at 139. These include the Competency Screening Test; the Competency Assessment Instrument; the Interdisciplinary Fitness Interview; the two versions of the Georgia Competency Test; the Computer-Assisted Competency Assessment Tool; the MacArthur Competence Assessment Tool; and the Competence Assessment for Standing Trial for Defendants with Mental Retardation.

Importantly, for our purposes, the authors focus on what mental health professionals need to understand about the attorney-client relationship and attorney-client communications. As previously noted, they, among others, place among the “required” inquiries to be made by the assessing mental health professionals an interview with the defense attorney concerning the length, substance, and nature of previous attorney-client contacts.<sup>47</sup> They make the following important observation:

“Points of misunderstanding about charges and the legal process will be interpreted differently depending on whether they occur after hours of counseling from the lawyer or, as may often be the case given the press of dockets and lawyers’ caseloads, after a five-minute meeting at a preliminary hearing. And, as noted previously, information about the quality of the relationship is crucial in addressing this second *Dusky* prong and in fulfilling the consultation role.”<sup>48</sup>

Another source that defense counsel should be thoroughly aware of in approaching competence assessments are the pertinent works of Dr. Thomas Grisso. His 1988 workbook entitled *Competency to Stand Trial Evaluations: A Manual for Practice* is useful, though now not only supplanted by some of his own work, but that of other reputable scholars as well. The 1988 work includes a few important observations, particularly where a lawyer is preparing to cross-examine a mental health examiner who has performed a “drive by” examination — characterized by a brief review of a few records, and by one relatively quick interview with the accused, which may or may not have included some competence-specific assessments.

One characteristic of a “drive by” of this type is that often the examiners neither taperecord the sessions nor use a methodical way of documenting both their competence-pertinent questions and the specific answers given. Often, these “drive bys” contain a brief summary of the charges, some anecdotal patient history, notations concerning any records reviewed, and a series of observations about competence. As Dr. Grisso points out, they may not even have a specific methodology that will allow their opinion to be compared

with those of other examiners. The end product of these sad professional exercises is a conclusion by the examiner largely based on a statement of the examiner’s professional qualifications, and an “I know it when I see it” type of assessment.

Noting that mental health professionals have an obligation to keep themselves informed of new developments that arise in their field of practice,<sup>49</sup> Dr. Grisso points out that a defendant may be legally competent for one purpose but not for another, and that the examiner must be careful to have used a method that can be validated for the competence inquiry to which it has been applied.<sup>50</sup>

Thus, in this early work, Dr. Grisso noted that a competency assessment might include five objectives, focused on the description of the defendant’s strengths and deficits; a causal explanation for the deficits in abilities that are known to define legal competence to stand trial; a description of mental disorder; possible causes of incompetence, including malingering, or the purposeful faking or exaggerating of deficiencies; the establishment of a relationship between the causal conditions and the deficits in competency abilities; and the interactive significance of deficits in competence abilities.

Dr. Grisso has pointed at one of the great deficits in the competence assessment process, which is that mental health examiners are not held, even in their professional circles, to particular methodologies in competence to stand trial procedures. Thus, it is rare that two examiners use the same methodologies, questions, response formats, and ways of evaluating the examinee’s responses.<sup>51</sup>

In a more recent work published in 2003, Dr. Grisso wrote that while mental health professionals have contributed to some improvements in the assessment of legal competencies, there continues to be a level of ignorance of the legal standards, the relevant professional literature that leads to irrelevance in courtroom testimony. At the same time, because courts and lawyers are often not sufficiently knowledgeable about competence issues, they allow the intrusion of psychiatric and psychological concepts into legal matters such as the definition of competence. Dr. Grisso observed that there is still a problem with the sufficiency and credibility of information provided to the courts to allow reliable competence assessments, while applauding the fact that there are guidelines published by various mental health profession groups that should help improve the panorama.<sup>52</sup>

From a practitioner’s viewpoint, there are a number of useful points made in Dr. Grisso’s work that should be of value to lawyers of all levels of experience. For example, he reiterates the distinction between “screening evaluations,” which may consist of an interview, or the administration of one test, and assessments conducted over time, noting the quality and extent of data that one might get through various in-patient or extended out-patient assessment processes.<sup>53</sup>

Moreover, he makes a point that is of great significance, particularly where the objective of the cross-examination is to point out the inherent problems in the competence assessment process. He observes that "little is known empirically about the methods that clinicians actually use in collecting data for competence to stand trial evaluations."<sup>54</sup> There are still a significant number of areas in which the mental health professions have yet to achieve consensus, which result in a lack of standardization and approaches to report writing on the one hand, or the assessment process on the other.<sup>55</sup>

Grisso repeats the area in which "...[a]lmost all texts describing pre-trial competence evaluations have agreed [, which is] that examiners need structure and a clear conceptualization of their objective, as well as appropriate methods, in order to perform evaluations that will have clinical quality, legal relevance, and practice utility to the courts." *Id.* at 82.

Helpfully, especially for lawyers, Grisso outlines his view of how the various available forensic instruments relate to the assessment process as he understands it. From defense counsel's viewpoint, he offers a very useful "critique" of a number of the standard instruments.<sup>56</sup>

In addition to the several already discussed, there are a number of other valuable works that address competence to stand trial and competence assessments. Well-known scholars have been working in the area for some time. For example, Professors Golding and Bonnie have separately published a number of works pertinent to competence, as have several researchers who have worked on the various MacArthur mental health projects, some of whom have addressed competence issues over the years. Bruce Winnick has for years dealt with various competence assessment issues. He wrote some of the scholarship that dealt with medication and competence issues dating back to the 1970s, and continues to publish today.

Dr. Richard Rogers' work on the assessment of malingering, and on forensic assessments generally, is reflected in several well-received books that he has authored. He has developed and recently published an approach to competence assessment. In addition, several researchers have been working on the issue of competence regarding juveniles, and the need to address (and for lawyers to understand) the important differences between the assessment of adult and juvenile competence. Look for a new Rogers book in 2005 that will offer a very useful addition to the literature on competence assessments.

As a number of mental health professionals point out to lawyers, studies funded by the MacArthur Foundation have produced valuable literature.<sup>57</sup>

#### **Strengths And Limitations of Competence Assessment Devices**

There are several sources that discuss the generally accepted structured interviews, assessment inventories, and instru-

ments specific to the assessment of competence to stand trial. A number of these have been described, at least by name, in the above review of the pertinent literature. Moreover, these items are all best seen in their original formats, and are more knowledgeably commented upon by the authors whose works have been mentioned at some length in this piece than they are by the present author.

For example, it does not take a great deal of time to review the Competency Screening Test, or any of the other much used competence assessment tools. What is commonly known as "The MacArthur" is an example of a "new generation" assessment tool that requires the uninitiated lawyer to be briefed by a mental health professional who has both the manual and knowledge of the relevant literature, as well as a copy of the screening device available.<sup>58</sup>

The MacArthur uses scenarios presented to the examinee to elicit responses, which are then integrated into the assessment process. The MacArthur Competence Assessment Tool is described as divided conceptually into what the law might describe as separate capability or ability areas, allowing the examinee to be assessed in those specific areas as he or she navigates various scenarios presented.

A number of the older assessment devices clearly concentrate on situational awareness, emphasizing questions such as What does the judge do?, Who is the judge?, What does the jury do?, What does your lawyer do?, etc.

There are new assessment devices being published, and in use, constantly. There are in-patient programs whose clientele involves a large number of persons there for competence assessment, or competence restoration, that have adapted and "retooled" a number of the published instruments and assessment devices. Thus, a practitioner who acquires an understanding of the panorama of assessment tools and devices from the literature may be surprised to find that at a given state hospital, the competence inventory administered for a "situational awareness" is not one of the "standard" and well-known devices.

Not all useful competence assessment inventories are extremely recent. For example, some time ago, Dr. Stephen Lawrence from Southern California, developed what he called the "Lawrence Psychological-Forensic Examination for Use within the Criminal Justice System." This structured interview was designed for a California competence inquiry, but it is well suited, from a lawyer's viewpoint, to help organize a number of areas that involve or implicate competence to stand trial.<sup>59</sup> This instrument is mentioned here as an example of a useful tool that is, in a sense, "off the radar" of mainstream mental health competence assessment tools, but useful for lawyers to review. It is certainly not unique, in that sense. Other experts have also developed worthy materials. It is an example of an inventory that a lawyer can use to gauge how thorough a competence assessment process has been in a given case.

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From a lawyer's viewpoint, an examiner's use of a given competence-specific assessment device is only part of the concern. Given that the case law and literature encourage trial lawyers to have input into a client's competence assessment, it makes little sense for lawyers to defer the responsibility of a competence assessment exclusively to a mental health expert. Moreover, as pointed out above, it is unclear that such experts have any foundation for opining on the significance of attorney-client communications in the absence of consultation with trial counsel.

Without counsel's input, mental health professionals can only provide general information on the accused's "ability to assist in the defense" and, indeed, most mental health professionals do not inquire sufficiently into the characteristics of a given case, the nature of attorney-client communications, and the specific defense strategies (and legal defenses) available, to understand the accused's situational awareness and ability to assist.

It is for this reason, as previously indicated, that it is important for lawyers to understand the accepted protocols for competence assessments, *including* the place that specific competence assessment tools, structured interviews, and situational awareness "tests" used by mental health experts should occupy. No one test or structured interview device is going to provide a sufficient basis for a defensible competence assessment. A competence assessment is contextual, and counsel should treat it as such. Counsel should certainly interact with competence examiners to have input on the elements of a given competence assessment.

#### **Developing A Client — And Case — Specific Competence Approach**

While the case law places *at least* the ability to monitor competence (and in some states, the responsibility to monitor competence) on defense counsel, it is relatively rare for a defense lawyer to have developed a defensible understanding of what goes into a competence assessment. Here, the understanding referred to is not what a mental health professional does in assessing competence, but rather what defense counsel needs to know to assess whether, when, and how to raise the question of a client's incompetence.

A number of well-qualified and well-intentioned lawyers will point out that there are a variety of strategic and tactical reasons for not "fronting" a client's incompetence where there would, in general, be some case-related "loss" for the client. This view is legitimate in the following respects. First, it may be that an amazingly good settlement opportunity is being presented to a client who, in a lawyer's judgment, is marginally competent. The settlement possibility will be eclipsed if a competence question is raised, and therefore, with the long view in mind, the lawyer decides not to raise the issue.

There may be other serious concerns about raising competence questions. For example, in a death penalty case, or in other cases involving mental state issues, raising a competence question will give both the trial court and the prosecution, insight into a client that neither would normally have. In some jurisdictions the prosecution is able to essentially control the nature and extent of the competence assessment. Therefore, a competence inquiry amounts to a combination prosecutorial discovery and prosecution evidence, notwithstanding the rules of judicial immunity that may limit the collateral uses of a client's statements during a competence assessment. Careful planning of a prosecution competence assessment may allow the prosecutor to assemble ammunition to rebut a mental state defense, and perhaps also in a death case, to assemble facts in aggravation, or rebut an *Atkins* claim.

Indeed, because of the U.S. Supreme Court's ruling in *Atkins*, there are even more refined questions asked of a capital case defender today than previously. For example, it may be that the lawyer who suspects that his or her client is likely both mentally retarded and incompetent will feel that the presentation of a competence question will trigger an examination of the client intended to neutralize defense evidence of mental retardation. Thus, a death penalty defense team might delay the raising of the competence question until the assessment, and even the adjudication, of the *Atkins* issue takes place — knowing that such an adjudication may actually have a bearing (either useful or useless) on the later competence adjudication. Indeed, there has already been litigation on the type of protocol that should be used in an *Atkins* examination to differentiate such an assessment from a competence assessment.

Undoubtedly, from a practitioner's viewpoint, outcome-oriented, competence-related decision making is legitimate, and discarding a competence question in favor of obtaining what is defined as a "better" outcome for a client is difficult to argue against. Moreover, it may be that the defenders will be guided by the viewpoint that in any event a competence claim cannot really be waived. This is a risky outlook, however. Indeed, some of the retrospective competence assessment cases demonstrate how difficult it is to prove a client's incompetence during a trial that occurred several and, in some cases, many years ago, especially where trial counsel did little to document the evidence of incompetence. For that reason, especially where the competence "punch" is being pulled, counsel should carefully think through how to memorialize concerns about incompetence so that if a case "blows up," the reality of the client's incompetence is not lost.

#### **A Competence Issues Checklist**

Assuming that the lawyer has arrived at the conclusion that the competence issue must be raised, a number of attendant questions need to be answered. First, in addition to collecting the relevant case law and mental health literature, counsel should begin to define whether the competence question

centers around situational awareness, including awareness of procedural and substantive rights, case outcomes, and the like, or the ability to communicate with, and assist counsel, or both.

Second, while considering the practical and strategic issues involved in the release of various forms of client history, counsel should outline what in the available records, including the available medical, psychological and psychiatric treatment records (if there are any), institutional behavior, and attorney-client related interaction records, may either support or undermine a claim of incompetence.

Third, counsel should identify *all* persons who are possible sources of information, and available witnesses, on competence questions, including family, friends, custodial personnel, medical personnel, court staff, and jail visitors.

Fourth, together with one or more mental health professionals, the lawyer should arrive at an understanding of what testing and assessment protocols are indicated, including whether basic psychological testing is needed; whether some understanding of the implications of medication or medical/psychiatric issues is required; and how the examiners propose to use the broad range of competence assessment tools available.

Fifth, the lawyer also should consider what position he or she needs to occupy in the proceedings — whether to remain as counsel of record, or essentially to become a witness. Obviously, there are some dangers in selecting the latter course, but note: the literature on competence clearly assigns an information sharing role to the lawyer of record. Moreover, at the high end, lawyers who have litigated competence issues where the issue centers on attorney-client communication and ability to assist are aware that counsel of record's input is critical.

A lawyer's role can be variable. On the one hand, it can involve discussions with a designated attorney-expert who becomes the lawyer's surrogate (and is a likely witness) during the course of the litigation of the competence question. There is a wide variety of formats used in connection with this type of approach. Counsel of record may allow the attorney expert (who is retained or appointed solely for that purpose) to communicate directly with the client, or to communicate with the client, lawyer, and a wide range of sources of information. In the alternative, counsel of record may use the attorney-expert only to explain: the duties of defense counsel; the requirement of competence and the attributes of competence; how a competent client and defense counsel interact in the defense of that particular type of case. Often the in-court examination of such an attorney-expert involves a series of hypothetical questions.

Sixth, counsel of record must not only plan how his or her own information will be presented to the trier of fact, but also how to interact with mental health professionals on the case.

There are a number of different formats that have been used in this respect. Some lawyers have gone so far as to videotape their interaction with the client, knowing that the video tape would be produced to the prosecution, and eventually to the court. However, the videotape, usually covering a discussion involving both situational awareness and ability to communicate issues, provides a unique insight into the nature of the communication problems that may be raised in a given case.

In other settings, counsel have provided experts with a diary, or chronicle of communication issues and problems, together with jail records evidencing a client's psychological deterioration, and increasingly incoherent conversations and statements. A clear record of the transmission of these materials is made so that when mental health professionals testify in proceedings, and essentially base their views on material other than that, counsel can successfully examine to point out that sources of information acknowledged both in U.S. Supreme Court opinions (remember *Medina v. California*), and accepted mental health literature clearly delineate and define the defense lawyer as a valuable front line source of information on trial competence.

Elsewhere, it has proven possible for a mental health professional to essentially serve as the surrogate for the lawyer, by not only using the arsenal of tools available to mental health professionals, but also by videotaping interaction with the client that involves a carefully planned set of questions designed to demonstrate the client's responses to questions involving situational awareness, and ability to assist in the conduct of the defense. On occasion, incidentally, the record of either attorney meetings, or mental health professional meetings, has proven to be extremely long — in part in order to assure the trier of fact that the possibility or hypothesis of malingering, and exaggeration of symptoms was considered.

### Some Pertinent Legal Issues

At the beginning of this writing, emphasis was placed on the usefulness of the district court's restoration to competence-related ruling in *U.S. v. Duhon*.<sup>60</sup>

For those whose cases involve presentation of evidence under the guidance of the Federal Rules of Evidence or similar rules, the reality is that psychological or psychiatric evidence often falls into a "soft science" area. For example, in federal courts, since *Daubert*, there have been a number of rulings on the threshold for the admission of psychological or psychiatric evidence that is not itself dependent on some new technique.<sup>61</sup>

Under *Daubert*, a central question was "whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue."<sup>62</sup>

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Several federal courts have indicated that the “non-scientific expertise” threshold for the presentation of expert testimony found in *Kumho Tire* is applicable to psychological, psychiatric, and social sciences.<sup>63</sup> Indeed, during the years between *Daubert* and *Kumho Tire*, several circuit courts had already decided that psychological and psychiatric testimony was really “specialized expertise” rather than testimony that was the product of a specific scientific theory.<sup>64</sup>

Thus, in a number of jurisdictions, where psychiatric and psychological expertise is at issue, the question is whether the expert has the appropriate qualifications; sufficient special knowledge, skill, experience and training to formulate the competence opinion; and generally employed methodologies and techniques that render the evidence sufficiently reliable to be proffered.<sup>65</sup>

Thus, in addition to having reviewed the literature on competence, and competence-specific definitions, counsel should be acquainted with the evidentiary tests, thresholds, and standards applicable to the introduction of expert testimony on competence — carefully differentiating those instances in which an examiner is relying on “a classic” combination of interviews and assessment devices that are recognized in the pertinent literature from those instances in which the examiner has either clearly done insufficient work (according to the literature) or has combined techniques, methods, and tests in a way that is novel and not supported in the literature.

A basic survey of reviewing court decisions where competence was at least one of the issues considered indicates that it is rare that counsel will have made an extremely thorough record where “bad science” has been involved. Thus, we have few opinions that cover research specific to the admission of psychological and psychiatric testimony in a given competence assessment process.

#### Every Case

In 2004, the United States Supreme Court unexpectedly issued a ruling (*Blakely v. Washington*) that has raised substantial questions about sentencing processes around the United States, and may change the way that criminal trials are conducted in certain instances, as well.<sup>66</sup> While astute commentators and scholars may well have predicted that after the seminal *Apprendi* ruling, the Court would be headed towards *Blakely*, before 2004 most practitioners certainly were not litigating their cases as though *Blakely* was looming large on the legal horizon.<sup>67</sup>

It is unclear whether the United States Supreme Court intends to tinker much with the current definition of trial competence, or with the procedures for the assessment of competence. Nonetheless, in subtle ways, since the Court’s ruling in *Godinez v. Moran*, it has grown increasingly expansive in its dealings with certain aspects of trial competence. But, the criminal defense bar has continued to treat trial compe-

tence almost as a passing matter, a question that is easily addressed. Indeed, there are probably more opportunities for criminal defense lawyers to be trained on the vicissitudes of fingerprint examination than on the requirement of each and every client’s competence to stand trial.

With competence, we have used a sort of “learn as we go” approach. Unless a lawyer has taken an accidental interest in learning about competence, or is faced with a competence assessment requiring a fast self-study course on competence issues, many lawyers remain barely acquainted with what competence means, how it should be assessed, and when a client’s incompetence should be raised.

The requirement of competence is sufficiently important that we should be learning about it at the same time that we learn trial techniques and the basic skills of criminal defense lawyering. Unlike many aspects of the lawyer’s case-specific knowledge, knowing about competence is not something that may be of benefit in only one case in a lifetime. Knowledge of competence and incompetence to stand trial is a factor that plays a part in every case that we handle.

