The Advocate

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

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NO EXCEPTIONS

A CAMPAIGN TO GUARANTEE A FAIR JUSTICE SYSTEM FOR ALL

HOW MANY GO UNREPRESENTED AND AT WHAT COST?

- **IS MICROSCOPIC HAIR COMPARISON DEPENDABLE?: A REVIEW OF *JOHNSON V. COMMONWEALTH***
- **IS VICTIM IMPACT EVIDENCE ADMISSIBLE IN KY?**
- **HIPAA V. KASPER**
- **DEFENDER CONFLICTS OF INTEREST: BALANCING ETHICAL, LEGAL, AND FISCAL REALITIES**

MEENA MOHANTY, OUR FEATURED DEFENDER
KATIE WOOD ELECTED PRESIDENT OF KY ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
JEFFERSON CO. METRO DEFENDERS RECEIVE NLADA AWARD

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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...

Seldom has *The Advocate* contained such a powerful lineup of articles.

The No Exceptions Campaign. The public defense crisis in America is a serious nationwide problem – there is not one state that fully delivers on the promise of the *Gideon* ruling. Many states fall woefully short. The American Bar Association has identified 10 principles that, if implemented by states, would strengthen public defense in America. The "No Exceptions" campaign is based on these principles and aims to remind each state of its responsibility to fulfill *Gideon's* promise. *The Advocate* begins in this issue the No Exceptions Campaign with a focus on the unrepresented. To learn more about the campaign, visit www.NoExceptions.org.

Ky's Unrepresented. In 1996, *The Advocate* addressed the many Kentuckians who go unrepresented. Are we at a different place after these many years? What is the command of *Shelton*? Bob Boruchowitz of the state of Washington recently presented on these issues to public defenders nationally. His rendition of Washington's realities mirrors Ky's. KY defenders offer comment on the ramifications in KY of Bob's analysis. We had work to do seven years ago. It remains. We have an opportunity to address it.

Hair comparison. *Modern Scientific Evidence: The Law and Science of Expert testimony* (2002) is one of the country's leading scientific references in the law. Michael Saks, one of the authors of that scientific work, offers in depth analysis of the lack of dependability of hair comparisons. Defense practitioners take note.

Victim Impact evidence is thought by some to be clearly admissible in capital cases. Margaret Case examines that assumption and undermines it.

HIPPA* and *KASPER present complex and far reaching realities. Individual constitutional guarantees are pitted against the public's desire for safety. Where is the constitutional and commonsense lines?

Conflicts. We have conflicts aplenty in our lives. They exist in the law and in defender cases. Ky's statewide public defender program has a deliberate system for managing conflicts in a way that accounts for the legal, ethical and fiscal realities. This system and its commonsense rationale are set out in this issue.

KACDL. Katie Wood has assumed the presidency of the KY Association of Criminal Defense Lawyers. She brings substantial criminal defense experience to this vital leadership position.

Ed Monahan, Editor

How to Deal with the Denial of Counsel in Misdemeanor Cases Post-*Shelton*

This article is published with permission of the *Washington State Bar News* which previously published a shorter version. The author presented this paper at the National Legal Aid and Defender Annual Conference in Seattle, WA, November 2003.

Every day in courts across the country, thousands of people face criminal charges without lawyers, and many of them plead guilty and go to jail, sometimes without even being told that they have a right to a lawyer.

Defendants who have not been told of their right to counsel are encouraged to talk to the prosecutor to arrange a guilty plea. In-custody defendants, often in shackles, face hearings in which their probation is revoked and they are sent to jail for months, even years, in proceedings which last a few minutes and in which there is not a whiff of due process. In many courts, the defendants are disproportionately people of color.

It has been 40 years since the United States Supreme Court made clear that accused persons in state courts were entitled to court-appointed lawyers. *Gideon v. Wainwright* 372 U.S. 335 (1963). It has been more than 30 years since the Court applied that right to misdemeanor cases in state courts. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Last year, in *Alabama v. Shelton*, 535 U.S. 654 (2002), the Court made clear that incarceration cannot be imposed for violation of a misdemeanor probation if the defendant did not have counsel or properly waive counsel at the underlying conviction. Yet the holdings of those cases are frequently ignored.

The scope of the problem is enormous. In 2002, there were 272,548 arraignments in courts of limited jurisdiction in Washington on 357,954 charges in 300,442 complaints and citations. There were only 9349 trials. 167,563 charges resulted in a guilty finding.[1] Nationally, there are approximately two million people on probation for misdemeanor offenses. [2]

The problem is not limited to adults. In too many places, it is not uncommon for juveniles to plead guilty without counsel. One probation officer in Eastern Washington told me that about half of the children facing incarceration for truancy contempt charges go to court without a lawyer. The American Bar Association (ABA) in October, 2003, released a series of reports from six states, including Washington, identifying institutional barriers to adequate representation to juveniles. ABA President Dennis W. Archer said: "Too many children, particularly children of color, fall victim to conveyer belt justice—with kids rushed through a system riddled with institutional flaws without regard for their individual cases or needs. The net result is a massive misdirection of resources that fails children, and undermines public safety."

Among the ABA studies' findings was that: "Many youths do not have counsel at critical stages of the juvenile justice process, despite the law's clear mandate and the harmful consequences of not having a lawyer."[3] The Washington report found:

> In Washington state, children are represented by counsel at most juvenile court proceedings. However, some counties do not ever provide counsel at probable cause hearings, and, in some counties, young people go forward in a variety of hearings without the assistance of counsel.

The Washington report recommended that children should be represented by effective counsel at all court hearings, and that Washington law should be changed to conform to national standards prohibiting children from waiving the right to counsel. Until the law is changed, the report recommended that "the judicial inquiry with youth regarding their decisions to waive counsel should be thorough, comprehensive, and easily understood." [4]

As one law review put it, "No doubt the denial of counsel comes as a jolt to most Americans, including the legal profession, who share the mistaken belief that every accused currently receives the benefits of a lawyer's advocacy when liberty is threatened."[5]

In some courts, there is no prosecutor at all,[6] and the courts take pleas without written plea forms. In some courts, the defendants are in jail on video and the judge is either blocks away or miles away in an empty courtroom. In some courts, the judges advise the defendants of their rights but never mention that there is a right to counsel at arraignment. In some courts which do use plea forms, the prosecutor fills them out in a conference with the unrepresented defendant. As Justice Black wrote in *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948): "The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be."

Federal constitutional law, Washington case law, and Washington court rules all require counsel to be available for people who cannot hire their own, and require judges to make a thorough inquiry before accepting a waiver of rights. Given the

7 Years Ago

This article and the sidebars revisit an issue reviewed and commented on 7 years ago. The March 1996 *Advocate* Vol. 18, No. 2 at page 6 carried "Many Indigents Accused of Crimes Go Unrepresented in Kentucky?" followed by "Indigents Accused of Crimes without Representation: A Growing Problem in Kentucky" in the May 1996 *Advocate*, Vol. 18, No. 3 at page.

collateral consequences of a conviction, including preclusion from certain jobs and benefits, as well as the prospect of incarceration, "Making an indigent—and perhaps addicted, mentally impaired, uneducated or illiterate—person plead guilty without some effort to convey this complex raft of consequences, seems almost sadistic—whatever the cost."[7]

This article will review the law, demonstrate examples of the failure to follow court rules, outline how some courts manage to enforce the right to counsel, and discuss changes which some courts have made and others could make to ensure the integrity of the courts in which hundreds of thousands of people are heard every year.

Courts Across Washington State Violate the Right to Counsel

During my observations as a Soros Senior Fellow this year, I have documented violations of the right to counsel in three of the largest counties in the state and in one rural one. These problems occur in affluent suburban areas as well as in large cities.

I have seen a judge continue for four days a video arraignment for an in-custody Spanish-speaking defendant because an interpreter was not available, keeping the bail at $3000. I have seen a prosecutor advise the defendants before the judge came into the court room, that it would be in the defendants' interest to discuss their cases with the prosecutor and that the prosecutor would let them know if he felt that they needed an attorney. (That prosecutor agreed when I asked him to alter that speech and since then has made efforts to help protect the right to counsel.)

I have seen two courts in which prosecutors approached unrepresented, shackled defendants to discuss pleas with them. The practice of the prosecutor negotiating directly with uncounseled defendants violates American Bar Association Prosecution Function, Standard 3-3.10 Role in First Appearance and Preliminary Hearing:

> (a) A prosecutor ...should not communicate with the accused unless a waiver of counsel has been entered, except for the purpose of aiding in obtaining counsel or in arranging for the pretrial release of the accused. A prosecutor should not fail to make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.

Some judges order cash-only bail, perhaps because they want to make sure the accused person does not get released. This is a violation of *City of Yakima v. Mollett*, 63 P.3d 177 (Wash.App.2003), in which Division Three held that the rule does not permit cash only bail. With no lawyers present, judges can violate the rule with no one to challenge it.

I have seen two judges advise defendants of their rights, including right to jury and right to call witnesses, and never mention the right to have a lawyer.

In one rural county court, the judge routinely denies counsel for college students, saying that "there is a limit to the definition of indigent contained in RCW 10.101.010(e); that limit is reached when an able bodied, employable young person with no dependants [sic] and virtually no debt chooses to forgo available employment so that he can attain a college degree."[8]

That view of indigency is totally unsupported by the statute and is at odds with case law. In the case in which the judge made that written ruling, the defendant had an annual income of $3600, which is well below the federal poverty guidelines.

I helped get a client out of jail whose entire probation revocation hearing occupied two and a half pages of transcript. The judge never advised the defendant of his right to an attorney, and when the defendant asked what was going on, the judge told him he was going to jail in Yakima for three years.

One woman in a municipal court stipulated to facts sufficient to convict her, received a suspended jail sentence, a $500 dollar fine, and a conviction on her record, all without the advice of counsel and without waiving that right. The judge did not inquire as to whether she knew that she had rights to waive. In the arraignment, stipulation, and sentencing, all of which together lasted one minute and forty-seven seconds, the judge's only question concerning the defendant's understanding of her right to counsel was "Have you had a chance to talk with a defense lawyer about it [the stipulation]" to which she answered "Yes I have." Yet the accused appeared in court without an attorney, she was un-represented and there is no record that she ever spoke with a defense attorney. It is possible she was referring to a prosecutor.[9]

Despite a number of strong public defender programs and able individual assigned counsel and contract defenders, there are many cities and counties where the lawyers are totally overwhelmed with crushing caseloads, do not have investigator or social work support, do not have adequate office space or equipment or research capacity, and often do not have the experience or training to handle the cases they are

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No Excuses

Reading this article, those of us in the trenches in Kentucky district courts cannot help but be reminded of the sad condition into which many criminal defendants are placed by lazy or indifferent, sometimes even abusive, prosecutors and judges, even by our own inability to cover every court as adequately as we would like while facing budget constraints and high caseloads. I am especially reminded of the coercive power on my clients of being stuck in jail without bond; of how attractive a plea of "time served" looks when otherwise one cannot obtain pretrial release from jail. As Mr. Boruchowitz notes however, there are no excuses for denial of due process and right to counsel, and steps must be made to improve where deficiencies are found. Fortunately, in the courts I see, while there are still great strides to be made, the right to counsel has been greatly improved where more attorneys have lightened caseloads, and where the law has been enforced requiring an attorney's appointment anytime a child in juvenile court faces jail time (KRS 610.060(2)(a) and *D.R. v. Commonwealth*, Ky. App. 64 S.W. 3d 292 (2001)).

Robert E. Stephens, Jr., DPA Somerset

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assigned. Often, they are coping with their caseloads, but do not have the resources to send lawyers to arraignment hearings. Some courts try to recognize defendants' rights without providing counsel. In one district court, the judge begins arraignment with a lengthy explanation of the defendant's rights, and he offers his opinion that if defendants wish to plead guilty at arraignment, they are better off doing so after speaking with an attorney[10]. The court admonishes defendants to plead not guilty and seek advice of counsel.[11] Yet there is no lawyer present for those who want one then.

One municipal Court on its web page advises people that to have a public defender, they should apply "immediately after arraignment," implying that having a defender at arraignment is not possible. The web site also includes information on where to go " to pay for my Public Defender," which could discourage and confuse defendants.[12]

In one municipal court, an in-custody defendant told the judge that his lawyer was not able to come that day. The judge said the lawyer could attend later proceedings, and demanded to know whether the defendant would represent himself at the plea he was about to enter. The defendant said he had no choice, as he needed to get out of jail, and pled guilty. I worked with the defendant's lawyer on a successful motion to set aside the plea.

In many courts, there is a culture that accepts the routine denial of counsel in order to facilitate the rapid movement of cases through a calendar, what John Cleary of the San Diego Federal Defender used to call the "Rawhide!" style of justice. This must change.

The Right to Counsel is Guaranteed

Persons charged with misdemeanors are entitled to counsel and may not be imprisoned for a misdemeanor unless they had counsel or knowingly, voluntarily, and intelligently waived counsel. *Argersinger v. Hamlin, supra; Alabama v. Shelton, supra*.

The Ninth Circuit has held "that in order to knowingly and intelligently waive the right to counsel, the defendant must be made aware of (1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation." *U.S. v. Akins*, 276 F.3d 1141, 1144 (9th Cir. 2002) (amended opinion), citations omitted. The Court noted that a threat to the accuracy of a guilty plea entered without the assistance of counsel is the danger that "innocent men pitted against trained prosecutorial forces may waive counsel and plead guilty to crimes they have not committed, if they think that by doing so they will avoid the publicity of trial, secure a break at the sentencing stage, or simply get the whole thing over with." Citing *Molignaro v. Smith*, 408 F.2d 795, 801 (5th Cir. 1969).

The Ninth Circuit recently held that if the right to counsel has not been effectively waived, the defendant is entitled to an automatic reversal of the conviction. *Cordova v. Baca*, 346 F.3d 924 (9th Cir. 2003).

The Iowa Supreme Court ruled that an inadequate waiver would preclude the use of a misdemeanor conviction to enhance a sentence for a later conviction. *State v. Tovar*, 656 N.W. 2d 112 (2003), cert. granted, 539 U.S. __, 02-1541(2003).[13]

Washington court rules are clear that a lawyer needs to be provided. CrRLJ 3.1 states:

> (2) **A lawyer shall be provided at every critical stage of the proceedings**....
> (d) Assignment of Lawyer. (1) **Unless waived, a lawyer shall be provided** to any person who is financially unable to obtain one without causing substantial hardship to the person or to the persons family. [emphasis added.]

CrRLJ 4.1(a)(2) provides:

> The defendant shall not be required to plead to the complaint or the citation and notice until he or she shall have had a reasonable time to examine it and to consult with a lawyer, if requested.

The implications of that language as well as the following section require the availability and appointment of counsel:

> (3) Advisement. At arraignment, unless the defendant appears with a lawyer, the court shall advise the defendant on the record: ... (ii) of the right to be represented by a lawyer at arraignment and to have an appointed lawyer for arraignment if the defendant cannot afford one.

The rule requires that appointed counsel be available for arraignment. The rule on probation reviews requires the same. CrRLJ7.6 B states: "...The defendant is entitled to be represented by a lawyer .... A lawyer shall be appointed for a defendant financially unable to obtain one."

Appropriate Public Defender Funding

This article highlights many of the concerns I have every time I walk into a district court in Kentucky. While we have made giant leaps forward with legislation mandating the appointment of counsel for juveniles, there is still much work to be done. In my experience, district court judges generally don't want the public defenders involved because there is a perception that the cases will take longer to resolve, there will be more hearings and possibly a jury trial. Without a lawyer, most defendants plead guilty at the second appearance, mostly just to "get it over with." Until public defenders are appropriately funded with the resulting reduction in caseloads, unrepresented and under-represented defendants in misdemeanor cases will continue to be the norm in Kentucky's District Courts.

Karen Mead, DPA Danville

Uncounseled Pleas Cause Problems

Judges, prosecutors, and even defendants all too often "just want to get it over with." Taking a quick plea from an unrepresented defendant seems to accomplish this goal. Unfortunately, after this 15 seconds of justice, the defendant has a criminal record and cannot get a job, owes fines and court costs that he cannot afford, and is ordered to abide by conditions that he cannot follow and maybe cannot even understand. In addition, he may be sent to jail immediately or later when he violates the court's conditions. Suddenly, the defendant learns that his troubles are not "over with" at all; they have just begun.

Damon Preston, DPA Directing Attorney, Harrison Co.

Unfortunately, in many courts no public defender is available and the judge does not conduct the thorough inquiry the case law contemplates to support a valid waiver.

In one King County municipal court which I observed, the waiver colloquy took 42 seconds. This does not comply with the approach outlined in *Akins, supra*, or in *State v. Chavis*, 644 P.2d 1202, 1205, 31 Wn. App. 784, 789,790 (Wash.App.1982):

> .... the court should question the accused in a manner designed to reveal *understanding*, rather than framing questions that call for a simple "yes" or "no" response. [emphasis in original.]

In the *Matter of the Personal Restraint of Jose Grajeda*, 579 F.2d 406, 20 Wn. App. 249 (Wash.App.1978), Division Three vacated the plea because of the trial court's failure to comply with CrR 4.1(c). At the time he entered his plea, Mr. Grajeda was advised of his right to counsel but proceeded without requesting appointment of counsel. The judge did not ascertain whether his waiver of counsel was made voluntarily, competently, and with knowledge of the consequences. The Court found that CrR 4.1(c) implements due process requirements as construed by the United States Supreme Court. The Court cited *Carnley v. Cochrane*, 369 U.S. 506, 516 (1962):

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver.

Twenty-five years have elapsed since *Grajeda*. There is one unpublished case citing it, *State v. Hotrum* 2000 WL 1022957 (Wash.App. 2000) (unpublished), which reversed several felony convictions because the court did not make a proper inquiry or record on waiver of counsel.

Washington case law is clear that a waiver of counsel must be accepted by a court only after a thorough inquiry. The Court in *Chavis, supra*, 644 F.2d 1202, 1205, 31 Wn. App. 784, 789,790, wrote:

> But [a]n accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the accused's comprehension of the offer and capacity to make the choice intelligently and understandably has been made....

Other cases have held that the defendant's request to proceed pro se must be unequivocal. The court must establish that the defendant, in choosing to proceed pro se, makes a knowing and intelligent waiver of the right to counsel. *State v. DeWeese*, 816 P.2d 1, 117 Wn.2d 369, 377 (Wash. 1991). The court must determine that the defendant is competent and aware of the dangers and disadvantages of waiving his or her right to counsel. *State v. Hahn*, 726 F.2d 25, 106 Wn.2d 885, 895 (1986); *State v. Nordstrom*, 950 P.2d 946, 89 Wn. App. 737, 740-41 (Wash.Appl.1997). The defendant must be advised of the disadvantages of proceeding pro se. *Faretta v. California*, 422 U.S. 806 (1975).

And the court must indulge every reasonable presumption against waiver. *Bellevue v. Acrey*, 691 P.2d 957, 103 Wn.2d 203, 207 (Wash. 1984).

In *Von Moltke, supra*, 332 U.S. at 723-724, the plurality opinion wrote that the right to counsel invokes

> ...the protection of a trial court, in which the accused — whose life or liberty is at stake — is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.
>
> .... a mere routine inquiry — the asking of several standard questions followed by the signing of a standard written waiver of counsel — may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel. [footnotes omitted.]

The *Von Moltke* case is of particularly timely relevance today, as it involved accusations of collaboration with the enemy during war time. No one imagined that a defendant so accused could be held without counsel or charges. And the Court wrote about the Sixth Amendment provision of legal services to such a defendant:

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No Exceptions for Comity, Cost or Convenience

An individual's right to Due Process of law in the district courts of this Commonwealth, including the right to counsel, is inherent and fundamental. It can not be ignored. Not for reasons of comity, cost or convenience. Its principle is absolute. To prosecute a defendant at any stage of a criminal proceeding without the imprimatur of Due Process illegitimatizes the judgments issuing from those courts and brings disrepute on its participants, judge and prosecutor alike. And this matter is only amplified by the fact that many criminal defendants are indigent, illiterate or mentally challenged. Anything less than complete Due Process of law in a district court proceeding, including the defendant's right to counsel, is not Due Process.

Pat Roemer, DPA Bowling Green

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> And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent. 332 U.S. at 726.

Lawyers Make a Difference

During my fellowship, I have worked on several cases involving guilty pleas or probation revocations without counsel. In each case, the involvement of a lawyer produced a more favorable result for the defendant, and in several cases also saved the local government thousands of dollars in jail costs when the judge released the defendant months or years earlier than had been ordered at a hearing without counsel.

A pilot project in Baltimore found the same results on a systematic basis. The Lawyers at Bail Project concluded that having a lawyer present at a bail hearing to provide more accurate and complete information has far-reaching consequences. The accused is considerably more likely to be released, to respect the system and comply with orders, to keep his job and his home, and to help prepare a meaningful defense. The public at large benefits, too, from the unclogging of congested court systems and overcrowded jails and the resulting saving in taxpayer dollars.[14]

Judges Face Discipline for Not Honoring Right to Counsel

In recent years, the Washington Judicial Conduct Commission has begun to discipline judges who ignore their obligations regarding counsel.

One municipal court judge, after being suspended by the Supreme Court, again was charged with misconduct. This included not advising defendants of their rights, consistently failing to advise defendants that they have a right to counsel, requiring defendants who pleaded not guilty to waive their right to counsel and to jury trial and failing to appoint counsel. The judge stipulated to his ineligibility to hold office.[15]

In *In re Hammermaster*, 985 P.2d 924, 139 Wn.2d 211, 235 (Wash. 1999), the majority wrote:

> For most citizens, appearing as witnesses, spectators, or defendants in municipal court is their only contact with the judicial system.... The impressions which individuals involved in court proceedings receive help form their opinion of our justice system.... [footnote omitted].... People appearing pro se and without legal training are the ones least able to defend themselves against rude, intimidating, or incompetent judges. The conduct here denigrates the public view of municipal courts as places of justice. [citation omitted.]

The Washington Supreme Court recently disciplined a judge for violating the basic responsibility to make sure eligible people have counsel. *In re Michels*, 75 P.3d 950 (Wash.App. 2003). Judge Michels was acting as judge in cases involving defendants whom he had represented as the public defender. The court stressed several times that it would not tolerate short cuts to due process. It emphasized the rights of an accused person and said: "Most fundamental of these rights include the right to an attorney and the right to be advised of your rights in a way to be able to make informed decisions regarding your case." The Court condemned the judge's actions in 12 cases in which he pressed the defendant to proceed without a lawyer or go back to jail.

The *Michels* court referred to *Hammermaster*, emphasizing: "... we recognized that all courts must provide equal justice, regardless of size and situation...." The court pointed out that "Courts of limited jurisdiction serve as the window to the judicial branch for many people who do not normally have contact with the judicial system." 75 P.3d at 956.

The Court concluded:

> The rights of the poor and indigent are the rights that often need the most protection. Each county or city operating a criminal court holds the responsibility of adopting certain standards for the delivery of public defense services, with the most basic right being that counsel shall be provided. 75 P.3d at 957.[16]

The Problem is not Unique to Washington

The problem of misdemeanor defendants going un-represented at arraignments is not limited to Washington. In Riverside County, California, neither public defenders nor prosecutors are present at misdemeanor arraignment[17]. Sometimes judges try to protect defendants' rights. In one city in Riverside County, the judges hold over arraignments of un-represented misdemeanor defendants until public defenders can be summoned from elsewhere in the courthouse. In another city, the judge postpones arraignments until the defendant has had time to consult with an attorney, regardless of whether or not the defendant wishes to plead guilty.[18]

In London, Kentucky, misdemeanor defendants go un-represented at arraignment.[19] The state is cognizant of the danger

Rawhide Justice

The "Rawhide" style of justice pervades most Kentucky courtrooms. Only the vigilance of dedicated defenders can hope to remedy this injustice. Early entry as authorized by *West* would permit effective use of our scarce resources thereby front loading our clients' rights. As it now stands in the Commonwealth, blanket rights waivers and pleas without the benefit of counsel are an unfortunate norm.

Glenda West, DPA Columbia

The Collision of Rights and Convenience

When constitutional rights collide with the convenience of the courts, the citizen accused lands on the wrong side of the scales of justice. Under staffed public defender offices with crushing caseloads must challenge the courts to value constitutional rights over convenience. The fulfillment of the promise of Gideon requires commitment by all involved in the court system.

Jim Norris, DPA Covington Office

of un-represented defendants pleading guilty. Indeed, un-represented *felony* defendants are not allowed to plead guilty; the court enters an automatic not-guilty plea for them.[20] But the same protections are not afforded to misdemeanor defendants. At misdemeanor arraignments, defendants appear without counsel. Judges read defendants short pre-packaged statements of their rights, contained in the "bench-book." Some judges inform the defendants of their rights in as little as thirty seconds. Some misdemeanor defendants who plead not guilty at arraignment enter into ill-advised guilty pleas at later pre-trial conferences. Defendants must fill out written requests for attorneys and until they do, they remain unrepresented. Felony defendants have the request for counsel filled out for them by the public defender. The upshot is that at pre-trial conferences, defendants sometimes appear without counsel after being detained for as long as three weeks and are offered a choice: they are allowed to plead guilty without counsel and receive time served or plead not guilty and remain in jail.[21]

In a court I visited in Louisiana, some misdemeanor defendants pled guilty without counsel, even when receiving jail time, and there was no proper waiver of counsel. This occurred even when there were public defenders in the courtroom.

Some Courts Do Provide Counsel at Arraignment

Some communities in various states have acted to protect the rights of misdemeanor defendants. As Fern Laetham, Executive Director of the Sacramento County Conflict Defenders put it, her office "simply never considered it an option to not represent indigent misdemeanor defendants at arraignment."[22]

The Conflict Defender staffs misdemeanor arraignments with two experienced attorneys. The attorneys assess the strength of their client's case and the worth of the prosecutor's plea offer.[23] They have the support of full time investigators and intern law clerks.

The Sacramento Public Defender assigns four to five full time attorneys to misdemeanor arraignment.[24] These attorneys are supported by 10 research assistants. Often, defendants represented by SCPD at arraignment have their cases dismissed by the prosecution. An SCPD supervisor said that she was not aware of any un-represented defendant's cases being dismissed.[25]

The Louisville-Jefferson County Public Defender provides counsel for indigent misdemeanor defendants at their initial appearance. In *West v. Commonwealth*, 887 S.W. 2d 338 (Ky. 1994) the court stated that the Kentucky statute provides that representation by the Public Defender for the indigent client begins at the "'earliest necessary proceeding at which the person is entitled to counsel' and upon a simple 'declaration by the person that he is needy under the terms of this chapter'…." *Id*. at 341.