#### EndNotes

1. *U.S. v. Duhon*, 104 F.Supp.2d 663 (W.D. La. 2000).
2. 104 F.Supp.2d 663 at 668, n. 21, citing Burt and Philipsborn *Assessment of Client Competence, A Suggested Approach*, 22 *The Champion* 18 (June 1998).
3. As used throughout this article, the word “competence” means competence to stand trial, unless otherwise indicated.
4. See n.3 above.
5. There are many types of legally recognized “competencies.” As used in this article, the word “competence” means only competence to stand trial in a criminal case.
6. *Dusky v. United States*, 362 U.S. 408 (1960) *per curiam*.
7. *See Riggins v. Nevada*, 504 U.S. 124, 139-40 (1992), Kennedy, J., concurring.
8. *See Medina v. California*, 505 U.S. 437, 553 (1992).
9. *Dusky v. United States*, *supra*, 362 U.S. 408.
10. *Drope v. Missouri*, 420 U.S. 162, 171 (1975). The court described these as the basic tests in use today in *Medina v. California*, *supra*, 505 U.S. 437, 452.
11. 505 U.S. 437 (1992).
12. *People v. Medina*, 51 Cal.3d 870 (1991), *affirmed in Medina v. California*, *supra*, 505 U.S. 437.
13. *People v. Medina*, *supra*, at 884-85.
14. *U.S. v. Duhon*, *supra*, 104 F.Supp.2d 663 at 668, n.21, citing Burt and Philipsborn, *supra*.
15. As noted, this truism is recognized in the mental health literature per Dr. Thomas Grisso, *Evaluating Competencies: Forensic Assessments and Instruments*, (2d. ed.) Kluwer Academic Publishers (2003). Note that Dr. Grisso points out: the *Godinez* Court included decision-making abilities within the *Dusky* standard.” *Id.* at 73.
16. *Id.* at p. 150.
17. 509 U.S. 389 (1993).
18. 509 U.S. 389, 398.
19. A good example of the understanding that an experienced mental health expert brings to this matter is found in Dr. Thomas Grisso, *Evaluating Competencies: Forensic Assessments and Instruments*, (2d. ed.) Kluwer Academic Publishers (2003). Note that Dr.

- Grisso points out: the Godinez Court included decision-making abilities within the Dusky standard.” *Id.* at 73.
20. 517 U.S. 348 (1996).
  21. *Sell v. United States*, 539 U.S. 166 (2003).
  22. *Riggins v. Nevada*, *supra*, 504 U.S. 127.
  23. See *Washington v. Harper*, 494 U.S. 210 (1990), a case that discusses the hearing requirements for the involuntary administration of anti-psychotics to a prisoner.
  24. 334 F.3d 803, 808 (9th Cir. 2003): “Capacity for rational communication once mattered because it meant the ability to defend oneself [citations omitted] . . . while it now means the ability to assist counsel in one’s defense. . .” [further citations omitted]
  25. *Atkins v. Virginia*, 536 U.S. 304 (2002).
  26. *People v. Lawley*, 27 Cal.4th 102, 132 (2004).
  27. *Wiggins v. Smith*, 539 U.S. 510 (2003).
  28. *Strickland v. Washington*, 466 U.S. 668 (1984).
  29. *Drope v. Missouri*, *supra*, 420 U.S. 162, 182-83.
  30. *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001).
  31. See *U.S. v. Mason*, 52 F.3d 1286, 1293 (4th Cir. 1995); *U.S. v. Renfro*, 825 F.2d 763, 767-68 (3d Cir. 1987); *U.S. v. Johns*, 728 F.2d 953, 957-58 (7th Cir. 1984); *Bolius v. Wainwright*, 597 F.2d 986, 988 (5th Cir. 1979).
  32. *People v. Ary*, 118 Cal.App.4th 1016 (2004).
  33. Grisso, *Evaluating Competencies: Forensic Assessment and Instruments*,
  34. 2d ed., *supra*, at p. 70.
  35. Grisso, *Competency to Stand Trial Evaluations: A Manual for Practice* (Professional Resource Exchange, 1988).
  36. 2d Ed.
  37. See *Melton, et al.*, Ch. 6 and 7.
  38. Reference is to the American Bar Association/State Justice Institute National Bench Book on Psychiatric and Psychological Evidence and Testimony (ABA, 1998). The section of the ABA that contributed to the work was the Commission on Mental and Physical Disability Law.
  39. This manual, published by the California Public Defenders Association and California Attorneys for Criminal Justice, has been used as a model in various parts of the country. A new edition has been published this year under the editorship of Michael Ogul, who has taken over from well respected death penalty defense counsel, Michael Burt. Burt edited the manual for years prior to the current edition. Thankfully, both Michael Burt and Michael Ogul have a great interest in mental health and the law, and have developed the publication accordingly. The present author has co-authored the sections on mental health experts with Michael Burt and Jennifer Friedman.
  40. *Melton, et al.*, 2d. ed., at 163.
  41. *Ibid.*
  42. For example, a lawyer wishing to review an approach to competence assessment and malingering should become familiar with the tortured history of *U.S. v. Gigante*, 982 F. Supp. 140 (E.D.N.Y. 1997) and *U.S. v. Gigante*, 996 F. Supp. 194 (E.D.N.Y. 1998) and Gigante’s eventual admission of malingering.
  43. This well-respected work is actually published today under the names Kaplan and Sadock. The Comprehensive Textbook covers a wide spectrum of subjects that may arise in criminal cases, and is certainly a compendium well worth knowing.
  44. *Id.* at 3285.
  45. *Id.* at 3285, 3289.
  46. *Id.* at 3289 citing Simon, Wettstein, et al. “toward the development of guidelines for the conduct of forensic psychiatric examinations,” 25 *Journal of American Academy of Psychiatry and Law* 17 (1997).
  47. *Id.* at 122.
  48. Page 150.
  49. *Id.* at 150.
  50. Introduction, p. xvi.
  51. At page 4.
  52. Grisso deals with this issue at p. 25 of his 1988 pamphlet.
  53. The comments made in the foregoing paragraph are based on Dr. Grisso’s writings in *Evaluating Competencies: Forensic Assessments and Instruments* (2d ed.) at pp. 10-11. Readers should be aware that the writer of this piece has mixed his own commentary with that of Dr. Grisso, who may not view the foregoing text as representative of his thinking.
  54. *Id.* at 79.
  55. *Id.* at 79-80.
  56. Page 81.
  57. *Id.* beginning at 89.
  58. See the compendium of recent literature produced the MacArthur Adjudicative Competence Study updated through May 2004 at [www.macarthur.virginia.edu](http://www.macarthur.virginia.edu). For understandable reasons, however, at least some of the emphasis of the MacArthur work, which has included well known mental health experts such as Drs. Bonnie, Monahan, Poythress, Otto, and others focus on the interests of the group of mental health experts who have worked together on, among other things, the MacArthur competence assessment tools such as the MacCAT-CA.
  59. A number of mental health professionals will not share a competence assessment tool, or any other kind of an instrument, with a lawyer whose case is pending, and whose client may be “briefed” or otherwise impacted by the lawyer’s acquired understanding of the materials reviewed. That said, a number of qualified mental health professionals are more than willing either during training sessions, or on a one-on-one basis, to brief lawyers with whom they are working for any number of valid and useful reasons.
  60. The author thanks Michael Burt, his periodic co-author, and occasional co-counsel, and a well-recognized capital case defender from San Francisco for pointing out Dr. Lawrence’s work.
  61. *Supra*, 104, F.Supp.2d 663.
  62. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
  63. *Id.* at 592-94.
  64. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150-51 (1999).
  65. See *U.S. v. Bighead*, 128 F.3d 1329, 1330 (9th Cir. 1997).
  66. See a discussion in *U.S. v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000). See, also, *Wilson v. Woods*, 163 F.3d 935 (5th Cir. 1999). See also the Second Circuit’s opinion in *U.S. v. Hall*, 93 F.3d 1337 (2d Cir. 1996) involving testimony about the symptoms of PTSD. But see, as well, rulings like *Usher v. Lakewood Engineering and Manufacturing Co.*, 158 F.R.D. 411, N.D. Ill., 1994) holding results of an MMPI-2 inadmissible because of insufficient correlation and validity proof.
  67. *Blakely v. Washington*, 124 S.Ct. 2531 (2004).
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# DISTRICT OF COLUMBIA DEFENDERS COMMISSION A SURVEY OF POTENTIAL JURORS TO DETERMINE WHAT THEY REALLY UNDERSTAND ABOUT EYEWITNESS TESTIMONY

By Timothy P. O'Toole

As in most jurisdictions, the District of Columbia criminal justice system repeatedly is called upon to assess the accuracy of witness claims that they "remember" having seen the accused committing a criminal offense, or that they "remember" other significant details about the crime. Recent data have shown that these sorts of eyewitness memories may be substantially less reliable than jurors believe them to be. The proof of these failures lies in the rising number of verifiably wrongful convictions, and the fact that, upon examination, it has become clear that the leading cause of these mistakes is faulty eyewitness testimony. This data suggests that eyewitnesses around the country are making mistakes on a regular basis, and that juries are relying on this unreliable evidence to send the wrong person to prison while the real culprit remains out on the street.

Despite this stark evidence, Superior Court judges often refuse to allow the defense to provide jurors with information that could help them to fully understand the limitations of eyewitness identification evidence and to place that evidence into a more informed context. Often, courts explain their decisions by making unsubstantiated assertions that jurors understand, as a matter of common sense, how memory works and what its limitations are in the eyewitness identification context.

In the winter of 2004, PDS' Special Litigation Division decided to investigate whether jurors did, in fact, understand as a matter of common sense what makes some eyewitness identifications more or less reliable than others. The motivation behind this project was simple: If jurors already understand what makes some eyewitness identifications more reliable than others, it would not make sense for PDS to continue to devote resources toward educating already-informed jurors on this topic. On the other hand, if jurors actually fail to understand memory and its limitations, it would remain imperative to continue to seek to provide jurors with the expert education necessary to ensure that they could intelligently evaluate the evidence presented to them by the government.

PDS accordingly commissioned a national polling firm (Peter D. Hart Research Associates) to survey approximately 1000 potential D.C. jurors about how jurors assess the reliability of eyewitness identifications and what factors, if any, contribute to making the testimony suspect in the eyes of potential jurors. The results are now in, and those results demonstrate that judicial assertions concerning jurors' ability to appraise eyewitness identifications are verifiably wrong: Contrary to speculation, jurors actually suffer from a basic misunderstanding of how memory generally works, and similarly do not un-

derstand how particular factors, such as the effects of stress or the use of a weapon, affect the accuracy of eyewitness testimony.

In particular, the PDS survey shows as an empirical matter that significant numbers of jurors (often substantial majorities) misunderstand human memory and eyewitness reliability in the following ways:

- Jurors overestimate the ability of people to remember strangers' faces, incorrectly analogizing the process of remembering and recounting events to the act of replaying a video recording;
- Jurors do not understand that the involvement of a weapon tends to make an eyewitness' memory for details about an event less reliable;
- Jurors do not understand how severe stress reduces the ability of a witness to remember details about an incident and identify faces;
- Jurors do not understand that eyewitnesses have a strong tendency to overestimate the duration of a stressful event;
- Jurors do not understand the lack of any meaningful correlation between witness confidence at trial and witness accuracy;
- Jurors place unwarranted stock in the identification abilities of police officers;
- Jurors fail to recognize that eyewitnesses are superior at identifying members of their own race and have difficulty-identifying members of other races;
- Jurors exhibit substantial confusion about how proper police procedures can affect the accuracy of identifications.

In short, the PDS survey shows that jurors are currently assessing eyewitness reliability on the basis of demonstrably mistaken assumptions. It is no wonder, then, that jurors often believe mistaken eyewitnesses. Wrongful convictions will inevitably continue to result until judges begin to allow jurors to hear empirical information about how to distinguish a reliable identification from an unreliable one. We are hopeful that the PDS survey (which has already been filed in a few Superior Court cases) will provide a critical first step in eliminating wrongful convictions by convincing courts to reassess their assumptions about what jurors understand about eyewitness reliability and, more importantly, what they do not. If you haven't seen the survey yet, contact SLD at [lmoorer@pdsdc.org](mailto:lmoorer@pdsdc.org) and ask for a copy.

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## THE DEFINITION OF HOMELESS AND ACCESSING SERVICES

By Marianne Chevalier

At what point does a person know they've become homeless? Is it when they get evicted from their apartment so they move in with their sister's family? Is it when their gas and electric gets shut off because they couldn't afford to pay the bill? Is it when they've got nowhere else to go so they take their children and move into an emergency shelter? Or is it when they are living out of their car, or in a motel? The answer is, a person in any of these situations is considered homeless under the Federal McKinney Vento Homeless Assistance Act. However, the common misconception is that a person is not really homeless if there is a roof over their head. Often the homeless person him or herself does not realize that they are considered homeless, because they have found a place to stay temporarily. But according to McKinney Vento, any person who lacks a fixed, regular and adequate nighttime residence is considered homeless. This includes people who are doubled up with family or friends because of economic reasons, and those who are living in sub-standard housing such as those without working utilities.

Recently, a homeless mother of three came into the Children's Law Center trying to get help for her children who had been kicked out of their school. The school principal had found out that the family was living in another school district, so they told the mother that the children could no longer attend. After meeting with the mother and inquiring out about the family's living situation, the CLC attorney found out that although the mother worked a full-time job, she did not earn enough to afford housing. She was also not eligible for subsidized housing because the local public housing guidelines require three years of a stable housing record in order to get an apartment. She had been evicted from her previous apartment for being behind in her rent. This mother had no choice but to pack up her children and move in with a family friend, which was outside of her children's school district. She did not realize that she was considered homeless under the federal law, and as such, her children were entitled to certain protections in school. All she knew is that she did not want to uproot her children from the school that they had been attending for the last several years, so she didn't tell anyone at the school that her address had changed. But somehow, the principal found out, and the children were withdrawn.

As soon as the CLC attorney found out that the family was homeless, the children were immediately placed back into their school. Not only was the superintendent of the school district willing to provide transportation and other mandated services to these homeless children, he also asked the CLC attorney to provide training to all of the district's principals on how to identify and serve homeless students so this situation would never be repeated. This story turned out to have a happy ending for not only this homeless family, but hopefully for other homeless families that haven't yet come in contact with the Children's Law Center.



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**104 East 7th Street**  
**Covington, KY 41011**  
**[www.childrenslawky.org](http://www.childrenslawky.org)**

## CAPITAL CASE REVIEW

By David M. Barron

### UNITED STATES SUPREME COURT

*Rhines v. Weber*,  
2005 WL 711587 (March 30, 2005)  
(*O'Connor, J., for unanimous court*)

Petitioner filed a habeas petition that, after the one year statute of limitations had run, was determined to contain exhausted and unexhausted claims. The federal district court stayed the petition conditioned on petitioner commencing state court exhaustion proceedings within sixty days and returning to federal court within sixty days of completing such exhaustion. The United States Court of Appeals for the Eighth Circuit vacated the stay and remanded for consideration of whether Petitioner could proceed by deleting the unexhausted claims from his habeas petition. The United States Supreme Court granted *certiorari* to resolve a split among the circuits regarding whether a federal district court has discretion to stay a mixed habeas petition to allow a petitioner to present his unexhausted claims to the state court in the first instance, and then to return to federal court for review of his perfected petition. The Court held that the Court of Appeals erred to the extent it concluded that stay and abeyance is always impermissible.

**Stay and abeyance is permissible under the AEDPA.** One of the purposes of the AEDPA (Anti-Terrorism and Effective Death Penalty Act) is to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases. Comity, however, requires a petitioner to exhaust the claim in state court before seeking relief from the federal courts. To balance these two interests, the AEDPA tolls its one year statute of limitations period while a properly filed application for state post conviction or other collateral review is pending. A properly filed federal habeas petition, however, does not toll the one year statute of limitations. Thus, the statute of limitations for filing a federal habeas petition could expire before the federal district court determines that the habeas petition contains an unexhausted claim. Under this circumstance, even a petitioner who files a habeas petition well before the one year period expires could be deprived of federal review of his claims solely based on which federal district court hears his case and when that court decides the issue of exhaustion. Thus, stay and abeyance must be permissible to allow a petitioner federal review of his claims when the statute of limitations otherwise would expire through no fault of his own.

**Stay and abeyance should be available only in limited circumstances—good cause:** Because staying a habeas peti-

tion effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court.

**Stay and abeyance unavailable when claims are meritless:** Even if a petitioner has good cause for the failure to have exhausted the claim in state court, the district court would abuse its discretion if it were to stay a habeas petition to exhaust claims that are clearly meritless.

**Time limits to exhaust claims:** A mixed petition should not be stayed indefinitely, because not all petitioners have an incentive to obtain federal relief as quickly as possible. Specifically, death row inmates might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution. Without time limits, petitioners could frustrate the AEDPA's goal of finality by dragging out their federal habeas review indefinitely. Thus, district courts should place reasonable time limits on a petitioner's trip to state court and back.

#### **Stay and Abeyance Should Not Be Permitted if a Petitioner Engages in Abusive Litigation Tactics or Intentional Delay**

**What should be done with a mixed habeas petition when stay and abeyance is inappropriate:** The district court should allow the petitioner to delete the unexhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief.

**Stevens, J., joined by Ginsburg, J., and Breyer, J. concurring.** Requiring a showing of "good cause" for failing to exhaust state remedies before staying and abeyance a mixed habeas petition is not intended to impose the sort of strict and inflexible requirement that would trap the unwary *pro se* prisoner.

**Souter, J., joined by Ginsburg, J., and Breyer, J., dissenting.** Instead of conditioning stay and abeyance on good cause for delay, stay and abeyance should be available unless the state can demonstrate "intentionally dilatory litigation tactics."

**Brown v. Payton,**  
2005 WL 645182 (March 22, 2005)  
(*opinion by Kennedy*)

(*failure to distinguish between pre-crime and post-crime mitigating evidence in jury instructions not unreasonable under the AEDPA*)

At the penalty phase, the prosecution argued that the jury could not consider post-crime evidence as mitigation. The jury was instructed to consider “any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.” On direct appeal, the defendant argued that there was a reasonable likelihood that the jury construed the prosecution’s argument and the court’s instruction to bar consideration of post-crime evidence of the defendant’s religious conversion and good behavior in prison. The California Supreme Court denied relief. In federal habeas proceedings, the Ninth Circuit Court of Appeals reviewed this claim under the constraints of the Anti-Terrorism and Effective Death Penalty Act, and granted a writ of habeas corpus, holding that the California Supreme Court unreasonably applied United States Supreme Court precedent. The United States Supreme Court reversed on the basis that the California Supreme Court’s decision was not unreasonable.

**Reasonable not to distinguish between precrime and postcrime mitigating evidence:** In *Boyde v. California*, 494 U.S. 370, 382 (1990), the Court held that the instruction at issue here “directed consideration of any circumstance that might excuse the crime.” The Court held that it was not unreasonable to believe that a postcrime character transformation was a circumstance that might excuse the crime, and, thus, the AEDPA’s limitation on relief barred granting the writ of habeas corpus.

**The AEDPA bars relief for prosecution argument that jurors cannot consider postcrime evidence as mitigation:** Considering the whole context of the trial, it was not unreasonable for the state court to have concluded that the prosecution’s closing argument stating that the jury could not consider post crime evidence as mitigation did not put the mitigating evidence beyond the reach of the jury.

**Scalia and Thomas concurring:** They would hold that individualized sentencing serves no purpose in death penalty cases, and would overrule the *Lockett* doctrine.

**Breyer concurring:** Breyer believed that the jury instructions and the prosecution’s closing argument were improper and grounds for reversal, but the AEDPA limitations on relief barred granting a writ of habeas corpus, because the state court’s adjudication was not contrary to or an unreasonable application of clearly established federal law as articulated by the United States Supreme Court.

**Souter dissenting, joined by Stevens and Ginsburg:** The prosecutor’s argument that the jury could not consider postcrime mitigating evidence is contrary to a long line of Supreme Court cases requiring the jury to consider any relevant mitigating evidence including post crime evidence. Thus, the state court’s adjudication of this claim was contrary to clearly established law, meaning that the writ of habeas corpus should be granted.

**Roper v. Simmons,**  
125 S.Ct. 1183 (2005)  
(*Kennedy for the Court; O’Connor, Rehnquist, Scalia, and Thomas dissented*)

After exhausting federal habeas corpus proceedings, Simmons filed a second petition for state post conviction relief, arguing that the reasoning of *Atkins v. Virginia*, 536 U.S. 304 (2002) (outlawing the execution of the mentally retarded), established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed. The Missouri Supreme Court agreed and set aside Simmons’ death sentence. The United States Supreme Court granted the petition for a writ of *certiorari* and affirmed.

**The evolving meaning of the Eighth Amendment cruel and unusual punishment clause:** “The prohibition against cruel and unusual punishment clause, like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design.” To implement this framework in determining which punishments are so disproportionate as to be cruel and unusual, courts must look to “the evolving standards of decency that mark the progress of a maturing society,” as reflected by the national consensus, the frequency of use of a particular punishment, legislative trends, public opinion, and international law. The law of other countries and international authorities are instructive in interpreting the Eighth Amendment’s prohibition of cruel and unusual punishments. Finally, the “Constitution contemplates that in the end [the Court’s] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”

**International consensus against executing juveniles as part of U.S. jurisprudence:** The court held that it was proper to “acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”

*Continued on page 22*

*Continued from page 21*

**National consensus against executing juveniles: states prohibiting executing juveniles:** When *Atkins* was decided, 30 states prohibited the death penalty for the mentally retarded, including 12 states that had abandoned the death penalty altogether. Similarly, “30 states prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.”

**National consensus against executing juveniles: infrequency of executing juveniles:** In the period between sanctioning executing the mentally retarded and abolishing it, only five states executed offenders known to have an IQ under 70. Similarly, since the Court last addressed executing juveniles, only six states have executed prisoners for crimes committed as juveniles. And, in the past ten years only Oklahoma, Texas, and Virginia, have done so.

**National consensus against executing juveniles: commutations as evidence of a consensus against executing juveniles:** In December 2003, the Governor of Kentucky commuted the death sentence of the only juvenile on Kentucky’s death row, with the declaration that “we ought not to be executing people who, legally, were children.” By this act, the Governor ensured Kentucky that it would not add itself to the list of states that executed juveniles within the last ten years. The Governor’s action in commuting a death sentence because of the condemned inmate’s youth is evidence of a national consensus against executing juveniles.

**National consensus against executing juveniles: consistency of direction of change:** Under the evolving standards of decency, the consistency of the direction of change is more important than the number of states that prohibit a particular punishment. However, the slower pace of abolition of the juvenile death penalty than that of the mentally retarded - - which may be due to the large number of states that have prohibited the execution of juveniles for many years - - does not justify executing juveniles. The same consistency of direction of change that served as a basis for not executing the mentally retarded also exists when addressing the execution of juveniles. Since this Court last dealt with the execution of juveniles, no state that previously prohibited capital punishment for juveniles has reinstated it. This fact “carries special force in light of the general popularity of anticrime legislation and in light of the particular trend in recent years toward cracking down on juvenile crime in other respects.

**Risk that nature of crime overshadows youth:** “An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.”

**The death penalty is reserved for the “worst of the worst”:** “Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force,” and restricts the death penalty to the “worst of the worst.”

**Juveniles lack of maturity and underdeveloped sense of responsibility:** “A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” Further, “adolescents are overrepresented statistically in virtually every category of reckless behavior.”

**Juveniles are more vulnerable than adults:** Juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure, than adults. “Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage,” and a time and condition when a person has less control over their environment.

**The personal character of juveniles is less developed than adults:** The character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

**Juveniles are not the “worst of the worst”: diminished culpability.** “The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”

**The social purposes of the death penalty:** The death penalty serves two social purposes: retribution and deterrence of capital crimes by prospective offenders.

**Retributive purpose of death penalty not served by executing juveniles:** “Whether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”

**Principles of deterrence do not support executing juveniles:** “The absence of evidence of deterrent effect [by executing juveniles] is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. In particular, the likelihood that the teenage offender has made the kind of cost-benefit analysis that attached any weight to the possibility of execution is so remote as to be virtually nonexistent. To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.”

**Youth is not just a chronological number:** “The qualities that distinguish juveniles from adults do not disappear when the individual turns 18.”

**Stevens, J. concurring, joined by Ginsburg:** Concurring opinion emphasizes that one’s understanding of the Constitution changes over time.

**O’Connor, J., dissenting:** O’Connor agreed with the categories of evidence evincing the evolving standards of decency and that executing 16 years olds violates the Eighth Amendment, but she believes that standards of decency have not evolved to the point where executing 17 year olds violates the Constitution. O’Connor also disagreed with permitting a state court to revisit a decision of the United States Supreme Court, solely because the state court believes standards of decency have evolved.

## SIXTH CIRCUIT COURT OF APPEALS

**Bates v. Bell,**  
2005 WL 659069 (6th Cir. March 23, 2005)

The court affirmed Petitioner’s conviction (finding that Petitioner entered a knowing and voluntary guilty plea) but reversed his death sentence because of improper and flagrant prosecution arguments that rendered the sentencing phase fundamentally unfair in violation of the due process clause. The comments improperly incited the passions and prejudices of the jury; injected personal beliefs and opinions into the record; and, inappropriately criticized Petitioner’s counsel for objecting to their improper arguments.

**Standard of review for improper prosecutorial argument:** Because harmless error principles apply to prosecutorial misconduct, a conviction or sentence will not be reversed unless the misconduct “had a substantial and injurious effect or influence in determining the jury’s verdict.” In a capital case, that requires a court to attempt to discover whether the constitutional error influenced the jury’s decision between life and death. When addressing a prosecutor’s comments, “the relevant question is whether the prosecutor’s

comments so infected the trial with unfairness as to make the conviction a denial of due process.” Thus, reversal is required “if the prosecutor’s misconduct is so pronounced and persistent that it permeates the entire atmosphere of the trial or so gross as probably to prejudice the defendant.” In other words, even if the prosecutor’s conduct was improper or universally condemned, relief is only available if the comments were so flagrant to as to render the entire trial fundamentally unfair.

Once improper conduct is found, four factors are considered in determining whether the challenged conduct is flagrant: 1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; 2) whether the remarks were isolated or extensive; 3) whether the remarks were deliberately or accidentally made; and, 4) the total strength of the evidence against the defendant.

**Prosecutor’s closing argument inciting the passions and prejudices of the jury:** In closing argument at the sentencing phase, the prosecution: 1) directly addressed opposing counsel; 2) referred to Petitioner as a rabid dog; 3) told the jury they would become an accomplice to Petitioner’s crime if they did not impose death; and, 4) argued that the jury would be responsible for future death of others if they sentenced Petitioner to life imprisonment rather than death, because Petitioner would either escape and kill again or would kill someone in prison. The Court held that each of these comments, which were themes throughout the prosecution’s closing argument, was an attempt to appeal to the fears and emotion of individual jurors, and was clearly improper.

**Assertion of personal opinion or personal knowledge:** It is well-established law that a prosecutor cannot express his personal opinions before a jury, including personal opinions as to the existence of aggravating or mitigating circumstances and the appropriateness of the death penalty. Violating these rules is likely to affect the jury’s decision making process because “[j]urors are mindful that the prosecutor represents the State and are apt to afford undue respect to the prosecutor’s personal assessment. Here, the prosecutor injected his personal opinion concerning the mitigating evidence presented by Petitioner’s mother and medical expert.

When defense counsel asked for a few moments for Petitioner’s mother to compose herself, the prosecutor commented “after a performance like that, I can understand why.” This statement clearly suggested that the prosecutor believed she was being untruthful. The prosecution’s assertions of personal knowledge continued during closing argument.

In closing, the prosecutor stated “I don’t really care what [the defense expert] says. I don’t care at all what [the defense attorney] says because I believe this to be true, and I

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believe you share the same belief.” Referring to the expert testimony concerning mitigating evidence, the prosecutor argued “you don’t believe that, and I don’t believe it; and I don’t even believe [the defense lawyers] believe that.” The prosecutor continued by saying that he agrees with his own expert’s testimony. This type of comment permeated the prosecutor’s closing argument and was clearly improper.

**Improper criticism of defense objections:** During cross examination, in front of the jury, the prosecutor responded to a defense objection by calling defense counsel paranoid. Then, during closing argument, the prosecutor argued that the defense was objecting as a diversionary tactic. For instance, the prosecutor told the jury “when it gets next to them, they stand up and object,” and “of course, they are going to object. They don’t want you to hear it again.” Each of these comments criticized defense counsel for protecting their client through objections and placed them in the untenable situation of either passively permitting the prosecutors to make improper argument or objecting and angering the jury. Such conduct aimed at prejudicing the defendant’s right to object is clearly improper, and cannot be tolerated because “this type of intimidation tactic can operate to the detriment of a defendant’s quality of representation, calling the fairness of the trial into question.”

**AEDPA does not bar relief - - *de novo* review of whether reversal is required because the state court did not address the claim on the merits:** The Tennessee Supreme Court held that the prosecution’s comments were clearly improper, but that the misconduct “did not affect the verdict to the prejudice of the defendant and did not warrant reversal of the conviction” in light of the nature of the crime involved and the facts surrounding the homicide. As the Sixth Circuit recognized, the Tennessee Supreme Court only dealt with the claim in connection to the guilt phase. Thus, the Sixth Circuit applied *de novo* review.

**The prosecution’s improper comments were so flagrant that reversal is required under the Eighth Amendment and due process:** The court held that reversal was required because 1) the remarks almost certainly prejudiced Petitioner because the jury was told they would be accomplices to another murder if they did not impose a death sentence; 2) attacks on defense counsel could have prejudiced Petitioner by fostering jury antagonism towards his attorneys; 3) the prosecution attempted to inject personal opinions into the record; 4) the improper conduct was not isolated to one comment, one section of the argument, or even to one prosecutor; 5) the misconduct was plainly deliberate as must be inferred from the strategic use of the improper comments; and, 6) the prosecutor’s arguments cannot be considered meaningless in the context of the total strength of the evidence at the sentencing phase.

In addressing the effect the prosecution’s argument had on the sentencing phase the court stated that “overwhelming evidence of guilt does not immunize the sentencing phase evaluation of aggravating and mitigating factors. The Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Prosecutorial misconduct in the sentencing hearing can operate to preclude the jury’s proper consideration of mitigation. When a prosecutor’s actions are so egregious that they effectively foreclose the jury’s consideration of mitigating evidence, the jury is unable to make a fair, individualized determination as required by the Eighth Amendment.”

Although a petitioner must prevail when there is grave doubt as to the harmlessness of an error, a harmless error analysis does not need to be conducted here because there is little doubt that the prosecution’s improper argument prejudiced Petitioner both as a violation of due process and an Eighth Amendment violation because the improper argument was so severe that it precluded the jury’s proper consideration of mitigating evidence.

**Batchelder concurring:** Because no United States Supreme Court case holds that the Eighth Amendment mitigation requirement applies to the actions of prosecutors, the AEDPA bars this Court from holding that the state court’s adjudication of this claim under the Eighth Amendment “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” However, because the misconduct of the prosecutor amounted to a denial of due process, the writ of habeas corpus must be granted.

*Keenan v. Bagley*,  
400 F.3d 417 (6th Cir. 2005)  
(equitable tolling)

Ohio law requires prisoners to seek post conviction relief while direct appeal proceedings are pending, setting up a situation where the time to seek state post conviction relief expires before the one year deadline for filing a habeas petition expires. Here, the Ohio Supreme Court issued an order staying proceedings for sixth months to allow Petitioner the opportunity to file a petition for post conviction relief. Thus, rather than filing a federal habeas petition within one year, Petitioner filed a state post conviction petition within the sixth month period provided by the Ohio Supreme Court. After filing the state post conviction petition, the Ohio Supreme Court changed its mind and held that the petition was untimely, and thus procedurally barred. Because the petition was not timely filed, it did not toll the one year statute of limitations for filing a federal habeas petition. Thus, Petitioner’s federal habeas petition also was time barred,

and dismissed by the federal district court. The Sixth Circuit Court of Appeals addressed whether equitable tolling of the statute of limitations should apply.

**Standard of review of denial of writ of habeas corpus:** A district court's decision to deny a writ of habeas corpus is reviewed *de novo*.

**Factors to consider in determining whether to apply equitable tolling:** 1) lack of actual notice of filing requirement; 2) lack of constructive knowledge of requirement; 3) diligence in pursuing one's rights; 4) absence of prejudice to the defendant; and, 5) a plaintiff's reasonableness in remaining ignorant of the notice requirement.

**Remand on equitable tolling is necessary:** The record is unclear on whether Petitioner relied on the literal language of the Ohio Supreme Court order granting six months to file a state post conviction petition as a basis for not filing a timely federal habeas petition. Thus, a remand to the district court is necessary to determine the basis for Petitioner's failure to timely file a federal habeas petition, and if that basis was the Ohio Supreme Court's order, to determine whether relying on that order was reasonable.

**Merrit, J., concurring in remand and dissenting in not granting equitable tolling:** Ohio's statutory system is a "maze designed to dispatch the capital defendant to the executioner's block without federal review. Such a system is like a nightmare, except its consequences are lethal."

Equitable tolling should be granted because 1) the plain language of the Ohio Supreme Court's order allowing six months to file a state post conviction petition makes it obvious that Petitioner relied on that six month period of time as a basis for not filing a federal habeas petition in the interim; 2) broad delegation to a state court to determine whether a federal court can hear a claim effectively suspends the writ of habeas corpus; 3) Ohio's requirement that post conviction proceedings be filed while the direct appeal is still pending creates a situation where consideration of some or all of the prisoner's federal claims will be barred; and, 4) either no lawyer should be faulted for not being able to work through this maze, (in which case surely equitable tolling should apply), or the ignorance of counsel is the reason.

**Siler dissenting:** Equitable tolling should not be granted for three reasons: 1) federal courts should not second guess state court's interpretation of state law; 2) Petitioner waived the equitable tolling issue by failing to raise the issue before the district court until he filed a surresponse memorandum; and, 3) that attorney error, which is not a basis for equitable tolling, is the only reason the federal habeas petition was not timely filed.

**Hill v. Mitchell,**  
400 F.3d 308 (6th Cir. 2005)

**AEDPA and claims not adjudicated on the merits:** *De novo* review rather than the AEDPA limitations on review standard applies when a claim has not been adjudicated on the merits, and the claim has not been procedurally defaulted.

**Ineffective assistance of counsel claim based on non-record evidence not procedurally defaulted:** Ohio law requires ineffective assistance of counsel claims to be raised on direct appeal unless the claim relies on evidence outside the record. Because Petitioner's ineffective assistance of counsel claim relies on evidence of what an expert would have testified to, if not for counsel's deficient performance, this claim did not need to be raised on direct appeal. Thus, the state court improperly applied its own procedural default rules, and never reached the merits, so the Court applied *de novo* review.

**No prejudice from counsels' failure to hire a mitigation psychologist until the day before the mitigation hearing:** Petitioner suffered no prejudice because: 1) other psychologists evaluated Petitioner at various times to determine his appreciation of what he was doing at the time of the assault; 2) nine reports from mental health examinations of petitioner that contained the same information as developed by the mitigation psychologist were introduced by defense counsel at sentencing; 3) despite being hired the day before testifying, the mitigation psychologist was able to evaluate petitioner in the same way he normally evaluates patients; 4) petitioner failed to show how the mitigation psychologist's testimony at trial was materially different from the testimony he would have presented had he been given more time to prepare.

**Failure to provide defendant with civilian clothes:** Because Petitioner confessed to the crime, prejudice cannot be established from counsel's failure to provide Petitioner with civilian clothes.

**Failure to instruct jury on intoxication:** Because no Supreme Court case requires jury instructions on intoxication as a defense to murder and because the absence of intoxication is not an element of the crime of murder, the state court's decision rejecting this claim was not objectively unreasonable.

**Trial counsel was not ineffective for failing to request an instruction on intoxication:** Trial counsel's decision to attack felony murder, the only aggravating circumstance making Petitioner eligible for the death penalty, at the exclusion of requesting an instruction on intoxication was a reasonable trial strategy given the risk that the intent argument involving an intoxication instruction would have diminished the focus on the felony murder contention.

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**No prejudice from failing to develop attorney-client relationship:** Assuming that trial counsel's failure to meet with Petitioner more often was deficient performance, Petitioner failed to establish prejudice, because he has not shown how additional meeting with counsel, or longer meetings with counsel, would have led to new or better theories of advocacy or otherwise would have created a reasonable probability of a different outcome.

**Prosecutor's misstatement of the law regarding weighing aggravating and mitigating circumstances does not require reversal:** Because there was only one aggravating circumstance and the prosecutor correctly stated the standard for weighing aggravating and mitigating factors on numerous occasions, the prosecutor's one incorrect statement suggesting that the mitigating factors had to outweigh the aggravating circumstances did not so infect the trial with unfairness to make the resulting conviction a denial of due process.

**Instructing the jury on statutory mitigating factors not relevant to case:** No due process or Eighth Amendment violation because the brief mention of mitigating factors not applicable to the case did not so infect the trial with unfairness to make the resulting conviction a denial of due process, particular since the prosecution did not argue that the jury should draw negative implications from Petitioner's failure to seek relief under certain statutory mitigating factors and since Petitioner relied on a significant number of statutory mitigating factors.

**No violation in considering nature of the offense as reason to support death sentence, even though nature of offense was not a listed statutory aggravating factor.**

*Smith v. Anderson,*

2005 WL 517525 (6th Cir. March 6, 2005)

(vacating stay of execution granted on a Rule 60(b) motion)

On the day Petitioner's execution date was set, Petitioner fainted and was rushed to a hospital where a cat scan was administered, and a follow-up MRI recommended. Petitioner then filed a Motion for Equitable Relief and For Relief From Judgment Under Federal Rules of Civil Procedure, Rule 60(b) on two grounds:

- 1) In denying relief as to Petitioner's grand jury foreperson discrimination claim, the Court found the claim to be procedurally defaulted without conducting the required cause and prejudice analysis. Petitioner has now obtained affidavits from trial counsel which demonstrate cause for the default; and,

- 2) In denying relief as to Petitioner's ineffective assistance of counsel in mitigation claim, both this Court and the Sixth Circuit held that Petitioner could not establish prejudice. Numerous courts, including the Sixth Circuit, have issued intervening decisions demonstrating that Petitioner was prejudiced by his counsel's failure to uncover and present evidence of his organic brain impairment. In addition, Petitioner now has medical support for his claim that he suffers from brain damage.