In Seattle Municipal Court, there are defenders at arraignment six days a week. They are able to challenge probable cause, argue for personal recognizance release or low bail, and to advise the clients on the advantages and disadvantages of plea offers from the city prosecutor. The defenders meet with their clients before appearing in front of the judge, negotiate pleas with prosecutors, and advocate for less restrictive conditions of release after pleas of not guilty.[26] It is not ideal, because while the defenders can review the police reports and negotiate with the prosecutor, there is no time to investigate the case or to do research which could inform a plea decision. But they are able to advise clients and to help get the best possible resolution for those defendants who want to resolve the case that day.

Alternatives

What can be done? In Snohomish County, I met with the judges, the prosecutors, and the defenders, and they agreed to end video arraignments. They found funds for a pilot program for defenders and prosecutors to be present at arraignment. The court consolidated calendars so that lawyers would have fewer hearings to attend. The report from the lawyers that have participated is that they are providing an invaluable service to the accused and that their presence is essential to assure that justice is served.

According to Public Defender Bill Jaquette:

> People coming before the court simply do not understand the possible consequences of being accused of a crime or of the rights they have in dealing with those accusations. Because the prosecutor is there, willing to make some plea offers, some cases can be resolved at their inception, avoiding subsequent court hearings and unnecessary jail time. The court saves time because the occasions where court has to permit withdrawal of an un-counseled guilty plea or waiver of jury are eliminated.[27]

After I wrote a letter to Auburn Municipal court, the judge changed the court's web page to make clear that counsel could

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Our Challenge

The challenge, which is faced by all participants in the criminal justice system, is not merely to provide representation in District Court, but to provide truly meaningful representation in that context, with its finite resources and seemingly infinite demands. Courts must balance the need for efficiency with the need for accurate fact-finding and deliberate consideration of legal issues. Prosecutors must, as ever, balance zealous advocacy with the duty to seek justice for all, including defendants. Defenders must, despite a host of conflicting demands on their time, be present and prepared, in a disciplined way, to provide the guiding hand of counsel to the often angry, frightened and confused poor who appear in their numbers in District Court. This challenge is vast, and great effort is ever required to meet it. We must also, I feel, renew our commitment to the adversary system as the best means of discovering truth and establishing justice. I am, however, fully persuaded that, with good will, good thought and good effort, we can work together to make the dream of Gideon a more fully realized presence in even our most crowded District Courts.

Rob Sexton, DPA Regional Manager, Owensboro

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be requested before arraignment, not only afterwards, and he has asked the city government to provide public defenders at arraignment. The judge decided not to accept guilty pleas without counsel available. He is considering establishing a diversion program.

In Spokane, I met with some judges, prosecutors, and defenders, and they agreed to try to re-schedule and consolidate DWLS 3 cases in one court, with the goal of sending as many as possible to a re-licensing program. This would reduce pressure on other courts, and could reduce the number of DWLS 3 cases assigned to the defenders. That would free up resources to be able to provide lawyers at arraignment.

In every court system, there are cases which could be diverted. Often, the prosecutors don't review the police reports before complaints are filed. When they do read them, they often dismiss the cases or offer resolutions with lesser charges. If they would review them in advance, they could save resources. In juvenile, greater use of diversion and alternatives to truancy prosecutions would reduce caseloads.

Defenders are in a good position to address with their local prosecutors and judges the routine denial of counsel to defendants in misdemeanor courts. When lack of resources is raised as a defense, there are two answers. First, lack of resources does not excuse complying with constitutional rights and rule requirements. Second, diverting cases, primarily DWLS 3 cases, would save more than enough money to fund lawyers at arraignments and probation hearings. DWLS 3 cases constitute as much as one-third of misdemeanor court cases. In the first eight months of 2003, there were 28,221 DUI filings in courts of limited jurisdiction, 85,276 "other traffic" offense filings, and 92,314 non-traffic offense filings. [28]

Seattle Municipal Court has a re-licensing program which has netted the city money in formerly unpaid traffic fines, while helping people to get back their licenses and avoid further DWLS tickets. More than half of the participants have been able to obtain their licenses.

King County District Court has a diversion plan for DWLS 3 which was developed by defenders and prosecutors working with the court and county government.[29] It has saved hundreds of thousands of dollars a year in defender costs, jail costs, and court costs, and helped people to get their licenses. In 2002, the King County District Court launched a full service re-licensing program for defendants charged with DWLS III and No Valid Operator's License. Instead of filing charges, the prosecutor's office invites individuals to appear in court. If the person appears in court a variety of options are made available for them. They can have their previous fines and violations mitigated by the judge and pay them in full, have a payment plan developed by service providers present in the courtroom, or agree to do work crew or community service which pay $150 dollars per day or $10 per hour respectively towards the violations. If the payment plan is chosen, holds on the individual's license are removed as soon as the first payment is made.

The re-licensing project allows for walk-in participants.[30] This is perhaps the most accurate indication of the program's success in the community. On one recent day, the walk-in courtroom for re-licensing at the King County District Court in Burien was filled to capacity. The program has had to cap the number of walk-ins. The word of mouth surrounding the program is enormous. Not only are people spreading the word that fines are significantly reduced but also there is none of the intimidation and fear that can surround normal court appearances: the re-licensing coordinator calmly and clearly explains the program, there are no prosecutors present, and once the judge takes the bench and begins to mitigate fines, it becomes clear that the program's goal is to make fines more manageable and get people re-licensed.

Thousands of jail days are saved because fewer people are held for DWLS 3 violations, attorney hours are saved for the prosecutor and the public defender, the underlying problem of the DWLS violations is addressed, and hundreds of participants regain their driving privileges.

Another alternative would be to de-criminalize some minor offenses, including DWLS 3 for people whose licenses are suspended only for failing to pay tickets. That part of DWLS is a relatively recent statutory change. The King County Regional Justice Summit sponsored by law enforcement officials this past October included decriminalization as one of seven priority areas in which to develop solutions.

Conclusion

The bottom line is that counsel must be provided to eligible defendants. If a case is important enough to prosecute, it is important enough to provide counsel and due process. Courts should not take pleas from unrepresented defendants without thorough inquiries into their waiver of their right to counsel. Prosecutors should not discourage people from exercis-

Catalysts for Change

Robert Boruchowitx's article *How to Deal with the Denial of Counsel in Misdemeanor Cases Post-Shelton* served to reinforce the lessons so ably taught to new DPA attorneys this fall in District Court and Juvenile Court training. Serious as they may be, we defenders are not simply charged with representing clients facing the death penalty or serious felony charges. Our statewide caseload reports verify that the vast amount of day-to-day in the trenches defense work is carried out in misdemeanor and juvenile court. As public defenders we have the unique opportunity, the training and the tools to be catalysts for change on behalf of our district and juvenile clients. I have often commented sadly and somewhat tongue in cheek that any resemblance between what happens in many district courtrooms and the practice of real law in a way which protects our clients' rights is merely coincidental. We have the expertise to change that reality. As an agency we need to continue to strive for more attorneys with which to develop a greater and more consistent presence in District and juvenile court. We must not be afraid to take the unpopular stand in support of our clients' rights even if doing so slows down a courts's docket. And we must utilize our wealth of in-house expertise to continually educate judges and prosecutors about the importance of ensuring the protection of our clients' rights.

Rebecca Murrell, DPA Directing Attorney, Bullitt County

ing their right to a lawyer and they should not be negotiating pleas with unrepresented, shackled defendants. Local governments must meet their obligations to pay for counsel.

And defense lawyers, judges, and prosecutors must not look the other way from these practices which sacrifice individual rights and basic fairness.[31]

Robert C. Boruchowitz

Robert C. Boruchowitz is director of The Defender Association, past President of the Washington Defender Association, and a 2003 Soros Senior Fellow. Ben Goldsmith, a third year student at the University of Michigan School of Law, assisted with research for this article.

Endnotes:

1. [http://courts.wa.gov/caseload?fa=caseload.display_subfolder&ID=clj&subFolderID=ann&fileID=cityr]
2. Bureau of Justice Statistics, Probation and Parole in the United States, 2002(August, 2003, NCJ 201135.) http://www.ojp.usdoj.gov/bjs/pandp.htm
3. http://www.abanet.org/media/oct03/102203.html
4. http://www.abanet.org/crimjust/juvjus/wareport wareport.pdf
5. Colbert, et. al., "Do Lawyers Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail," 23 Cardozo Law Review 1719, 1782-1783 (2002).
6. The problem of judges acting as prosecutors is somewhat beyond the scope of this article. But the court should not adopt the role of a prosecutor in a trial or a probation revocation hearing. See, *People v. Bedenkop*, 625 N.E.2d 123, 252 Ill. App. 3d 419 (1994); *Giles v. Prattville*, 556 F. Supp. 612, 617(Mid. Dist. Ala., N. Div.1983): "the practice in the Prattville Municipal Court of having the same official serve as judge and prosecutor will not meet minimal constitutional standards." The Washington Supreme Court has decided 6-3 that it does not violate due process for a district court to conduct a traffic infraction hearing without a prosecutor. *State v. Moreno*, 58 P.3d 265, 147 Wn.2d 500 (Wash. 2002). Justice Johnson wrote in dissent: "In our adversarial system, when the only advocate for the State in the courtroom is the judge, the appearance of fairness is violated." This issue bears raising again in the context of taking pleas in criminal cases and of revocation of probation.
7. Wallace, Remarks at Indigent Defense Symposium (2002). http://www.nlada.org/DMS/Documents/1046801534.62/

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Criminal Justice Depends on the Adversary System

No government has a legitimate interest in convicting its citizens of criminal offences unless those citizens are guilty. This is true even if the penalty is slight or the sentence probated. Every day in this Commonwealth I see citizens appear in droves before tribunals that have neither the time nor the motivation to determine actual guilt. Those citizens are disproportionately the poor and the powerless, but in a system where the Judge and the prosecutor are not only highly educated, but are additionally specially trained, anyone who ventures in off the street starts, and frequently ends, at a distinct disadvantage. The system need not fear an evil motive from judges and prosecutors, only that their motivations to "move the docket" and "keep a high conviction rate" interfere with that stated goal of justice. There is a real, meaningful difference between being guilty with a sentence of a small fine or some probated jail time and being not guilty. The cost to the citizen may appear later in lost job opportunities or higher insurance rates. It may appear to the county in jail costs when the probation is revoked. It ultimately appears to all of us in a loss of confidence in the system to produce the right result. Criminal justice depends on the adversary system. That system depends on adversaries who play on a level field. When only one side has a lawyer, the result that prevails only approximates justice. That may be enough for some. It should not be enough for us.

Rob Riley, DPA Northern Regional Manager, LaGrange

An Ounce of *Shelton* is Worth a Pound of *Boykin*

Edgar, not his real name, was not my client at the time; but I was in the courtroom to see his arraignment.

"Sir," the Judge began, "you are charged with driving on a DUI suspended license, first offense. How do you plead?"

"I have to be honest, Edgar said, I was driving and I hadn't got my license back."

"And was that license suspended because of a prior DUI conviction?" the Judge queried.

"Yes, it was, Judge."

"Well," said the Judge, "for your honesty, I'm going to give you time served, suspend the fees and fines, and let you out today. Is that okay with you, prosecutor?"

"That'll be fine, Judge," or words to that effect.

Everything seemed right and just with the world. A man was admitting his guilt without making excuses, and the Judge and prosecutor content to reward such honesty by giving him the absolute minimum for the offense.

Then, two years later, I was appointed to represent Edgar on his *third* offense of driving on a DUI suspended license. Of course, a third offense is a felony. As I examined his driving record which had been produced in discovery, I learned for the first time the facts of the charge to which Edgar had pled guilty two years earlier: Edgar had been given a ninety day suspension for DUI, and on the *ninety-third* day after being suspended, he had been stopped and arrested. So Edgar had already served his mandatory period of DUI suspension; he just had not yet got his license back. Edgar had been charged with and convicted of the wrong offense!

But no one told him that.
Not the prosecutor.
Not the Judge.

Not even me, though I was there. All present, including Edgar, simply assumed he was guilty of the charge. I had sat idly by at the time, thankful, I suppose, not to have been appointed to another case.

Shelton had not been decided at the time, but if it had, would I have used it? Would I have urged the Court to appoint me before taking the plea, just to make sure that he was pleading knowingly to the proper charge? Maybe. Maybe I would have asked the judge to address the issue of appointment of counsel prior to taking a plea, thereby increasing my own caseload and adding some delay to what was certainly an expedited process for Edgar.

If I had, I would not be drafting a lengthy *Boykin* motion now, asking the Circuit Judge and Prosecutor today to disregard an injustice done to Edgar over two years ago.

Scott West, DPA Directing Attorney, Murray

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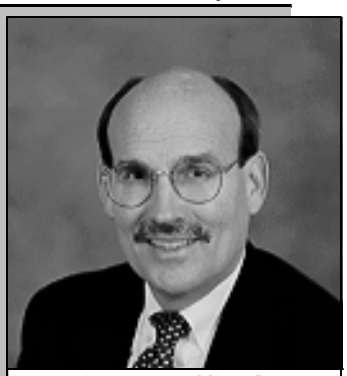
Georgia%20Indigent%20Defense%20Symposium,%20Remarks%20of%20Scott%20Walla%85.pdf.

8. Findings and conclusions available from the author.
9. Review of record by Rule 9 intern Ben Goldsmith, on file with author.
10. Observations of Ben Goldsmith, Rule 9 Intern at the Defender Association in Seattle, WA , 9/16/03
11. *Id.*
12. http://www.ci.redmond.wa.us/insidecityhall/police/faq.asp#Public
13. This case was presented to the Supreme Court by the state as raising an issue of what is required to support a proper waiver of counsel. Yet the state court and the parties did not address what should have been the determinative issue in the case, that the defendant had requested counsel and been denied improperly because he was "dependent on his parents" as he was a college student.
14. Colbert, et. al., *supra*, 23 Cardozo Law Review 1719, 1783 (2002).
15. http://www.cjc.state.wa.us/publications/decisions/2002/3210%20Reconsideration%20and%20Order% 20of %20Closure.pdf.
16. The Court cited RCW 10.101, which requires local governments to establish standards for public defense services.
17. From notes of a telephone conversation by Ben Goldsmith with Robert Willey Assistant Public Defender for the County of Riverside, 9/5/03
18. *Id.*
19. From notes of a telephone conversation by Ben Goldsmith with Roger Gibbs, Public Defender in Laurel County, Kentucky 10/24/03
20. *Id.*
21. *Id.*
22. From notes of a telephone conversation by Ben Goldsmith with Fern Laethem, Executive Director of the Conflict Defender in Sacramento California, 9/12/03
23. *Id.*
24. From notes of a telephone conversation by Ben Goldsmith with Karen Flynn, Supervising Attorney with the Sacramento County Public Defender, 9/19/03
25. *Id*.
26. Observations of Ben Goldsmith, Rule 9 Intern at the Defender Association in Seattle, WA, 9/19/03
27. Email to the author, October, 2003.
28. http://courts.wa.gov/caseload/?fa=ca seload.display_subfolders&folderID=clj&subFolderID=ytd&fileID=rpt01
29. http://www.metrokc.gov/kcdc/dwls3pr.htm.
30. The participation rate in the District Court re-licensing program is higher than the initial appearance rate in Seattle Municipal Court where DWLS cases are prosecuted traditionally, not diverted. ■

Has the Problem of the Unrepresented Changed?



Ernie Lewis, Public Advocate

"What is discouraging is that while there have been numerous significant changes in DPA's funding situation over the past several years, the problem of the unrepresented defendant in district court has not significantly changed. The conveyor belt has been moving for many years and will continue to move in the district courts of this Commonwealth. There is neither the funding nor the political will to provide counsel to each person in district court who is both eligible and who desires to have counsel...The only proper remedy is to provide people with counsel in district court when their preliminary hearings and other important procedures are being held.

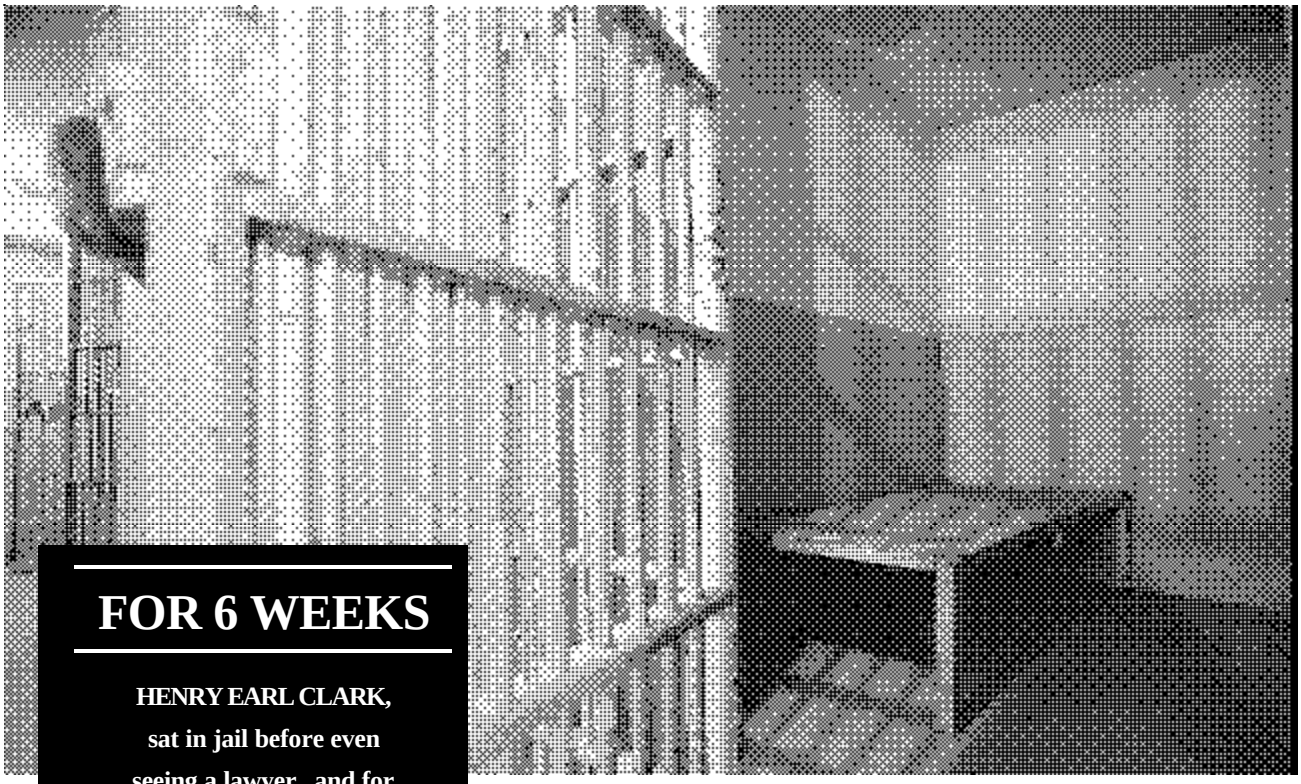
This is indeed a problem that appears to be virtually intractable. While I doubt whether we will ever see full funding for all those accused who desire counsel and are eligible, we need to continue to raise the vision of our Constitution and *Gideon* and continue to press toward that goal."

That was what I said from the perspective of a directing attorney in the Richmond Office in 1996 when *The Advocate* last examined the unrepresented indigent in Kentucky. Sadly, there remain far too similarities between that day and today. We still do not have defenders available in most counties in Kentucky at the time an arrested person first appears before a judge to be advised of the charges, asked whether he wants counsel or not, and to have bond set. Sadly, we have far too many judges advising groups of persons of their right to counsel rather than ensuring at an individualized colloquy that they understand their rights and wish to waive their right to counsel. Sadly, the norm is that defenders are not available when bond is first set. Sadly, *Alabama v. Shelton*, 535 U.S. 654 (2002) is a dream rather than a reality in Kentucky.

That is not to say that progress has not been made. We have a full-time public defender system in 117 counties today, with almost double the resources from 8 years ago. That means we have more public defenders available to represent far more persons charged with crimes, including misdemeanors and juveniles. We also have *DR v. Commonwealth*, Ky. App., 64 S.W.3d 292 (2001) and KRS 610.060(2)(a), which have gone far toward eliminating the problem of the unrepresented juvenile. We are providing more justice to more people through our public defender system in Kentucky.

But this problem will never be fully solved without a significant increase in funding. DPA handled over 117,000 cases last year at $238 per case. Trial public defenders averaged 484 cases opened during FY03. Defender caseloads are 150% of national standards. DPA is charged with the mission of representing every eligible indigent accused of a crime, no exceptions. DPA stands ready to complete this mission, but we must receive additional resources to be able to accomplish this.

Ernie Lewis, Public Advocate



FOR 6 WEEKS

HENRY EARL CLARK, sat in jail before even seeing a lawyer...and for a full three months before they found out they had the wrong man.

FOR 40 YEARS

THE LAW that should have prevented this fiasco has sat on the books, waiting for enforcement.

It's a basic right: "equal justice under law" means that every American should stand equal before the courts. 2003 marks the 40th anniversary of the landmark Supreme Court case, *Gideon v. Wainwright,* that ruled the Constitution guarantees all Americans access to legal representation when facing prison time for criminal charges. If someone cannot afford to hire an attorney, the court is required to appoint one for him or her.

This guarantee legitimizes our legal system - if we can all count on getting qualified counsel, we can all trust our system of justice.

The "No Exceptions" campaign aims to remind each state of its responsibility to promptly provide qualified counsel to anyone who is facing prison time for criminal charges and cannot afford an attorney. There are no exceptions to this rule.

Anyone accused of a crime who can't afford an attorney on his or her own must get qualified counsel in 24 hours. **No Exceptions. It's the American way.**

To learn more about the campaign and the issue, visit
www.NoExceptions.org.

NO EXCEPTIONS

It's the American Way

JOHNSON V. COMMONWEALTH: HOW DEPENDABLE IS IDENTIFICATION BY MICROSCOPIC HAIR COMPARISON?

A professor from Harvard Law School once gave a speech to the Association of American Law Schools in which the professor cautioned that legal education had a deleterious effect on a person's ability to think sensibly about reality and how to evaluate claims about the material world. Suppose, said the professor, you asked the average young adult whether the moon was made of green cheese. Before law school, a typical response would be: "I don't know; we probably need to get hold of a piece of it in order to find out." To a law school graduate, however, the answer, "It could be argued that the moon is made of green cheese," would seem entirely adequate. If you do not already realize that *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258 (1999), confirms the Harvard professor's worst fears, you will by the end of this case comment. But first we need some legal background.

Admissibility of Scientific Evidence in American Law

Before *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), courts used the "marketplace" test. In trying to determine whether a proffered expert witness had valid opinions to offer, courts of the 19th Century asked themselves whether, in the commercial marketplace, consumers of that expertise found its opinions and advice worth purchasing with their hard earned money. If the expertise were valued in the marketplace, then courts also were willing to value it and allow it as expert testimony. Thus, consumers of an asserted expertise were the principal judges of its validity.

As the *Frye* court realized, such a test was impossible to apply to expertise that had no life in any commercial marketplace, such as a field that was invented exclusively for forensic purposes. So, when confronted with the need to determine whether a proffered polygraph expert had a valid basis for his opinions, the *Frye* court employed an analog to the commercial marketplace: the intellectual marketplace. The court asked not whether an expertise enjoyed general acceptance among consumers, but whether the expertise had gained general acceptance "in the particular field in which it belongs." Thus, the *Frye* test replaced consumers with producers as the principal judges of validity.

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), of course, made judges the principal judges of the validity of proffered expertise. And it called upon those judges, when confronted with empirical claims to assess, to think like scientists: Are the claims testable and have they been tested? Have those tests been conducted using sound research methodology (perhaps the central lesson of the paragraph in *Daubert* that begins with the words "peer review and publication")? What do the findings of well designed studies reveal? "General acceptance" still can be considered, but with a scientist's skepticism – as the Supreme Court later made clear in *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), when it observed: "Nor... does the presence of *Daubert's* general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability." So, general acceptance within a field counts for something only after the field has been otherwise determined to be a sound one. To have held otherwise would have been to allow *Frye* to swallow *Daubert.*

The essential logic of *Daubert* and its progeny could not be simpler. What better way is there to find out whether something works or not than to empirically test it? And then to look at the quality of those studies and what the results of good studies show. If you had a serious illness and you wanted your doctor to recommend an effective treatment, would you want your doctor to choose a treatment whose sellers assure buyers that the treatment they are selling is terrific? (*Frye*.) Or would you want your doctor to look at the research literature testing what works and suggest something to you that has been demonstrated to be effective? (*Daubert/Mitchell*.)

The essence of *Daubert's* gatekeeping task is to look at the research offered by the proponent on the specific "task at hand" in the case at bar and see what it shows. If the research satisfies the court that the expertise is sufficiently dependable, it is to be admitted. If the research fails to establish that the expertise is dependable, it is to be excluded. The proponent of expert evidence that has no research or minimal research or weak findings to support it cannot gain admission – the fate of any party bearing the burden of proof but who is unable to meet its burden.

The U.S. Supreme Court plainly realized that there were many old kinds of asserted expertise that had won admission under *Frye* (or had been admitted without being subjected to any test at all), and which would be challenged under *Daubert* as they never had been challenged before:

> Although the *Frye* decision itself focused exclusively on "novel" scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence. Of course, well-

> established propositions are less likely to be challenged than those that are novel, and they are more handily defended.

As one federal court later observed:

> [*Daubert*] may mean, in a very real sense, that "everything old is new again" with respect to some scientific and technical evidentiary matters long considered settled. Alarmists may see this as undesirable.... The more probable outcome is that judges, lawyers and expert witnesses will have to learn to be comfortable refocusing their thinking about the building blocks of what truly makes evidence that is beyond the knowledge and experience of lay persons useful to them in resolving disputes. The beneficiaries of this new approach will be the jurors that have to decide increasingly complex cases. *Daubert*, *Kumho Tire*, and now Rule 702 have given us our marching orders, and it is up to the participants in the litigation process to get in step. *United States v. Horn*, 185 F.Supp.2d 530 (D.Md. 2002).