The federal district court denied relief on the grand jury discrimination claim, but granted a stay of execution and the 60(b) motion on the ineffective assistance of counsel claim involving organic brain damage, holding that this claim was properly filed under Rule 60(b) for two reasons. First, "although [Petitioner] does present newly discovered evidence, he does so to challenge the structural and procedural integrity of the Court's earlier ruling denied relief – he does not attack the conviction and sentence itself. [Petitioner] is challenging the nature of the judgment by which it was reached." Second, "the circumstances revolving around this newly discovered evidence—namely, its discovery through no action of [Petitioner], but rather, through the actions of Ohio by having [Petitioner] tested at the Mansfield General Hospital—presents the Court with the need to review this evidence. Rule 60(b)(6) which allows a district court to hear the motion for 'any other reason justifying relief from the operation of the judgment' is the appropriate route for the Court to consider this important development."

The Sixth Circuit vacated the stay of execution, holding that both claims were successive habeas claims not 60(b) claims, and thus the federal district court had no jurisdiction to enter a stay of execution because the Sixth Circuit had not authorized the filing of a successor habeas petition.

**Federal district court jurisdiction to enter a stay of execution:** A district court has jurisdiction to enter a stay of execution based on a 60(b) motion only when the court has jurisdiction to entertain the 60(b) motion on the merits. Similarly, the Sixth Circuit only has jurisdiction to consider the underlying merits of the 60(b) motion when the district had jurisdiction to entertain the motion. Thus, the threshold issue is whether a purported 60(b) motion is properly filed as a 60(b) motion rather than a successor habeas petition which requires permission from the Sixth Circuit before filing in the district court. If the motion should have been filed as a successor habeas petition, the federal district neither has jurisdiction to grant a stay of execution nor to entertain the motion on the merits.

**Successor habeas petition vs. 60(b) motion:** "When the motions factual predicate deals primarily with the constitutionality of the underlying state conviction or sentence, the motion should be treated as a second or successive peti-

tion.” On the other hand, if “the motion’s factual predicate deals primarily with some irregularity or procedural defect in the procurement of the judgment denying habeas relief, then it should be treated within the usual standards governing Rule 60(b) relief.”

**Petitioner’s brain damage claim is a successor habeas claim:** The court held that there is no question that Petitioner’s claim for relief is based on a factual predicate that deals with the constitutionality of the underlying federal conviction. Petitioner asked the district court to vacate its previous judgment based solely on new evidence of a brain abnormality and the district court held that there is now new evidence of a brain abnormality that may have served as a basis for a sentence of less than death. In essence, the district court reversed its previous decision denying habeas relief, based on a new assessment of possible merit of Petitioner’s claim of ineffective assistance of counsel. Thus, Petitioner sought to vacate the state criminal judgment, which makes his motion a successive habeas petition, depriving the federal district of jurisdiction to grant a stay of execution.

**Certificate of appealability from federal district court on denial of 60(b) motion:** When a federal district court denies a Rule 60(b) motion to reopen federal habeas proceedings, the district court had no authority to grant a certificate of appealability. The same rule applies to individual claims within the 60(b) motion.

**Cole, J., concurring and dissenting:** Cole disagreed with the majority’s basis for vacating the stay of execution. Because the United States Supreme Court has granted *certiorari* to determine the proper treatment of Rule 60(b) claims and could permit all 60(b) motions to be considered on the merits, the court’s reliance on the Sixth Circuit’s more restrictive interpretation of 60(b) motions as a basis to vacate a stay of execution is misplaced.

However, Cole would vacate the stay of execution because the “catch-all” provision of Rule 60(b) is only available when the other provisions are inapplicable. Petitioner’s 60(b) motion is based on new evidence, which is one of the enumerated reasons for granting 60(b) relief that must be filed within one year of judgment. Thus, because the “catch-all” provision is not available and because Petitioner’s 60(b) motion was filed more than one year after judgment, the stay of execution granted by the district court must be vacated.

Cole also disagreed with the majority expanding the record under Federal Rules of Appellate Procedure, Rule 10(e)(2), to include an affidavit from a neurologist that was not presented to the district court. The purpose of 10(e)(2) is to allow the court to correct omissions from or misstatements in the record for appeal, not to introduce new evidence in the court of appeals. Thus, it is inappropriate and inequitable for this Court to rely on the unchallenged opinion of an expert on appeal to support a reversal of a stay of execution.

#### KENTUCKY SUPREME COURT

***Bowling v. Commonwealth***

(mental retardation case) will be discussed when it becomes final. ■

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country. A calm, dispassionate recognition of the rights of the accused and even of the convicted criminal, ... tireless efforts towards the discovery of curative and regenerative processes; unfailing faith that there is a treasure, if you can only find it, in the heart of every man; these are the symbols which, in the treatment of crime and the criminal, mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue within it.

— Winston Churchill

## 6<sup>TH</sup> CIRCUIT REVIEW

By David Harris

***Jordan v. Hurley,***  
**397 F.3d 360 (6<sup>th</sup> Cir. 2005)**

Petitioner convicted of raping a woman with Down syndrome, seeks *habeas corpus* relief. Petitioner raises three claims: 1) Prosecution's leading questions on direct examination of victim violated defendant's right of confrontation; 2) judge disallowing impeachment of victim with prior inconsistent testimony from first trial violated due process and confrontation; and 3) sufficiency of the evidence.

Sixth Circuit found no merit regarding the prosecution's leading questions, noting that Ohio law permits leading witnesses who are "of tender years" or are "nervous and 'a little slow.'" The Court noted that, because this claim involves a state rule of evidence, federal review of these rulings is "extremely limited." *Waters v. Kassulke*, 916 F.2d 329 (6<sup>th</sup> Cir. 1990).

The Sixth Circuit next found the state court's ruling disallowing impeachment of the victim with her testimony from the first trial to be harmless error, as the evidence of force was "overwhelming." (Note, however, one judge dissented, commenting that the victim's testimony was the only evidence of use/threat of use of force. This judge went on to state that harmless error analysis should be done "on the effect of the error on the jury" rather than from a "sufficiency of the evidence" standpoint.)

Finally, evaluating the evidence in the light most favorable to the prosecution, the Court found no merit in the petitioner's claim that the evidence was insufficient to support the conviction. The denial of petitioner's *habeas corpus* was affirmed.

***Tinsley v. Million,***  
**399 F.3d 796 (6<sup>th</sup> Cir. 2005)**

In 1989, Scott Lee Tinsley was convicted of murder in Lincoln Co., Kentucky. After unsuccessful appeals and state post-conviction actions, petitioner sought federal *habeas corpus* relief. The Eastern District of Kentucky denied his petition, and Tinsley appealed to the Sixth Circuit.

Reviewing this case for a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," the Sixth Circuit analyzed each of petitioner's claims in turn.

Ineffective assistance of counsel (IAC) claims:

1) Trial counsel allowed potential jurors to volunteer to be removed with peremptory strikes. The 6<sup>th</sup> Circuit rejected this claim as an inaccurate characterization of the *voir dire*. After questioning from the judge, prosecutor, and defense attorney, trial counsel gave petitioner an opportunity to have input into who should be excused. Petitioner replied that he wanted all of them cut, at which point trial counsel asked for a "self-evaluation" for fairness, and if jurors didn't feel they could be fair, they could be excused with a peremptory strike. Though unusual, the 6<sup>th</sup> Circuit found this to be a reasonable strategy in this situation. Further, no prejudice was shown to result from this "error."

2) Trial counsel failed to challenge the prosecution's handling/withholding of certain evidence. The 6<sup>th</sup> Circuit denied this claim summarily, noting that the allegations lack specificity and fail to address any resultant prejudice.

3) Trial counsel failed to hire an independent blood-spatter expert. The 6<sup>th</sup> Circuit found that cross-examination of the state's witness was reasonable strategy here. Again, prejudice is notably lacking because petitioner does not demonstrate what other evidence could have been presented or how it may have affected the outcome of trial. It is interesting to note that the 6<sup>th</sup> Circuit agrees with petitioner's contention that the Kentucky Court of Appeals misstated *Strickland v. Washington's* prejudice standard: "*Strickland*, it is true, does not require allegations that would 'compel[] acquittal,' only claims that would establish a 'reasonable probability' of a different outcome."

4) Several miscellaneous IAC issues. The 6<sup>th</sup> Circuit disposed of these claims quickly, finding: a) statement by attorney "[t]here are no lie detectors in this case" is not equivalent to admission of polygraph evidence, but merely using the *concept* of polygraph evidence to explain the meaning of reasonable doubt, which is permissible; b) fact that trial attorney received death threats for representing petitioner does not create a conflict such that prejudice is presumed per *Cuyler v. Sullivan*, so petitioner must show prejudice resulting from this conflict, which petitioner has not; c) no IAC for failure to request self-defense or lesser-included instructions, but reasonable trial strategy where theory of defense's case was that petitioner was not the "shooter;" d) no IAC in other allegations regarding failure to object to testimony and argument, as Kentucky courts' decisions were correct that these were permissible, especially given trial strategy.

5) Trial counsel failed to introduce any mitigation evidence in the penalty phase. 6<sup>th</sup> Circuit found legitimate trial strategy here, though admittedly an unusual/unique case. Specifically, the jury's guilty verdict came back late in the day. Trial counsel felt that the prosecution was not prepared/would not push hard if they quickly went through the penalty phase. Petitioner was counseled on this strategy, and agreed. Prosecutor only told the jury about the 50% parole eligibility, then rested. Petitioner changed his mind and insisted on testifying, opening the door to the prosecution's inquiry into his prior manslaughter conviction. Clearly counsel cannot be said to be ineffective for failing to present evidence or prepare the petitioner for testimony when the agreed-upon strategy was to not permit damaging evidence of prior convictions to come in.

\*However, as part of this claim, petitioner claimed that trial counsel was ineffective for failing to give an opening or closing statement during the penalty phase. Apparently there was some confusion in the record; the 6<sup>th</sup> Circuit REMANDED this issue back to the district court for a determination as to whether or not this claim had been properly exhausted, and if so, whether it was properly raised; if it was properly raised, the district court should review the claim on the merits.

Having addressed all of petitioner's IAC claims, the 6<sup>th</sup> Circuit then moved on to address his other issues:

6) Petitioner's first trial ended in a mistrial during the third day. Trial counsel moved for a mistrial on the grounds that exculpatory evidence – in this case, a blood-stained "sleeper" that was on petitioner's son – was not turned over prior to trial. Petitioner claims that this second trial violated his Double Jeopardy rights. The 6<sup>th</sup> Circuit pointed out that, because petitioner consented to the mistrial, the only bar to re-prosecution would be judicial or prosecutorial bad faith. The Kentucky Supreme Court rejected this contention, and the 6<sup>th</sup> Circuit agreed.

7) Petitioner claimed a violation of his right to a jury from a fair cross-section of the community when the circuit clerk was permitted to dismiss potential jurors. However, no "group membership" was shown by the petitioner to establish a violation—the petitioner merely opined that college students, the elderly/sick, and the deceased were excused, but was unable to establish that the state courts decided this issue incorrectly and in violation of "clearly established Federal Law...."

8) The arresting officer in this case testified twice about petitioner's invocation of his right to counsel. However, trial counsel objected both times—the first time he objected to the answer as non-responsive, and the second time he approached the bench and asked for a mistrial on the basis of a violation of *Doyle v. Ohio*. The judge sustained both

objections, but denied the mistrial. Trial counsel did not ask for a limiting instruction. The 6<sup>th</sup> Circuit determined that the trial judge made the correct decision in sustaining the objection, and demonstrates that the Kentucky courts did not violate "clearly established Federal Law...."

9) The 6<sup>th</sup> Circuit summarily rejected petitioner's claims regarding sufficiency of the evidence (there was enough evidence), hearsay and false testimony during grand jury proceedings (this claim misstates the evidence provided and rules of grand jury proceedings), lack of jurisdiction once petitioner was transferred temporarily to federal custody for federal trial, after his first trial ended in a mistrial (despite the fact that his first trial "ended," petitioner was still pending trial in Kentucky; further this claim does not raise a cognizable federal due process claim for *habeas corpus*), and cumulative error.

Thus, the *habeas corpus* denial of the district court was affirmed, except for the one issue regarding whether opening/closing statements were made by trial counsel, properly exhausted and properly raised for *habeas corpus* review, which was REMANDED back to the district court.

***Dorchy v. Jones,***  
**398 F.3d 783 (6<sup>th</sup> Cir. 2005)**

Petitioner was convicted of murder and the commission of a felony while in possession of a handgun. According to petitioner, he shot his drug dealer out of self-defense, fearing for his life because he owed him \$10,000. The prosecution's theory, alternatively, was that petitioner walked up and shot the victim in the back of the head, then added a few more shots for good measure. During trial, the state's only two eyewitnesses were unavailable. The first, Knox, had testified earlier in a codefendant's trial, but since he could not be found, his testimony from the codefendant's trial was read to the jury. The other eyewitness, McCrary, gave a statement to police shortly after the incident, but stated that he would not testify and would assert his Fifth Amendment privilege against self-incrimination. A taped recording of this statement was played to the jury.

The Michigan Court of Appeals held that the Knox testimony carried sufficient indicia of reliability, and that the McCrary testimony, while inadmissible, was harmless. The federal district court granted petitioner a writ of *habeas corpus*, finding that neither of the eyewitness' testimony was admissible, and that the error was not harmless. The State appealed to the 6<sup>th</sup> Circuit.

The 6<sup>th</sup> Circuit began by pointing out that *Crawford v. Washington* 541 U.S. 36 (2004) is the current standard for reviewing the admissibility of out-of-court statements. Because the state courts made their decisions prior to *Crawford*, however, the previous standard contained in *Ohio v. Roberts*,  
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448 U.S. 56 (1980) must be used by the federal courts to evaluate the § 2254(d) “reasonableness” of the rulings.

The 6<sup>th</sup> Circuit first looked at Knox’s testimony. Under *Roberts*, an unavailable witness’ statement is only admissible if it has enough “indicia of reliability” to make it trustworthy. The Michigan Court of Appeals found four grounds for trustworthiness: 1) Knox was cross-examined by the codefendant’s lawyers who had a “similar interest” in challenging his Knox’s testimony; 2) his testimony was consistent with his earlier statements to police and another witness; 3) Knox was an eyewitness; and 4) his testimony was taken under oath. After review of the Knox’s testimony during co-defendant’s trial, the 6<sup>th</sup> Circuit found the Michigan Court of Appeals first ground to be incorrect. Specifically, the codefendant’s cross-examination focused on the claim that petitioner, not the codefendant on trial, was really the shooter. Thus, the co-defendant’s cross-examination sought to *increase* the witness’ credibility and certainty that it was the petitioner who actually did the shooting rather than challenge his credibility or memory. As such, the codefendant’s motivations in cross were in fact contrary to petitioner’s case, despite the Michigan Court of Appeals’ finding of a “similar interest.”

The 6<sup>th</sup> Circuit additionally found the other grounds of reliability insufficient. First, corroboration does not necessarily increase trustworthiness. Next, while the fact that he was an eyewitness may increase reliability, alone it does not establish reliability. Finally, the Court found that the fact that the testimony was under oath similarly was insufficient to satisfy the Confrontation Clause. The 6<sup>th</sup> Circuit thus found that Knox’s testimony was improperly admitted into evidence in petitioner’s trial. Though the state argued harmless error, the 6<sup>th</sup> Circuit rejected this claim as Knox’s testimony was the only eyewitness account of what happened, excluding McCrary’s statement which the Michigan Court of Appeals already conceded was inadmissible. Thus, Knox’s testimony was “essential” to the prosecution’s case, and the error cannot be deemed harmless.

The 6<sup>th</sup> Circuit agreed with the Michigan Court of Appeals’ determination that McCrary’s statement was improperly admitted into evidence. The 6<sup>th</sup> Circuit disagreed that this error was harmless, however—because, as shown above, Knox’s statement was inadmissible, McCrary’s statement was left as the only eyewitness account of the shooting. The 6<sup>th</sup> Circuit determined that this admission had a “substantial and injurious” effect on the jury. The 6<sup>th</sup> Circuit affirmed the district court’s granting of the *habeas corpus* petition.

***Humphress v. United States,***  
**398 F.3d 855 (6<sup>th</sup> Cir. 2005)**

Petitioner sought writ of *habeas corpus*, challenging his convictions of conspiracy to murder, attempted murder, and aiding and abetting murder. In sentence calculations, federal judge increased petitioner’s offense level from 28 to 37 based on factual findings, some of which were not found by the jury. The minimum sentence (for this offense level) of 210 months was imposed.

After conviction affirmed by 6<sup>th</sup> Circuit on appeal, petitioner filed *habeas corpus* motion under 28 U.S.C. §2255. Petitioner’s primary claim was that he received ineffective assistance of counsel (IAC) during the plea negotiation process, as required by *Hill v. Lockhart*, 474 U.S. 52 (1985).

The 6<sup>th</sup> Circuit analyzed this claim by assuming deficient performance *arguendo*. Looking to whether the petitioner was prejudiced by the alleged IAC, *i.e.* whether he would have insisted on pleading guilty had he been properly advised by counsel, the 6<sup>th</sup> Circuit reviewed petitioner’s testimony during his evidentiary hearing in district court. When asked if he would have pled guilty if properly counseled on the Sentencing Guidelines, petitioner was evasive. He responded that “it’s hard to speculate” and, had he known, he could have made “a more intelligent decision.” When directly and repeatedly asked by the prosecutor, petitioner again said “it’s hard to say,” finally stating “to a certain extent, yes.” The 6<sup>th</sup> Circuit found these statements to be equivocal, and insufficient to demonstrate the prejudice required by *Hill*.

The 6<sup>th</sup> Circuit also noted petitioner’s assertions of innocence at trial. Due to the “overwhelming evidence of his guilt,” the 6<sup>th</sup> Circuit also opined that it is unlikely that the prosecution would have offered an *Alford* plea. Determining that petitioner had not met his burden of demonstrating prejudice, the Court found no IAC, without analysis into counsel’s performance.

After deciding that *United States v. Booker*, \_\_\_ U.S. \_\_\_, 125 S.Ct. 738 (2005) does not apply retroactively to collateral attacks, the Court found no sentencing errors. Thus, the 6<sup>th</sup> Circuit Court of Appeals affirmed the district court’s denial of petitioner’s *habeas corpus* action.

\*Note: the alleged intended victim was a federal official, an FBI agent.

***United States v. Caseer,***  
**399 F.3d 828 (6<sup>th</sup> Cir. 2005)**

Appellant was convicted under federal drug laws for importation of the plant khat (*Catha edulis*) into the United States from Amsterdam. Stems from the khat plant are chewed or used to make tea in much of East Africa, including Somalia

and Kenya, where appellant had lived until the three years prior to arrest, when he lived in the United States. Testimony indicated that khat used in this manner has mild stimulant effects, like coffee or tea, and is legal in much of East Africa, the Arabian Peninsula, and Europe. The young khat plant carries a drug called cathinone, which is a Schedule I controlled substance in the United States. During maturation or decomposition of the plant, cathinone turns into cathine, a Schedule IV stimulant.

In his appeal, appellant stated that his conviction was in violation of the Fair-Warning Doctrine, because though cathinone is listed as a Schedule I drug, there is no reference to derivation of this substance from the khat plant. The 6<sup>th</sup> Circuit noted that a person of average intelligence very well may not be able to tell from the law that the khat plant was a source of this drug. Though the district court found reference to the khat plant is made in a “Supplementary Information” section of the Federal Register as well as a 1971 United Nations Convention on Psychotropic Substances, the 6<sup>th</sup> Circuit found that absence of this connection in the U.S. Code, Code of Federal Regulations, or even mainstream dictionaries made it unlikely that an average person would connect the Schedule I drug term “cathinone” with the khat plant. Ultimately, however, the 6<sup>th</sup> Circuit determined that the drug statute was not constitutionally deficient because a violation of the law required actual knowledge of the drug, *i.e.* “knowingly or intentionally” importing the drug.

Moving to appellant’s claim of sufficiency of the evidence, the 6<sup>th</sup> Circuit agreed that there was insufficient evidence for the district court to have found the requisite intent. Testimony merely recounted that the plant was chewed for its stimulant effects that were equivalent to coffee or tea, and was culturally used the same way in East Africa. Neither the plant itself (see above) nor awareness of the effects provide much proof of actual knowledge that this was a controlled substance. Additionally, though appellant arguably knew the plant may not make it through U.S. Customs, this alone would not support that he knew importing the plant violated U.S. drug laws, as many items prohibited to be brought through Customs are not illegal substances. The 6<sup>th</sup> Circuit reversed the conviction and remanded the case back to the district court.

***Griffin v. Rogers,*  
399 F.3d 626 (6<sup>th</sup> Cir. 2005)**

Petitioner filed for *habeas corpus* relief prior to exhausting state remedies, and her petition was dismissed without prejudice. Two years later, petitioner returned to federal court, this time after AEDPA’s 1-year statute of limitations had run.

While this case was pending, the 6<sup>th</sup> Circuit adopted a stay-and-abeyance procedure. *Palmer v. Carlton*, 276 F.3d 777 (6<sup>th</sup> Cir. 2002). Thus, *habeas* petitions with unexhausted claims

could be stayed, the petitioner could pursue the state claims within 30 days and then, within 30 days of the resolution of those issues, could continue with the federal *habeas corpus* petition.

In the instant case, petitioner took longer than the 30 days to both go to state court and then to bring another *habeas* petition to the federal court. The district court determined that *Palmer*’s “automatic” equitable tolling was inapplicable, because the 30-day windows were not observed in filing.

The 6<sup>th</sup> Circuit agreed that *Palmer*’s automatic equitable tolling was inapplicable. However, turning to “normal” equitable tolling, the 6<sup>th</sup> Circuit considered the *Andrews v. Orr* factors. The 6<sup>th</sup> Circuit ultimately found that petitioner and her counsel were reasonably ignorant of the relevant filing time requirements, reversed the dismissal of the petition, and remanded for proceedings on the merits.

\*Note: the dissenting judge expressed concern with the Court’s consistency. In *Palmer*, the Court ultimately dismissed the petition because it found a two-month delay (in refileing in federal court after exhausting state court remedies) to be unacceptably long to demonstrate diligence. In the instant case, the petitioner refiled in federal court just over six months after exhausting state remedies, yet equitable tolling was found.

***Turner v. Bagley,*  
401 F.3d 718 (6<sup>th</sup> Cir. 2005)**

Petitioner convicted in 1993, and files for direct appeal. Petitioner “goes through” 3 appointed attorneys who all fail to brief his case, and the Ohio Court of Appeals dismisses appeal for failure to prosecute in February of 2001. On March 12, 2001, attorney #3 moves to reinstate appeal and withdraw as counsel. On March 19, 2001, petitioner files federal *habeas corpus* petition.

On December 18, 2002 the federal district court dismissed petitioner’s *habeas* due to failure to exhaust state court remedies—petitioner appeals to 6<sup>th</sup> Circuit (\*this case).

Meanwhile, on March 18, 2003, the Ohio state court reinstates petitioner’s direct appeal, appoints attorney #4. Attorney #4 withdraws and attorney #5 is appointed, and files brief on June 17, 2003. On October 27, 2003, petitioner was paroled. On March 19, 2004, the Ohio Court of Appeals affirmed petitioner’s conviction.

Given this history, the 6<sup>th</sup> Circuit reviews the district court’s denial of petitioner’s *habeas corpus* from December 2002. Again, the reason for the district court’s denial was failure to exhaust state court remedies. At this time, the state court had dismissed petitioner’s direct appeal for failure to prosecute.

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The 6<sup>th</sup> Circuit began by quoting *Lucas v. People of the State of Michigan*, 420 F.2d 259 (6<sup>th</sup> Cir. 1970), stating that a *habeas* court should excuse exhaustion where further action in a state court “would be an exercise in futility.”

The 6<sup>th</sup> Circuit looked primarily to two cases in resolving the exhaustion issue, that existed because the instant petitioner had not yet had his claims adjudicated in the state court prior to presenting them to the federal courts via a *habeas corpus* petition. In *Workman v. Tate*, 957 F.2d 1339 (6<sup>th</sup> Cir. 1992), the 6<sup>th</sup> Circuit excused the exhaustion requirement where the petitioner’s motion for post-conviction relief “languished in state court for more than three years.” In *Harris v. Champion*, 938 F.2d 1062 (10<sup>th</sup> Cir. 1991), the 10<sup>th</sup> Circuit excused the exhaustion requirement where an Oklahoma public defender failed to pursue petitioner’s state court appeal.

Considering the fact that the Ohio state courts had ultimately dismissed petitioner’s appeal (at the time he filed his federal *habeas* petition), the 6<sup>th</sup> Circuit determined that the district court erred in failing to excuse the exhaustion requirement per the above-mentioned cases.

Next, the Court looked to whether the state court’s decision in petitioner’s direct appeal (again, determined over a year after he filed his federal petition) had any effect on petitioner’s instant case, as it might be considered a “ruling” for exhaustion purposes. This would also be important because two of petitioner’s issues were not addressed by the state court. Thus, if the appeal decision is considered a “ruling,” issues not addressed in the direct appeal are unexhausted as not brought before the state court. The 6<sup>th</sup> Circuit determined that “[t]he state court’s decision was too late,” and that exhaustion should be excused for all issues raised in the federal *habeas* petition. The Court noted that “[t]he exhaustion ‘clock’ stopped ticking in state court no later than when Turner’s direct appeal was dismissed for failure to prosecute because such failure can only be attributed to Turner’s appointed attorneys and the State of Ohio.”

Lastly, the 6<sup>th</sup> Circuit looked to appropriate remedy. Citing *Ward v. Wolfenberger*, 340 F.Supp.2d 773 (E.D.Mich. 2004), and *Hannon v. Maschner*, 981 F.2d 1142 (10<sup>th</sup> Cir. 1992), the 6<sup>th</sup> Circuit determined that, because “the ineffective assistance rendered by Turner’s attorneys in state court deprived him of an opportunity to pursue a meaningful direct appeal from his conviction, we hold that law and justice require that Turner’s petition for *habeas corpus* be unconditionally granted.”

\*Note: the concurring/dissenting judge agreed with the findings of the Court, but thought a better remedy would be to send the *habeas corpus* petition back for a ruling on the merits, to “find out” if actual prejudice resulted from the delay.

***Ballard v. United States*,  
400 F.3d 404 (6<sup>th</sup> Cir. 2005)**

Petitioner sought post-conviction relief in federal court per 28 U.S.C. §2255. Petitioner charged with, and convicted of, conspiracy to possess with intent to distribute cocaine, cocaine base, and marijuana. The 6<sup>th</sup> Circuit affirmed the conviction.

Meanwhile, one of petitioner’s codefendants was convicted at a separate trial. At that trial, counsel asked for special verdict forms to be presented to the jury to determine whether the conspiracy finding was related to cocaine or marijuana. The trial court denied the request for special verdict forms. However, the conviction was reversed by the 6<sup>th</sup> Circuit based upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *United States v. Dale*, 178 F.3d 429 (6<sup>th</sup> Cir. 1999). In *Dale*, like the instant case, the trial attorney did not ask for special verdict forms; however, the 6<sup>th</sup> Circuit determined that the judge, in sentencing from a general verdict involving several different drug types, could only sentence the defendant as if he had distributed the drug with the lower penalty.

Though *Apprendi* and *Dale* had not yet been determined, they did come down while petitioner’s direct appeal was pending.

Thus, the 6<sup>th</sup> Circuit reviewed specifically the issue of whether petitioner’s appellate attorney rendered ineffective assistance of counsel (IAC) in failing to argue that petitioner was entitled to appellate relief pursuant to *Apprendi* and *Dale*.

The 6<sup>th</sup> Circuit determined that there was “simply no rational basis for completely foregoing an argument that was not only potentially, but actually successful.” The Court found that appellate counsel’s failure to include this appropriate claim, especially when the codefendant’s brief was available for reference (which again, was successful), that deficient performance was clear.

The Court next moved to the “prejudice” prong of *Strickland*, i.e. whether, but for counsel’s unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. The 6<sup>th</sup> Circuit applied a “plain error” analysis, and determined from the record that a jury could have found that the petitioner was involved in a conspiracy to sell marijuana and cocaine. Thus, the rationale of *Dale* was appropriate, that the trial court’s use of a general verdict in sentencing the defendant led to “a manifest miscarriage of justice,” where the court sentenced based on the drug with a higher penalty.

The 6<sup>th</sup> Circuit reversed the district court’s denial of the *habeas* petition, vacated the petitioner’s sentence, and remanded for new sentencing. ■

## WELCOME TO MY WORLD: OUTSIDE LOOKING IN – PART III

### HOME SWEET ...

By Robert E. Hubbard

A prison cell is not likely to resemble the place most individuals would want to call home. However, following a conviction, for many defendants, the reality is a prison cell may be home for years to come. Although physically distanced from family and friends, those persons remain close in the hearts and minds of the incarcerated.

We cannot fully understand or appreciate the importance of maintaining contact with the outside world or preparing for a return to society. For the inmate, however, correspondence, telephone contact and visitation is their life's blood, preparation for employment means the prospect of a brighter tomorrow, and participation in religious services can replace the all too familiar emptiness and despair with new found joy and hope despite the circumstances. These aspects of incarceration are discussed below.

#### Inmate Correspondence

There are 2 basic forms of correspondence: outgoing mail that originates from the inmate and, incoming mail, received by the inmate from outside sources. Within those categories, mail is further classified as either "General Correspondence" or "Privileged Mail." General correspondence is any correspondence except privileged mail and includes magazines, periodicals, books, etc. Privileged mail is correspondence sent to or received from a licensed attorney, government official, state or federal courts, DOC officials, DPA staff or an individual from a government agency. However general information, forms, etc. is not treated as privileged mail. Provided they pay the necessary cost, an inmate may send correspondence by registered, certified or insured mail. However, services such as Express Mail, C.O.D., private carriers, etc. may not be utilized for outgoing mail. Generally, received correspondence will be delivered to the inmate within 24 hours of receipt during normal workdays, excluding weekends and holidays.

#### Incoming Mail

The inmate may receive mail from any sender except as more specifically discussed below in following sections. Incoming mail, not classified as privileged, will be opened and inspected for the presence of contraband or any other content that may be in violation of institutional rules. For items identified as contraband, the reader is referred to Corrections Policy and Procedure (CPP) 9.6. In cases where impermissible content/contraband is found, the item will be re-

moved, and a record made of the action taken. Additionally, if the item is not illegal, both the inmate and sender will be provided notice. Absent an appeal, the inmate will be allowed 7 days to direct how the item is to be disposed of. If the item is to be sent out, the inmate is responsible for the necessary cost, which must be paid within 7 days. If the inmate fails to direct how the item should be disposed of, the contraband may be destroyed, donated to charity or used for institutional purposes unless the item is unsanitary or of a non-hygienic nature (in which case it will be immediately destroyed). Where correspondence received fails to have a proper address, or has stickers, decals or for other reasons justifying rejection, the institution may immediately return the item to the sender with notice provided the inmate. Within 5 days of the notice of rejection, the inmate may appeal the decision to the warden.

#### Privileged Mail

A specific requirement of privileged mail is that the sender's identity be evident on the face of the envelope or container. Other regulations provide that this type of mail: (1) be opened only in the presence of the inmate and inspected for contraband; (2) not be read, provided the sender is adequately identified, or may be inspected to determine if the mail is privileged absent sufficient identification; (3) be recorded as incoming privileged mail with the date and time of delivery reflected and the inmate being required to sign for its receipt; (4) if outgoing privileged mail, be sealed by the inmate and not be subject to inspection as long as the addressee meets the definition of a privileged mail recipient.

#### Pornography/Sexually Explicit Materials

Any pornography or sexually explicit material that poses a threat to the security, good order or discipline of the institution may be disapproved. However, exclusion cannot be based on sexual content alone. Each institution maintains a list of publications that will be rejected any time they are received, with designated staff assigned to review all incoming publications. Examples of materials justifying rejection include those depicting homosexuality, sadism, masochism, bestiality and sexual acts/nudity with children. Also, any sexually explicit or nude photographs or reproductions, sent by non-publishers or on-line services, will be rejected regardless of the content. Any rejected material will be held and notice supplied the inmate. As with other incoming

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correspondence the inmate has the right to appeal as earlier discussed. If denied by the warden however, no further appeal is allowed.

### **Publications Generally**

Institutions have instituted the “publisher only” rule. Under this rule inmates are not permitted to receive any publication from a non-publisher. Rather, any magazine, book, religious material, etc., is required to be mailed, prepaid, by publishers or authorized distributors. Any publications received from a non-publisher may be donated to the prison chapel, library or other appropriate recipient.

### **Other Prohibited Mail**

In addition to other specific provisions addressing prohibited mail, mail containing any of the following is prohibited.

1. Threats of physical harm against any person or threats of criminal activity;
2. Plans to smuggle contraband in or out of the institution;
3. Information to formulate an escape, commit a crime or violate a prison rule;
4. Solicitation of gifts, goods, money or things of value from individuals or entities other than family or established close friends;
5. A code or gang insignia;
6. Obscene language or drawings;
7. Any information which, if communicated, would create a threat to the security of the institution;
8. Free advertising material, fliers, and other bulk rate mail except that received from recognized religious organizations sent in care of the institutional chaplain, or catalogs/magazines that are subscribed to by the inmate and mailed from the distributor by first or second class postage.

### **Inmate to Inmate Correspondence**

The general rule is that inmates are not permitted to write to each other unless approved by the warden in intra-institutional situations or the wardens of both institutions for regular mailings. There are exceptions however. For instance, inmates who are related as spouses, parent-child/stepchild, grandparent-grandchild or siblings. The relationship must be verified within the PSI Report and approval is contingent upon the understanding that such correspondence is subject to inspection and being read. Additionally, in institutions where Resident Legal Aides are prohibited from visiting segregation inmates, legal documents may be exchanged. These legal documents may be reviewed to the extent necessary to insure the content involves an authentic legal matter. If inmates are permitted to correspond with each other, but abuse the privilege or violate other related rules, the permission to correspond shall be suspended pending reapproval.

### **Forwarding Mail**

Even though inmates have the responsibility to inform their correspondents of any change of address, for 30 days institutional staff will forward the mail of any transferred or released inmate. After that time all mail received, including privileged mail, will be returned to sender. All privileged mail returned will reflect the reason the mail is being returned or the last known address of the inmate. If an inmate is out-of-court, on hospital stay, on a funeral visit, etc., that is expected to last less than 7 days, the mail (except privileged mail) will be held pending the inmate’s return. Institutional staff will attempt to forward privileged mail but, if the inmate is expected to return within 48 hours, the mail will be held pending their return.

### **Inmate Packages**

Inmate packages are designated as either: 1) a “home mailed package,” 2) a “vendor order,” or 3) a “special package.”

Home mailed packages are those mailed from a private individual or group. This package is limited to 1 mailing and must be sent through the U.S. Postal Service or by commercial delivery and include a verifiable return address. It must be of reasonable size and weigh no more than 20 pounds. This package is limited to containing certain specified items of clothing, laundry and/or bedding and must be accompanied by a signed copy of the package guidelines; see, Attachment 1 of CPP 16.4 for a specific listing of these items.

Inmates may receive a minimum of one vendor order per calendar year; the exact number allowed is established by each institution. The order must be mailed from outside vendors who have been approved by the institution. The only authorized items are those listed in Attachment 1 of CPP 17.1, and the inmate must adhere to ordering requirements established by DOC in placing the order.

Special packages are those specifically authorized by the Warden. These packages may contain only items necessary to meet the needs of a specific medical condition or for other documented reasons.

Any unauthorized packages, or improperly shipped packages, will be refused by the institution. When the institution receives a package containing contraband, which is not otherwise illegal, the inmate will be notified of this fact and provided the opportunity to appeal the determination to the warden. If unsuccessful in this appeal the inmate must dispose of the unauthorized items by returning them to the sender, donating them to a charitable cause or causing their destruction. Perishable items must be disposed of within 10 days. Non-perishable items must be disposed of within 45 days.

### Outgoing Mail

All outgoing mail, except privileged mail, is subject to inspection and review and any threats, extortion, etc. subjects the inmate to disciplinary action and/or referral to "outside court." All outgoing mail may be left unsealed and reflect the name and full return address of the inmate to include the name of the institution, or, if sealed, be subject to opening and searched for contraband and/or to determine if any violation of prison rules exists or is planned. Mail that contains contraband and/or that constitutes a violation of prison rules or mail in violation of Federal or State law may be rejected. Mail that does not have the proper return address will be returned to sender when the sender can be identified. Otherwise, the mail will be held for 30 days and if not claimed by the sender it will be destroyed. Any mail opened by institutional staff will be marked as being opened and inspected by staff at the respective institution. All outgoing mail will be stamped to identify the fact that the mail is being sent from a correctional institution. Inmates who are indigent, as defined within CPP 15.7, will be provided upon request postage and stationary sufficient for at least 2 letters (1 oz or less) to be sent weekly.

### Returned Mail

Any undeliverable mail returned to the inmate will be opened and inspected for contraband prior to being given to the inmate; privileged mail is only opened in the inmate's presence. During the inspection, staff will determine if the envelope contains any substance, material or property that is being improperly sent into the institution and if the mail was opened or otherwise tampered with prior to its return.

### Access to Telephones

Corrections Policy and Procedures provide for all inmates to have reasonable and equitable access to the telephone. Inmate calls are required to be collect calls made at the expense of the person called; third party calls are not permitted. However, an inmate telephone call may be charged to the institution in emergency situations with prior approval of administrative staff. When an inmate receives an emergency telephone call, the emergency nature of the call will be verified by staff and the name and phone number of the caller obtained. The inmate may be advised of the necessary information and permitted to return the call.

Inmate calls are subject to monitoring on a periodic, random basis or when there is reason to believe the telephone privilege is being abused in a manner in violation of the law or detrimental to the security of the institution, its employees or other inmates. Proper notification that telephone conversations may be monitored must be visibly posted by each inmate telephone or where multiple phones are located within the telephone area.

Violation of relevant phone related policies may subject the inmate to an adjustment committee action and/or referral to outside court.

### Inmate Visits

Since each institution establishes many of its own operational guidelines the reader is encouraged to check with each facility concerning the specific dates and hours for visitation. More general visitation policies follow.

Each institution maintains a clean, comfortable and safe visiting area and provides adequate supervision and security. If space is available, often a portion of the visiting area is equipped for children's use. In addition, outdoor visiting areas may be provided inside the security perimeter. These areas may be arranged to permit personal contact but the entire area is subject to continual supervision. Aside from regular visitation areas, more secure areas may be provided for non-contact visits with inmates who demonstrate a substantial security risk and/or have been convicted of specifically designated institutional infractions.

Taking into consideration space, staff resources and institutional order and security limitations, each inmate is allowed the opportunity to visit a minimum of 8 hours per month, scheduled so that the inmate's work/program schedules are not interrupted; restrictive lengths of visits may be established to avoid overcrowding.

Exceptions to normal visitation guidelines may be made if "special circumstances" exist. Special circumstances include:

- a) The visitor's traveling distance;
- b) Frequency of visits for the inmate;
- c) Health problems affecting the inmate/visitor;
- d) A visit for business purposes when the assets or prospects of a business or property may be affected.

Any request for special circumstance visits should be made and approved 1 week in advance.