A field that has the right stuff, and has done its scientific homework, would have no trouble demonstrating that what it is selling is worth buying. If its claims are true, its adherents should have no trouble showing that to be so. But a field that has been engaged in a parody of science, dressing up in lab coats but never doing the research needed to test the extent and limits of its claims, and making claims that exaggerate what is known about its subject matter and its own skills, such a field would have the gates closed to it – unless and until it can demonstrate the validity of its claims.

Admissibility of Scientific Evidence in *Johnson*

At trial in *Johnson v. Commonwealth*, counsel for the defendant challenged the admissibility of hair identification expert testimony under *Mitchell v. Commonwealth*, Ky., 908 S.W.2d 100 (1995), Kentucky's adoption of *Daubert*. In light of *Daubert*, and presumably of *Mitchell*, one would have expected the trial court simply to require the proponent to demonstrate the soundness of what it was proffering. A field of supposed science that has been in business for a century ought by now to have a mountain of studies about its subject matter and itself with which its claims, if valid, could be "handily defended." But the trial court did something even simpler: it refused to require any showing by the proponent, and denied the opponent's motion to exclude. The reason for that decision, apparently, was that microscopic hair comparison had long been admitted in Kentucky – though obviously not under the test now required by Kentucky law.

The trial court's failure to place the burden of proof on the proponent of the admission of evidence, and then to admit the testimony without the proper showing having been made, would seem to be an elementary error. That the proponent of evidence has the burden of establishing that its proffer meets the requirements for admission is a quotidian legal notion. (The rule is ancient, followed (almost) universally, fair, and efficient. Where the proffer is an asserted expert in some assertedly scientific field, the proponent has the proposed witness who has the supposed knowledge that will answer the question.)

On review by the Kentucky Supreme Court, however, the trial court's refusal to require the proponent to "show us the data" was upheld as a proper application of *Daubert/Mitchell*. To reach this result, the Court had to explain how it could be that an asserted expertise, never before tested under *Daubert/Mitchell*, did not need to be tested, and could be found "scientifically reliable" without any court ever doing the one thing that was the touchstone of the new test: looking at the data.

FIRST, the court argues that well established findings of science need not be revisited and proven over and over again. This seemingly sensible view not only strikes a blow for judicial efficiency, it spares courts the intellectual burden of a task which is fundamentally difficult for many of them, namely, evaluating the validity of asserted scientific claims. In the words of the *Johnson* Court:

> *Daubert* also recognized that some scientific methods, techniques and theories are so firmly established as to be proper subjects of judicial notice pursuant to FRE 201(b)(2). Thus, in *United States v. Martinez*, it was held that once an appropriate appellate court holds that the *Daubert* test of reliability is satisfied, lower courts can take judicial notice of the reliability and validity of the scientific method, technique or theory at issue. Courts are "right to admit or exclude much evidence without 'reinventing the wheel' every time by requiring the parties to put on full demonstrations of the validity or invalidity of methods or techniques that have been scrutinized well enough in prior decisions to warrant taking judicial notice of their status." 3 C. Mueller and L. Kirkpatrick, *Federal Evidence* § 353, at 657 (2d ed.1994). (Case citations omitted.)

The trouble is that none of what those authorities were talking about is present in *Johnson*.

The cited footnote in *Daubert* was referring to overpoweringly well tested and thoroughly confirmed findings or principles: "theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice." Is microscopic hair comparison on a par with the laws of physics? Are the principles of hair comparison "scientific laws"? Indeed, the gravamen of the cited footnote in *Daubert* should have taken the *Johnson* Court in the opposite direction, concluding not that scrutiny of the claims of hair examiners can be dispensed with but rather that "well-established propositions... are more handily defended" and must be defended. If

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the claims of microscopic hair identification are sound, they can easily be shown to be so. But if they are not, they will fail. And the only way a court can determine whether the claims are sound is going to be to require the data to be presented at a proper hearing.

The *Martinez* court is talking about a situation where an appellate court holds that the requirements of *Daubert* have been properly satisfied in other proceedings, so that a later district court does not have to go over the same territory redundantly. But that is not what happened here. There had been no prior hearing at which the claims of microscopic hair identification had been rigorously scrutinized and the requirements of *Daubert/Mitchell* found to have been met. Moreover, both the earlier court and the court seeking to forego a *Daubert* hearing would both have to have been sufficiently careful in framing the task-at-hand that a reviewing court could be sure that the data reviewed in the former hearing fit the task at hand in the latter case. In *Johnson*, for example, a single questioned hair was available to work with. Had a previously conducted *Daubert/Mitchell* hearing addressed itself to *that* difficult evidence situation? (As we know, there was no such hearing in a sister court addressing itself to anything.) A finding of nothing more than general acceptance would not have sufficed, given the touchstone requirements of *Daubert,* elaborated in *Kumho Tire,* disapproving of general acceptance as a continuing substitute for a review of the relevant research data. As Justice Scalia emphasized in his concurrence in *Kumho Tire*: "Though... the *Daubert* factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion."

If the Kentucky Supreme Court is saying that an appellate court can make the substantive decision for the trial courts, then it is saying that review is *de novo*. If that is the rule in Kentucky, then the Court must conscientiously conduct its own review of the research literature and explain what it found there. (The U.S. Supreme Court, of course, has gone in the opposite direction, holding in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), that appellate review is deferential. (In practice, federal district courts revisit uncertain sciences repeatedly, working their way toward a clearer understanding and an eventual consensus.) But, in any event, the Kentucky Supreme Court undertook no such *de novo* review of the question of the validity of the claims of hair identification examiners.

Similarly, the language quoted from Mueller & Kirkpatrick is drawn from the midst of a discussion of how courts are to meet their obligation to ensure the validity of proffered science, and how they might do so efficiently. A court's first obligation under *Daubert/Mitchell* is not to be efficient but to ensue the validity of the proffered science. The *Johnson* Court seems so intent on sparing judges the burden of "reinventing the wheel" that it is willing to spare them the burden of inventing the wheel altogether.

SECOND, the Kentucky Supreme Court argues that the question of scientific reliability and validity of hair comparisons is something Kentucky courts can learn about through judicial notice, and that the taking of judicial notice shifts the burden of proof to the opponent of evidence admission.

Part of the problem here is that there are two kinds of facts that can be judicially noticed, serving different purposes and accompanied by different standards and procedural requirements. The Court is contradictory about (and probably confused about) which kind it is trying to invoke as the vehicle for relieving the proponent of admission of the obligation to meet its burden of actually proving that the claims of hair comparison can be trusted.

Initially, the *Johnson* Court quotes *Daubert's* invocation of "judicial notice pursuant to FRE 201(b)(2)" as the magic wand for this job. But FRE 201(b)(2), like KRE 201(b)(2), is a reference to "adjudicative facts," which are facts specific to the immediate parties in the case at bar. An adjudicative fact, in order to be judicially noticed, must be "not subject to reasonable dispute in that it is... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Where are these indisputably accurate sources on the scientific reliability of hair comparison? The Court seems to realize there aren't any, because it next looks for a way to dispense with the indisputability requirement of 201(b)(2). The escape hatch is found in some language of the Study Committee Commentary to KRE 201, which says that "a matter need not be beyond dispute to be part of a court's reasoning." How can that be? The Rule requires indisputability, but the Commentary says it's not necessary? The answer is that the Study Committee's Commentary, borrowing from the Federal Rules Advisory Committee Comments, is talking about a completely different realm of facts, "legislative facts," facts a court (like a legislature) relies on when it is making law. Rule 201 is about adjudicative facts at trial. The Commentary is talking about legislative facts in judicial lawmaking.

So is the *Johnson* Court making law (legislative facts) or finding facts (adjudicative facts)? The opinion incoherently and paradoxically does both at once. By relieving the court below, and itself, of the obligation to take judicial notice only of facts that are "indisputable," it seems to be making law through a finding of legislative fact. But by declaring that "trial courts in Kentucky can take judicial notice that this particular method or technique [of hair comparison] is deemed scientifically reliable," as a matter of trial court discretion, rather than announcing a rule of law which courts below are obligated to follow, the Court is behaving as if it is making a much more limited finding of adjudicative fact. The opinion probably seeks to have it both ways because only that mixture of language, contradictory though it may be, seems capable of excusing Kentucky courts from doing the work they committed to doing when *Daubert/Mitchell* was adopted.

Relatedly, the *Johnson* Court reassigns the burden of proof from the proponent of admission to the opponent: "judicial notice relieves the proponent of the evidence from the obligation to prove in court that which has been previously accepted as fact by the appropriate appellate court. It shifts to the opponent of the evidence the burden to prove to the satisfaction of the trial judge that such evidence is no longer deemed scientifically reliable." We have to try to make our way through some confusion. The burden of persuasion cannot be shifted *because of* judicial notice. Judicial notice is one way for a party to meet its burden of production, and perhaps of persuasion. The burden of persuasion normally (and almost invariably) starts and stays on the proponent of admissibility of evidence. The proponent might try to satisfy its burden of production by saying: we ask the court to take judicial notice, etc., etc. And the court could agree to do so or decline. And at the end of the hearing (if there had been a hearing) the fact judicially noticed might also be found to satisfy the proponent's burden of persuasion. If the burden of persuasion has been shifted, for some reason, from its customary place on the shoulders of the proponent, to the opponent, the court never explains why.

One would have thought that, given a challenge to a form of expert evidence that had never passed muster under the newly applicable rule, the burdens of production and persuasion remained on the proponent of the evidence. And that the opponent's pointing out the absence of any testing under *Daubert/Mitchell* would have been more than sufficient to trigger a 104(a) hearing where the proponent could present the evidence it has to present, or request the taking of judicial notice, in its effort to meet its burden of persuasion. For example, in *Jacobs v. Government of the Virgin Islands*, 53 Fed.Appx. 651, 2002 WL 31887857 (3rd Cir. 2002), the Government was silent in the face of a challenge to the admissibility of its proffered fingerprint expert evidence, and for its failure to meet its burden, the court ruled the expert testimony inadmissible. The taking of judicial notice would shift the burden of production over to the opponent, but not the burden of persuasion. The Kentucky Supreme Court, however, says that somewhere along the way, for some unspecified reason, the burden of persuasion was shifted to the opponent and the opponent failed to meet its burden to prove that hair comparison evidence is unreliable.

FINALLY, whatever the legal nature of the fact it seeks to take judicial notice of, the Court zeroes in on the one key fact the decision is designed to turn upon: that microscopic hair comparison is "generally accepted." How does the Court show that hair comparison is "generally accepted" in Kentucky? Easy. It cites five earlier Kentucky cases, two from the 1950s and three from the 1970s, which upheld the admission of microscopic hair comparison expert testimony. Well, actually that's not so easy. Because, as the Court acknowledges:

> Although we have never specifically addressed the scientific reliability of this method of hair analysis, we must assume that it at least satisfied the *Frye* test of general acceptance; for otherwise, the evidence would never have been admitted in the first place. The absence in our previous opinions of any in-depth analysis under the "general acceptance" test was probably due to the overwhelming acceptance of this procedure as a reliable scientific method for the past fifty years.

Let's play that back in slow motion so we do not miss what is happening. Prior decisions had "never specifically addressed the scientific reliability of this method of hair analysis." Then how can they now be used to establish its scientific reliability? Prior decisions did not engage in "any in-depth analysis under the 'general acceptance' test." The Court is too generous. The truth is that not one of the cited cases engaged in *any* analysis of admissibility of any kind or even mentioned *Frye* or general acceptance or any other legal test to which microscopic hair comparison expertise was being subjected. Indeed, it is not evident that a challenge to admissibility under Rule 702 or its common law equivalent was even raised in any of these cases (the closest to it was a cryptic mention in the case from 1950), so those courts might have had no occasion to conduct such an analysis. In any event, if none of those prior decisions found general acceptance, how can they now be used to establish general acceptance? The *Johnson* Court assumes: "we must assume that it at least satisfied the *Frye* test of general acceptance; for otherwise, the evidence would never have been admitted in the first place." That is a very shaky assumption. As already noted, it does not appear that a challenge to admissibility of the hair experts was even lodged, so the courts would have had no occasion to test the asserted expertise under general acceptance or any other test. If challenges had been raised, and each of these courts admitted anyway, without conducting a *Frye* or any other admissibility test, they would be doing what most courts have done over most of the 20th Century with most scientific evidence, especially government proffers of forensic "science." *Frye* itself was an obscure test, ignored for decades. As one scientific evidence treatise notes, judges did not have much "interest in the *Frye* test until a few years before the promulgation of the Federal Rules of Evidence." That was 1975. "By the 1980s, it was being cited as much each year as it had been in its first fifty years. The first citation to *Frye's* general acceptance test in an opinion by a Kentucky court occurred in 1983.

The *Johnson* Court insists that the absence of any analysis under the general acceptance test "was probably due to the overwhelming acceptance of this procedure as a reliable scientific method for the past fifty years." What can one say about such a statement? The force – indeed, the very legitimacy – of courts depends on what their opinions say. If there is no argument or reasoning or even mention in an

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opinion about a matter central to what is at issue, then the opinion has nothing to say on that point, and it must be resting its holding on something else or on nothing. The issue in *Johnson* simply does not appear to have been an issue in those cases. But, never mind, the *Johnson* Court can just invent the missing pieces. That the *Johnson* Court fills in what is missing would not be quite so astonishing if it were not the central issue in the decision – as the Court itself has framed the inquiry. And the Court is willing to just make up what it needs out of thin air.

Next, and finally, the court cites 10 opinions from other jurisdictions, which it tells us "specifically hold that human hair analysis by microscopic comparison is an accepted and reliable scientific method or technique." The Court says nothing about the contents of those opinions, to demonstrate the quality of the evidence and reasoning of those opinions, or even what issue they were addressing. Were they inquiring into general acceptance or something else? If general acceptance, was the inquiry a narrow *Frye* test (accepted by those who make their livings doing what they say they accept) or a broad *Frye* test (accepted by a wider a range of relevant scientific disciplines)? Before abandoning *Frye* for *Daubert*, did Kentucky subscribe to a broad or a narrow *Frye* test? Which approach maps onto *Daubert/Mitchell*? (Given the *Daubert* trilogy, it is hard to believe that the narrow approach to general acceptance is still viable.) Seven of the ten opinions were from the era before *Daubert* (and all ten of them, of course, preceded *Kumho Tire*, though one might hope that the three that followed *Daubert* were alert to *Daubert's* logic, and did not need to wait to be told by *Kumho Tire* that general acceptance alone does not save a field that has no other demonstrable validity). The Court's best chance for convincing us that those ten opinions mean something more than its own fanciful readings (mindreadings might be more apt) of the five prior Kentucky opinions would have been to *tell us what there is to learn about the general acceptance of hair comparisons from those opinions.* But the Court does no more than to cite them.

Conclusion

Johnson is a rare opinion – at least we might hope that it is rare. First, the Court excised from *Daubert/Mitchell* every element that makes it the new test that it is, and built the opinion's entire analysis on the weakest and most suspect element, general acceptance. Then, instead of requiring a fresh examination of the general acceptance of hair identification (among hair comparison examiners? more broadly among real scientists?) pursuant to the new law or in light of new scientific findings, the Court merely looked at its own cases from generations ago. Upon finding in those opinions no inquiry into the issue of general acceptance, the Court imagined that the reason for silence was that the technique was so obviously accurate and dependable that those courts felt no need to say so. (The exact contrary seems far more likely: if a challenge had been raised, and if those courts were aware of information supporting admission, they would have eagerly referred to it. Since they did not, either there was no such information or they had no need to mention it because no proper challenge had been raised. And that would make *Johnson* a case of first impression on the question of hair comparison for an appellate court in Kentucky.)

What is most paradoxical about the opinion is that, pursuant to new law which plainly conditions admission of expert evidence on a scientific-minded appraisal (that is, a look at the relevant empirical data) of the expertise at issue, the conclusion that hair comparison is "scientifically reliable" is arrived at without any judge at any time having to look at any studies or data whatsoever. Nothing could be more at war with the letter or spirit of *Daubert*.

Had any court at any stage in the process of considering this challenge merely pulled from a library shelf some recent publications about hair comparison (entirely appropriate if a court is in the process of taking judicial notice of legislative facts) it might have found the following textbook views of the reliability of identification by hair comparison:

> In an exclusionary mode, hair is a rather good form of evidence. If the evidence hair is blond, straight, and twelve inches long, it may be emphatically eliminated as having originated from a person whose exemplar hair is black, curly, and two inches long. In an inclusionary mode, however, hair is a miserable form of evidence. The most that can be said about a hair is that it is consistent with having originated from a particular person, but that it would also be consistent with the hair of numerous other people. Stronger opinions are occasionally expressed, but they would not be supportable.

The authors of that passage, Thornton & Peterson, both prominent forensic scientists, writing in 2002, also state that, in the view of most forensic scientists, the reliability of hair comparison is "very low," and they therefore rate vulnerability to a *Daubert* challenge as "high."

Less than six months after the Kentucky Supreme Court assured the people of the Commonwealth that identification by hair examination was "scientifically reliable," it emerged that William Gregory had been falsely convicted, largely on the strength of hair comparison expert testimony, served 7 years of a 70 year sentence for a crime he was innocent of, and released after DNA testing showed that he could not have been the person who committed the rape.

The hair identification error in William Gregory's case is not unusual. Review of a large set of DNA exoneration cases found this one form of expert testimony to be the sixth leading cause of erroneous convictions. (All forensic science errors or exaggerations added together make them collectively the second leading cause of erroneous convictions, second only to eyewitness errors.)

A recent study by the FBI compared cases in which results on the same hair were available from both microscopic hair examinations and mitochondrial DNA testing in 95 cases. If we treat the mtDNA results as the criterion of accuracy, microscopic hair examination experts saw associations in all of the cases where mtDNA found associations. But microscopic hair examiners mistakenly saw associations for 35% of the comparisons where mtDNA indicated no match.

All of which leads one to ask: why not simply put the proffered expertise to the legal test? Why should a court work so hard to avoid finding out exactly what *Daubert/Mitchell* want the court to find out: how good or bad the expert evidence is? If the science were sound, would any of these judicial gymnastics be necessary?

Old truths do not necessarily remain true or become more true. Sometimes they are found to have been in error and need to be withdrawn, or at least need to be revised, tempered, or amended. Thus, old admissibility decisions can become obsolete. As time passes, knowledge grows. There should be more, hopefully many more, studies today than there were 25 or 50 years ago. Courts ought to want to know what is known today, not what was know generations ago. Gradually, the scientists and practitioners of a field come to generally accept the new knowledge and abandon obsolete beliefs. (Think leeches.) What is scientific advancement about if not discarding less valid knowledge and replacing it with more valid knowledge?

Forensic science has suffered from a paucity of empirical research evaluating its claims and limits. As studies begin to be conducted, courts ought to be curious about what they show, and prepared to rule accordingly. Deferring to the data is exactly what *Daubert* and *Mitchell* are about.

I cannot conclude without acknowledging that a dissent by Justices Stumbo and Lambert makes the same essential point that I have made, though they did it much more succinctly. That dissent notes, among other things, that it is the "clear mandate in *Mitchell v. Commonwealth* that 'pursuant to KRE 702 and *Daubert*, expert scientific testimony must be proffered to a trial court. The trial court judge must conduct a preliminary hearing on the matter utilizing the standards set forth in *Daubert*.'" (Citations omitted.) And, further, that "the majority's holding improperly removes the burden of demonstrating admissibility from the proponent of the evidence, and instead requires the opponent of the evidence to prove its inadmissibility. Such has never been the law of this Commonwealth. *Daubert*, as did its predecessor *Frye*, establishes a hurdle of admissibility which must be overcome by the proponent of the evidence before it may be admitted at trial."

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Resources

Max Houck & Bruce Budowle, *Correlation of Microscopic and Mitochondrial DNA Hair Comparisons*, 47 J. *Forensic Sci* 964 (2002).

Michael J. Saks, *Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science*, 49 Hastings L. J. 1069 (1998).

Barry Scheck et al., *Actual Innocence* (2000).

John Thornton and Joseph Peterson, *The General Assumptions and Rationale of Forensic Identification*, § 24, in *Modern Scientific Evidence* (David L. Faigman et al., eds., 2002). ■

It is said an eastern monarch once charged his wise men to invent a sentence, to be ever in view, and which should be true and appropriate in all times and situations. They presented him with the words, 'And this, too, shall pass away.' How much it expresses! How chastening in the hour of pride! How consoling in the depths of affliction!

-- Abraham Lincoln

VICTIM IMPACT EVIDENCE NOT ADMISSIBLE IN KENTUCKY DEATH PENALTY TRIALS

Introduction

From the text of the Kentucky Supreme Court's decisions in cases such as *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky., 1997), and *Woodall v. Commonwealth*, 63 S.W.3d 104 (Ky. 2001), it might appear at first glance that the admissibility of victim impact evidence in Kentucky death penalty trials is a well-settled matter. But, that is not the case.

A recent Wyoming Supreme Court decision has alerted us to the fact that we in Kentucky have apparently been missing an obvious reason why victim impact evidence is inadmissible in our death penalty trials. The history of Wyoming's death penalty law, (which is very similar to the history of our Kentucky death penalty statute), caused the Wyoming court to declare victim impact evidence inadmissible in that state. When that court's analysis is applied to our Kentucky statutory scheme, the same result obtains: victim impact evidence is simply not admissible in our death penalty trials.

It appears, though, that the Kentucky Supreme Court has never decided a case in which this argument was made on behalf of a defendant/appellant. Past claims involving victim impact evidence seem to have been due process claims, focusing on the unduly prejudicial nature of evidence introduced at the particular trial in question, rather than focusing on the more fundamental question of whether any victim impact evidence is ever allowed. So, the Kentucky Supreme Court's pronouncements thus far about the admissibility of victim impact evidence are not at all the final word on the subject.

What is "Victim Impact Evidence?"

"Victim impact evidence" is penalty phase information, presented to a death penalty sentencing jury, "relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family," *Payne v. Tennessee*, 501 U.S. 808, 817, 111 S.Ct. 2597, 2604, 115 L.Ed.2d 720 (1991).

It has been described as including "background and information regarding the victim in order to give a full understanding of the nature of the crime," and "a quick glimpse of the life the criminal chose to end so as to remind the jury that the victim was a unique human being," *Woodall v. Commonwealth*, 63 S.E.3d 104, 124 (2001).

Typically, survivors of the deceased testify as prosecution witnesses, telling jurors how well the deceased had lived his or her life before losing it in an untimely way, and describing admirable qualities exhibited by the loved one they lost, as a way of showing the societal value of the life that was taken. Also, it is common for survivors to describe the pain, suffering, and loss they themselves have experienced personally. Rarely do the courts truly limit victim impact evidence to the "quick glimpse" contemplated by *Woodall, supra*.

Victim impact evidence effects jurors' decision-making. We know this intuitively, but there is also empirical proof in studies of how jurors make decisions. For example, according to one mock jury study, the more "respectable" the victim was shown to be, the less open were the jurors to considering mitigation evidence. Green, Koehring, & Quiat, *Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter?*, 28 Journal of Applied Social Psychology, No. 2 (1998).

The Changing Law on Victim Impact Evidence

In order to grasp why victim impact evidence is not admissible in Kentucky death penalty trials, it is necessary to know a bit about how we arrived at our current jurisprudence on the matter.

At one time, the United States Supreme Court believed that the Eighth Amendment's prohibition against cruel and unusual punishment was a *per se* bar against the admission of victim impact evidence during the penalty phase of a death penalty trial and against prosecutorial argument for a death sentence based upon the value of the life of the deceased. *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987); *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989).

But, in short order, there was a change in the makeup of the United States Supreme Court, and the anti-*Booth*, anti-*Gathers* justices orchestrated the undoing of those two precedents. The case was *Payne v. Tennessee, supra*. Suddenly (in less than two years), the same Eighth Amendment, which had so recently provided an absolute bar to such evidence, no longer barred it. (For an excellent analysis of the *Booth-Gathers-Payne* line of cases, see Mirkin, *Payne v. Tennessee: Must Victim-Impact Eulogies Return to Kentucky?"*, *The Advocate*, Dec. 1992, Page 62.)

The holding in *Payne* was that, "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar," *Payne v. Tennessee*, 501 U.S. at 827, 111 S.Ct. at 2607. The Court threw criminal defendants

a tiny bone by noting that, under the facts of a particular, individual case, the Fourteenth Amendment's due process clause would provide a mechanism for relief if victim impact evidence was so prejudicial that it resulted in a fundamentally unfair trial. But, *Payne* opened wide the doors for any state that wished to walk through and allow victim impact evidence in death cases.

In Kentucky, the reaction to the *Payne* decision has been a judicial one, crafted by the state supreme court rather than the General Assembly. Before *Payne*, our court had condemned the introduction of evidence "to engender sympathy for the victim and her family," *Ice v. Commonwealth*, 667 S.W.2d 671, 676 (1984). It had stated that "evidence of the good or bad morals of the one slain has no proper place in a trial for murder," *Benge v. Commonwealth*, 265 Ky. 503, 97 S.W.2d 54, 56 (1936).

But, then came *Payne*. Our court, in *Bowling v. Commonwealth*, 942 S.W.2d 293 (1997), spent several long paragraphs, embracing *Payne* with a vengeance and quoting extensively from it. "(T)he harm inflicted upon the families, loved ones, and community of the slain victim is an integral element in the assessment of the criminal's blameworthiness;" evidence about the life and character of the deceased shows "the full extent of harm caused by the crime," because "each victim has a distinct measure of societal worth." *Id*, at 942 S.W.2d 303. Clearly, the Kentucky Supreme Court adopted the reasoning from *Payne* for why a state might find victim impact to be relevant in death penalty sentencing.

Kentucky's Death Penalty Statute

Any examination of what evidence is admissible in the penalty phase of a Kentucky death penalty trial must start with the text of KRS 532.025, which sets out that the following evidence is admissible: "evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas; provided, however, that only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible."

Further provisions in the statute list 8 specific aggravating circumstances, one of which must be found by the jury before a death sentence may be imposed. None of those aggravating circumstances deals with victim impact information. But, the list is proceeded by introductory language, which says the jury shall consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating or mitigating circumstances," (emphasis supplied).