Each institution maintains an approved visitation list for each inmate that is updated at least twice a year during classification reviews. An individual's name must be on the list in order to visit. An inmate may request visitation from any "immediate family" member and 3 additional adults. Immediate family members are parents, step-parents, others who may have raised the inmate in place of their parents, grandparents, brothers and sisters, spouse and children (including step or adopted children), a child to whom the inmate has acted as a parent, and grandchildren.

It is the responsibility of the inmate to provide the institution with the required information concerning the visitor by completion of a D.O.C. "Visiting Information Form." In the case of immediate family, the family relationship must be verifiable. In instances where the inmate does not have any

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immediate family, at the discretion of the warden, the number of other adult visitors may be increased. Falsification of visitor information may lead to the denial of approval and result in disciplinary action.

Staff will be present to supervise each visit in order to insure the security and order of the institution but both visitor and inmate can expect to be treated in a courteous and positive manner. At the beginning and end of the visit, the inmate in regular visiting is allowed brief physical contact, *i.e.*, holding hands, kissing and embracing within the bounds of good taste; sexual stimulation/activity is strictly prohibited. Inmates are restricted to having only a few or no articles in their possession while in the visiting area and, before and after each visit, the inmate is subject to being frisked or strip-searched. Visits are to be conducted in a quiet and orderly manner and are subject to termination if guidelines are not followed. Children are to be under the control of the accompanying adult: however, an inmate may hold their minor child/stepchild in an appropriate manner during the visit. Inappropriate actions may result in termination of the visit and possible disciplinary action.

Some rules particularly relevant to the visitor are:

1. The visitor should not be on more than 1 inmate list unless both inmates are verified immediate family members of the visitor.
2. A visitor cannot visit more than 1 inmate unless authorized.
3. Children under 18 must be approved, included on the visiting list, accompanied by a parent, legal guardian or other immediate family member with written, notarized permission of the parent or guardian. The name of the person accompanying the child must also be on the list. A person under 18, who is married to the inmate and provides proof of marriage may be placed on the list and need not be accompanied.
4. Attorneys, clergy, government officials, law enforcement officials or approved volunteers on official business are approved for visitation on a case by case basis with prior written approval and are not required to be added to the inmate's visitation list;
5. Ex-offenders, parolees, probationers, or former DOC employees must have prior approval of the warden (or designee) and if applicable, the Probation/Parole office. Approval will not be given until at least 1 year following:
  - a) date of release from an institution to parole or conditional release;
  - b) placement on probation; or
  - c) termination of employment with DOC.
6. No communication or recording device is permitted.

Although otherwise eligible to visit an inmate, a visitor may be excluded if:

1. Their presence constitutes a probable danger to institutional security or its orderly operation;
2. They have a past record of disruptive conduct;
3. They are under the influence of drugs or alcohol;
4. They refuse to show proper photo I.D. after the initial visit;
5. They refuse to submit to a search;
6. They are directly related to the inmate's criminal behavior.

Upon entry to the institution each adult visitor is required to register and show proof of identification with a valid driver's license or photo I.D. Any children on the approved list will be registered by the accompanying parent/guardian. The visitor may be required to submit to a personal search of his/her person, any object in his possession, or any vehicle brought onto the institutional grounds. Additional information concerning searches is set out in CPP 9.8.

To ensure compliance with institutional rules and regulations, a copy of the institutional visitation policies is made available to each visitor. Further, each institution is required to post copies of KRS 520.050 and 520.060, that prohibits the introduction of contraband and sets forth the relevant penalty for any violation of the prohibited conduct. A violation of institutional guidelines or statutory law may result in visiting restrictions, disciplinary action and/or criminal prosecution for the inmate and the visitor may be permanently or temporarily restricted from visitation and/or be criminally prosecuted.

While the dress code may vary slightly by institution, the more general rule is that clothing should be in good taste and not offend other visitors, staff or inmates.

### **Marriage**

With approval of the warden, (or if in community custody, the community center program manager), an inmate may marry during the term of their incarceration. However, the request to marry is subject to disapproval when:

1. There exists a legal restriction to the marriage;
2. The security of the institution or the public would be threatened;
3. The inmate making the request is emotionally unstable or incompetent;
4. The inmate is seeking to marry a current DOC employee; or
5. The inmate is seeking to marry an inmate currently incarcerated at another facility.

In requesting permission to marry, both parties must submit a written request that contains a narrative explanation of the circumstances of the marriage; and, if the inmate has been married before, a copy of the divorce decree or other documentation verifying that there is no legal restriction to the marriage.

Within 90 days of the written request the warden will render a decision. Not until that decision has been made, should an application for a marriage license or other arrangements be made. If the request to marry is disapproved, the inmate may appeal the decision to the Deputy Commissioner of Adult Institutions. These same requirements apply to the inmate confined within a community center, except, permission to marry is sought from the probation/parole officer assigned to the center, and any appeal is submitted to the Director of Local Facilities.

Marital counseling, while not required is available to the inmate upon request. This service is provided by the institutional chaplain or other "counselor" approved by the warden. If costs are incurred by the use of an outside counselor the cost is borne by the applicant. In the case of hardships however, special arrangements may be made and the requirements waived.

The marriage ceremony itself may be held within the institution or on an approved furlough. If held in the institution, the following rules apply:

1. The ceremony may be conducted by the Chaplain or a visiting clergy, who the Chaplain, or other designated staff, will assist the couple in obtaining.
2. Wedding guests will be limited to 8 people, including the bride and groom. Based upon security needs, that number may be limited. All guests will be pre-screened; no children under 18 are permitted to attend; with the warden's consent 1 guest may be a resident inmate, who serves as a member of the wedding party.
3. The ceremony and reception is limited to 1 hour; at the warden's discretion, the reception may be disapproved.
4. Correctional staff will be present during the ceremony to assist with the required security searches.

At the ceremony the inmate is required to wear clothing already in their possession. No clothing may be brought in to the institution. Family, friends or others attending the ceremony, may however bring:

1. A large sheet-cake no larger than 12x14 which will be cut by institutional staff prior to it entering the institution. No other food items are permitted.
2. A bouquet of artificial flowers for the bride to carry.
3. One unloaded camera and 1 roll of film which must remain out of the camera until searched by institutional staff.
4. The inmate's wedding ring.

At the conclusion of the ceremony, the inmate is only permitted to take their ring and one Polaroid picture (if taken) back to his living area. A copy of the marriage license will be placed within the inmate's institutional record.

### Religious Programs

During incarceration D.O.C. ensures that each inmate has the opportunity to participate in the practice of their religious faith as deemed essential by the faith's judicatory. As such, the inmate is allowed to possess or have access to religious publications, symbols, congregational services, individual and group counseling, study classes and adherence to dietary requirements. Religious practices will be limited only upon a showing that the practice constitutes a threat to the safety of persons involved or the activity itself disrupts order in the institution. Special services or ceremonies may be permitted but the request for these must be in writing to the chaplain, made 45 days in advance with appropriate justification.

Each institution provides a chaplain who plans, directs and, coordinates the religious program, including the approval and training of lay and clergy volunteers. If a religious leader of a particular faith is needed, the chaplain will assist in contacting a person with the appropriate credentials who will minister under the chaplain's supervision. The chaplain must also establish and maintain communication with members of the faith community and approve the donation of equipment or materials for use in the program.

In meeting their responsibilities the chaplain must:

1. Ensure equal status and protection for all religions.
2. Coordinate the scheduling of all religious programming to provide adequate opportunity for expression.
3. Have access of all areas of the institution and visit special management program areas weekly.
4. Develop and maintain relationship with community resources.
5. Supervise all chaplain students.
6. Coordinate and supervise all religious volunteers.

Upon entry into the correctional system, the inmate's religious preference is recorded. Any changes in preference should be reported to the Classification and Treatment Officer (CTO) by the inmate. The inmate also has the responsibility to seek a job or program assignment that does not conflict with their religious preference.

### Inmate Wage Program

Incarcerated inmates have the opportunity to participate in numerous educational, job, and program assignments. While the specifics of those opportunities will be reviewed within Part IV of this series, we will discuss here the system established for compensating inmates for work performed.

Each institution is responsible for establishing its own number of positions and no inmate will be classified to a position unless a vacancy occurs. When available, the individual job of an inmate is assigned through the classification pro-

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cess. In making assignments, the work experience and needs of the inmate are considered, as is the proper maintenance of the institution. As used, the term "job assignment" refers to all inmate job and program assignments, which includes community and governmental job assignments. However, it does not include job assignments within Correctional Industries, Frankfort Career Development Center, or Capital Construction that are each responsible for adoption of a separate pay scale.

All job assignments are assigned to a specific group and pay category.

1. Category I jobs consist of Food Service, Maintenance, Outside Details and Community Support. These jobs are compensated at \$1.25 per day;
2. Category II jobs in Education, Sanitation and Program and Support are compensated at the rate of \$.75 per day; and,
3. Category III jobs that are Specialized Project Assignments are compensated at a maximum \$2.00 per day.

Unless exceptions are made with approval from the Office of Adult Institutions, each job is considered a full time position, limited to 5 days per week. To receive pay, for any given day, the inmate must be present at the job site and utilized by the supervisor. Any inmate who fails to report to work, for any reason, will not be paid for that particular day. Neither overtime pay nor pay for multiple assignments is allowed. Where an inmate is classified to multiple assignments, they are compensated for the work in the highest pay category.

Inmates placed in unassigned status (UA), *i.e.*, medically unassigned or inmates dismissed from an assignment without being reclassified, are not eligible for pay. Further, unless approval is received, an inmate who is dismissed will not be eligible for reassignment for 30 days. Inmates transferred to another institution will not begin to receive pay again, until placed in a new position at the receiving institution. ■

## KACDL EVENTS

- Annual Video Seminars will be hosted in June 2005 at various locations throughout the state. Please contact your local KACDL members in their area to get dates, times and locations, or contact KACDL directly.
- KACDL board meeting will be on July 8, 2005. Location: TBA Frankfort
- 19th Annual Seminar will be held Friday, November 18, 2005 from 8:00 a.m. until 5:00 p.m. at Caesar's Palace in Elizabeth, Indiana. (Right outside of Louisville, Kentucky.) There is a room discount for anyone that calls in within 30 days of the event.

The cost 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

### KACDL

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## PLAIN VIEW . . .

***Muehler et al. v. Mena,*  
125 S.Ct. 146, 2005 U.S. LEXIS 2755 (2005)**

Two police officers learned that a member of the West Side Locos lived at 1363 Patricia Avenue and that because he had been involved in a drive-by shooting the officers also believed he was armed. Officers Muehler and Brill obtained a search warrant. The warrant was served while the house was “secured” by a SWAT team. Mena was in bed when the SWAT team came in. They handcuffed her with guns drawn. Mena along with three others who were similarly handcuffed were taken to a garage. An INS officer accompanied the officers during the search and questioned Mena and the others regarding their immigration status. As a result of the search, a handgun, ammunition, a bag of marijuana, and gang related paraphernalia were seized. Thereafter, Mena filed a civil suit under 42 USC §1983 alleging a violation of her Fourth Amendment rights as a result of the manner in which she had been detained and the manner in which the warrant was executed. The trial court denied the officers’ motion for summary judgement, and the 9<sup>th</sup> Circuit affirmed. Thereafter, a jury found that the officers had violated Mena’s Fourth Amendment rights, and awarded her \$60,000. The Court of Appeals affirmed. 332 F. 3d 1255 (9<sup>th</sup> Cir. 2003). The Court held that the officers had violated Mena’s Fourth Amendment rights when they confined her in the garage in handcuffs. Further, they held that questioning her about her immigration status while in the garage also violated her Fourth Amendment rights, and because those rights were clearly established, the officers were not entitled to qualified immunity.

In an opinion written by Justice Rehnquist, the US Supreme Court vacated the judgement of the 9<sup>th</sup> Circuit. The Court held first that Mena’s detention was legal under the authority of *Michigan v. Summers*, 452 U.S. 692 (1981). “An officer’s authority to detain incident to a search is categorical; it does not depend on the ‘quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.’ . . . Thus, Mena’s detention for the duration of the search was reasonable under *Summers* because a warrant existed to search 1363 Patricia Avenue and she was an occupant of that address at the time of the search.”

The Court also held that the use of force to detain Mena did not violate the Fourth Amendment. “Inherent in *Summers*’ authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention . . . The officers’ use of force in the form of handcuffs to effectuate Mena’s detention in the garage, as

well as the detention of the three other occupants, was reasonable because the governmental interests outweigh the marginal intrusion.”



*Ernie Lewis, Public Advocate*

The Court rejected Mena’s argument that the duration of the handcuffing was an independent Fourth Amendment violation. The “2-3 hour detention in handcuffs in this case does not outweigh the government’s continuing safety interests. As we have noted, this case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapons. We conclude that the detention of Mena in handcuffs during the search was reasonable.”

The Court also overturned the Ninth Circuit’s finding that the questioning of Mena regarding her immigration status was an independent violation. “We have ‘held repeatedly that mere police questioning does not constitute a seizure.’ . . . [E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual.”

Justice Kennedy concurred in the judgement, writing separately in order to emphasize that police handcuffing should become “neither routine nor unduly prolonged.” He wrote a virtual handbook on when handcuffing is appropriate and when it is not, perhaps mindful of the prisoner abuses at Abu Ghraib and elsewhere. “If the search extends to the point when the handcuffs can cause real pain or serious discomfort, provision must be made to alter the conditions of detention at least long enough to attend to the needs to the detainee . . .” However, under all of the circumstances, Justice Kennedy believed that the handcuffing and its duration did not violate the Fourth Amendment.

Justice Stevens also wrote a concurring opinion, joined by Justices Souter, Ginsburg, and Breyer. While these four concurred, they disputed the use of *Michigan v. Summers*, 452 U.S. 692 (1981). “Given the facts of this case . . . I think it clear that the jury could properly have found that this 5-foot-2-inch young lady posed no threat to the officers at the scene, and that they used excessive force in keeping her in handcuffs for up to three hours. Although *Summers* authorizes the detention of any individual who is present when a valid search warrant is being executed, that case does not give officers *carte blanche* to keep individuals who pose no threat in handcuffs throughout a search, no matter how long it may last. On remand, I would therefore instruct the Court

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of Appeals to consider whether the evidence supports Mena's contention that the petitioners used excessive force in detaining her when it considers the length of the *Summers* detention."

The concurrence also found that the use of the SWAT team was reasonable. "When officers undertake a dangerous assignment to execute a warrant to search property that is presumably occupied by violence-prone gang members, it may well be appropriate to use both overwhelming force and surprise in order to secure the premises as promptly as possible."

Finally, the concurrence found that the jury could have found the use of the handcuffs to have been unreasonable. "In short, under the factors listed in *Graham* and those validly presented to the jury in the jury instructions, a jury could have reasonably found from the evidence that there was no apparent need to handcuff Iris for the entire duration of the search and that she was detained for an unreasonably prolonged period. She posed no threat whatsoever to the officers at the scene. She was not suspected of any crime and was not a person targeted by the search warrant. She had no reason to flee the scene and gave no indication that she desired to do so. Viewing the facts in the light most favorable to the jury's verdict...there is certainly no obvious factual basis for rejecting the jury's verdict that the officers acted unreasonably, and no obvious basis for rejecting the conclusion that, on these facts, the quantum of force used was unreasonable as a matter of law."

***Fisher v. Harden,***  
**398 F.3d 837, 2005 Fed.App. 0096P,**  
**2005 U.S. App. LEXIS 3276 (6th Cir. 2005)**

This is a sad case out of Morrow County, Ohio. 77 year old Buster Fisher took a folding chair and set it on elevated railroad tracks in order to shoot groundhogs with his rifle, as he often did, to protect his neighbor's crops. A passerby saw him, and thought he had his feet tied to the tracks, and called the Sheriff's department, reporting a possible suicide attempt. Stephen Alexander, his wife Molly, and Sheriff's Deputies, went to where Fisher was. He was hundreds of yards away, so they used a microphone to tell him to come to them. He began carrying the folding chair and the rifle. Once the deputies saw he had a rifle, they told him to lay it down. He did so. Then they told him to lay down the chair, and he did so again, and kept walking toward them. He kept walking toward them, and the deputies kept their guns drawn on him. Fisher got to where the deputies were, and "the officers commanded Fisher, still at gunpoint, to lay face down on the roadway, and handcuffed him behind his back." Fisher then had a heart attack. As a result, he is now permanently disabled. Fisher filed a 42 USCA #1983 lawsuit. The district judge granted summary judgment, holding that the deputies

had qualified immunity "because Fisher had failed to establish a constitutional violation, and that there was no genuine issue of a material fact." Fisher appealed.

The Sixth Circuit reversed in an opinion written by Judge Keith and joined by Judge Clay. The Court held that the deputies had violated Fisher's Fourth Amendment rights. The Court rejected the notion that deputies had a right to conduct a *Terry* stop in the context of a mental health seizure. "Absent suspected criminal activity, in this circuit a law enforcement official may not physically restrain an individual merely to assess his mental health. Rather, we have established that in the context of a mental health seizure an officer must have probable cause to believe that the person seized poses a danger to himself or others." Probable cause in the mental health context requires "only a 'probability or substantial chance' of dangerous behavior..."

The Court also found that the constitutional right violated was clearly established. "It is clearly established that an officer may not affect a mental health seizure without probable cause. Viewing the facts in the light most favorable to Fisher, we conclude that the Alexanders engaged in conduct that violated a clearly established constitutional right. Accordingly, we find that qualified immunity does not shield them from civil liability."

Judge Gibbons dissented. He noted that the deputy knew that people committed suicide by laying on train tracks, that Fisher had not readily put down the rifle when told to do so (the majority had said that the 77 year old Fisher did not hear the initial commands), and that the deputy was unsure whether Fisher had other guns on him. He also believed that the deputy had a right under *Terry* to make an initial determination whether Fisher was a threat to him or not. "Probable cause was not required to conduct this temporary investigation and detention." Because the deputies had a reasonable suspicion, there was no constitutional violation, according to the dissent. "At the time the deputies handcuffed Fisher, it was reasonable under the circumstances then known to them to fear that he might suddenly reach for a second firearm and harm them. Consequently, it was also reasonably necessary for them to continue training their weapons on Fisher and to handcuff him in order to guarantee their own safety."

***United States v. Yoon,***  
**2005 U.S. App. LEXIS 3207, 398 F.3d 802;**  
**2005 FED App. 0092P (6th Cir. 2005)**

Just when you think that you know about all of the exceptions to the warrant requirement, a case like this comes along. This case explores the doctrine of "consent once removed," an exception to the warrant requirement that is percolating in the circuits but one that has not been established by the US Supreme Court.

Meen Kim had been arrested in June of 2002 by the Tennessee Bureau of Investigation. Kim agreed to act as an informant against Min Yoon. Kim went to Yoon's apartment in Nashville, Tennessee, wearing a wire. Once inside the apartment, Kim negotiated a marijuana transaction with Yoon. Once the officers outside heard the negotiations, they went inside the apartment and arrested Yoon. Yoon ultimately entered a conditional guilty plea after he lost his motion to suppress.

The Sixth Circuit, in a decision written by Judge Hood, affirmed the decision by the district court overruling the motion to suppress. The government claimed that the search was justifiable under the "consent once removed" doctrine, citing *United States v. Pollard*, 215 F.3d 643 (6th Cir. 2000). *Pollard* had allowed the warrantless entry and search of a person where an informant and an undercover officer had entered a dwelling and obtained probable cause. "According to *Pollard*, the police can enter a suspect's premises to arrest the suspect without a warrant if '[an] undercover agent or informant: 1) entered at the express invitation of someone with authority to consent; 2) at that point established the existence of probable cause to effectuate an arrest or search; and 3) immediately summoned help from other officers.'" Judge Hood held that the concept of "consent once removed" would be extended "to cases in which a confidential informant enters a residence alone, observes contraband in plain view, and immediately summons government agents to effectuate the arrest."