Why Victim Impact Evidence is Not Admissible

We start from the obvious point: our statute governing death penalty cases simply does not provide for victim impact evidence. No mention at all is made of such evidence. This stands in stark contrast to our statute governing penalty proceedings in non-death felony cases; KRS 532.055(2)(a) states specifically that, in felony cases, the Commonwealth may offer evidence relative to sentencing, including "(t)he impact of the crime upon the victim, as defined in KRS 421.500, including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim." Such language is completely absent from our death penalty statute. And KRS 532.055 does not apply to death penalty cases, since it sets out a wholly different procedure than the one prescribed by the death penalty statute; *see also Perdue v. Commonwealth*, Ky., 916 S.W.2d 148, 164 (1995).

Before victim impact evidence can be used against a death penalty defendant, the state legislature must have made provision for such evidence to be admissible. This principle comes from the *Booth* and *Payne* opinions.

In *Booth*, the Court dealt with a Maryland statute explicitly authorizing victim impact evidence in the sentencing phase of a death penalty trial. The justices who dissented in *Booth*, and who ultimately carried the day later as the majority in *Payne*, explained: "(D)eterminations of appropriate sentencing considerations are peculiarly questions of legislative policy," *Booth v. Maryland*, 482 U.S. at 515, 107 S.Ct. at 2539 (White, J., dissenting, joined by Rehnquist, C.J., O'Connor, and Scallia, JJ)(emphasis supplied; internal citation omitted). "(I)n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Id*.

Chief Justice Rehnquist wrote subsequently for the majority in *Payne* that "Congress and most of the States have, in recent years, enacted similar legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant," *Payne v. Tennessee*, 501 U.S. at 821, 111 S.Ct. at 2606. Justice O'Connor's concurrence also noted that "(m)ost of the States have enacted legislation enabling judges and juries to consider victim impact evidence," *Id*., at 831, 111 S.Ct. at 2612 (White and Kennedy, J.J., joining). Justice Scalia also wrote a concurrence, in which he stated that the Eighth Amendment "permits the people to decide (within the limits of other constitutional guarantees) what is a crime and what constitutes aggravation and mitigation of a crime," *Id*., at 833, 111 S.Ct. at 2613 (O'Connor and Kennedy, J.J., joining)(emphasis supplied).

Therefore, if we are seeking authority for the use of victim impact evidence in Kentucky death penalty trials, we must look to what our state legislature has done. Using Justice O'Connor's terminology, there must be some "enabling legislation" from the General Assembly. The determination cannot be accomplished through court rule or judicial determination or any means other than legislative enactment. This principle was recognized by the Wyoming Supreme Court

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earlier this year, when it declared victim impact evidence inadmissible in the absence of a legislative imprimatur. *Olsen v. State*, 67 P.3d 536, at 592 et seq. (Wyoming, 2003). The principle was recognized at least as long ago as 1996, when the Pennsylvania Supreme Court held that victim impact evidence was inadmissible in cases tried before that state's death penalty law was amended so as to allow such evidence. *Commonwealth v. Fisher*, 681 A.2d 130, at 144 et seq. (Pennsylvania, 1996).

Outside the victim impact context, our Kentucky law is in accord. Under our state constitution, the power to determine public policy lies in the legislature, not the courts. Kentucky Constitution, Sections 27, 28, and 29; *Bailey v. Commonwealth*, 70 S.W.3d 414, 417 (2002).

No matter how much the Kentucky Supreme Court's reasoning might coincide with the majority in *Payne*, (that a state may properly see victim impact as relevant in the death penalty sentencing context), the Court's agreement with the principle is not what is needed. Rather, for victim impact evidence to be admissible in a death case, the legislature must agree with the principle and must legislate in favor of the admissibility of such evidence. And, it is simply outside the court's purview to assess the wisdom of legislative action or inaction. *Bailey, supra*, at 416-17.

So, we reach the next question: Has our Kentucky General Assembly determined that victim impact evidence should be admissible in death penalty cases? No, it has not.

First, as noted at the outset, our statute is silent on the matter. Unlike Maryland (in *Booth)*, we had no statutory authority for victim impact evidence before *Payne*. And, unlike many other states, we did not later amend our death penalty statute, after *Payne*, to include any provision for victim impact evidence. (The Wyoming Supreme Court's decision this year in *Olsen, supra*, identified the following states which amended their statutes in this way, while Kentucky did not: Arkansas, Colorado, Florida, Louisiana, Missouri, Montana, New Jersey, Oklahoma, Pennsylvania, South Dakota, and Utah.)

Second, the timing of our legislature's enactments shows that our statute does not authorize victim impact evidence. Our death penalty statute took effect in 1976 and said nothing about victim impact evidence. This was long before the idea of "victim impact evidence" was a part of our death penalty jurisprudence, so there is no basis to believe that our legislature was contemplating the use of such evidence when it enacted the language, "evidence in . . . aggravation of punishment" or "aggravating circumstances otherwise authorized by law." And, it must be remembered that is outside the province of courts, (as opposed to legislatures), to expand the scope of what the statute authorizes. This type of "catch-all" language in death penalty statutes was held in *Olsen, supra*, and *Fisher, supra*, to be inadequate to allow for introduction of victim impact evidence.

Third, a comparison of our General Assembly's activity in relation to the death penalty sentencing statute on one hand, and the felony sentencing statute on the other hand, plus the timing of that activity, show the legislators' intention to allow victim impact evidence in non-capital felony cases, but not to allow it in death penalty cases. Originally enacted in 1986, the felony sentencing statute, (which does not apply in death penalty sentencing proceedings, *Perdue, supra*), was amended in 1998, so as to add victim impact evidence to the list of proof the prosecution may introduce in felony sentencing proceedings. House Bill 455, Section 111. This amendment came well after Kentucky had been told, by the 1991 decision in *Payne v. Tennessee*, that it was permitted to allow victim impact evidence in death penalty cases if it wanted to. Because our legislators chose to allow victim impact evidence only in non-death felony cases, during a period of time when they knew they were also permitted to extend that principle to death penalty cases, it is clear that the lawmakers did not intend to make that extension into the death penalty context.

Fourth, if there could still be any doubt about the intent of the legislature, and if it were suggested somehow that the conflicting sentencing statutes, (KRS 532.025 for death cases, and KRS 532.055 for felony cases), could be read reasonably to mean that it is unclear whether or not the legislature has approved of victim impact evidence in death penalty trials, then such evidence would still have to be excluded under the rule of lenity, *Roney v. Commonwealth*, 695 S.W.2d 863, 864 (1985); *Young v. Commonwealth*, 50 S.W.3d 148, 162 n. 23 (2001). If there are two reasonable readings of the law, the courts must adopt the reading which is the least punitive to the defendant.

We have in Kentucky the "salutary rule" that "the operation or meaning of a penal statute shall not be extended by mere implication." *Commonwealth v. Malone*, 141 Ky. 441, 132 S.W. 1033, 1035 (1911). And, as the Pennsylvania Supreme Court ruled, "The imposition of capital punishment may not rest on a mere supposition that the Legislature intended victim impact evidence to be considered by the jury, but only upon the clear and unambiguous language of the death penalty statute," *Commonwealth v. Fisher*, 681 A.2d 130, 146 (1996

Conclusion

Anyone who has defended a client's life at a trial, where victim impact evidence was arrayed against the defense, knows how devastating such evidence can be. We owe it to our clients to show the courts of the Commonwealth that such evidence is inadmissible. ■

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HIPAA VERSUS KASPER IN A PREEMPTION CHALLENGE: THE FIX IS IN

In 1996 Congress enacted a major health insurance bill entitled the "Health Insurance Portability and Accountability Act" (HIPAA), in part, to protect the privacy rights of patients.[1] Federal regulations promulgated pursuant to HIPAA provide a statutory right to privacy for certain medical information.[2] This article considers what effect the HIPAA regulations may have on how law enforcement is able to utilize Kentucky's All-Schedule Prescription Electronic Reporting (KASPER) system.

Is a prescription protected health information? "Protected health information" as defined by the privacy rule includes all individually identifiable health information.[3] "Individually identifiable health information" includes any information created or received by a health care provider relating to the provision of health care to the individual that either identifies the person or could reasonably be used to identify the person.[4] A prescription falls squarely within the definition and is referenced elsewhere within the regulations as form of protected health information.[5] As a general rule, HIPAA regulations prohibit the unauthorized disclosure of protected health information.[6]

At a minimum, the HIPAA regulations provide a standard for measuring the appropriate use of KASPER, and in some instances, may preempt KASPER. The privacy rule affords partial preemption of state law.[7] It provides that if the privacy regulation is contrary to a state law requirement, the federal rule preempts the state law.[8] "Contrary to" means: (1) a covered entity would find it impossible to comply with both the state and federal requirements; or (2) the provision of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the privacy rule.[9] If the rule is "contrary to" the state law, Kentucky practitioners must then determine whether: (1) an exemption applies; or (2) the Kentucky law is "more stringent" than the privacy rule.[10] Finally, to resolve any doubt about a preemption issue, the Commonwealth may seek a conclusive determination from the Secretary of Health and Human Services.[11] If the Secretary determines that the provision of state law has as its principal purpose the regulation of controlled substances, then the HIPAA regulation does not preempt the state law.[12] This provision, of course, is the Commonwealth's trump card. The fix is in.

The flow of prescription information must be charted and relevant laws identified in order to analyze possible preemption issues. Pursuant to KASPER, prescription information flows from the doctor and/or pharmacist to the Kentucky Cabinet for Health and Humans Services, then, upon request, to law enforcement. The Cabinet's "Drug Enforcement and Professional Practices Branch," a law enforcement agency itself, acts as the custodian of the records.[13] The following chart identifies the state and federal laws that both limit and permit the flow of this information:

Disclosure Laws → / Covered Entity ↓	State law prohibition	State law exemption	HIPAA Prohibition	HIPAA Exemption
Doctor ↓ Pharmacist ↓	KRS 311.595(16) KRS 304.17A-555 KRS Chapter 315	KRS218A.202(3)--(4) mandates disclosure to Cabinet	§164.502	§164.512(a) excepts disclosures required by law
Cabinet ↓ Drug Enforcement ↓	KRS 218A.202 (10) prohibit disclosure except to authorized persons	KRS 218A.202(6) (a)-(e) authorizes disclosure to law enforcement + others	§164.502	§164.512(f) permits disclosure to law enforcement
Law Enforcement	KRS218A.202(6) (f) prohibits re-disclosure	KRS218A.202(6) (f) permits re-disclosure w/court order	§164.502	§164.512(e) permits disclosure in judicial proceedings

Doctors and pharmacists, as health care providers, are covered entities.[14] The Cabinet, law enforcement and regulatory agencies, as public health authorities, are also covered entities.[15] HIPAA requires a strict accounting of disclosures by a covered entity under certain circumstances.[16] KASPER has no such accounting provisions.

Frequently, a request by law enforcement to peruse a person's prescription records will be made based on an uncorroborated, anonymous tip. In this situation, defense attorneys should ask whether KASPER legislation is "contrary to" the HIPAA privacy regulations. HIPAA provides:

> A covered entity may disclose protected health information: (ii) In compliance with and as limited by the relevant requirements of: (C) An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that: (1) the information sought is relevant and material to a legitimate law enforcement inquiry; (2) the request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought: and (3) de-identified information could not reasonably be used.[17]

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Compare this detailed provision to Kentucky's cursory law:

> The Cabinet for Health Services shall be authorized to provide data to: (b) A state, federal, or municipal officer whose duty is to enforce the law of this state or the United States relating to drugs and who is engaged in a bona fide specific investigation involving a designated person.[18]

A similar provision allows the Cabinet to provide data to a regulatory body, or its investigator, engaged "in a bona fide specific investigation involving a designated person."[19] KASPER's administrative regulations further provide that such requests shall be made on the "Request for KASPER Report, Form DCB-15 except for a subpoena issued by a grand jury."[20] In practice, the Cabinet has designed at least two such forms. One is for the use of physicians. The other form is for the use of law enforcement and regulatory investigators and requires the signature of the requesting officer, as well as his or her supervisor, certifying that they are engaged in a bona fide specific investigation involving a designated person.

The preemption question can be framed as whether this certification pursuant to KASPER and its implementing regulations is "contrary to" the limited authorized investigative demand permitted by the HIPAA regulation. Aside from requiring this certification, the Cabinet makes no independent inquiry into whether the information sought is relevant and material to a legitimate law enforcement inquiry. They simply take their word for it. Without any independent inquiry by the custodian of the prescription records, no determination can be made that the request is specific and limited in scope. Yet, existing case law requires some level of individualized suspicion prior to making a KASPER request.[21] Nevertheless, neither this standard nor the HIPAA standards have been codified in the KASPER legislation, in KASPER's implementing regulations, or in the certification process practiced by the Cabinet.

And what if the designated person being investigated is a physician and the request is to view the doctor's patient list so it can be compared to the patient lists of other physicians? If the physician is the target of the investigation, and not a specific patient, then, pursuant to HIPAA, de-identified information must be used by law enforcement. At present, law enforcement manually reviews such patient lists in order to make a short list of possible doctor shopping patients. In the future, however, the technology will exist, if it doesn't already, to analyze the prescribing trends and practices of physicians as well as red flag any patient that gets prescriptions from more than one physician. The absence of any "de-identified information" requirement in the KASPER system and legislation may present the most serious conflict with HIPAA.

The current KASPER standards, which permit disclosures based on uncorroborated, anonymous tips, provide law enforcement and the prosecution team with an unimpeachable basis for requesting the records of anyone. When anyone includes attorneys, witnesses, judges and jurors, the administration of justice is jeopardized by the absence of detailed disclosure requirements and accounting provisions. When anyone includes physicians, a foreseeable result is the refusal by physicians to treat certain patients or reluctance to prescribe certain medications even when medically indicated.[22] When anyone includes patients, a foreseeable result is that patients who must use controlled substances for the treatment of a medical condition may feel stigmatized, as if their ailment has been criminalized, and thus they may not seek the treatment they need.[23]

In conclusion, HIPAA clearly provides more privacy protections for patients than KASPER. KASPER is certainly not more stringent than the HIPAA regulations with respect to certain exemptions that permit the disclosure of prescription records to law enforcement. The critical issue to be raised is whether the KASPER and HIPAA law enforcement exemptions are in conflict. Preemption challenges should be made to illustrate that patients do have a reasonable expectation of privacy in prescription records. Perhaps then, if a preemption challenge fails, the groundwork for a constitutional challenge will have a bit firmer footing. And, if abuses are brought to light by a preemption challenge, perhaps the Legislature will take steps to make KASPER's privacy protections more stringent than HIPAA.

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Endnotes:

1. Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996), codified in part at 42 U.S.C. §§ 1320d *et seq*; *See generally*, Barlett, Melissa, "Protection of Patient Privacy Rights Under the Health Insurance Portability and Accountability Act of 1996," *Kentucky Bench & Bar*, Vol. 67, No. 1, p.14-21, 27-28 (January 2003).
2. HIPAA Privacy Regulations, 45 C.F.R. §§ 160 *et seq*.
3. *Id*. at § 164.501.
4. *Id.*
5. *Id.* at § 164.510(b)(3).
6. *Id*. at § 164.502(a).
7. *Id.* at § 160.203.
8. *Id*.
9. *Id*. at § 160.202.
10. *Id.*
11. *Id*. at § 160.203-204.
12. *Id*. at § 160.203(a)(2).
13. KRS 218A.240(2).
14. *Id*. at § 164.104.
15. *Id*. at § 164.501; see also § 164.512 (b)(2) which discusses the permitted uses of protected information by a covered entity that is also a public health authority.
16. *Id*. at § 164.528.
17. *Id.* at § 164.512(f)(1).
18. KRS 218A.204(6)(b).
19. KRS 218A.204(6)(a).
20. 902 KAR 55:110.
21. *Thacker v. Commonwealth*, Ky. App. , 80 S.W.3d 451, 455 (2002).
22. C. Stratton Hill, Jr., M.D., "Government Regulatory Influences on Opiod Prescribing and their Impact on the Treatment of Pain of Nonmalignant Origin," *Journal of Pain and Symptom Management*, Vol. 11, No. 5, p. 287, 292 (May 1996).
23. *Id*. at 294. ■

PROVIDING CONFLICT COUNSEL TO KENTUCKY INDIGENT CRIMINAL DEFENDANTS: BALANCING ETHICAL, LEGAL, AND FISCAL REALITIES TO PROVIDE QUALITY REPRESENTATION

> Despite the long-standing and universal understanding in the profession and in the courts that *some* conflicts of interest are intolerable, other conflicts are pervasive throughout the legal profession, and are in fact inevitable. It would be as impossible to eliminate them completely from lawyering as it would be to eliminate them from relationships in life generally. Thus, the law of lawyering must focus on identifying conflicts of interest in a realistic manner, and regulate them in such a way as to avoid infringing on the effective representation of clients, where elimination of the conflict is not practical.
> -Hazard and Hodes, *The Law of Lawyering*, Section 10.1 (2003).

When all the interests are balanced, the Department of Public Advocacy (DPA) has a structure and system to provide trial conflict representation and post-trial representation that is both ethical and legal. DPA has effective measures to:

- *prevent communication of confidential information between lawyers representing individual defendants for which there is a conflict,*
- *provide separate Kentucky Rules of Professional Conduct (KRPC) 5.1 case supervision of attorneys representing a client for whom there is a conflict,*
- *insure disclosure to the client,*
- *require informed consent and a signed waiver from the client, and*
- *contract out cases that cannot be handled by a full-time attorney despite the safeguards.*

A review of the authorization and responsibility of DPA, the applicable ethical and legal provisions, and the fiscal constraints indicate that DPA has a progressive structure and system of safeguards in place to provide ethical and legal representation in conflict cases. The method of providing representation in conflict cases meets the responsibilities to clients and provides public value.

1. Kentucky Indigent Defense's Authorization, Responsibility, Funding.

The Kentucky General Assembly established the Kentucky Public Defender program in 1972. DPA is authorized by KRS Chapter 31 to "provide for the establishment, maintenance and operation of s state sponsored and controlled system for: (1) The representation of indigent persons accused of crimes or mental states which may result in their incarceration or confinement…." KRS 31.010. The public defender program is statewide. It is administered by a Public Advocate who serves a four year renewable term and who appoints staff assistants within both the classified and unclassified positions. The Public Advocate is the "chief administrator," KRS 31.020(2), charged with "Administering the statewide public advocacy system…." This includes setting standards and reviewing and approving representation plans from counties. See KRS 31.030. The Public Advocate is appointed by the Governor from a list of 3 names provided to the Governor by the Public Advocacy Commission. This provides DPA with the independence necessary for it to provide ethical representation to its clients. Independent representation is further assured because Kentucky's public defender program through its various supervisors assigns counsel. While Kentucky judges appoint DPA to represent an indigent, judges do not select or assign counsel. This is a significant structural approach that advances independent representation.

Ed Monahan

There are 114 counties where the delivery of legal services at trial is done through full-time attorneys who are state employees employed by DPA. In 3 counties, legal services are delivered through full-time attorneys who are employees of a nonprofit association with which DPA contracts on a yearly basis. Three counties provide legal services through private attorneys under contract to DPA for a year at a time. Each of DPA's full-time trial field offices has a contract or series of contracts with attorneys in private practice to provide conflict representation in the counties covered by that filed office. The contracts are negotiated by the field office director and approved by the Public Advocate upon recommendation of the trial division director.

DPA has a delivery structure that provides great public value. On appeal and in post-conviction, DPA has full-time post-trial litigators in its appellate and post-conviction work units which are primarily in Frankfort. By having both trial and

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post-trial responsibilities within the statewide public defender program, DPA is able to use the limited funds available to maximize the effective representation of clients with high efficiency. Kentucky is not saddled with various defender organizations duplicating administrative costs and reducing efficiencies.

Under KRS 31.110, DPA is required by the Legislature to provide representation to:

- indigents suspected of or charged with a crime, or a public offense;
- those committed to the Department of Juvenile Justice or the Cabinet for Families and children for having committed a public or status offense;
- indigents who appeal;
- indigents who have a post-conviction action that "a reasonable person with adequate means would be willing to bring at his own expense";
- those under 18 in the custody of DJJ as to conditions of confinement "involving violations of federal or state statutory rights or constitutional rights."

From July 1, 2002 through June 30, 2003 (FY 03) the representation amounted to 115,000 cases at the trial level from DUI to capital cases with approximately 3,000 of those cases contracted out to conflict counsel. During that same period, DPA handled 2000 post-trial cases on appeal and in post-conviction, including capital cases. DPA contracted 2,700 cases out to private attorneys in FY 03.

DPA's funding for FY 03 was $27.8 million. The 117,000 cases were done with an average of $238 funding per case.

2. DPA's System for Providing Conflict Representation.

DPA's structure, policies and practice regulate conflicts in such a way as to avoid infringing on the effective representation of clients, either by contracting with private counsel or where contracting the case to a private attorney is not practical with clear safeguards. Conflict representation is provided by DPA through several mechanisms:

1) At trial, conflicts are handled by either contracting with local counsel, or by a separate trial office providing representation, or in some cases by attorneys within the office with the informed consent of the client confirmed in writing;
2) On appeal, conflicts are handled by attorneys within DPA who have separate KRPC 5.1 supervision;
3) At post-conviction, conflicts are handled by attorneys working in post-conviction work units within DPA that have separate work unit supervision;
4) Capital cases with multiple defendants or other conflicts are handled in a variety of ways. One of the co-defendants is often represented by the capital trial branch, another by a field office and another by a DPA capital conflict attorney located in yet another DPA field office. Each of these attorneys has different immediate supervisors.
5) There are occasions when DPA contracts with private attorneys to do capital cases when DPA is unable to handle the conflict internally, most often due to multiple co-defendants.
6) DPA has policies and practices in place for the post-trial division and in process for the trial division that require confidentiality with signed agreement by employees, no sharing of support staff on conflict cases, disclosure to client, informed client consent, signed waiver from client.
7) Lawyers with DPA who have a conflict are required by policy and practice to:

a) not participate in the case;
b) not communicate to any other member of DPA about the case or share documents relating to the case;
c) not convey any confidential information to anyone in DPA.

3. We Manage Conflicts in Personal and Professional Life.

None of us are islands. All matters of our private and legal lives have conflicts. We cannot eliminate all conflicts and still live a reasonable life. When we cannot eliminate conflicts, we manage them with practical safeguards. For example, a friend of ours has a serious drug problem that is rendering his management of his employees at work ineffective. We believe that if we report this to his employer that he will be without a job and in a further predicament but we know if we do not report it to the employer that our friend will continue to be abusive to the employees he supervises and the service to his work unit's customers will suffer. We are one of the people his employees service.

Our commonsense way of handling conflicts in our personal life balances the interests in a practical way that is straightforward. We eliminate those that are impossible to live with. We manage the rest by assessing competing values and making decisions to protect what we value, and we do whatever we can to reduce the risk of harm. We do not eliminate the potential of harm *at all costs*. We do not adhere to a purist practice that would undermine our ability to provide what is best needed for the situation we face. We work for a balanced response that prevents actual harm. We assess the possibility of damage and manage our response.

4. Managing Conflicts with "Risk of Harm" Methodology.

The current DPA structure and practice of providing representation in conflict cases responds to these natural tensions and realities that conflict cases present professionally. Lawyers cannot completely eliminate conflicts in their personal life. Conflicts cannot be completely eliminated in

our professional life as a lawyer. Lawyers, law firms, and DPA must manage conflicts of interest to reduce the harm to clients while balancing the relevant interests. "Thus, the law of lawyering must focus on identifying conflicts of interest in a realistic manner, and regulate them in such a way as to avoid infringing on the effective representation of clients, where elimination of the conflict is not practical." *The Law of Lawyering*, Section 10-1.

In order to best manage the competing values, *The Law of Lawyering* recognizes that the contemporary approach is not to apply rigid rules and that it is not to look at actual vs. potential conflicts but that the modern approach is to is to focus on "the degree of *risk* that a lawyer will be unable to satisfy all of the legitimate interests that compete for attention in a given matter." *The Law of Lawyering,* Section 10.4. This risk of harm approach identifies what the risk of harm is to competent representation and to the maintaining confidentiality, and measures what the likelihood the representation will be "materially and adversely affected." *Id*. at Section 10.6. The degree of risk determines the response, the extent of restrictions. *Id.* "Often there is no perfect 'solution' that will fully satisfy all competing interests, only a workable compromise that will ameliorate the worst aspects of the predicament." *Id*. at Section 10.3.

In effect, DPA has adopted within its structure, policies, and practices the risk of harm methodology and decision making model recommended by Hazard and Hodes in the *Law of Lawyering*. That approach involves the following process:

1) **Recognize Conflict.** There must be a recognition of when a conflict exists: when:
   A) attorney-client relationship, or
   B) quality of representation is at risk.
2) **Assess Harm.** The risk of harm to client must be assessed.
3) **Calibrate Response.** There must be an appropriate response: not representing the client vs. representing the client and alleviating the risks through full disclosure, informed consent, policies and practices of confidentially, an organizational structure and operational flexibility to assure an attorney provides representation with independent professional judgment.

DPA's structure and response to conflicts that includes the recommended risk analysis methodology advances the core ethical representation responsibilities of the Rules of Professional Conduct: loyalty to client, confidentiality of information, and competent representation within its fixed fiscal resources.

5. Criticisms of the Current Kentucky Defender Approach.

Different people have varying opinions of how a defender program should handle conflict cases. Whichever approach to handling conflicts is used, it has significant advantages and disadvantages. There is no easy solution under any of the approaches. Some judges, litigators, and other criminal justice professionals criticize the way some of the conflict cases are handled by the statewide Kentucky Public Defender program. Their criticisms include the following:

- **Appearance of Impropriety.** There is an appearance of impropriety when one counsel employed by the same organization raises ineffective assistance on another counsel employed by that organization.
- **Lack of Confidentiality**. There is a failure to insure confidentiality since attorneys raising ineffective assistance on another counsel share an e-mail system, office space, investigators, and support staff.
- **Lack of True Independence**. Attorneys being supervised lack the requisite true independence since they ultimately answer structurally to the Public Advocate. There is a resulting inability to effectively make appropriate legal claims against DPA leaders. There are unacceptable conflicts when a staff attorney can or does raise ineffective assistance or fraud by the leaders of DPA.

Taking these views to their logical conclusions, DPA could not within the same state-wide defender program legally or ethically provide or arrange for co-defendant representation or post-conviction representation by any employee of the system or a nonprofit association or individual attorney with whom DPA contracts.

This idealistic view strikes no balance. While such a conclusion would provide immaculate assurance of no conflicts, it does not account for the real limit of fiscal resources provided by the General Assembly for counsel for indigents. It ignores the very practical issue of which approach provides higher quality representation for indigent clients across the state.