Judge Kennedy wrote a concurring opinion fleshing out the "consent once removed" doctrine. According to Judge Kennedy, "it is based upon the theory that, because an undercover agent or informant who establishes probable cause to arrest the suspect may in fact arrest him then and there, he should be entitled to call in the agents with whom he is working to assist in the arrest because, once the suspect invites the agent or informant into his house and displays his illegal activity to him, the suspect's Fourth Amendment expectation of privacy has been 'fatally compromised.'"

Judge Gilman wrote a dissenting opinion. He would have had the Sixth Circuit reject the extension of the "consent once removed" doctrine to police informants. Judge Gilman also rejected the notion that once the informant signaled to the police that there was probable cause, a warrantless entry could be made. "The opinion fails to note, however, that in the absence of exigent circumstances, the existence of probable cause simply *entitles the police to obtain a warrant* to enter a home, not to charge inside without a warrant... Indeed, if this were not the law, there would be no need for the warrant requirement at all—police officers could simply invade homes whenever they deemed that probable cause existed, without the intervention of a neutral magistrate. Such a severance of probable cause from the warrant requirement is completely unjustified."

Judge Gilman asserted that expanding the concept of "consent once removed" is a dangerous one. "I have no problem with the proposition that a suspect who voluntarily consents to the entry of a law enforcement officer waives the right to insist on a search warrant. Nor do I question the wisdom of the consent-once-removed doctrine that imputes collective knowledge among law enforcement officers. What gives me grave concern is the extension of the doctrine to lay informants, because the extension entrusts to ordinary civilians law-enforcement powers previously given only to the police. Furthermore, these powers are entrusted to a suspect class of civilians—informants who themselves often have criminal charges pending and therefore have every reason to curry favor with the police in the hope of receiving lenient treatment for their own wrongdoing. Thus, by not recognizing the conceptual basis for the consent-once-removed doctrine, the majority effectively deputizes the very criminals from whom law enforcement officials should be protecting law-abiding citizens."

*United States v. May*,  
2005 U.S. App. LEXIS 3086, 399 F.3d 817;  
2005 FED App. 0089P (6th Cir. 2005)

Benji Brown told Officer Jeffrey Allen that Terrence May had a large amount of powder cocaine in his possession. Allen met with FBI Agent McCann and put a wire on Brown, gave him a cell phone, and crack-cooking utensils. The officers left to obtain a search warrant. They called Brown on the cell phone and learned he was already cooking crack cocaine. An affidavit was prepared and a petition for a search warrant was presented to an Ohio judge. The affidavit had a great deal more information in it regarding the investigation of Terrence May. It did not name Benji Brown, but referred instead to a "cooperating source." A search warrant was issued. Officers executed the warrant by approaching the house yelling "police department, search warrant." They knocked twice, waited 15 seconds, and knocked the door open with a battering ram. 10-12 ounces of crack cocaine and a .38 caliber revolver were seized. After May lost his suppression motion, he entered a conditional plea of guilty and appealed.

The Sixth Circuit, in an opinion written by Judge Gilman, affirmed the lower court. The Court rejected May's complaint that the identity of the cooperating source had not been disclosed in the affidavit. While concerned that the identity was not disclosed in the affidavit, the Court found that additional evidence substantiating the informant's reliability was contained in the affidavit. There was also sufficient corroboration of the informant's statements to support a finding of probable cause. Even if the affidavit was thought not to be sufficient, the Court also relied upon the good faith exception to the warrant requirement.

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***United States v. Chambers,*  
2005 U.S. App. LEXIS 1621, 395 F.3d 563;  
2005 FED App. 0045P (6th Cir. 2005)**

An informant let the Fayette County, Tennessee, Sheriff's Department know that Chambers had a meth lab in his trailer and garage. Thereafter, the officers watched the trailer and garage for three nights, including helicopter flyovers. As a result, there was "strong, indeed overwhelming, evidence of multiple drug sales at the premises on a daily basis, evidence supporting the informant's statements that a meth lab was in frequent operation at the Chambers home." However, no warrant was obtained.

Instead, three months after the surveillance, the Sheriff's Office received an anonymous call on October 9, 2002, saying that Chambers was cooking meth "right now." The Sheriff's officers went to the trailer and conducted a "knock and talk investigative technique." A woman came to the door and retreated when she saw three cars full of armed deputies. The officers entered with guns drawn and began to search the trailer. They found Chambers, gave him his *Miranda* warnings, and asked him if he would consent to a search. "At that point, after the illegal entry and after the officers had found some evidence of the methamphetamine lab they had expected to find, and after Chambers was not free to leave, Chambers and his wife then signed a consent to search form."

Chambers was indicted. When the district court granted his motion to suppress, the government appealed. In an opinion by Judge Merritt and joined by Judge Daughtrey, the Sixth Circuit affirmed the lower court. First, the Court reaffirmed the importance of the warrant requirement. "The first and most important principle is that searches must ordinarily be cleared in advance as part of the judicial process...[O]fficers must seek a warrant based on probable cause when they believe in advance they will find contraband or evidence of a crime. They must articulate the basis of their belief in the affidavit and bring the matter before a magistrate. When the police go to a home with the intention of searching for evidence, they may not forgo a warrant."

The Court rejected the government's position that exigent circumstances justified the warrantless search here. "The failure to seek a warrant in the face of plentiful probable cause, the timing and Freeman's call to Officer Feathers advising him of the impending search, as well as the arrival with three cars and the immediate entry with guns drawn, taken together, meet the requirement of 'some showing of deliberate conduct on the part of the police evincing an effort to evade the warrant requirement.' Even were the Court finding exigent circumstances, the record indicates that any exigency was calculated by the police in order to facilitate their warrantless search."

In places, the Court's language soars in a manner that is rare these days when evaluating search and seizure claims. "The freedom from armed intrusions of the home 'outside the judicial process, without prior approval by judge or magistrate,' ...is one of our most 'basic' civil liberties. Like the rights of free speech and assembly, trial by jury and the right to counsel, it is among the civil liberties the founding generation fought for and included in our founding documents—a liberty that the American people have pointed to with pride for 200 years. We should continue to take seriously the rule that judicial review is necessary to allow such intrusions and not water down the warrant requirement because advanced judicial clearance is an inconvenient or inefficient practice that the police or the military are too busy, or otherwise unwilling, to observe."

Judge Sutton dissented from the opinion. He found both probable cause and exigent circumstances justifying the warrantless entry. Because the woman who answered the door said, "the police are here," the dissent believed that an exigency existed. "In view of the reaction of the woman and the other individuals in the house to the arrival of the police and in view of the reality that there was probable cause that drugs and drug-manufacturing equipment were in the house, exigent circumstances existed to enter the house promptly to control the situation. Time and again, courts have recognized that because drugs (and, it follows, the raw materials used to make them) are eminently disposable, exigent circumstances will often exist to enter a house without knocking and announcing or, as here, without a warrant."

***United States v. Jenkins and Thompson,*  
2005 U.S. App. LEXIS 1405, 396 F.3d 751  
2005 Fed.App. 0044P (6th Cir. 2005)**

This is a highly fact-bound, complex case. The essence of the facts is that officers were investigating persons in a hotel room, and while doing so, one of the officers manipulated bags containing bricks. An affidavit for a search warrant did not include the evidence obtained as a result of the manipulation; the officer did tell the magistrate about the manipulation. As a result of the illegal search, the district judge granted three motions to suppress, and the government appealed.

The Sixth Circuit, in an opinion written by Judge Gibbons, reversed the district court. The Court held that the evidence was admissible under the independent source doctrine. "The independent source rule holds that evidence will be admitted if the government shows that it was discovered through sources 'wholly independent of any constitutional violation.' While it was clear that the illegal evidence had been conveyed to the district judge, and thus had some impact on the judge's decision, the Court held nevertheless that the independent source doctrine would apply. "All courts of appeals to have considered the matter, however, have inter-

preted *Murray* to mean that, in these situations, for evidence to be inadmissible due to the government's failure to collect it via an independent source, the tainted information presented to the judge must affect the judge's decision in a *substantive*, meaningful way."

***United States v. Bruce,***  
**396 F.3d 697**  
**2005 Fed.App. 0049P2005 U.S. App.**  
**LEXIS 1712 (6th Cir. 2005)**

Three persons, including Bruce, checked into two hotel rooms in Blue Ash, Ohio. When staff reported smelling marijuana smoke coming from the rooms, the manager contacted the police. The manager then directed staff to save the trash bags from both rooms. Whether there was a "do-not-disturb" sign on the doors of the rooms was a disputed fact. Bags were taken and secured, and various evidence of drug possession was seized from the bags. As a result, warrants to search the rooms were obtained, and evidence of forgery was seized during the execution. After the searches were conducted, the defendants were charged with bank fraud and unauthorized use of an access device. Motions to suppress were filed and denied, and conditional pleas were entered. The defendants appealed.

In an opinion written by Judge Rosen, the convictions were affirmed. The Court held that the removal of trash from the two rooms did not violate the Fourth Amendment. The Court found that staff was not acting as agents of the police, and thus there was no state action. As a result, it did not matter whether "do not disturb" signs were violated by staff. Finally, the Court noted that the defendants did not have a reasonable expectation of privacy in the trash bags taken from their hotel rooms.

The Court also rejected challenges to the search warrants. The Court held that the warrants were sufficiently particular in their description. "Given these indicia of probable cause to search the rooms for evidence of drug trafficking, the warrant was appropriately limited to the search and seizure of illegal drugs, papers 'showing ownership and/or control' of such drugs, articles used in the preparation of such drugs for distribution, and any proceeds realized from such distribution."

***United States v. McCraven,***  
**401 F.3d 693 (6th. Cir 2005)**  
**2005 U.S. App. LEXIS 4450,\*;2005 FED App. 0135P**

The affidavit read: "affiant has talked with a reliable informant of Memphis, Shelby County, Tennessee who has given the affiant other information in the past, which has found [sic] to be true and correct. This reliable informant stated that within the past five days of October 12, 2001 this reliable informant has been inside of [Mr. McCraven's house]

and observed the m/b Jackie McCraven storing and selling cocaine and marijuana inside the residence. This occurred in Memphis, Shelby County, Tennessee."

A judge signed the warrant, and it was executed two days later. Officers loudly announced their presence, and then after 10-12 seconds, "forcibly entered" the house. Inside they found McCraven and powder cocaine, crack cocaine, marijuana, and a handgun. McCraven was indicted. After his motion to suppress was denied, he entered a conditional guilty plea.

The Sixth Circuit, in an opinion written by Judge Nelson, affirmed, while saying that the case presented "a close question as to whether a search warrant should have issued." The Court expressed concern that the affidavit did not demonstrate the reliability of the informant, nor did it show independent corroboration of the informant's story. Because this was a "close question," the Court did not "resolve the question, however, because, as we conclude, the denial of the motion to suppress was proper under the good-faith rule...even if the affidavit be deemed insufficient."

The Court also affirmed the district court on the knock and announce piece of the case. "[W]e are not persuaded that it was unreasonable for the officers to enter Mr. McCraven's house 10 to 12 seconds (or even a somewhat shorter time) after announcing their presence. A reasonable officer could believe, it seems to use, that a longer time might have allowed McCraven to dispose of the drugs in his possession."

## SHORT VIEW . . .

1. *People v. Lisa G.*, 23 Cal.Rptr.3d 163 (Cal. Ct. App. 2005). Held that where a student is being disruptive and leaves a classroom, a teacher violates her Fourth Amendment rights when she looks in her purse to find identification (she couldn't remember the student's name) and finds a knife. As a result, the evidence of the knife should have been suppressed in a delinquency action.
2. *Brigham City, Utah v. Stuart*, 2005 WL 387966, 2005 Utah LEXIS 23 (Utah 2005). The police violated the defendants' Fourth Amendment rights when they entered their home without a warrant during a domestic dispute. Here, the police went to a loud party and saw through the window four adults subduing a juvenile, and then the juvenile hit one of the adults in the nose. The officers entered the house and arrested the adults. The Court stated that under these facts, whether exigent circumstances exist or not requires a balancing of the privacy rights of the persons against the safety concerns of the officer or other persons.

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3. *State v. Patterson*, 868 A.2d 188, 2005 Me. LEXIS 26, (Me. 2/9/05). Demanding that a motorist roll down his window constituted a seizure in violation of the Fourth Amendment, according to the Maine Supreme Judicial Court. Thus, the evidence obtained when the officer smelled alcohol inside the car should have been suppressed.
4. *Moreno v. Baca*, 400 F.3d 1152, 2005 U.S. App. LEXIS 3739 (9th Cir. 2005). The Ninth Circuit has revisited the issue of the standard that must be met prior to the search of a parolee or probationer. This involved interpretations of both *Griffin v. Wisconsin*, 483 U.S. 868 (1987), and *United States v. Knights*, 534 U.S. 112 (2001). The Court was examining a case where the defendant was walking down a sidewalk when two sheriff's deputies stopped him without reasonable suspicion, made him empty out his pockets, and put him into the back of a police vehicle. The Court held that this situation, despite a parole condition allowing for warrantless searches, required a reasonable suspicion. "Whatever the extent of Moren's Fourth Amendment rights, they clearly included the right to walk along a public sidewalk unmolested by law enforcement."
5. *Halsema v. State*, 2005 823 N.E.2d 668, Ind. LEXIS 197 (Ind. 2005). A man was arrested during a traffic stop on meth related charges. The police went the next day to the address he gave them as the place he had been staying. The woman there gave consent to search her home, but stated that the drawer in her bedroom was for the exclusive use of the defendant. The police searched the drawer, and found a large quantity of meth. The Indiana Supreme Court held that the meth found in the drawer should have been suppressed. "Because Ritchie Halsema enjoyed the exclusive use of at least one of the dresser drawers in Whiteley's bedroom and because Whiteley specifically advised the officers of that fact, Whiteley did not have actual authority to consent to a search of the drawer where the methamphetamine was found, nor could an officer reasonably believe that she had such authority."
6. *Padgett v. Donald*, 401 F.3d 1273, 2005 U.S. App. LEXIS 3647 (11th Cir. 2005). The 11th Circuit has upheld Fourth Amendment challenges to the requirement that Georgia incarcerated felons provide saliva samples for a DNA database. ■



***Justice Jeopardized***

## KENTUCKY CASE REVIEW

By Sam Potter

*Michael C. Blair v. Commonwealth*

144 S.W.3d 801

Final 10/14/04

Reversing and Remanding

Opinion by Cooper, Wintersheimer dissents

A Graves County jury convicted Michael Blair of murder and sentenced him to 25 years in prison. Someone murdered Mary Katherine Johnson in her bedroom by strangling her and beating her face and head. Her purse lay open on the floor with its contents spread across the floor. Blair, Johnson's nephew, lived in Michigan but had been visiting her for a couple of weeks. In that time, Blair met Wendee Morris, a neighbor of Johnson's.

Morris sold drugs. Blair went to Morris' house on the night of April 1, 1999. They smoked crack that night and the next day. Blair left several times to go to victim's house to get more money to buy more crack. He returned the first couple of times with \$15 and \$20. He returned for the third time about 8:00 a.m. on April 2, with \$600, acting nervous and paranoid and with a wet face and forehead. He remained at Morris' house until 1:00 a.m. on April 3, 1999, when he returned home and discovered Mary Katherine Johnson. Several people testified that they stopped by her house during the day on April 2, but she did not answer her door.

James Cavitt, a local bootlegger and friend of Johnson, testified about multiple statements she told her about Blair and her future plans. Vanessa Lawson, Johnson's sister, testified about similar statements. The Kentucky Supreme Court ruled some of these statements inadmissible and reversed.

**Even if a hearsay statement falls within one of the exceptions, the statement still must be relevant to be admitted.**

Cavitt said Johnson told him that she was disappointed in Blair, that Blair was not working or helping her, that Blair was on "that stuff," and that she did not want to leave Blair at her home when she went to Michigan because she thought he would eat her food and go through her things. The Supreme Court said these statements fell within the scope of KRE 803(3)-then existing mental, emotional, or physical condition. However, the Supreme Court ruled them irrelevant and declared them inadmissible.

**When no exception applies, the statement is inadmissible.**

Cavitt testified that Johnson had saved her money for some dental work. The Supreme Court ruled this statement inadmissible because no hearsay exception applied to it. The Supreme Court also noted that this statement proved par-

ticularly prejudicial because it corroborated Cavitt's testimony that he saw four \$100 bills in Johnson's purse, which supported the inference that Blair stole the money from her to buy crack.

**The adoptive admission exception requires that the declarant be confronted with the statement and agree to it or not deny it.** Cavitt also testified about a phone conversation he had with Blair and Johnson. Blair called Cavitt and asked him to tell Johnson that he had left a bag with him. Johnson took the phone and Cavitt heard her tell Blair that he was no good, that he was lying to her, and that she would not let him spend her money and eat her food. Then she told Cavitt she would talk with him later. The Supreme Court ruled these statements did not qualify as adoptive admissions under KRE 801A(b)(2) because Cavitt did not testify that Blair agreed with the statements or that Blair heard them and did not deny them.

**Curative admissibility, or opening the door, renders an otherwise inadmissible fact admissible to rebut or explain an inadmissible fact introduced by the opposing party.**

Lawson testified during the Commonwealth's rebuttal that Johnson told her that Blair was borrowing her money and eating her food. The Commonwealth had cross examined Blair about the similar hearsay statements testified to by Cavitt. The trial judge allowed Lawson's testimony because Blair opened the door when he testified that Johnson would not say those things because he ate most of his meals at Ms. Lawson's house and he did not get a job because he was staying for a short visit.

The Supreme Court stated that opening the door, or "curative admissibility," "occurs when one party introduces an inadmissible fact that opens the door for the opponent to offer similar facts whose only claim to admission is that they negative, explain, or counterbalance the prior inadmissible fact." Thus, proper curative admissibility testimony would consist of evidence that Blair and the Johnson did not eat at Lawson's house or that Blair intended to stay with Johnson for a long period of time. However, Lawson's testimony only repeated the Johnson's inadmissible hearsay statements introduced through Cavitt and was equally inadmissible.

**The defendant may introduce reverse 404(b) evidence if it tends to prove he is not guilty.**

Mayfield detective Tracy House led the investigation. He secured the Johnson's purse and its contents into evidence. After he completed his investigation of this case, the police department fired House for a matter unrelated to Blair's case. (He failed to prevent a

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supervisor from selling a VCR from the evidence room.) House faced a pending complicity to official misconduct charge during Blair's trial.

At Blair's trial, the Commonwealth asked Blair if he found it odd that the police did not find any money in the Johnson's house. Blair answered that the police could have taken it. To support this theory, Blair sought to introduce House's firing and pending charge. The trial judge did not allow it. Blair presented this evidence by avowal.

The Commonwealth's theory suggested theft as Blair's motive for killing Johnson, though it did not charge Blair with theft. This makes evidence that someone else had motive and opportunity to steal the Johnson's money relevant to refute the evidence that suggests that Blair killed Johnson to steal money to buy more crack. Thus, to show House's motive and intent to steal victim's money renders the "reverse 404(b) evidence" of House's participation in the theft of other evidence admissible as substantive evidence.

The Supreme Court recognized that noticeable differences between the two thefts existed. A lower standard of similarity governs reverse 404(b) evidence because it will not prejudice the defendant. The defendant may introduce it if it tends to negate his guilt, and it may be excluded only pursuant to KRE 403. The Supreme Court compared this to the Commonwealth's burden to prove guilt beyond a reasonable doubt and the defendant's burden to raise an affirmative defense by a preponderance of the evidence.

**KRE 608 prevents attacking a witness' credibility by cross examining the witness on specific instances of wrongful conduct for impeachment purposes.** KRE 608 was amended in 2003 but both versions prohibit proof of specific instances of conduct by extrinsic evidence. However, the amended version allows the questioning of a witness about specific instances on cross examination if it concerns the witness' character for truthfulness or untruthfulness. The Supreme Court implies here that the amended KRE 608 would allow Blair's questioning of House as well.

**The Commonwealth cannot argue facts not in the record during its closing statement.** A jailhouse snitch testified that Blair confessed to him that he (Blair) had murdered the victim. Blair cross examined the snitch regarding the Commonwealth's dismissal of the snitch's charges three days after the snitch made his statement. The Commonwealth asked the circuit court clerk about the defense counsel not asking her to bring the snitch's file showing a subsequent indictment and conviction and that he was on probation. The clerk answered that the defense counsel only requested information about the dismissed charges. In the Commonwealth's closing, it argued that the snitch's subsequent conviction rebutted Blair's theory that the Commonwealth and the snitch made a deal. The Supreme Court ruled

that no evidence had been introduced regarding a subsequent conviction making the comment improper but declined to deem it reversible error by itself because the case had already been reversed. It did state such a comment should not be repeated during retrial.

*Steven A. Gerlaugh v. Commonwealth*

**To Be Published, 2005 WL 384882**

**Final 3/10/05**

**Reversing and Remanding**

**Opinion by Cooper, Wintersheimer  
dissents joined by Scott**

A Montgomery County jury convicted Steven Gerlaugh of 1<sup>st</sup> degree robbery and sentenced him to 20 years in prison. A man and a woman knocked on the door of Richard and Kristina Boone's home at 10:15 June 17, 2001, Father's Day. The man pistol whipped Richard and then the man and woman tied up the Boones. They took watches, jewelry, \$400 in cash, and all of the phones and left. Kristina untied herself and her husband. Then she went to a neighbor's to call the police.

**Some independent corroborating evidence must exist before introducing a hearsay statement under the coconspirator exception of KRE 801A(b)(5).** Gerlaugh presented an alibi defense. Four witnesses testified that he was at a picnic in Ohio about three hours away from Montgomery County until 9:15 p.m. on June 17, 2001. The Commonwealth called Sergeant Corky Abney on rebuttal. He testified that he searched Gerlaugh's belongings at jail the morning of trial. He discovered a letter written by Brian DeWitt, who did not testify. The letter read "As for the 17th, you need to find out by a discovery packet, to see what evidence they have, before anyone puts their neck out there. Remember, you are in Kentucky. They don't play, especially with out-of-staters."

The Commonwealth argued that the letter was admissible as "a statement by a coconspirator made during the course and in furtherance of the conspiracy." KRE 801 A(b)(5). The conspiracy involved Gerlaugh, DeWitt, and the four alibi witnesses conspiring to produce perjured testimony. No evidence besides the letter supported the conspiracy theory.

The pre-KRE rule did not allow the Commonwealth to prove the existence of a conspiracy or a defendant's participation in it only by a hearsay statement of a coconspirator, commonly referred to as bootstrapping. The federal courts had the same pre-KRE rule. The Supreme Court then considered what affect KRE 104, which frees a trial judge from the rules of evidence when deciding on the admissibility of evidence, had on the prohibition against bootstrapping.

The Supreme Court noted that the drafters did not want to depart from the federal rules except for good reason. The USSC ruled that KRE 104 allowed a judge to consider the coconspirator's hearsay statement when ruling on the ad-

missibility of that statement but did not rule as to whether the coconspirator's hearsay statement by itself sufficiently prove the existence of a conspiracy. Every federal appellate court that considered this question required some other evidence besides the statement itself to prove a conspiracy. The federal rule was eventually amended to specify that the statement could be considered but was not alone sufficient to establish a conspiracy. The Supreme Court adopted the federal approach. It ruled the letter should not have been admitted.

**The defendant's cross examination of improperly admitted hearsay evidence does not waive the issue for appeal.**

Gerlaugh attempted to attribute a nonconspiratorial meaning to the letter on surrebuttal by showing that DeWitt had been incarcerated in Kentucky, was afraid of the Kentucky judicial system, and thought alibi witnesses would be charged with perjury if they were mistaken. The Supreme Court reiterated that it allows a defendant to mitigate the prejudicial effect of improperly admitted testimony without waiving the error.

**The judge improperly admitted into evidence a gun seized by the police from a third party because no one ever identified the seized gun as the gun used to commit the crime at issue.**

Identification of an item of real evidence, such as a gun, is a condition precedent to its admissibility. Its proponent must produce evidence sufficient to conclude that the item is what the proponent alleges it to be. The Commonwealth did not meet this burden here.

Gerlaugh met his ex-stepson, Thomas Hinkle, at a gas station owned by Hinkle's mother, in Madison County, nine days after Father's Day. The local police arrested Gerlaugh there on an unrelated manner. The police had Gerlaugh's car towed. Hinkle said that he found Gerlaugh's car that night and removed a 9-mm gun from the engine compartment. Hinkle gave the gun to Gerlaugh's friend, Dennis Yarber. The police took possession of the gun later that day. Detective Shane Barnes said he took the 9-mm from Yarber.

Gerlaugh testified that he owned a .38 but not a 9-mm. A search of his car revealed .38 ammunition but no 9-mm ammunition. Hinkle could not identify the gun at trial, partly because he was confused and nervous, but he also mentioned that he had been in a mental institution and was not competent. Only Yarber and Barnes identified the gun at trial.

The Commonwealth did not show the gun to the Boones. Barnes did testify that someone, though he did not say who, described the gun as a blue steel automatic. Nor did he say that the gun he took from Yarber fit that description. The appellate record did not include the gun or a picture of it. Based on these facts, the Supreme Court concluded that no evidence identified the 9-mm as the one used in the robbery and should not have been admitted.

**The rule does not require absolute certainty of identification.** In this discussion, the Supreme Court backed away from *Reed v. Commonwealth*, Ky., 579 S.W. 2d 109, 111 (1979), which held the statement that it "looks like my gun but I couldn't swear to it," insufficient to establish identification. The Supreme Court wrote that *Reed* "probably pushed the identification requirement too far." Uncertainty about identification affects the weight of the evidence, not its admissibility. In Gerlaugh's case, though, no identification evidence existed at all.

*Steve Mondie v. Commonwealth*  
**To Be Published, 2005 WL 635020**  
**Rendered 3/17/05**  
**Reversing and Remanding**

**Unanimous opinion by Keller**

Steve Mondie and Greg McGowan fought each other back in 1991. McGowan received parole in 1999 for a charge not related to that fight or this case. One day, Mondie and James Callinan sat on Mondie's trailer porch drinking beer. McGowan pulled up and got out. Mondie told him to leave. McGowan went in Mondie's trailer instead. Mondie told him to leave again, and McGowan punched him twice. Mondie got a gun and fired two shots at McGowan. One hit him in the chest. McGowan left Mondie's trailer and drove off. Mondie fired two more shots into the air to encourage him not to return. The Commonwealth tried Mondie for 1<sup>st</sup> degree assault. The judge instructed the jury on self protection. A jury convicted Mondie of 2<sup>nd</sup> degree assault.

**The judge erred by refusing to instruct the jury on "protection against burglary."** The Supreme Court summarized the history of common law burglary and discussed the expansion of burglary in the penal code. The Supreme Court engaged in significant statutory interpretation of the burglary statute. The Supreme Court also noted that KRS 503.080 allows a dweller to use deadly force against someone who enters unlawfully for any criminal purpose including misdemeanor offenses. The Supreme Court concluded that the jury could have reasonably believed that McGowan had entered or remained in Mondie's home with the intent to assault him, thereby committing a burglary, and that Mondie shot him, believing that it was necessary to prevent the burglary.

**A police officer's general experience with guns does not necessarily qualify him to give expert testimony on the ejection pattern of casings from a particular gun.** McGowan testified that Mondie shot him outside. The police found two bullet casings in the trailer about three inches apart. The Commonwealth called two police officers, who testified that in their experience, working with guns, two casings usually do not land that close together. The officers had not fired Mondie's gun to observe its casings' ejection pattern. Nor did they send the gun to a laboratory to have it tested. The

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Commonwealth used the officers' testimony to argue that Mondie placed those casings in the trailer.

Because the Supreme Court reversed for other reasons, it declined to make a specific ruling on the admissibility of the officers' testimony. However, the Supreme Court stated that the officers' general experience with other guns did not qualify them as experts on the casings' ejection pattern of the gun at issue in this case. This testimony should not be admitted at retrial unless the officers' qualifications are made sufficient.

***Commonwealth v. Robert Sowell***  
**To Be Published, 2005 WL 628973**  
**Rendered 3/17/05**  
**Affirming**

**Opinion by Lambert, Johnstone dissents**  
**joined by Graves and Wintersheimer**

The Commonwealth timely commenced a misdemeanor assault prosecution against Robert Sowell. The alleged victim failed to appear for trial on two different dates. The Commonwealth dismissed the case without prejudice following the second absence.

**The Commonwealth must recharge a defendant if it dismissed without prejudice the charges against the defendant and more than 10 days have passed.** When the Commonwealth dismisses a case without prejudice, this produces a final and appealable order. This causes the trial court to

lose jurisdiction over the case. If the Commonwealth wants to prosecute a defendant on the dismissed charges, the Commonwealth must recharge the defendant if more than 10 days have passed in accordance with CR 59. The Commonwealth's filing of a motion to redocket the case is insufficient in this case because more than 10 days had passed.

***Commonwealth v. C.J., a child***  
**156 S.W.3d 296**  
**Final 3/10/05**  
**Affirming**

**Opinion by Johnstone, Keller dissents**

C.J. pulled a butterfly knife on another student at Shawnee High School following a verbal altercation. The Commonwealth charged him with unlawful possession of a weapon on school property and 2<sup>nd</sup> degree wanton endangerment. The judge denied the Commonwealth's motion to detain C.J. and ruled that the case be resolved by an informal adjustment. The Commonwealth objected because the school had not been notified and tried to appeal the judge's decision.

**No appeal can be taken from an informal adjustment in a juvenile case.** An informal adjustment does not constitute a final action by a juvenile court. It is neither an adjudication nor a disposition. Rather, it holds the matter in abeyance and no further action is taken if the juvenile satisfies its conditions. The General Assembly included no language in Kentucky's Juvenile Code authorizing an appeal from an informal adjustment. Thus, the Commonwealth cannot appeal from an informal adjustment. ■

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

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## PRACTICE CORNER

### LITIGATION TIPS & COMMENTS

“Practice Corner” is brought to you by the staff in DPA’s Post Trial Services Branch. Post-trial defenders are in a position to see patterns of practice across the state. In this column, their goals are to report on trends and to share helpful ideas they come across.

#### (1) **No good deed goes unpunished, (or unpublished).**

Defense counsel fought long and hard over an issue in circuit court, but ultimately lost the point with the trial judge. At the end of the argument, defense counsel finally conceded and added in conclusion, “That’s fine,” and “We understand.”

How many of us have done this numerous times? We acknowledge that we understand what the judge has ruled. Or, we say, “Thank you, Judge,” when we are certainly not agreeing with the decision the judge just made.

But, in the case of the excellent trial lawyer referred to above, who said, “That’s fine. We understand,” the Kentucky Supreme Court has ruled that those words were a waiver of the issue he had been fighting so hard about just thirty seconds earlier. The appellate decision is designated to be published. (And we have several post-trial lawyers who remember another recent occurrence similar to this one.)

Clearly, this lawyer did not intend to waive anything. But his own politeness and civility got turned against him on appeal. The KBA Code of Professional Courtesy has been on the books for over a decade. But, we now know that counsel are going to have to be particularly careful about the exact words to use in expressing their courtesy.

#### (2) **Do you know that your language interpreter is doing it right?**

Our post-trial lawyers are seeing that the use of language interpreters in legal proceedings is increasing exponentially. But, just because someone is said to be “qualified” to interpret, it does not necessarily follow that he is the right person for your case.

Appellate DPA attorney Lisa Clare advises that we should be aware of, for example, the many different types of Spanish that can be spoken by different people. And, she advises that the only way to know if an interpreter has expertise in both the language *and legal terminology* that are used, *both* here and in the client’s place of origin, is to insist on a “certified” interpreter. An interpreter must pass examination before he or she can be certified.

#### (3) **Microphones need to be unimpeded.**

Our post-trial lawyers want to remind their trial-level colleagues that courtroom microphones won’t record the proceedings if the microphones are blocked by piles of paper or if the people speaking are drowned out by the sound of shuffling papers. So, a word to the wise: Don’t let your paperwork get in the way of any words you want memorialized in the record.

**Practice Corner is always looking for good tips. If you have a practice tip to share, please send it to the Department of Public Advocacy, Post Trial Division, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601. ■**

**A lawyer should express professional courtesy to the court and has the right to expect professional courtesy from the court.**

— Kentucky Bar Association, Code of Professional Courtesy

## BLACK THURSDAY

By Ryan Davis

As a third-year law student at the University of Louisville, I was required to perform thirty hours of public service before being allowed to graduate. Since I am a Somerset native, I decided that it would be interesting to spend my spring break working at the Somerset Public Defender's office. What a week it was! Thursday, in particular, was a day that will stick in my mind for years to come. I had wondered why everyone in the courthouse called certain Thursday's "Black Thursday." I quickly found out why!

I took a seat with the Public Defender at counsel's table and was immediately struck by the sheer number of people crammed into this tiny courtroom. It was shocking! People filled the seats, others lined the walls, and still others gave up and just sat outside the courtroom. It was nothing like the courtrooms shown on television shows and nothing like I had envisioned during my law school career.

Two public defenders that were in Circuit Court that day had a list of clients that boggled the imagination. Both were constantly either representing a client whose file they had ten seconds to review, running into the hallway to converse with other clients, or quickly chatting with clients that were assigned to them in the middle of this chaos. To make matters worse, they both had cases in District Court, which was meeting at the same time downstairs. I was shocked at their ability to competently represent this mass of people and amazed at how their attitude remained positive in the face of this onslaught. I quickly grew tired just watching them!

As I watched the proceedings, it felt like I was watching a conveyor belt. The defendants entered the machinery when called, spent a minute in front of the judge, and were spat out the other end, often into the custody of the state. I was chagrined to see that the lofty ideals that were hammered

into my head in law school had little effect in real life. These people were being sent to prison with little more than a passing glance. I found myself feeling a great deal of compassion for people that just a week ago I would have looked down upon.

As I left the courtroom that day, several things stuck in my mind. First, I was amazed at the sheer volume of people that public defender's office is called to represent. At least 90% of the people called before the judge were either already represented by the public defender or were assigned to be so represented. Second, I was surprised at the speed with which people were being sentenced or having probation revoked; often the defendant would be before the judge for no more than five minutes. Third, I was struck by the discrepancy between the large number of people working for the Commonwealth Attorney and the small number of people appearing for the public defender's office. Finally, I was astonished at the ability of the public defense attorneys. They were representing a courtroom full of people, with sometimes only a few seconds to review each individual's file before addressing the judge. Yet, they always knew exactly what was occurring in each defendant's case and always provided excellent representation.

I leave the public defender's office changed because of my "Black Thursday" experience. I have new compassion for those that are fed into the criminal justice machine, only to be spat out behind bars. My already ample respect for the Department of Public Advocacy has increased ten-fold, especially considering how understaffed and overworked their office is. Finally, I have a greater appreciation of just how disturbing the "real world" of criminal justice can be.

*Ryan Davis is a graduate of the University of Louisville School of Law and is presently studying for the bar exam. ■*

**We can end the existing denial of justice to the poor if we can secure an administration of justice which shall be accessible to every person no matter how humble.**

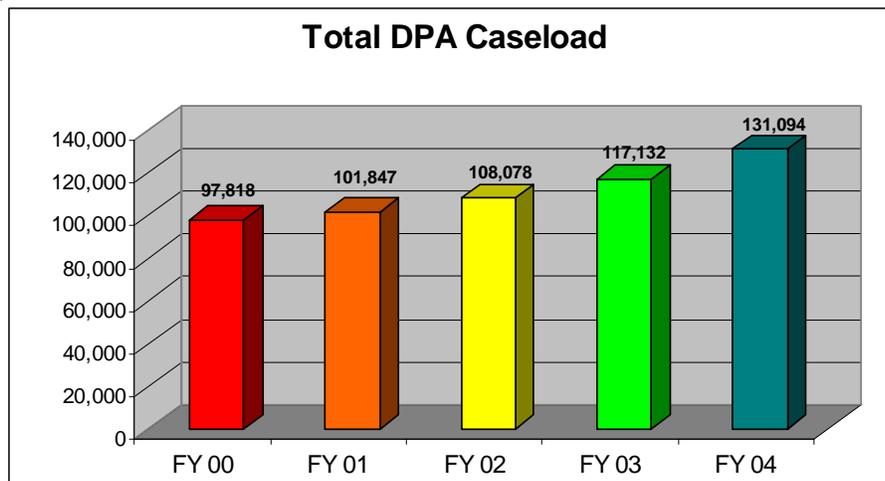
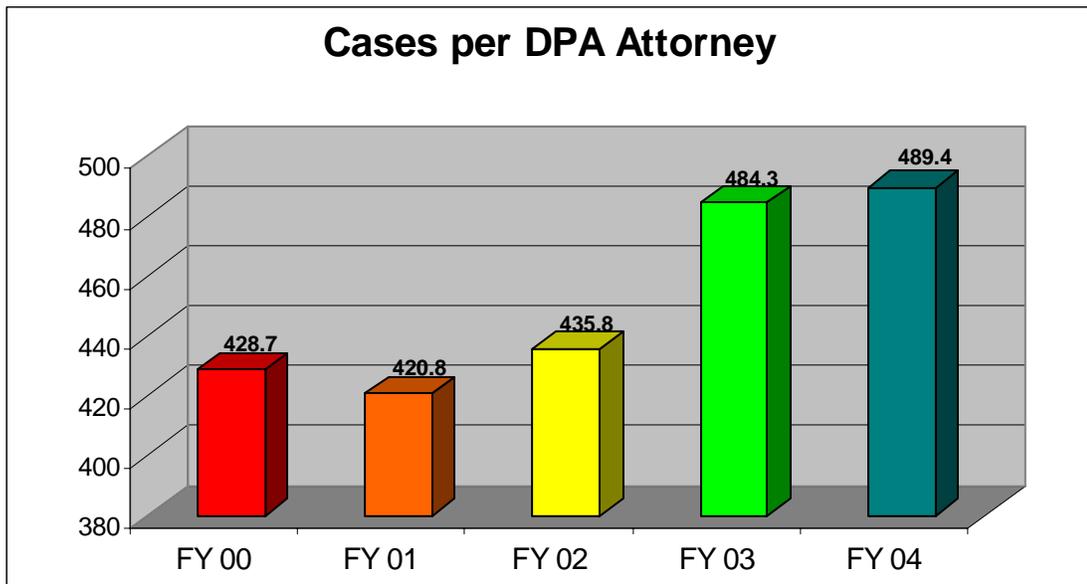
**- Reginald Heber Smith, *Justice and the Poor* (1919) page 257**

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