A look at the criticisms on their merits is helpful to understanding their limitations.

No Appearance of Impropriety. The ABA Model Rules of Professional Conduct and the Kentucky Rules of Professional Conduct reject the appearance of impropriety standard in the specific context of the rule on imputed conflicts, KRPC 1.9 since it is not a workable standard.

The "ABA Model Rules reject the 'appearance of impropriety' test. The Kutak Commission drafters thought that it is too loose and vague, gives no fair warning, and allows, or even encourages, instinctive judgments by disgruntled clients. Also, one cannot begin to define 'appearance of impropriety' unless one first defines 'impropriety,' and the purported 'test' does neither. The Rules, at times, impose a bright line prohibition in order to avoid an 'appearance of impropriety,' but that phrase, by itself, is not a test. Because 'impropriety' is not defined, 'the term 'appearance of impropriety'

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is question-begging.' The Restatement of the Law Governing lawyers similarly rejects this formulation." Ronald D. Rotunda, *Legal Ethics: the Lawyer's Deskbook on Professional Responsibility* (2003) at 12, Section 1-2.

Even if an appearance of impropriety were the ethical standard in Kentucky, it would not be a persuasive reason to find the Kentucky public defender conflict representation method unethical with the practical safeguards that are in place. *United States v. Reynoso,* 6 F. Supp. 269 (S.D.N.Y. 1998) held that the standard for disqualification of attorneys from the same law firm does not apply to federal defenders in the same office. That court drew distinctions between the institution of a federal defender office and a law firm, including the lack of danger in reality or in public perception where attorneys are appointed as compared with a law firm which involves clients retaining attorneys. *Reynoso* decided the issue by balancing the interests and found no appearance of impropriety, "…there is no basis to believe that a reasonably informed public would perceive any impropriety…." *Id*. at 272.

Confidentiality is Assured. DPA has many work units both in its central Frankfort state office and throughout the state. Each has the ability and the requirement to assure that the client's information is kept confidential from any attorney or support staff within DPA who has a conflict with the representation. Each DPA employee is educated on the critical importance of maintaining confidences in general and in cases where there are conflicts within DPA. Each DPA employee signs an extensive confidentiality statement that there is knowledge of the responsibility to maintain confidentiality and assuring compliance. When there is a breach of confidentiality, DPA imposes the appropriate discipline. All DPA attorneys, including attorneys in the 3 counties that provide representation through a nonprofit association, are connected to a common DPA e-mail system. When an attorney in DPA is handling a conflict case, the attorney and those working on the case do not use the e-mail system in a way that communicates confidential information.

Independence is Guaranteed. Each attorney within DPA is required to represent each client with professional independence under the KRPC 5.1 supervision. The fact that another attorney within the statewide public defender program is the object of a claim of ineffective assistance of counsel does not undermine the ability of the attorney to provide independent legal representation. With its separate work units, DPA has separate supervision of counsel handling a conflict case.

Informed Client Consent is Provided. The best safeguard to the various criticisms is the informed consent of the client confirmed in writing with the appropriate policies and implementation of the safeguards with active supervision. DPA attorneys inform clients of the conflicts and ask the clients if they want to waive the conflict. If the client does not waive the conflict, the case is contracted out and in some cases taken to the judge for resolution, and DPA follows the orders of the Court.

Implementation and Supervision of the Safeguards. Each attorney employed by DPA has a responsibility to comply with the KRPC and DPA policies, including those that set out the safeguards in conflict situations. DPA supervisors are required by DPA policies and KRPC 5.1 to actively supervise the litigation of its attorneys and the assistance to the attorneys by the support staff to insure competent representation and to insure no ethical or legal impropriety. KRPC 5.1(b) imposes ethical responsibilities on a supervisor to "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." DPA educates on these responsibilities and has policies to implement them.

Imputed Disqualification: Ethics Opinions. State Bar ethics opinions are on both sides of the issue of whether there is imputed disqualification of an attorney who resides in a separate public defender work unit. The trend, especially with Kentucky's addition to the ABA Model Rule 1.10, is towards permitting representation without imputing disqualification if the client consents or if there are adequate screens.

"Although it is not unethical under Model Rule 1.10 for government lawyers to continue representation where their private sector counterparts would be barred by imputation, the disqualification cases are in conflict as to the proper treatment of prosecutor and public defender offices, which are special purpose government law offices. Certainly neither kind of office should automatically be considered to be a single 'firm' for purposes of imputed disqualification: neither the incentives nor the opportunities to share client information are the same as in traditional private law firms, and the dislocations resulting from overdisqualification would be against the public interest in both cases." *The Law of Lawyering*, Section 14.5.

KRPC 1.10, Imputed Disqualification: General Rule, addresses imputed disqualification by stating that generally an attorney in a law firm cannot represent a client when anyone in the firm would be precluded from representing the client if practicing alone. However, KRPC 1.10 has a section (d) that allows such representation with the condition of effective screening of the attorney.

Further, KRPC 1.10 indicates that the definition of "firm" depends on the situation. KRPC 1.10 is clear from its Commentary to distinguish legal representation of indigents in the way "firm" is defined. As the Commentary states, "Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those em-

ployed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule involved, and on the specific facts of the situation."

The KBA Ethics Committee has not directly addressed the issue of whether Kentucky's statewide public defender program can ethically represent clients with conflicts if the client consents or if there are adequate screens. However, there are three informative KBA ethics opinions relevant to this discussion, which indicate that the trend is to limit imputed disqualification if either the client consents or if there are adequate safeguards in place.

KBA E-321 (July 1987) provides the view that if a public defender operates out of a separate office that may allow for that defender raising ineffective against another attorney in the agency who is at a different office location.

KBA E-321 responded to the question of whether a criminal defense lawyer could argue that he had been ineffective in seeking relief for his client with a qualified no. It also said it was a more difficult question of "whether an attorney in the same office can argue the matter."

The opinion stated, "even though the rule of imputed disqualification (DR 5-105(D)) is not always applied to attorneys in public agencies (*Summit v. Mudd*, Ky., 639 S.W.2d 225 (1984) there are sound reasons to apply the rule in this instance. Attorneys in the same office have personal relationships and share an interest in the quality of the legal work of that office. These are interests which conflict with the client's interest in establishing that the trial attorney erred. The secondary authorities (Wolfram at 406, Webster at 742, Ethical Dilemma at 610), cases (*Angarano v. United States*, 329 A.2d 453, 457 (D.C. Ct.App. 1974), and ethics opinions (*e.g.*, New York State Op. 533, Law. Ma. Prof.Con.801:6104), concur that the ineffectiveness claim should be presented by outside counsel. *On the other hand, Wolfram notes that 'an arguable different case is presented if the public defenders, although employed by the same agency, operate from physically separated offices." Wolfram at 406, citing Babb v. Edwards, 412 So. 2d 859 (Fla. 1982). This issue may presumably be addressed by the courts in the context of specific cases, as the need arises."* (Emphasis added).

KBA E-407 (July 1999) noted that whether a public defender office is a firm for imputed disqualification is fact specific. KBA E-407 responded to the question, may an attorney employee of the Department of Public Advocacy negotiate for future employment with prosecutorial entities by sating, " No, a public advocate may not negotiate employment with any person who is a party or attorney for a party in a matter in which the lawyer is participating 'personally and substantially.' In addition, a public advocate must obtain client consent to any future employment negotiation if the advocate has information protected by KRPC 1.6 or 1.9(b) or if 1.7(b) otherwise indicates that consent is necessary."

Importantly, the opinion went on to note that the conflict could not be imputed to all other public defenders because for public defenders whether they are a member of a firm is fact specific:

"The prohibition created by KRPC 1.11(c) applies to the lawyer involved 'personally and substantially' but does not affect other public advocates. There is no imputation of disqualification. Conflicts under KRPC 1.7(b) are imputed to all lawyers with whom the conflicted lawyer is "associated in a firm." KRPC 1.10. Comment 1 to KRPC 1.10 states that "firm" includes "lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization." Comment 3 to Rule 1.10 states: *'[l]awyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.'*

A public advocate's situation can be analogized to a legal service organization. *See* Utah Op. 95-08 (1996) (applying the concept of imputation to the office of the guardian ad litem) and Utah Op. 98-09 (1998) (affirming that stance). *But see* ABA Op. 96-400 (1996) (suggesting that imputed disqualification should not apply to the situation of an attorney in a private firm who must withdraw from the representation because of negotiations for future employment with opposing counsel).

The determination of whether public advocates are to be treated as a firm for purposes of imputed disqualification must be fact specific. *See S. C.* Op. 96-22 (1996) (the South Carolina Committee noted that "a public defender's office may be equated to a law firm," but that the analysis would be fact specific); *Commonwealth v. Westbrook*, 400 A.2d 160 (Pa. 1979) (lawyers in same defender office treated as firm); *People v. Spreitzer*, 525 N.E. 2d 30 (Ill. 1988) (not a firm); *Graves v. State*, 619 A.2d 123 (Md. Ct. App. 1993) (not treated as single firm per se). *See also ABA/BNA Lawyers Manual* of *Professional Conduct* 51:2008-09. For example, in South Carolina Op. 93-01 (1993), a part-time public defender working in a public defender corporation was appointed to represent a post conviction relief applicant. The basis of the post conviction relief claim was the conduct of another public defender employed by the same corporation. In determining whether the public defenders should be treated as a firm for purposes of imputed disqualification, the South Carolina Committee stated: *where separate offices are maintained by each public defender, there would not be a single public*

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defender's office for purposes of imputing disqualification under Rule 1.10."

KBA Opinion E-418 answered the question, " Is Lawyer A imputedly disqualified from representing a client if s/he shares office space with Lawyer B, who — before sharing the space – represented (or practiced in a firm that represented) a former client with an adverse interest in the same or substantially similar matter?" by stating, "If the office-sharing arrangement resembles a firm, causing the lawyers to be treated as members of a firm under the Rules of Professional Conduct, then Lawyer A is imputedly disqualified as stated below unless (i) the former client consents after consultation to the representation, or (ii) Lawyer B is effectively screened from any participation in the matter, and timely written notice is given to the former client."

If the client consents or if there is adequate screening then there is no violation of the imputed disqualification rule. As the KBA Opinion E-418 notes, "There are two exceptions to this broad matrix of imputed disqualification. First, as noted earlier, Lawyer A could represent a client whose interests are materially adverse to those of a person formerly represented in the same or substantially related matter by colleague Lawyer B, or by B's previous firm, if the former client gave consent upon consultation. Second, Kentucky's present version of Rule 1.10, as amended in Supreme Court order in 1999 (effective in 2000), provides at subsection (d) that a firm is 'not disqualified from representation of a client if the only basis for disqualification is representation of a former client by a lawyer presently associated with the firm, sufficient to cause that lawyer to be disqualified pursuant to Rule 1.9 and (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no specific part of the fee therefrom; and (2) written notice is given to the former client.' (Emphasis supplied.)"

The opinion observes that its finding of the screening exception is consistent with the national trend and it specifically identified what screening was necessary: "Kentucky rule 1.10 (d) has no counterpart in ABA Model Rule 1.10, which does not recognize a screening exception to imputed disqualification in cases involving former clients. Nonetheless, it is consistent with many court decisions holding that imputation can be removed through screening in such cases. See, Restatement (Third) of the Law Governing Lawyers §124 (2000). Indeed, our Committee commented several years ago on the developing case law. See, KBA Opinion E-354 (1993). Kentucky Rule 1.10 (d) also is consistent with the approach taken elsewhere in the Kentucky Rules and the Model Rules when a lawyer joins a firm after a period of judicial service or other government employment. In such situations, imputed disqualification of the firm can be avoided if the lawyer is effectively screened. See Kentucky Rules and Model Rules 1.11 and 1.12; see also, KBA Opinion E-301 (1985) (screening of former judge). An adequate screen usually is understood to include safeguards that the disqualified lawyer: (i) will not participate in the matter; (ii) will not talk to any other member of the firm about the matter or share documents relating to it; (iii) will not impart (and prior to screening has not imparted) any confidential information to the firm; (iv) will not have access to any files or documents relating to the matter; or (v) will not receive a direct and specific apportionment of fees or other financial benefit generated in the matter."

The Opinion of Courts: Caselaw and Rules. Like the state Bar ethics opinions, case law is on both sides of the issue of whether there is imputed disqualification of an attorney who resides in a separate public defender work unit.

RCr 8.30 sets out required process a trial judge must employ before one attorney can represent co-defendants. While there are situations where representing co-defendants is permissible if there is the required informed waiver, it is unlikely that there will be many situations, especially in circuit court, where such joint representation would be prudent. When an attorney represents co-defendants who have waived their right to separate counsel, the potential for irresolvable conflicts on decisions and consequences from those decisions rises significantly. For instance, take a case where 3 clients want to have one lawyer represent them on the theory that "they cannot convict any of us if we all stick together." The morning of trial, the prosecutor says to the one defense counsel, we offer defendant No.1, a 19 year old female with a new baby, probation, defendant No. 2, her boyfriend, is offered time served, defendant No. 3 is the person the prosecution decides it is going to ask the jury to really sanction, and by the way for defendants Nos. 1 and 2, to get the deal they must testify against defendant No. 3. How could a lawyer competently advise and subsequently competently represent these clients when something so beneficial to one is so damaging to the other. Additionally, we would expect a judge to view dimly on the day of trial a request for a continuance to provide all 3 clients with new, separate counsel. Joint representation in district court of codefendants who waive separate counsel may be advisable under circumstances where all defendants receive the timely, desirable disposition of their case that day rather than their facing more jail time for the same resolution but later in time. DPA seeks to contract out all codefendant conflicts in circuit court, and when that is not possible, assign conflicts to separate attorneys with waivers, and assign conflicts to 1 attorney with waivers only where it makes clear sense to do so.

There is legal authority that has found that a public defender cannot represent a client when another attorney in the same public defender office previously represented the victim. See, *e.g., Okeani v. Superior Court*, 871 P.2d 727 (Ariz. App. 1993).

However, there is substantial legal authority finding that such representation is appropriate if the confidentiality of the case information is protected and if the attorney representing the client in the action is in an organizational unit in the agency that is different from that of the attorney who has the conflict, and there are sufficient screens and consent by the client.

People v. Wilkins, 268 N.E.2d 756 (NY Ct. App. 1971) involved the New York public defender office that had 150 attorneys in 4 branches and 3 units representing both the defendant on appeal and the complaining witness in an unrelated case. In finding no impropriety, the court observed, "While it is true that for the purpose of disqualification of counsel, knowledge of one member of a law firm will be imputed by inference to all members of that firm..., we do not believe the same rationale should apply to a large public-defense organization such as the Legal Aid Society." *Id*. at 757.

Kentucky's statewide public defender program has two defender divisions (trial and post-trial). The trial division has 6 branches, 27 field offices and 3 nonprofit programs. The post-trial division has 3 branches (appeals, juvenile post-disposition, post-conviction) with section units in the post-conviction and appeals branches. In all, there are nearly 300 public defenders statewide.

In *People v. Neely*, 407 N.E.2d 814 (IL App. 1980) the defendant was represented on appeal by the Cook County Public Defender Office. When he filed his post-conviction action claiming his appellate attorney was ineffective he was represented by a public defender from the Cook County Public Defender office. The client asked for a different lawyer due to the conflict but the court looking at what the assistant public defender did in the post-conviction representation found no conflict.

In United States v. Reynoso, 6 F. Supp. 269 (S.D.N.Y. 1998) the federal public defender represented a client when a federal public defender in the same office four years previously represented a person who pled guilty to an offense and who was a potential government witness in the current case. The court held that "in the circumstances of this case, it does not make sense to apply to the Federal Defender Division, the same standards for disqualification that would apply to a private law firm." *Id* at 271. That court decided the issue by balancing the interests The court drew distinctions between the institution of a federal defender office and a law firm, including the lack of danger in reality or in public perception where attorneys are appointed as compared with a law firm which involves clients retaining attorneys, the lack of financial interest in the matters handled, the large volume of cases that lessen the likelihood that confidential information will be shared.

In *People v. Black*, 507 E2d 1237 (Ill App 5 Dist 1987) involved a number of cases with one attorney in the Illinois' Office of the State Appellate Defender (O.S.A.D.) raising ineffective assistance on an attorney in the same public defender program, and in another case O.S.A.D. representing codefendants on appeal with antagonistic defenses.

Like Kentucky, the Illinois public defender program was statewide with a number of different offices across the state with those offices centrally administered by a chief defender. The public defender program asked to withdraw saying it could not provide effective assistance due to the conflict. Withdrawal was denied.

The Court said that the representation was appropriate as long as the attorneys representing the client were from a different office within the same program than the attorney whose conduct was being litigated as ineffective. The court stated, "[N]o claim is made that a deputy defender lacks autonomy to approve the filing of briefs in his or her appellate district without prior review or approval. Because of his autonomy, there is no basis to the claim that representation by attorneys in different district offices would result in divided loyalties where multiple defendants pose antagonistic defenses, In essence, each district office is free to pursue its own appellate strategies notwithstanding the other centralized features of O.S.A.D." *Id*. at 1244.

Graves v. State, 619 A.2d 123 (Md. App. 193) extensively reviewed the cases on both sides of the issue of whether a public defender program can represent codefendants. The court determined that a public defender program was not per se viewed the same as a private law firm for conflict purposes. Instead, a public defender program could handle conflicting cases if it put in place a system that assured confidentiality. " The public defender may make changes within a specific office that could sufficiently insulate, from each other, assistant public defenders who operate from the same office and who are simultaneously representing codefendants. These institutional changes could include early screening of the cases, structural and procedural separation of the units, assignments to completely separate units in the same office, and other innovations in the handling of codefendants that would be conducive to the avoidance of any conflict of interest." *Id*. at 133-134. See also *In Re TM*, 569 N.E.2d 529 (IL App. 1991) where the court found no conflict in two juveniles being represented by two public defenders from the same office.

The Kentucky Supreme Court has addressed disqualification issues in the context of a lawyer joining the "other side." In *Summit v. Mudd*, Ky., 679 S.W.2d 225 (1984) the Court found that actual prejudice must be shown when defendant's original attorney moves from public defender staff to prosecutor's office. The "mere possibility of impropriety is not sufficient to disqualify the entire staff of a prosecu-

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tor…." *Whitaker v. Commonwealth*, Ky., 895 S.W.2d 953 (1995) addressed the situation when a public defender joins a prosecutor's office. T the trial judge must make an inquiry on a case of the former public defender prosecuted by the prosecutor's office and determine whether the former defender "participated personally and substantially in the preparation of the defense" of the client before the Commonwealth Attorney's Office is disqualified from prosecution. In *Savage v. Commonwealth*, Ky., 939 S.W.2d 325 (1996) the Court determined that the entire prosecutor's office is not required to be disqualified in a case when public defender who previously represented the client joins the prosecutor's office as the trial judge's inquiry indicated that attorney's representation of the defendant was perfunctory. In *Commonwealth v. Maricle*, Ky., 10 S.W.3d 117 (1999) a prosecutor's joining a criminal defense firm that represented the client required disqualification of the defense firm since her representation of the Commonwealth was personal and substantial as the former prosecutor had actually prosecuted the client and represented the Commonwealth at the preliminary hearing and had extensive conversations with the surviving victims family.

In *United States v. Huff*, 2002 WL 1856910 (W.D. Ky. 2002) (Not Reported in F.Supp.2d) the Court determined that the entire United States District Attorney's Office did not have to be disqualified when a criminal defense attorney who represented the defendant for 9 months and who was "personally and substantially involved in the preparation of [the client's] defense" joined that prosecutor's office because there was no showing of actual prejudice or "more apparent probability of prejudice." *Id.* at 3. That Court struggled to harmonize the Kentucky rulings and rationale and relationship between the sixth amendment and KRPC analysis. The Court stated, "Federal courts have uniformly concluded that where an attorney leaves private practice for service in government, absent a showing of actual prejudice the Sixth Amendment does not mandate the disqualification of other government lawyers in the new office from handling matters in which that attorney was involved in his former practice…. Moreover, if one reads *Whitaker* as interpreting Model Rule 1.11(c)(1) to require *per se* recusal of an entire governmental office, Kentucky literally stands alone among the states." *Id.* at 3.

Imputed Disqualification: The Opinions of Commentators. Catherine L. Schaefer in "Imputed Disqualification: Do Ethics Screens Adequately Shield Public Defenders from Conflicts of Interest?" *The Champion* (March 1997) at 29 discusses in-house conflict units within a public defender program and reviews the cases which held that for purposes of the imputed disqualification rule a public defender office is a law firm and there is a per se rule against a defender office representing a client due to imputed disqualification. The article also discusses those cases which hold there is no such per se rule and that a public defender office should be not treated as a law firm for purposes of imputed disqualification rules.

The advantages and disadvantages of the two approaches are analyzed in the article. The benefit of doing the cases in-house include: "it is true that public defenders do not share the financial incentive to represent numerous clients that characterizes private law firms, It is also true that public defenders who practice criminal law every day may be most familiar with criminal practice, and can possibly be more effective advocates, particularly in death penalty and other complex cases. Finally, it may be true that an ethics screen provides the most cost-effective way to provide representation to indigent defendants with conflicting interests." *Id.* at 33.

6. Alternate Approaches to Handling Conflicts Exist but have Consequences.

There are other ways to deliver services for conflicts in indigent criminal defendant cases than currently being done under KRS Chapter 31. There could be a separately funded, organized and supervised group that handles all conflicts. There could be no formal public defender organization. An administrator could handle all cases through individual appointments by judges and payment. Each county could have a separate public defender organization that has separate funding from the county, city or legislature. The statewide public defender organization could have one person who administers all conflict contracts across the state.

Each of these methods has some systematic conflicts within its design. Each has practical problems of consequence. The most significant problem with each of these alternatives is the availability of adequate funding to implement them. Few funders would likely be willing to expend additional funds on a separate system of conflict counsel that would require a separate administrative apparatus with additional costs when conflict counsel can be ethically provided through an existing statewide system. Even if a funder were willing to expend money on a totally separate defender organization to provide conflict representation, that would not fully meet the criticisms above as there would then be those cases where the conflict organization would be conflicted out of representation, *e.g.*, where there are 3 codefendants, where the conflict organization has previously represented a client who is now a witness in the new case. With current funding at $238 on average per case, these alternatives are problematic.

Under the current method used in Kentucky, trained, supervised, supported criminal defense specialists are provided to represent conflict cases competently and with efficiency. There is one place for funders, courts, and other criminal justice agencies to look for providing counsel and for accountability. The current method of providing conflict rep-

resentation in Kentucky allows maximization of resources statewide when resources are limited. Clients receive specialists in post-conviction litigation. These advantages would be at risk under the alternatives.

Perfectly conflict-free counsel is not only impossible, it is not practical. It would not be a prudent method to provide the most effective representation nor efficient service to the courts and criminal justice system. "Pushed too far and too routinely, therefore, the imputation rule could have a negative impact on the availability of legal services." *The Law of Lawyering*, Section 14.3.

Conclusion

Conflicts are best viewed in context as they admit to few dogmas. We cannot afford the turbulent consideration of conflicts as did Samuel Johnson when he observed, "I dogmatise and am contradicted, and in this conflict of opinions and sentiments I find delight." We must provide the best public defense we are able with the resources we have been afforded.

Kentucky's statewide public defender program, the Kentucky Department of Pubic Advocacy, has policies and practices that provide the necessary safeguards to permit conflict cases to be handled within the Department. These safeguards are:

1) Separate KRPC 5.1 supervision on the conflict case;
2) Informed client consent confirmed in writing;
3) Lawyers with DPA who have a conflict do not:
   a) participate in the case;
   b) communicate to any other member of DPA about the case or share documents relating to the case;
   c) convey any confidential information to anyone in DPA.

"The rule governing conflicts of interests derive, in large part, from the need to protect client confidences and secrets and the need to assure clients that they have their lawyer's loyalty." Ronald D. Rotunda, *Legal Ethics: the Lawyer's Deskbook on Professional Responsibility* (2003) at 205, Section 8-11. DPA has policies and practices that require adequate safeguards to protect these confidences and provide loyal representation to clients who have conflicts through its various separate work units.

This method of delivering legal representation with limited funding is providing better representation to more clients as a result. Kentucky is fortunate to have a statewide defender program that has all the delivery components within its structure. Most defender programs do not have the authorization nor funding for what Kentucky offers to clients beyond trial and appeal. Other states do not have Kentucky's conflict issues because most states do not have any system to have post-conviction clients represented within a single public defender organization. There is great public value in Kentucky's progressive decision to have a statewide public defender operation. More clients are represented better and more efficiently. Kentuckians have assurance that their tax dollars that fund public defense are maximized. Kentucky could spend more on a variety of separate delivery systems with less effective representation for clients. ■

Ed Monahan
Deputy Public Advocate

The harder the conflict, the more glorious the triumph. What we obtain too cheap, we esteem too lightly; it is dearness only that gives everything its value. I love the man that can smile in trouble, that can gather strength from distress and grow brave by reflection. 'Tis the business of little minds to shrink; but he whose heart is firm, and whose conscience approves his conduct, will pursue his principles unto death.

— Thomas Paine

WHAT'S IN A NAME?: THEFT OF IDENTITY AND GIVING FALSE INFORMATION TO A PEACE OFFICER

Robert Stephens

Kentucky's Theft of Identity statute is fresh and new, with no case law to guide practitioners in its application. As always, however, we can look to the wording of the statute itself, as well as associated statutes, to guide our interpretation. The situation has arisen where peace officers charge individuals with Theft of Identity when these persons give a false name, address, social security number, etc. to the police, for example during a traffic stop. Is this a correct application of the Theft of Identity charge? Is another crime more likely being committed? If Theft of Identity is not the correct charge in this situation, why does the wording on first glance appear to say it is correct? We will attempt to answer these questions in this article.

The Statute

KRS 514.160 Theft of Identity.

(1) A person is guilty of the theft of the identity of another when he or she knowingly possesses or uses any current or former identifying information of the other person or family member or ancestor of the other person, such as that person's or family member's or ancestor's name, address, telephone number, electronic mail address, Social Security number, driver's license number, birth date, personal identification number or code, and any other information which could be used to identify the person, including unique biometric data, with the intent to represent that he or she is the other person for the purpose of:
(a) Depriving the other person of property;
(b) Obtaining benefits or property to which he or she would otherwise not be entitled;
(c) Making financial or credit transactions using the other person's identity;
(d) Avoiding detection; or
(e) Commercial or political benefit.
(2) Theft of identity is a Class D felony. If the person violating this section is a business that has violated this section on more than one (1) occasion, then that person also violates the Consumer Protection Act, KRS 367.110 to 367.300.
(3) This section shall not apply when a person obtains the identity of another to misrepresent his or her age for the purpose of obtaining alcoholic beverages, tobacco, or another privilege denied to minors.
(4) This section does not apply to credit or debit card fraud under KRS 434.550 to 434.730.
(5) Where the offense consists of theft by obtaining or trafficking in the personal identity of another person, the venue of the prosecution may be in either the county where the offense was committed or the county where the other person resides.
(6) A person found guilty of violating any provisions of this section shall forfeit any lawful claim to the identifying information, property, or other realized benefit of the other person as a result of such violation.

Can Theft of Identity Ever Apply to Giving Another's Information to a Police Officer?

A. A Fact Scenario with Hypothetical: Theft of Identity and Giving Another's Information to Police

At least in the author's jurisdiction, peace officers have brought several charges against individuals for alleged Theft of Identity when, during a traffic stop or other occasion for coming into contact with police, the accused have given the names, birth dates, social security numbers, addresses, or other identifying information of other persons, usually to avoid old warrants and other annoyances attached to their real name. Our clients, obviously, are not acting in a socially responsible manner, but what crime is being committed? One answer to this question is found in KRS 523.110, at least when the false name or address is given after proper warning by the officer.

KRS 523.110 Giving peace officer a false name or address.
(1) A person is guilty of giving a peace officer a false name or address when he gives a false name or address to a peace officer who has asked for the same in the lawful discharge of his official duties with the intent to mislead the officer as to his identity. The provisions of this section shall not apply unless the peace officer has first warned the person whose identification he is seeking that giving a false name or address is a criminal offense.

(2) Giving a peace officer a false name or address is a Class B misdemeanor.

Does KRS 514.160 apply to this situation as well? Under the *Blockburger*[1] test, Double Jeopardy would not preclude an indictment for Theft of Identity just because KRS 523.110 also applies. What is required for conviction of Theft of Identity? In the fact scenario which we are addressing, where a person gives a police officer the identifying information of another, the Commonwealth is seeking conviction under KRS 514.160 (1)(d). Two requirements must be met for conviction under this subsection. One, as with any violation of KRS 514.160, the defendant must have *knowingly* used or possessed [2] the identifying information of another person with the *intent* to represent he or she is the other person. Two, in (1)(d), he or she must do so to "avoid detection."

To aid in analysis of the statute, we will examine a simple hypothetical. A person, we will call him Bubba Trubba, is stopped for speeding, knows he has outstanding bench warrants in district court, and does not wish to miss "all you can eat Buffalo Wings" night at his favorite honky-tonk. Motivated by the precariousness of his position, our less than admirable protagonist lies, saying his name is that of his honest and hardworking first cousin, Ernest N. True. Further, Bubba gives Ernest's social security number, address, and telephone number, a product of a far too open discussion between the cousins at the last family reunion. Assuming he has been warned against giving a false name or address, the defendant has clearly violated KRS 523.110; has he, however, committed theft of identity? A careful look at the statute's language shows he has not, although it may appear differently at first glance.

Bubba has acted knowingly to make the officer think he is his more noble cousin. If this were a situation where the defendant simply made up a name, this element would not have been met. It is only because Bubba is intentionally trying to "become" Ernest, that he potentially meets this element of the statute. One cannot accidentally commit Theft of Identity by making up a name or other identifying information. Bubba's conduct, then, initially appears to meet the first criterion for theft of identity.

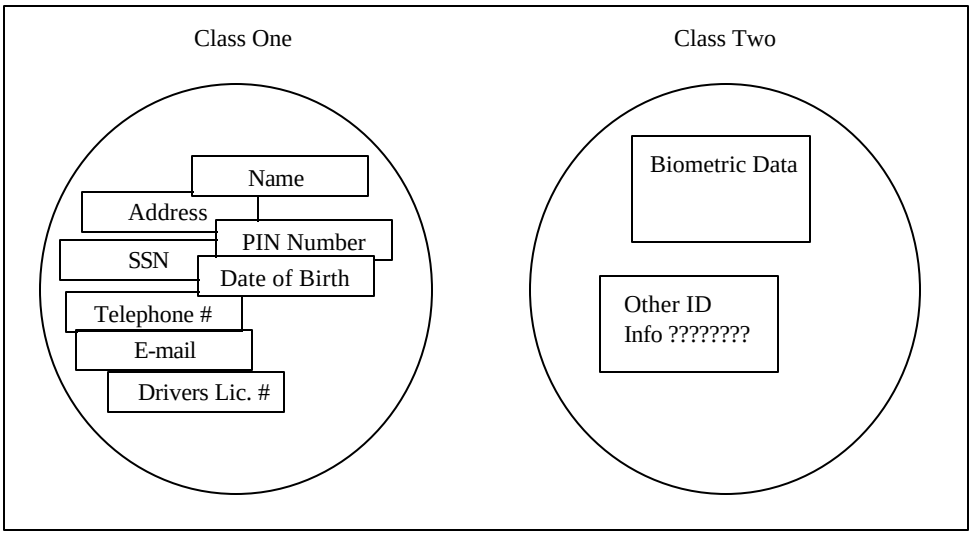
Bubba must have acted not only to knowingly present himself as the other person, in essence to "become" the other person in the eyes of another, but must also have acted to "avoid detection." This also appears at first glance to be true. After all, we are told in the hypothetical that Bubba did not want to be caught and hailed into court on those old bench warrants that so threaten to intrude on his entertainment agenda.

On closer examination of the language of KRS 514.160, however, we will see that neither of the two basic criteria has been met in the hypothetical. There are two reasons for this, which we will discuss in detail in the sections to follow, but are stated briefly here. One, though he acted knowingly with the requisite intent, Bubba did not use or possess all the information required by the language of KRS 514.160. Two, the statute is not addressing the kind of avoidance of detection contemplated in this fact scenario.

B. What Information Must be Used or Possessed?

(1) A person is guilty of the theft of the identity of another when he or she knowingly **possesses or uses any current or former identifying information of the other person** or family member or ancestor of the other person, **such as that person's or family member's or ancestor's name, address, telephone number, electronic mail address, Social Security number, driver's license number, birth date, personal identification number or code,** *and* **any other information which could be used to identify the person, including unique biometric data**, with the intent to represent that he or she is the other person for the purpose of: (KRS 514.160 (1), Emphasis added).

Carefully reading the highlighted language above, we see the Theft of Identity statute requires the perpetrator to have possessed or used, with the requisite intent, another's identifying information "such as that person's or family member's or ancestor's name, address, telephone number, electronic mail address, Social Security number, driver's license number, birth date, personal identification number or code, **and** any other information which could be used to identify the person, including unique biometric data." *Id.* The first clause, from "such" to "code;" and the second clause, from "and" to "data;" each define one of two distinct classes of information which must both be possessed or used with the required intent to violate KRS 514.160. The diagram on the next page shows these two classes and the information included in each.



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Classes of Information, Wrongful Possession or Use of Which by Another is Prohibited in KRS 514.160

By the plain wording of the statute, therefore, to violate KRS 514.160 Bubba would have had to give some other information, such as Ernest's biometric data, in addition to his name, social security number, and date of birth. Bubba's actions provided information in the first of the two information classes, but not the second. There is simply no other way to read the actual language of KRS 514.160. For a comparison of how a statute can be written so that wrongful use of one class of information or the other can violate the statute, one need only read KRS 523.110, where giving a false name **or** address to a police officer after having been warned of the consequences of such is prohibited. Because of the clear wording of KRS 514.160, the charge against Bubba in our hypothetical must be amended to one of KRS 523.110.

If the analysis above is not correct, then any use of any name, address, social security number, or any other identifying information will be a violation of KRS 514.160 if the arresting officer decides to take that route. Indeed, if the analysis above is not correct, the only way to choose whether to proceed under KRS 514.160 or KRS 523.110 is by the officer's discretion and personal choice. This is *per se* violative of Section 2 of the Constitution of the Commonwealth of Kentucky, which prohibits arbitrary power over the lives, liberty, and property of persons in Kentucky.

One may say, so what, the hypothetical does not meet the criteria for KRS 514.160, but can any providing of another's information to police satisfy the Theft of Identity statute? It is hard to imagine a situation that might do so. Two classes of information are required by the statute's own wording, as well as to avoid an arbitrary use of governmental power. The only member of the second class specifically listed in KRS 514.160 is "biometric data," with a generalized "any other information which could be used to identify the person" making up the remainder of the class. We are given no guidance by the drafters of KRS 514.160 as to what else could make up this class.

With the one member of class two that we are provided, unique biometric data, it is hard to see how the same could be provided to law enforcement to avoid detection! Perhaps for persons sharing the same height, weight, eye color, and so forth, this could be done! How often, however, would these match in real persons in the real world? In the context of giving biometric information other than to peace officers, such as on applications for grants, discussions by mail or internet where one pretends to be another person, etc., perhaps another's biometric data could be given, but the result is too easily tested against the subject in the live context of contact with police officers for this to occur during police questioning.[3]

C. Theft of Identity's Implied Economic Element

If Theft of Identity does not apply to giving another's identifying information to police, to what does it apply? Again, our answer comes from inspecting the words of the statute itself and related statutes. The Theft of Identity statute is overwhelmingly aimed at situations where using another's identifying information leads to pecuniary gain by the defendant, with the possible exception of subparagraphs (d) and (e), where "avoiding detection" and "political benefit" are also listed. In these provisions, however, "political benefit" is directly contrasted with general "commercial" gain. Subparagraph (e) thus appears to be a catchall provision for general "commercial" benefit to the defendant, or contrasted "political benefit." What does "avoiding detection" mean, though, in subparagraph (d)?

Current double jeopardy case law would not under the right circumstances prohibit prosecution under KRS 523.110 and a new statute such as KRS 514.160, but was this the legislature's intent? If the legislature meant of do this, after "avoiding detection" in KRS 514.160 (1)(d), it could have added the following words, or their equivalent: "of one's true identity or known aliases, under either of which the defendant is charged with crimes." The implication; from the words the legislature did not place in a critical location, especially in light of the overwhelmingly economic nature of the legislature's other references to Theft of Identity; is that the statute is aimed at defendants who use the identifying information of another for pecuniary gain, to avoid detection to obtain some economic gain (for example, if the defendant has prior bankruptcies, bad credit, service on civil cases he wishes to avoid), or the non-economic exception of "political benefit" under KRS 514.160 (1)(e).

KRS 514.160 would seem applicable in some fact situations, but a look at the statutes associated with KRS 514.160 shows Theft of Identity should only apply when there is an economic element, when a real theft occurs.

KRS 532.034 Restitution for financial loss resulting from theft of identity or trafficking in stolen identities.

(1) A person found guilty of violating any provisions of KRS 434.872, 434.874, 514.160, or 514.170 shall, in addition to any other punishment, be ordered to make restitution for financial loss sustained by a victim as a result of the violation. Financial loss may include any costs incurred by the victim in correcting the credit history of the victim or any costs incurred in connection with any civil or administrative proceeding to satisfy any debt or other obligation of such victim, including lost wages and attorney's fees.
(2) A person found guilty of violating any provisions of KRS 434.872, 434.874, 514.160, or 514.170 shall pay restitution to the person or entity that suffers the financial loss. In addition to the financial loss detailed in subsection (1) of this

section, the person or entity may include a financial institution, insurance company, or bonding association that suffers direct financial loss as a result of the violation.

This statute provides that anyone found guilty of violating KRS 514.160 must make restitution for financial loss suffered as a result of the violation. The wording of KRS 532.034 requires payment of restitution for financial loss (note use of the word "shall"), so restitution in these cases is not discretionary. Even more importantly, however, the wording of KRS 532.034 implies that there will be financial loss in every case: "shall, in addition to any other punishment, be ordered **to make restitution for financial loss sustained by a victim as a result of the violation**." *Id*. (emphasis added.) The statute does not say "make restitution for any financial loss which may be sustained by a victim as a result of the violation;" rather, the statute assumes there will be such financial loss. The wording of KRS 532.034 thus also points to the requirement of an economic element in KRS 514.160, Theft of Identity.

Finally, the comparative placement of the Theft of Identity statute shows the intent of its application. Theft of Identity, KRS 514.160 is placed in Chapter 514, Theft and Related Offenses. Giving Peace Officer a False Name or Address is located in Chapter 523, Perjury and Related Offenses. Without delving into the etymology of the words "theft" and "perjury," suffice it to say that in deciding where to place the new Theft of Identity statute, the legislature obviously thought it had to do with stealing the property of another rather than providing false information to authorities.

Conclusion

Though the Theft of Identity statute at first appears to apply to situations where a defendant gives law enforcement another person's identifying information, a closer review of the statutory language, and of its sister statute, KRS 532.034, shows this is not the case. This is the only way to read the language of these statutes and still make logical sense. Peace officers acting in good faith can read the Theft of Identity statute and wrongly apply it to a roadside encounter with a deceitful defendant, but Theft of Identity is simply not the correct charge under these circumstances. This must be the case unless and until the legislature amends the language of KRS 514.160 to make the same applicable to giving another's information to a police officer.

Robert Stephens, Jr.
Assistant Public Advocate
Somerset

Endnotes:

1. *Blockburger v. United States*, 284 U.S. 299 (1932).
2. An interesting question arises regarding how the Commonwealth can prove knowledge in some cases. If one possesses false identification cards with another person's identifying information, but is not caught using the same, how can the government prove intent to use it in a prescribed manner? Indeed, in the extreme case, what if a an alleged co-conspirator testifies that the defendant possessed (even entirely in the defendant's memory, with no documentary proof) the identifying information of another with an intent to violate KRS 514.160 or its companion statute, KRS 514.170 Trafficking in Stolen Identities? Is this enough to satisfy the statute?
3. An interesting situation where this could occur in the context of giving another's biometric data to police officers to avoid detection, albeit a rare one, is where one identical twin pretends to be another. It is doubtful, though, that the legislature was carving out this one unlikely scenario for the sole applicability of KRS 514.160(1)(d).

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BILL SEABOLD RETIRES FROM KY CORRECTIONS AND AS WARDEN AT THE KENTUCKY STATE REFORMATORY

William Seabold

In a November 27, 2003 *Courier Journal* story entitled, "Warden closes door on 33-year career retiring prison director known for compassion" by Andrew Wolfson, Seabold commented on capital punishment and life without parole.

On the Death Penalty
"'It's an easy solution but not the right one' — he said he was grateful that he didn't have to preside over any executions during his six years as the maximum-security penitentiary's warden."

On Life Without Parole
"He also opposes the sentence of life without parole, which lawmakers put back on the books in 1998. 'You want to give inmates some ray of hope,' he said, 'some light at the end of the tunnel.'" ■

Continued from page 37

COMMONWEALTH OF KENTUCKY
34TH JUDICIAL CIRCUIT
DIVISION II
INDICTMENT NO. 03-CR-XXXXX

COMMONWEALTH OF KENTUCKY PLAINTIFF

V. **MOTION TO AMEND THE INDICTMENT TO A CHARGE OF VIOLATING KRS 523.110**

XXXXXXX DEFENDANT

Comes now the Defendant, by counsel, pursuant to KRS Sections 514.160, 523.110, 532.034; Sections 1,2,3,10, and 11 of the Constitution of the Commonwealth of Kentucky; and the 5th and 14th Amendments to the United States Constitution; and moves this Court to dismiss the indictment or in the alternative to amend the charge to one of KRS 523.110 and remand the case to District Court. In support of this Motion, the Defendant states as follows:

A. The Pertinent Facts

On June 12, 2003, a vehicle was stopped in the Burgess Drug Store parking lot in Whitley City, Kentucky. (See attached police report, p. 1). The accused, XXXXXXX, was a passenger in the vehicle, and was arrested for charges unrelated to those alleged in this indictment. XXXXXXX gave his name as YYYYYYYYYY, his Social Security Number as 111-11-1111, and his date of birth as January 01, 1983; and this despite his having been warned of the ramifications of giving false information to a police officer. (See police report, p.2). Later that day, YYYYYYYYYY told police he was the real YYYYYYYYYY. XXXXXXX, sitting in jail on the charges for which he had been arrested that same date, when questioned again regarding his having given false information to a police officer, "dropped his head and stated his name was XXXXXXX SSN # 222-22-2222 Date of Birth 12-13-83 – Address the same." (Police report, p. 2). XXXXXXX was subsequently indicted by the McCreary County Grand Jury on a charge of Theft of Identity, KRS 514.160.

B. The Charge Against Jeremy XXXXXXX Should be Amended to One of Giving False Name or Address to a Police Officer, KRS 523.110.

1. KRS 523.110 clearly applies to XXXXXXX's actions, because he was warned of the consequences of giving a false name or address to a police officer and nonetheless did exactly so.

KRS 523.110 Giving peace officer a false name or address

(1) A person is guilty of giving a peace officer a false name or address when he gives a false name or address to a peace officer who has asked for the same in the lawful discharge of his official duties with the intent to mislead the officer as to his identity. The provisions of this section shall not apply unless the peace officer has first warned the person whose identification he is seeking that giving a false name or address is a criminal offense.
(2) Giving a peace officer a false name or address is a Class B misdemeanor.

2. KRS 514.160 states as follows:

KRS 514.160 Theft of identity

(1) A person is guilty of the theft of the identity of another when he or she knowingly possesses or uses any current or former identifying information of the other person or family member or ancestor of the other person, such as that person's or family member's or ancestor's name, address, telephone number, electronic mail address, Social Security number, driver's license number, birth date, personal identification number or code, and any other information which could be used to identify the person, including unique biometric data, with the intent to represent that he or she is the other person for the purpose of:

(a) Depriving the other person of property;
(b) Obtaining benefits or property to which he or she would otherwise not be entitled;
(c) Making financial or credit transactions using the other person's identity;
(d) Avoiding detection; or
(e) Commercial or political benefit.

(2) Theft of identity is a Class D felony. If the person violating this section is a business that has violated this section on more than one (1) occasion, then that person also violates the Consumer Protection Act, KRS 367.110 to 367.300.

(3) This section shall not apply when a person obtains the identity of another to misrepresent his or her age for the purpose of obtaining alcoholic beverages, tobacco, or another privilege denied to minors.

(4) This section does not apply to credit or debit card fraud under KRS 434.550 to 434.730.

(5) Where the offense consists of theft by obtaining or trafficking in the personal identity of another person, the venue of the prosecution may be in either the county where the offense was committed or the county where the other person resides.

(6) A person found guilty of violating any provisions of this section shall forfeit any lawful claim to the identifying information, property, or other realized benefit of the other person as a result of such violation.

3. Two reasons, based on the wording of the Theft of Identity statute, exist for amending the charge to one of KRS 523.110, under the facts of this case.

First, the accused must have given the identifying information of another with a certain intent. It is presumed by counsel that the Commonwealth seeks to proceed under subparagraph (d) of paragraph (1) of 514.160, though this is not stated in the indictment and needs to be established. 514.160 (1)(d) requires that XXXXXXX had to give the identifying information of YYYYYYYYYY, with the intent of "avoiding detection." It is difficult to see how this section can apply to the facts of the case at hand, however, since XXXXXXX was arrested and sent to jail before it was discovered he had used a false name, social security number, and date of birth.

This is not a case where the defendant went home after giving another's identifying information, thus avoiding detection on old bench warrants, pending indictments or charges, service of process, etc. The Commonwealth has not stated why the accused is supposed to have been trying to avoid detection. Since establishment of the accused's intent of "avoiding detection" is required for a conviction of KRS 514.160, the Commonwealth cannot ignore this issue. At any rate, XXXXXXX was charged that date with new offenses (See attached Uniform Citation No. Q2222222), and he was going to jail on June 12, 2003 no matter what name, social security number, and date of birth he gave. How, then, was he giving another's identifying information with the intent to "avoid detection"?

Second, the plain wording of KRS 514.160 requires more information to have been given by XXXXXXX for a true offense of Theft of Identity to have occurred. The key wording is highlighted below:

(1) A person is guilty of the theft of the identity of another when he or she knowingly **possesses or uses any current or former identifying information of the other person** or family member or ancestor of the other person, **such as that person's or family member's or ancestor's name, address, telephone number, electronic mail address, Social Security number, driver's license number, birth date, personal identification number or code,** *and* **any other information which could be used to identify the person, including unique biometric data**, with the intent to represent that he or she is the other person for the purpose of: (Emphasis added).

Clearly, the Theft of Identity statute requires the perpetrator to have possessed or used, with the requisite intent, another's identifying information **"**such as that person's or family member's or ancestor's name, address, telephone number, electronic mail address, Social Security number, driver's license number, birth date, personal identification number or code, **and** any other information which could be used to identify the person, including unique biometric data." (*Id*.) The first clause, from "such" to "code;" and the second clause, from "and" to "data;" each define one of two distinct classes of information which must both be possessed or used with the required intent to violate KRS 514.160. By the plain wording of the statute, therefore, to violate KRS 514.160 XXXXXXX would have had to give some other information, such as YYYYYYYYYY's

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biometric data, in addition to his name, social security number, and date of birth. XXXXXXX's actions provided information in the first of the two information classes, but not the second. There is simply no other way to read the actual language of KRS 514.160. For a comparison of how a statute can be written so that wrongful use of one class of information or the other can violate the statute, one need only read KRS 523.110, where giving a false name **or** address to a police officer after having been warned of the consequences of such is prohibited. Because of the clear wording of KRS 514.160, the charge against XXXXXXX must be amended to one of KRS 523.110.

4. If the analysis above is not correct, then any use of any name, address, Social Security Number, or any other identifying information will be a violation of KRS 514.160 if the arresting officer decides to take that route. Indeed, the only way to choose whether to proceed under KRS 514.160 or KRS 523.110 is by the officer's discretion and personal choice. This is *per se* violative of Section 2 of the Constitution of the Commonwealth of Kentucky, which prohibits arbitrary power over the lives, liberty, and property of persons in Kentucky.

5. The Theft of Identity statute is overwhelmingly aimed at situations where using another's identifying information leads to pecuniary gain by the defendant, with the possible exception of subparagraphs (d) and (e), where "avoiding detection" and "political benefit" are also listed. In these provisions, however, "political benefit" is directly contrasted with general "commercial" gain. Subparagraph (e) thus appears to be a catchall provision for general "commercial" benefit to the defendant, or contrasted "political benefit." What does "avoiding detection" mean, though, in subparagraph (d)?

Current double jeopardy caselaw would not under the right circumstances prohibit prosecution under KRS 523.110 and a new statute such as KRS 514.160, but was this the legislature's intent? If the legislature meant of do this, after "avoiding detection" in KRS 514.160 (1)(d), it could have added the following words, or their equivalent: "of one's true identity or known aliases, under either of which the defendant is charged with crimes." The implication; from the words the legislature did not place in a critical location, especially in light of the overwhelmingly economic nature of the legislature's other references to Theft of Identity; is that the statute is aimed at defendants who use the identifying information of another for pecuniary gain, to avoid detection to obtain some economic gain (for example, if the defendant has prior bankruptcies, bad credit, service on civil cases he wishes to avoid), or the non-economic exception of "political benefit" under KRS 514.160 (1)(e).

This argument is buttressed by looking at KRS 532.034, quoted below:

532.034 Restitution for financial loss resulting from theft of identity or trafficking in stolen identities
(1) A person found guilty of violating any provisions of KRS 434.872, 434.874, 514.160, or 514.170 shall, in addition to any other punishment, be ordered to make restitution for financial loss sustained by a victim as a result of the violation. Financial loss may include any costs incurred by the victim in correcting the credit history of the victim or any costs incurred in connection with any civil or administrative proceeding to satisfy any debt or other obligation of such victim, including lost wages and attorney's fees.
(2) A person found guilty of violating any provisions of KRS 434.872, 434.874, 514.160, or 514.170 shall pay restitution to the person or entity that suffers the financial loss. In addition to the financial loss detailed in subsection (1) of this section, the person or entity may include a financial institution, insurance company, or bonding association that suffers direct financial loss as a result of the violation.

This statute provides that anyone found guilty of violating KRS 514.160 must make restitution for financial loss suffered as a result of the violation. The wording of KRS 532.034 requires payment of restitution for financial loss (note use of the word "shall"), so restitution in these cases is not discretionary. Even more importantly, however, the wording of KRS 532.034 implies that there will be financial loss in every case: "shall, in addition to any other punishment, be ordered **to make restitution for financial loss sustained by a victim as a result of the violation**." (*Id*., emphasis added). The statute does not say "make restitution for any financial loss which may be sustained by a victim as a result of the violation;" rather, the statute assumes there will be such financial loss. The wording of KRS 532.034 thus also points to the requirement of an economic element in KRS 514.160, with the sole exception of subparagraph (1)(e). ■

In The Spotlight. . . .Meena Mohanty

"Treat people as if they were what they ought to be and you help them become what they are capable of being."
Goethe

The theory is ancient. We can change reality with our thoughts. William James, an American psychologist, professor and author writes, "Human beings, by changing the inner attitude of their minds, can change the outer aspect of their lives." For a public defender, this idea seems impossible given the tremendous caseload and constant pressure. But there are those who see it differently.

Meena Mohanty's parents are intelligent, hardworking people. They journeyed to Richmond, Kentucky from Orissa, India, 100 miles south of Calcutta, to establish careers at Eastern Kentucky University. Both are instructors. Her mother teaches math and her father teaches sociology. They raised their children to be independent thinkers and gave Meena and her brother a strong sense of duty and responsibility. The family prayer is a mantra to using each day wisely: "This is the beginning of a new day. . . . I can waste it or use it for good. But, what I'm doing is important because I'm exchanging a day of my life for it."

Meena clearly lives her life with purpose. After receiving an undergraduate degree in Bio Psychology, she pursued a law degree from Temple University in Pennsylvania. She knew that she wanted to go into trial law and she that she wanted to be a public defender. Meena laughs, "My personality is just suited to trial law."

Her first year as an attorney with the Kentucky Department of Public Advocacy was rich with challenge. Newly married, her husband had to remain in Philadelphia to finish his degree. Hired by the DPA on October 1st, 1996, Meena was immediately whisked off for a week of education in Faubush, Kentucky. "No one else from the Richmond Office went, my husband was still in Philly and my parents were on a trip to Jordan," she recalls. It was a difficult and lonely time for her.

She persevered and seven years later, Meena radiates joy. She loves her life and her career. "I have the greatest clients in the world and I think that would sustain anyone," she says. Letters of thanks cover her message board. Writes one client, "I really want to thank you from the bottom of my heart. You have really helped me and I appreciate that….Thanks for being there for me. I am 28 years old and it was time for me to wake up." This kind of client response Meena receives is a direct result of the respect she shows to everyone around her.

Her supervisor, Lynda Campbell, observes, "Meena is excellent at forming and maintaining relationships. She treats people very well, no matter the charge. She gets along very well with everyone in the court system to the clients' benefit." If the theory holds, then one can suppose that through her own vision, Meena changes her landscape, creating a world filled with promise for herself and her clients.

In *The Power of the Powerless*, Vaclav Havel says "For the real question is whether the brighter future is really always so distant. What if, on the contrary, it has been here for a long time already, and only our own blindness and weakness has prevented us from seeing it around us and within us, and kept us from developing it?" Meena Mohanty sees the brighter future and transforms it into reality. The world is a better place for her efforts. ■

Patti Heying
Program Coordinator

This above all; to thine own self be true.

— William Shakespeare

LOUISVILLE METRO PUBLIC DEFENDER'S OFFICE WINS THE 2003 CLARA SHORTRIDGE FOLTZ AWARD

Washington, DC, October 31, 2003: The National Legal Aid & Defender Association (NLADA) is pleased to announce that the 2003 Clara Shortridge Foltz Award goes to the Louisville Metro Public Defender's Office in Louisville, Kentucky.

This prestigious national award is presented biennially to a public defender program or defense delivery system as a commendation for its outstanding achievement in the provision of public defense services. Co-sponsored by NLADA and the American Bar Association's Standing Committee on Legal Aid and Indigent Defense, the award is named for the founder of the nation's public defender system. The selection committee found that, among many worthy nominations, the Louisville Metro Public Defender best met the following award criteria:

- the office exemplifies a best practice of public defense advocacy that can serve as an inspirational national model;
- it has measurably expanded or improved access to full and excellent criminal defense representation for those who cannot afford counsel; and
- it represents innovation worthy of continued development and replication by others.

In a letter nominating the Louisville Metro Public Defender's office, former ABA President L. Stanley Chauvin, Jr., of Louisville, states: "During my term as president of the American Bar Association, I had the pleasure of observing, evaluating and interacting with many defender offices across the country. I know of no program or organization that better exemplifies the spirit and high standard of practice pioneered by the individual in whose name this important award is presented than the Louisville Metro Public Defender.

"Since its incorporation in 1971, the Louisville Metro Public Defender's office has revolutionized criminal defense representation in this jurisdiction and led the way for the establishment and implementation of a full-time, statewide public defender system in Kentucky. Dubbed 'The Best Legal Minds Money Can't Buy' in a *Courier-Journal Magazine* article published in 1990 … , the office operates a mixed caseload/vertical representation system in accordance with ABA standards and NLADA guidelines. Its record of achievement on behalf of indigent accused in the trial and appellate courts, both state and federal, is truly remarkable."

Dan Goyette

The Louisville Metro Public Defender has a reputation among its peers as being the best. In the trial courts, the success of the office's defender litigators is second to none in either the private or public sector. Its representation of juvenile clients has been singled out for praise by the ABA. Its TeamChild program has broken new ground in Kentucky with an innovative and proactive approach. TeamChild pairs civil attorneys with public defenders to holistically address the needs of youth in the juvenile justice system.

Similarly, the office's aggressive advocacy on behalf of respondents in involuntary hospitalization proceedings has changed practices and attitudes toward perhaps the most vulnerable clients in the court system. Staff attorneys in the defender's office are recognized as among the most expert in this area of the law and are regularly called upon to lead or participate in task forces and legislative efforts to improve the quality of justice for the mentally ill. Insofar as appellate advocacy is concerned, the office has been responsible for numerous favorable changes in state and federal case law, including the landmark U.S. Supreme Court decision in *Batson v. Kentucky.*

In addition, the Louisville Metro Public Defender's office successfully challenged the use and expansion of video arraignments, and Chief Public Defender Dan Goyette convinced judicial and executive branch leaders to rethink and redesign new courts and corrections construction in Jefferson County so that all persons accused of crimes are assured of in-person, in-court, "live" arraignments. Currently, Jefferson County is the only one of the 120 counties in the state in which video arraignments are not used. Instead, the equipment originally purchased by the county for video arraignments is being installed at the public defender's office to allow for "24/7" video-conferencing capability between attorneys and inmates.

In seconding the nomination of the Louisville Metro Public Defender, Justice Martin E. Johnstone of the Kentucky Supreme Court remarked that "[T]hey have been instrumental in raising the bar for the effective representation of indigents

accused of criminal offenses and bringing us closer to the promise of *Gideon*. Furthermore, their leadership in all facets of the bar and the justice system has resulted in progress and innovation that never would have occurred otherwise. I shudder to think how different and inferior our system would be had the Louisville-Jefferson County Public Defender Corporation not come into being in 1971."

Ernie Lewis, Kentucky's Public Advocate, observed that "it is a great honor for the Commonwealth of Kentucky and the Department of Public Advocacy for the Louisville Metro Public Defender's Office to be recognized by NLADA. The Office predated the creation of Kentucky's statewide public defender system. Bob Ewald, the Chair of the Public Advocacy Commission, has been instrumental in leading the Louisville Metro Public Defender's Office by chairing their Board of Directors. The Office has experienced outstanding leadership from Col. Paul Tobin and now Dan Goyette. Dan has surrounded himself with an excellent leadership team. Together, they set a high bar and hold their attorneys and staff to it. I find it particularly significant that the Office is receiving this recognition during the *Gideon Year* in Kentucky, because the Office exemplifies the promise of *Gideon v. Wainwright*."

Deputy Public Advocate Ed Monahan said, "Dan Goyette sets a standard of representation that combines professionalism with vigorous advocacy. Clients are the beneficiary of Dan's leadership."

Led by **Daniel T. Goyette** for the past 21 years, the Louisville Metro Public Defender office's staff includes 51 attorneys, nine investigators, five paralegals, two social workers, a mitigation specialist, two law clerks, 12 secretaries, eight data entry personnel and a comptroller. The workload and delivery system is organized into eight coordinated, collaborative divisions. Goyette's leadership team includes: **Leo G. Smith**, deputy chief public defender; **Peter L. Schuler**, chief of the Juvenile and Mental Health Division; **Frank W. Heft, Jr.**, chief appellate defender; **Ann Bailey Smith**, chief of Adult Trial Division I; **Donald J. Meier**, chief of Adult Trial Division II; **Jay Lambert**, chief of Adult Trial Division III; **Raymond M. Clooney**, chief of the Capital Trial Division; **Patricia L. Echsner**, deputy chief of the Juvenile Trial Division; and **William E. Sharp**, deputy chief of the Adult Trial Division.

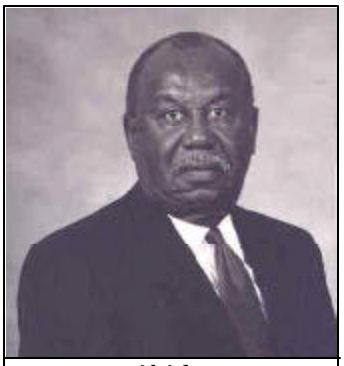
In accepting the award, Goyette said: "It is an important award that we are grateful for and honored to receive. Each and every hardworking, dedicated member of the staff shares in the award, and it is at once a tribute to individual achievement and a triumph of teamwork. The founders of the program, and its leaders and supporters who have remained loyal to the office and committed to indigent defense over the years, also deserve a large measure of credit."

The National Legal Aid & Defender Association (NLADA), founded in 1911, is the oldest and largest national, nonprofit membership organization devoting all of its resources to advocating equal access to justice for all Americans. NLADA champions effective legal assistance for people who cannot afford counsel, serves as a collective voice for both civil legal services and public defense services throughout the nation and provides a wide range of services and benefits to its individual and organizational members. ■

DEFENDER RECRUITMENT

The Kentucky Department of Public Advocacy is recruiting for staff attorneys to represent the indigent citizens of the Commonwealth of Kentucky for the following locations:

Covington	Columbia
Danville	Elizabethtown
Frankfort	Hazard
Henderson	Hopkinsville
London	Madisonville
Murray	Owensboro
Paducah	Pineville



Al Adams

For further information and employment opportunities, please contact:

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APPELLATE CASE REVIEW

Euva May

Bell v. Commonwealth
—S.W.3d— (10/23/03)
Affirming in Part and Reversing and Remanding in Part

Bell appealed his five year sentence based on convictions for first-degree fleeing or evading police and two misdemeanor convictions for carrying a concealed deadly weapon and third-degree criminal mischief. The Court of Appeals affirmed these convictions. The Supreme Court granted discretionary review. The sole issue on review was whether the Commonwealth presented sufficient evidence to support a conviction for Fleeing and Evading.

The Supreme Court interpreted the meaning of "caused or created a substantial risk of or serious physical injury or death to any person or property." In order to convict under KRS 520.095 the Commonwealth must prove that the defendant was 1) A pedestrian, 2.) With intent to elude or flee, 3) Knowingly or wantonly disobeyed an order to stop, 4) Given by a person recognized as a police officer, and 5) By fleeing or eluding, the person caused or created a substantial risk of or serious physical injury or death to any person or property.

The Supreme Court interpreted element 5. In this case, Bell fled the police disregarding an order to stop. The chase ensued through a residential area including scaling fences. During the pursuit, Bell discarded a firearm. The police recovered the gun subsequent to the arrest.

The Supreme Court held that even though Bell was an armed robbery suspect that fled through a residential area and discarded a loaded, operational handgun, this conduct did not create the kind of "substantial risk of serious physical injury or death" required for a conviction. Moreover, the Commonwealth's speculation and hypotheticals as to what could happen when one runs from a police officer with a loaded gun could not support a conviction.

In dicta, the Court re-emphasized conditions permitting police to use physical force to capture a fleeing suspect. Also, the Court re-iterated the considerations permitting police to use physical force to take down a defendant. The facts in this case would not support such action.

Justice Wintersheimer dissented. He opined that flight from an officer while armed with a handgun was sufficient evidence to support a first-degree fleeing or evading conviction.

Bishop v. Commonwealth
—S.W.3d.— (10/23/03)
Reversing

Competency to stand trial vs. defense of mental illness. The Commonwealth is entitled to an independent expert only where defense of mental illness is an issue. Bishop appealed the Court of Appeals's denial of a writ of prohibition which would prohibit Bishop from undergoing a psychiatric evaluation by the Commonwealth's independent expert. KCPC had completed a competency evaluation but the court sua sponte allowed both the defendant and the Commonwealth to move for their own independent examination. Both parties moved for an independent examination. Bishop objected to the Commonwealth's motion. He argued that since he was not raising an insanity defense or mental illness, the Commonwealth had no right to have its own expert probe Bishop's competency to stand trial.

The Supreme Court lengthily noted the differences between competency to stand trial and the defense of mental illness or insanity. The Court recognized that an independent evaluator is appropriate when mental state is a trial issue.

The Supreme Court held that the competency statute did not provide for an independent examiner for either the defense or the Commonwealth. The competency evaluator works for the trial court. The Court found that the prejudice to the defendant was inherent if the Commonwealth were allowed an independent examiner. While the defendant's statements would not be admissible at trial, the defendant may disclose information that would lead the Commonwealth to discover other crimes or defense strategy.

Justice Keller concurred. However, in his opinion, the Commonwealth is entitled to an independent competency examiner "if the Commonwealth can demonstrate good cause, it should be permitted to seek an independent competency evaluation under CR 35.01." Justice Wintersheimer dissented, adopting most of Keller's concurring opinion. However, he believed in this particular case, the Commonwealth had demonstrated good cause sufficient to merit appointment of an independent expert.

Burkhart v. Commonwealth
—S.W.3d— (10/23/03)
Affirming

Burkhart appeals his twenty-year sentence based on convictions for first-degree criminal mischief, operating a motor vehicle without insurance, leaving the scene of an accident, and first-degree persistent felony offender.
The Commonwealth alleged that Burkhart drove his older model van through the front doors of the Citgo Redi-Mart. In support of this theory at trial, the Commonwealth offered a video tape from the store's surveillance system. The tape depicted a van similar to Burkhart's driving through the front doors. During its case-in-chief, the Commonwealth played the video at regular speed. The issue presented on appeal was whether it was error for the trial court to play this video in response to a jury request, in slow motion.

The Supreme Court found no error in the trial court's accession to the jury's request to view the tape in slow motion. On appeal, Burkhart argued that the trial court abused its discretion and placed undue emphasis on the surveillance video not only "by playing the tape for deliberating jurors in a manner different from the Commonwealth's presentation of the evidence at trial" but also by allowing the jurors to sit closer to the video and by operating the video controls himself. Burkhart argued the court's operation of the equipment gave an appearance of bias in favor of the Commonwealth. Relying on case law from other jurisdictions, the trial court found no error in allowing the jury to view the video tape in slow motion.

Moreover, the Supreme Court found that the trial court's replay of the tape in open court, under his control did not lend undue emphasis to the exhibit. The Court reasoned that it is typically testimonial evidence that gives rise to claims of undue emphasis. Since the tape in this case was non-testimonial evidence, no error occurred.

Finally, the Court found that although the judge controlled the VCR and the re-play of the tape, the record presented no evidence that would allow the Court to find the judge acted with bias in the matter.

Spears v. Commonwealth
—S.W.3d— (10/23/03)
Affirming

Spears appealed his conviction on two counts of first-degree robbery, one count of first-degree rape, and one count of first-degree burglary. Spears entered an open-end guilty plea which resulted in the trial court giving him the maximum sentence – 60 years. However, the trial court allowed Spears to appeal issues that arose prior to sentencing.

The trial court did not err by failing to grant a continuance of the sentencing hearing so the defendant could prepare and present an alternative sentencing plan. The Supreme Court held that the trial court did not err in failing to continue the sentencing proceedings so that the defendant could prepare an alternative sentencing plan. Relying on *Hughes v. Commonwealth*, Ky., 875 S.W.2d 99 (1994), the court held "when conditions of the statute [KRS 533.060 (1)] were met and the domestic violence statute did not apply, the trial court did not have the authority to consider probation with an alternative sentencing plan." Because Spears's convictions and use of a gun in the offense meet the requirements of 533.060 (1) and because the domestic violence exemption did not apply, the court did not have the authority to consider probation with an alternative sentencing plan.

The defendant waived any claim of double jeopardy by pleading guilty. Spears alleged that the conviction on the first count of first-degree robbery violated double jeopardy. Specifically, the indictment charged Spears with robbing the Kentucky Farm Bureau, as a business entity, and robbing the individual that worked at the Farm Bureau at the time of the robbery. The Court found that the defendant waived the issue by pleading guilty. However, in dicta, the Court stated that these two occurrences were sufficiently remote in time and location to permit multiple counts of robbery.

Taylor v. Commonwealth
—S.W.3d— (10/23/03)
Vacating in Part and Reversing and Remanding in Part

Taylor appealed his thirty year sentence based on convictions for manufacturing methamphetamine, driving on DUI suspended license, and first-degree fleeing and evading.

The trial court should never direct a verdict in favor of the Commonwealth. At trial, Taylor testified. He admitted to the DUI and fleeing charges. The trial court directed a verdict for the Commonwealth. The Supreme Court held "it is never proper for a trial court to direct a verdict of guilty were there is a plea of not guilty, despite the fact that the evidence of his guilt may be convincing and wholly uncontradicted."

The manufacturing methamphetamine statute was constitutional. However, the trial court erred by failing to direct a not guilty verdict on the methamphetamine charge. The Supreme Court did not find KRS 218A1432(1)(b) unconstitutional. However, the Court found that the trial court erred by failing to direct a verdict in the defendant's favor on the manufacturing methamphetamine charge. Taylor possessed Sudafed pills, lithium batteries, starting fluid, tubing, paper towels, and drain cleaner. Since Taylor did not possess anhydrous ammonia, the conviction could not stand. Per *Kotila v. Commonwealth*.

Finally, the Court found it improper for the Commonwealth to inform the jury that his co-defendant pled guilty to helping the defendant manufacture methamphetamine. ■

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6TH CIRCUIT REVIEW

Harris v. Carter
337 F.3d 758 (6th Cir. 7/29/03)

Habeas relief granted where attorney represented co-defendants, albeit in separate trials. The 6th Circuit holds Harris was denied his 6th amendment right to effective assistance of counsel due to his lawyer's conflict of interest. Harris' trial attorney, Evans, represented Harris and co-defendant Payton in Ohio state court on charges arising out of a drive-by shooting. Payton went to trial first and had been convicted when Harris' trial began. At Harris' trial, the judge ordered Payton to testify under a grant of immunity from prosecution for further crimes. Evans objected and requested separate counsel for Payton to no avail. Payton testified he and Harris were the only people in the van involved in the drive-by shooting and he was the driver. He also said he was not the shooter. Evans did not cross-examine Payton, nor did he object to improper questions by the prosecutor.

Prejudice presumed in conflict of interest cases where attorney objects and trial court fails to conduct inquiry. In the context of alleged conflicts of interest in representation, the 6th amendment requires that prejudice be presumed and a reversal be automatic when a timely objection has been made to joint representation and the trial court fails to inquire whether the conflict requires appointment of separate counsel. *Holloway v. Arkansas*, 435 U.S. 475, 484-488 (1978). If no objection has been made to joint representation, prejudice is presumed only if the defendant can prove "an actual conflict of interest affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348-350 (1980). *Cuyler* limits a trial court's duty to initiate an inquiry about joint representation only when the trial court "knows or reasonably should know that a particular conflict exists." *Id*., 446 U.S. at 346-347.

Timing and specificity of request for separate counsel in attorney's discretion. The Ohio Court of Appeals held Evans' request for separate counsel was not sufficient to trigger the trial court's duty under *Holloway*, *supra*, to inquire whether the conflict required appointment of separate counsel. The 6th Circuit disagrees, noting that a detailed request for trial court inquiry may not always be appropriate in conflict of interest cases, particularly where the trial court has discouraged continued discussion of the issue and where a more specific request could result in a lawyer's violation of the duty of confidentiality to his clients. *Holloway*, 435 U.S. at 485. Furthermore, an objection prior to the start of trial is not required: the attorney "is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." *Id*. at 485-486. In the case at bar, the conflict of interest did not arise until Payton received immunity at Harris' trial and was compelled to testify.


Emily Holt

Barnes v. Elo
339 F.3d 496 (6th Cir. 8/8/03)

Trial counsel not ineffective for failing to call medical expert where testimony could potentially hurt client as well as help him. This case is back before the 6th Circuit after remand for an evidentiary hearing on the issue of competency of trial counsel. At a bench trial, Barnes was convicted of breaking and entering, assault with intent to commit 2nd degree criminal sexual conduct, and felonious assault. Barnes argues his trial attorney rendered ineffective assistance of counsel (IAC) when he failed to call medical witnesses to testify to his post-polio syndrome where the assailant in the case "ran down the stairs" after attempting to rape a 12-year-old girl. Trial counsel did stipulate at trial that Barnes had post-polio syndrome and wore a leg brace. The Court remanded the case for an evidentiary hearing to determine whether and to what extent trial counsel investigated Barnes' medical condition, and why he failed to contact Dr. Waring, Barnes' treating physician.

At the evidentiary hearing, Barnes' trial counsel, Barnett, testified that prior to trial he had reviewed Dr. Waring's medical records, although he had not contacted him, and consulted with someone about post-polio syndrome. The defense at trial was misidentification, and he stipulated to Barnes' medical condition because the medical records also hurt Barnes. For instance the records revealed he walked with a limp (which the victim said her attacker did) and he could play basketball (and thus perhaps run down stairs) despite his condition. Waring testified that Barnes had post-polio syndrome; has difficulty going down the stairs; and would have a "herky jerky sort of motion down the stairs" which could be interpreted as a limp. Waring conceded that while Barnes may not be able to run like a normal person, he could move faster than his normal walking speed if he so desired. Barnes testified that he could not run; that he did not know he would be stipulating his medical condition until during the trial; and that the trial judge did examine his leg and observe him move through the courtroom during trial.

The medical records and testimony "included damaging information. . .and was less than compelling." Barnett's performance was not deficient, and Barnes suffered no prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). Even if the Court considered prejudice to Barnes (which it was not required to under *Strickland* since counsel's performance was not deficient), reversal was not required since the victim's description of her attacker and the composite picture fit Barnes "to a tee [sic]" and the judge was aware of Barnes' medical condition.

Judge Merritt dissent: would grant petition for writ of habeas corpus since Barnes appears to be innocent. Judge Merritt dissents, noting that since the defense was mistaken identity, the failure to investigate and present evidence about Barnes' medical condition was deficient. *Wiggins v. Smith*, 123 S.Ct. 2527, 2535 (2003). He also notes that "given all the evidence, it seems doubtful that Barnes was the perpetrator."

Maples v. Stegall
340 F.3d 433 (6th Cir. 8/19/03)

Maples plead guilty in Michigan state court to distribution of cocaine. He did so because his trial attorney assured him he could appeal the denial of a speedy trial claim. Unfortunately Michigan law would not allow such an appeal upon a plea of guilty. The 6th Circuit remands the case to district court to assess Maples' speedy trial argument as part of his ineffective assistance of counsel claim.

"Prison mail box rule" excuses procedural default for habeas purposes. The state claims that Maples' IAC claim is procedurally defaulted. After losing his state post-conviction motion in the trial court and Michigan Court of Appeals, he completed an application for leave to appeal to the Michigan Supreme Court. Michigan law requires such an application be filed no more than 56 days after the Court of Appeals decision. MCR 7.302(C)(3). 51 days after the Court of Appeals' decision, Maples called the prison mailroom, per prison policy, to ascertain the cost of mailing his application. He was told to call back 2 days later, which he did. Either that day (day 53) or the next (day 54), he delivered his application to the prison mailroom. The Michigan Supreme Court did not receive his application until the 57th day, and declined to file the application as it was procedurally defaulted under MCR 7.302(C)(3).

Federal courts will consider a procedurally defaulted claim in a habeas petition where the petitioner shows "that there was cause for the default and prejudice resulting from the default, or that a miscarriage of justice will result from enforcing the procedural default in the petitioner's case." *Lancaster v. Adams*, 324 F.3d 423, 436 (6th Cir. 2003). "'[C]ause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him. . . some objective factor external to the defense [that] impeded. . . efforts to comply with the State's procedural rule." *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)(emphasis in original). Because Maples completed his motion 5 days prior to the deadline, attempted to mail it at that time, and then had to entrust prison officials to timely mail it, he has established cause for his procedural default. The Court notes that it is not requiring Michigan to adopt the "prison mailbox rule;" it is simply holding that when a *pro se* prisoner attempts to deliver a motion for mailing in sufficient time for it to timely arrive at a court in the normal course of events, the "prison mailbox rule" excuses procedural default for habeas purposes. The prejudice resulting from the default is that the Court failed to consider Maples' motion.

Trial counsel deficient where he advises client he could appeal an issue despite a plea of guilty. Under *Wiggins v. Smith*, 123 S.Ct. 2527, 2542-4 (2003), the Court reviews Maples' IAC claim *de novo* because the Michigan appellate courts failed to assess its merits despite the fact the claim had been properly raised. Maples' trial attorney's advice was "patently erroneous," fell below "an objective standard of reasonableness," and cannot be considered "sound trial strategy." *Strickland v. Washington*, 466 U.S. 668, 688-689 (1984).

When determining whether prejudice exists in an IAC case involving a plea of guilty, reviewing court must consider merits of underlying claim. In order to establish prejudice under *Strickland* when the defendant has plead guilty, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). On the surface that standard is satisfied by Maples' unchallenged assertion that he would have gone to trial and not plead guilty but for his attorney's erroneous advice. However, *Hill* goes on to state that "[i]n many guilty plea cases. . . the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Id.* The 6th Circuit holds that it interprets this sentence to require a reviewing court to always analyze the substance of the petitioner's underlying claim, and that this inquiry "will be dispositive to the resolution of the habeas action 'in many guilty plea cases.'" Thus, the Court remands the case to the district court to assess whether Maples' speedy trial rights were violated.

Rockwell v. Yukins
341 F.3d 507 (6th Cir. 8/27/03)

Court *en banc* holds petitioner's right to present complete defense not violated where evidentiary rules required exclusion of evidence. This is the third time the 6th Circuit has considered this case. In 2000, the Court vacated the district court's grant of writ of habeas corpus because the district court had reviewed a "mixed petition" of exhausted and

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unexhausted claims. *Rockwell v. Yukins*, 217 F.3d 421 (6th Cir. 2000). On remand, the unexhausted claim was dismissed and the district court again granted the writ. A divided 3-judge panel of the 6th Circuit then reversed the district court's grant of Rockwell's petition, holding the state court did not unreasonably apply federal law on the right to present a complete defense when it excluded evidence, as more prejudicial than probative, that Rockwell's husband, the victim, had sexually abused their sons. *Rockwell v. Yukins*, 296 F.3d 507 (6th Cir. 2002). The full court voted to rehear the case *en banc*, and affirms the panel in the instant case.

Rockwell was convicted in Michigan state court of conspiracy to commit murder of her husband with her sons and sentenced to life in prison. She wanted to present a "talk therapy defense;" in other words, she wanted to argue that her participation in talks with her sons about killing their father was not intended to further an actual murder, but to allow them to vent their anger at their father for allegedly abusing them, sexually and otherwise. To further her defense, Rockwell wanted to present evidence that her husband had sexually abused their sons. The trial court excluded said evidence as not being material under MRE 404.

"Unreasonable" application of U.S. Supreme Court law does not mean "erroneous" or "incorrect" application. Rockwell contends that the affirmance of her conviction by the state appellate courts involved an unreasonable application of Supreme Court law. The 6th Circuit emphasizes that "unreasonable" is different from "incorrect" or "erroneous," and that the standard is objective unreasonableness. *Williams v. Taylor*, 529 U.S. 362, 409-412 (2000). The Court concludes that the state court's decision that the probative value of evidence of Mr. Rockwell's abuse of his sons was outweighed by the danger of unfair prejudice may or may not be in error, but it was not unreasonable.

"[T]he right to present a 'complete' defense is not an unlimited right to ride roughshod over reasonable evidentiary restrictions." Defendants must "comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Lawmakers can always establish rules excluding evidence from criminal trials. "Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *U.S. v. Scheffer*, 523 U.S. 303, 308 (1998). In the case at bar, it was not "objectively unreasonable. . . for the Michigan courts to conclude that 'other legitimate interests in the criminal trial process' outweighed Mrs. Rockwell's interest in presenting evidence of her husband's prior conduct." *quoting Scheffer, supra*. The evidence, if admitted, may have been used to acquit Rockwell not because of her lack of participation in the crime but because the jury felt Mr. Rockwell deserved to be killed. Furthermore, the evidence presented a risk of undue delay and confusion of the issues because the facts Rockwell wanted to introduce were disputed. Rockwell was not deprived of her ability to present a "talk therapy defense." She could still testify "that her sons hated their father because of his unspeakable behavior toward them over the years. . .[t]he court's ruling barred Mrs. Rockwell only from testifying that her husband's abuse of her sons was sexual in nature."

"The decision made by the Michigan court was a judgment call of the sort that judges make all the time. Some members of this court, had they been on the state bench, would have made a different call. We cannot say they would have acted unreasonably in doing so, particularly in view of the fact that the danger of undue prejudice could have been minimized by a cautionary instruction. What we can say, however, if that the call made by the Michigan Court was well within the court's discretion. . .and did not involve an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States."

Vroman v. Brigano
346 F.3d 598 (6th Cir. 9/22/03)

The Court holds Vroman's habeas petition is time-barred under AEDPA. On July 28, 1995, Vroman was convicted in Ohio state court of murder with a firearm specification. The Ohio Court of Appeals affirmed his conviction on June 24, 1996, and on December 18, 1996, the Ohio Supreme Court denied his request for leave to appeal. On August 11, 1997, Vroman filed a delayed application to reopen his appeal, Ohio Appellate Rule 26(B), and the application was dismissed as untimely. He filed a *pro se* appeal of this decision to the Ohio Supreme Court on October 31, 1997, and the Court dismissed his petition on January 21, 1998.

While the above pleadings were being filed, Vroman began working on his post-conviction motions. On September 24, 1996, Vroman filed a delayed petition to vacate or set aside his sentence. The trial court denied the petition as untimely on November 15, 1996. The Ohio Court of Appeals affirmed the trial court on April 15, 1997. On September 2, 1997, the Ohio Supreme Court dismissed his appeal. On November 12, 1997, Vroman filed a motion in the trial court requesting that it vacate its November 15, 1996, judgment. On December 31, 1997, the trial court denied this motion. On December 10, 1998, the Ohio Court of Appeals affirmed the judgment of the trial court. The Ohio Supreme Court dismissed his appeal on April 21, 1999.

On November 23, 1999, Vroman filed a *pro se* petition for writ of habeas corpus in the district court. The petition was dismissed as time-barred by the court on December 17, 2001.

Under 28 U.S.C. § 2244(d)(1)(A), Vroman's conviction became final on March 18, 1997, ninety days after the Ohio Supreme Court dismissed his direct appeal. Thus, in the

absence of any tolling, he had until March 18, 1998, to file his habeas petition. Vroman filed a delayed Ohio Appellate Rule 26(B) action in the Ohio Court of Appeals on August 11, 1997, which was dismissed by the Ohio Supreme Court on January 21, 1998. Because Vroman filed the 26(B) motion 146 days after his conviction became final, he had 219 days remaining of his AEDPA statute of limitations as of January 21, 1998. For Vroman's habeas petition filed November 23, 1999, not to be time-barred, he must receive tolling during the pendency of his state post-conviction action.

AEDPA statute of limitations not tolled when state post-conviction motion is not "properly filed" under state law. The AEDPA limitations period is tolled for that period of time "during which a *properly filed* application for State post-conviction relief or other collateral review. . .is pending." 28 U.S.C. § 2244(d)(2)(emphasis added). At issue in this case is whether Vroman's post-conviction petition was properly filed for purposes of the AEDPA. Under the Ohio post-conviction statute, Vroman had until September 23, 1996, to file his post-conviction petition. Vroman's petition was filed one day late, on September 24, 1996. "Properly filed" within the meaning of § 2244(d)(2) is "when [the petition's] delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example,. . . the time limits upon its delivery." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). Furthermore, "federal courts. . . defer to a state court's judgment on issues of state law and, more particularly, on issues of state procedural law." *Israfil v. Russell*, 276 F.3d 768, 771 (6th Cir. 2001), *cert. denied*, 122 S.Ct. 1985 (2002). The Ohio state court's determination of whether Vroman's petition was properly filed governs whether the action tolls the AEDPA statute of limitations. The Court further declines to apply the federal mailbox rule to this case, noting that Ohio courts have expressly rejected a mailbox rule. Vroman is not entitled to an evidentiary hearing on this issue since he only wants to submit evidence that the state court ruling that his post-conviction petition was untimely was unreasonable. This is a matter of state law, not a federal constitutional claim.

McAdoo v. Elo
346 F.3d 159 (6th Cir. 9/23/03)

McAdoo plead guilty in Michigan state court to one count of 2nd degree murder and two counts of assault with intent to commit murder and was sentenced to 3 life sentences to run concurrently. McAdoo claims his attorney misinformed him about the effect of a life sentence. The Court denies his petition for writ of habeas corpus.

Plea knowing and voluntary even if defendant told erroneous information about the consequences of plea, where misstatement occurred at sentencing. McAdoo first argues his plea was not knowing and voluntary because his attorney misinformed him about the consequences of the plea. McAdoo concedes he was aware he was receiving a life sentence, but argues that because of confusion about the consequences of a parolable life sentence in Michigan at the time, he was misinformed by his attorney about parole eligibility. Furthermore, at his sentencing the judge said he would receive "statutory life which is 20 years," and his attorney said nothing. This was an incorrect statement of the law which was corrected at a re-sentencing. The Court rejects McAdoo's argument, noting that the misstatement of law was made at sentencing, *after* the plea had been entered and accepted and after McAdoo acknowledged he knew he was receiving a life sentence. The relevant time for inquiry as to whether a plea is knowing and voluntary is at the time a plea is entered, not at final sentencing.

Petitioner not entitled to relief because he misunderstand the meaning of an unambiguous word where plea colloquy was adequate. McAdoo claims that he thought a life sentence meant a 20-year sentence. In *Ramos v. Rogers*, 170 F.3d 560 (6th Cir. 1999), the Court rejected Ramos' argument that he did not understand the real meaning of "probation" so his plea was involuntary and unknowing. "If we were to rely on Ramos' alleged subjective impression rather than the record, we would be rendering the plea colloquy process meaningless, for any convict who alleges that he believed the plea bargain was different from that outlined in the record could withdraw his plea, despite his own statements during the plea colloquy. . .indicating the opposite." *Id*., 566. An individual defendant's misunderstanding of a commonly used term cannot render a plea void. While acknowledging this is a closer case than *Ramos*, the Court holds "that a term unambiguous on its face and agreed to be the defendant in open court will be enforced. . . the term 'life sentence' is not ambiguous."

Plea to parolable life not illusory even though defendant will probably never get paroled. McAdoo also argues his plea was illusory because he obtained no benefit for entering a guilty plea. The Michigan Parole Board rarely grants parole to defendants sentenced to parolable life. While it may be true that parole is unlikely, "McAdoo did obtain his bargained-for benefit, the possibility of parole." McAdoo was facing a first-degree murder charge, which could result in life without parole, and entered a plea to parolable life. Thus, McAdoo did derive a benefit from his plea. Furthermore, "it is not necessary for the prosecutors or the court to explain the likelihood of parole to" defendants.

Trial counsel's performance may be deficient if counsel makes affirmative misstatements about parole possibilities and defendant relies on statements. Finally, McAdoo says his attorney was ineffective for misinforming him about the parole consequences of his sentence. In the context of a plea agreement, ineffective assistance of counsel claims require a defendant to prove his attorney's performance was deficient, *Strickland v. Washington*, 466 U.S. 668, 687 (1984),

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and that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). "[G]iving erroneous advice about parole may constitute deficient performance. Affirmative misstatements about parole possibilities are more objectively unreasonable that failure to inform the defendant about the parole possibilities. When defense counsel grossly misinforms a defendant about the details of parole and the defendant relies on that misinformation, the defendant may have been deprived of his constitutional right to counsel." (citations omitted) McAdoo says that his trial attorney told him he would serve at most 20 years in prison. If this is true, the Court says, his trial attorney's performance may have been deficient. Nevertheless McAdoo has failed to prove the prejudice prong of *Strickland*. The Court states that while a state court may have concluded that prejudice was proven, the Michigan state courts held otherwise, and this was not unreasonable. *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000).

Castleberry v. Brigano
2003 WL 22663236 (6th Cir. 11/12/03)

Conditional writ of habeas corpus granted where prosecution withheld *Brady* material. Castleberry was convicted in Ohio state court of aggravated murder and robbery. On federal habeas review, he argues the prosecution withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The 6th Circuit reverses the district court and grants Castleberry a conditional writ of habeas corpus that will result in the vacation of his convictions and sentence unless he is brought to trial within 90 days.

Soriano, a pot dealer, was shot and killed in his apartment. There were no leads as to the perpetrator until several months later when police contacted an inmate, Thomas. Thomas said Castleberry killed Soriano. Ultimately Thomas' friends also told the police that Castleberry killed Soriano, although some of these witnesses needed the police to tell them what Thomas had told police before they could make a statement.

Thomas and his friends testified for the prosecution at trial. Castleberry testified during the defense case, as did Correy, who lived in Soriano's apartment complex and said he heard the gunshot, went to answer a knock on the door by a man named "Albert" who pushed him back into his apartment, and saw 2 men running away. Conflicting testimony of witnesses was the only evidence presented at trial, as no physical or forensic evidence connected Castleberry to the crime.

At Castleberry's state post-conviction evidentiary hearing, additional facts were revealed about the investigation into the case. During the canvassing of the neighborhood following the shooting, police interviewed several people. Ms. Thomas, whose apartment was diagonal to Soriano's, observed 2 thin African-American men, one tall and the other somewhat shorter, arguing with Soriano, and heard one of the men say, "You mother———, I'll kick your ass." Ms. Neddles, also a neighbor, saw a car with 4 African-American men park in the apartment complex parking lot. 2 men got out of the car and walked toward the apartment building. She then heard shots. The 2 men who remained in the car drove away. Ms. Clark saw 2 African-American men walk toward the apartment building, and, a few minutes later, heard a car drive away from the parking lot at a high rate of speed. Furthermore, Soriano did not die from his injuries until a few months later. Soriano was interviewed at the hospital 2 days after he was shot. He said he did not know who shot him, but he had dark black skin, was 5'6"-5'8", had short hair, and was clean-shaven. At the time of the shooting, Castleberry had a goatee. Finally, after the police had interviewed Mr. Thomas, who became the prosecution's key witness at trial, they interviewed another man who told them that he heard Thomas himself plotted the robbery of Soriano. *None of the above information was ever revealed to defense counsel prior to trial.*

Withheld evidence must be favorable to accused: without evidence, was the verdict worthy of confidence? "There are 3 components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-2 (1999). "Favorable" mean "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *U.S. v. Bagley*, 473 U.S. 667, 682 (1985). As for "reasonable probability," "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

In determining whether withheld evidence is material under *Brady*, court must look at all evidence collectively, not item-by-item. In the case at bar, the state court's rejection of Castleberry's *Brady* claim was contrary to the Supreme Court's decision in *Kyles, supra*. *Kyles* requires that a reviewing court examine the withheld evidence collectively in determining whether it is material. *Id.*, 514 U.S. at 436. The Ohio appellate court applied an item-by-item determination of materiality.

The Ohio appellate court also unreasonably applied Supreme Court precedent when it determined Castleberry's trial produced an outcome worthy of confidence. "It [state appellate court] could not have reasonably believed that the out-

come of Castleberry's trial was worthy of confidence under *Brady*. . . [n]o reasonable court can have confidence in the decision of a jury that did not hear" (1) Soriano's description of his assailant contrasted by Castleberry's appearance at the time; (2) that Thomas, the key state witness, had said he planned to rob Soriano; and (3) neighbors who saw men who did not match Castleberry's appearance."

Short takes

***—U.S. v. Calor,* 340 F.3d 428 (6th Cir. 8/15/03):** The Court rejects Calor's claim that a Kentucky state court *ex parte* EPO hearing could not be used to convict him of possession of firearms while subject to a court order. 18 U.S.C. § 922(g)(8). Calor was given actual notice of the hearing when served by a summons and an opportunity to participate. The fact that he chose not to participate does not defeat the latter requirement.

***—Williams v. Meyer,* 346 F.3d 607 (6th Cir. 9/25/03):** At issue is whether it was "excusable neglect" for counsel for Williams to move for 2 extensions of time in the filing of objections to the magistrate's report and recommendation denying his petition for writ of habeas corpus. Three factors are relevant: (1) culpability of the party seeking relief; (2) whether party opposing relief will be prejudiced; and (3) whether the party seeking relief has a meritorious claim. *United Coin Meter v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983). Williams was not culpable as he filed motions for extensions of time; gave reasons for the requested extension; and only requested 51 days extra total. The requested relief will not prejudice the respondent. Finally, permitting the filing of objections to the magistrate's reports, which opens up the possibility of an appeal on the merits, creates "some possibility" of a different outcome. *INVST Financial v. Chem-Nuclear Systems* 815 F.2d 391, 398-9 (6th Cir. 1987). The district court is ordered to file Williams' objections.

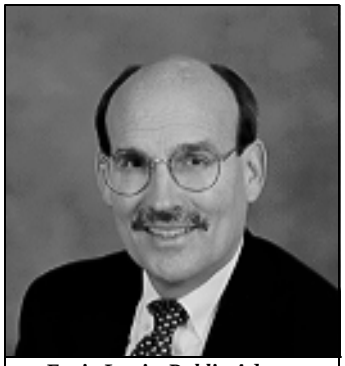
***—U.S. v. Jenkins,* 345 F.3d 928 (6th Cir. 10/9/03):** Jenkins was charged with possession with the intent to distribute 50 grams or more of crack after receiving a package containing said drugs in the mail. At trial the postal inspector testified that Jenkins told him that she had smoked crack cocaine in the past and that she was a current crack cocaine user. The trial court allowed this testimony to show that Jenkins had knowledge of what the package contained. The trial court did give a limiting instruction which cautioned jurors he evidence was admissible "only to the extent that you may determine it might be relevant to the issue of knowledge" as to what was in the packages. The Court holds this was inadmissible FRE 404(b) evidence. Jenkins' "prior crack cocaine usage is not probative of her knowledge of the contents of the package which would, in turn, establish her intentional participation in the distribution of crack cocaine. . . 'acts related to the personal use of a controlled substance are of a wholly different order than acts involving the distribution of a controlled substance. One activity involves the personal use of narcotics, the other the implementation of a commercial activity for profit.'" *quoting U.S. v. Haywood*, 280 F.3d 715, 721 (6th Cir. 2002). The Court further notes the evidence is highly prejudicial. Not only could the evidence lead a juror to believe Jenkins was a "bad person," it was the only evidence to indicate that she knew what was in the package, and the limiting instruction was an insufficient remedy.

***—U.S. v. Jackson,* 347 F.3d 598 (6th Cir. 10/20/03):** The government used a peremptory challenge to remove Turner, the only remaining African-American on the jury panel. Jackson made a *Batson* challenge, *Batson v. Kentucky*, 476 U.S. 71 (1981), and the government responded it struck Turner because it did not like his demeanor or attitude. The trial court concluded this was a legitimate, non-discriminatory reason and overruled the objection. While a trial court must carefully examine justifications for strikes when they are "predicated on subjective explanations like body language or demeanor," *McCurdy v. Montgomery County*, 240 F.3d 512, 521 (6th Cir. 2001), discriminatory intent was not obvious from the government's justification. Furthermore, Jackson failed to rebut the government's explanation with evidence that it was a pretext for discrimination. In fact, he did not respond at all when the government offered its justification. "A movant's failure to argue pretext may even constitute waiver of his initial *Batson* objection."

***—Abela v. Martin,* 2003 WL 22398701 (6th Cir. 10/22/03)**: This is an important case. A 6th Circuit panel held that Abela's petition for writ of habeas corpus was untimely because the statute of limitations was not tolled by the filing of a petition for writ of *certiorari* in the U.S. Supreme Court following state post-conviction litigation. *Abela v. Martin*, 309 F.3d 338 (6th Cir. 2002). The Court now hears the case *en banc* and holds Abela's petition was timely filed. The Court specifically holds the AEDPA statute of limitations is tolled from the filing of state post-conviction petition until conclusion of the time for seeking U.S. Supreme Court review of a state's final judgment on that application independent of whether the petitioner actually petitions the Supreme Court to review the case. This case overrules *Isham v. Randle*, 226 F.3d 691 (6th Cir. 2000), *cert. denied*, 531 U.S. 1201 (2001). ■

Emily Holt
Assistant Public Advocate
Frankfort

PLAIN VIEW . . .



Ernie Lewis, Public Advocate

United States v. Banks
2003 WL 22843793 (U.S. 2003)

The United States Supreme Court has added another case in its interpretation of the knock-and-announce requirements of the Fourth Amendment. This case followed *Wilson v. Arkansas*, 514 U.S. 927 (1995), *Richards v. Wisconsin*, 520 U.S. 385 (1997), and *United States v. Ramirez*, 523 U.S. 65 (1998).

Here, the question was whether a 15-20 second wait by the police following their knocking and announcing when executing a search warrant for crack cocaine was sufficient to meet constitutional standards. In a unanimous opinion written by Justice Souter, the Court held that the manner in which the search warrant was executed was constitutional.

The North Las Vegas police obtained a warrant for Lashawn Banks after receiving information that he was selling cocaine from his two-bedroom apartment. They executed the warrant at 2:00 p.m. while Banks was taking a shower. After knocking and announcing "police search warrant", they waited for 15-20 seconds and then broke open the front door with a battering ram. Banks came out of the shower to discover the police in his apartment. They found crack cocaine and guns. Banks entered a conditional plea of guilty when his motion to suppress was denied. The 9th Circuit reversed, and the United States Supreme Court granted *cert*.

The Court affirmed the standard they have been using on search warrant executions. The execution of a warrant is judged by asking whether the execution is reasonable under the totality of the circumstances. "[W]e have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones."

The Court relied upon exigent circumstances in finding that the execution of the search warrant here was reasonable. Although the Court found that the case was a close one, they held that "after 15 or 20 seconds without a response, police could fairly suspect that cocaine would be gone if they were reticent any longer." The exigency they found was that cocaine could be destroyed quickly and easily following the knocking and announcing. "[W]hat matters is the opportunity to get rid of cocaine, which a prudent dealer will keep near a commode or kitchen sink. The significant circumstances include the arrival of the police during the day, when anyone inside would probably have been up and around, and the sufficiency of 15 to 20 seconds for getting to the bathroom or the kitchen to start flushing cocaine down the drain."

The Court previously rejected a "drug exception" to knocking and announcing in *Richards v. Wisconsin*. One way to look at *Banks* is that they have created just such an exception through the back door. Counsel should resist that analysis, and instead use the totality of the circumstances of the particular execution to fashion an argument that the particular search was not conducted in a reasonable manner.

Commonwealth v. Brandenburg
Ky., 114 S.W.3d 830 (2003)

The Supreme Court has issued an important decision regarding the importance of the "neutral and detached magistrate" requirement for a valid warrant. The case involved an entry of a conditional plea of guilty to one count of possession of drug paraphernalia and one count of possession of marijuana. The evidence had been uncovered following the execution of a search warrant in Brandenburg's home. The warrant had been signed by the Lee County District Court trial commissioner, a nonlawyer who was married to the Victim's Advocate in the Lee Commonwealth's Attorney's Office. Brandenburg lost her motion to suppress. However, the Court of Appeals reversed, finding the trial commissioner not to be sufficiently neutral and detached pursuant to *United States v. Leon*, 468 U.S. 897 (1986) and *Crayton v. Commonwealth*, Ky., 846 S.W. 2d 648 (1992). The Supreme Court granted discretionary review, and affirmed the panel decision.

Justice Stumbo wrote the opinion. The stated holding is that "the trial commissioner, due simply to her marital status, was not the neutral and detached magistrate that the Fourth Amendment to the United States Constitution, Section 10 of the Kentucky Constitution, and the United States Supreme Court guarantee." The Court referred to Canon 2 and 3(e)(1) of the Code of Judicial Conduct which require a judge to "avoid impropriety and the appearance of impropriety" and to disqualify when his impartiality "'might reasonably be questioned.'" The Court relied upon *Dixon v. Commonwealth*, Ky. App., 890 S.W. 2d 629 (1994) to hold that a violation of the Code of Judicial Conduct could cause a judge to be viewed as no longer neutral and detached. Here, the fact

that a nonlawyer trial commissioner was married to a staff member of the Commonwealth's Attorney's Office was sufficient for the creation of an appearance of impropriety. "It is enough that the public might perceive that the trial commissioner is not impartial due to her husband's employment with the Commonwealth's Attorney's office, thereby creating an appearance of impropriety." It is significant that the mere appearance of impropriety created the issue. "We reiterate that there need not be an actual claim of bias or impropriety levied, but the mere appearance that such impropriety might exist is enough to implicate due process concerns."

The Court founded its holding on the Fourth Amendment. However, in interesting language, the Court also resurrected the notion that Section 10 in some instances might require more than does the Fourth Amendment. "While we have previously recognized that there is little difference in the language of Section 10 of the Kentucky Constitution and the Fourth Amendment to the U.S. Constitution, *Id*., this Court has at no time denied itself the right to enhance the protections afforded the citizens of this Commonwealth by the Kentucky Constitution. The need for such enhanced protection is particularly evident when the nature of the error goes to the accused's right to have a probable cause determination made by a neutral and detached judicial officer. An error of this magnitude taints the entire judicial process. The error can only be cured by suppression of any evidence obtained pursuant to the tainted search, regardless of the good faith of all the parties."

Justice Graves dissented, joined by Justices Cooper and Wintersheimer. The dissenters relied upon the fact that the trial commissioner's husband was not a lawyer and did not prosecute cases. As a result, there was no obvious bias present. The dissenters also rejected the idea that a nonlawyer trial commissioner might rely more upon the request of the Commonwealth's Attorney's Office for a warrant to issue as a result of the relationship with her husband victim's advocate. "[T]he majority's argument that a trial commissioner who is not a lawyer will give more credence to warrants prepared by the Commonwealth Attorney suggests that a trial commissioner must be a lawyer to be unbiased. Such contravenes Section 113 of Kentucky's Constitution, as well as KRS 24A.100, allowing non-attorneys to serve as trial commissioners in counties where an unbiased attorney cannot be found."

Taylor v. Commonwealth
2003 WL 22415373, 2003 Ky. LEXIS 227 (Ky. 2003)

A police officer in Graves County saw Joe Taylor run through a stop sign. He followed Taylor in an apartment complex while checking out his driving record. When he found out that he did not have a license, he attempted to stop Taylor, who sped off at a high rate of speed. Eventually, Taylor was stopped by other officers at a dead end street. He moved to suppress, but was overruled by the trial court. After a jury convicted him, he was sentenced to 30 years in prison for manufacturing methamphetamine, driving on a DUI-suspended license, and fleeing and evading police.

The Supreme Court affirmed the trial court on his ruling on the motion to suppress while reversing the conviction on other grounds. The Court relied upon *California v. Hodari D.*, 499 U.S. 621 (1991) to hold that no seizure had occurred because the defendant had not yielded to the authority of the police when the blue lights were first turned on. "[H]e led police on a high-speed chase…Taylor's seizure only occurred when the police physically apprehended him following the chase. Thus, the police officer's justification for initially attempting to stop Taylor is immaterial."

Davis v. Commonwealth
2003 WL 22319242, 2003 Ky. App. LEXIS 248 (Ky. Ct. App. 2003)

The McLean County Sheriff's Office learned that one Rodney Crick had an arrest warrant out on him, and that he was living with Allan David. They contacted the Kentucky State Police, and together they went to Davis' mobile home. One officer went to the front door and one to the back door. The officer at the front door heard someone tell him to come in. Once inside, the officer "noticed a thick haze of smoke and he smelled the distinct odor of marijuana." He saw Davis sitting on a couch along with someone else. The officer also saw a loaded handgun, rifles, and a shotgun. The officers asked Davis and his friend if anyone else was in the mobile home, saying they were looking for Crick. Davis said no one else was there; one Revlett then walked out, and was arrested when he was found with a syringe on him. One officer then searched the other rooms of the mobile home to see who else was present. He found a marijuana growing operation in the closet of the bedroom, a baggie full of marijuana, a glass pipe, other firearms, a plastic bag filled with methamphetamine, hemostats, and scales. Davis was indicted for trafficking in a controlled substance within 1000 yards of a school while in possession of a firearm and other charges. His motion to suppress was denied. The trial court found that the officers' initial entry had been consensual, that many of the items seen were in "plain view", and that the items in the bedroom had been seen as a result of a safety sweep. The trial court found that a ceramic container where the methamphetamine was found in the kitchen had been properly searched because it was within Davis' control and was thus a search incident to a lawful arrest. Ultimately he entered a conditional plea of guilty and was sentenced to 4 years in prison.

The Court of Appeals affirmed the trial court in a decision written by Judge Johnson joined by Judges Guidugli and Knopf. The Court held that the trial court had properly found the search to be justified by the safety check exception, relying upon *Commonwealth v. Elliott*, Ky. App., 714

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S.W. 2d 494 (1986). The Court stated that "the presence of a loaded handgun, rifles, a shotgun, drugs, and various individuals suspected of criminal activity constituted a '"'serious and demonstrable potentiality for danger.'"' To hold otherwise would severely undermine the ability of law enforcement officials to safely and effectively perform their duties. Accordingly, we hold that the trial court properly denied Davis' motion to suppress the items seized during the search of the bedrooms."

The Court also affirmed the trial court's decision regarding the search of the ceramic container in the kitchen, relying upon *Collins v. Commonwealth*, Ky., 574 S.W. 2d 296 (1978), and *Watkins v. United States*, 564 F. 2d 201 (6th Cir. 1977). The Court noted that the "search incident to arrest" exception to the warrant requirement hinges upon whether the item searched is within the "immediate control" of the individual arrested. This was defined as "the area from within which he might gain possession of a weapon or destructible evidence." Although the ceramic container was 8-10 feet from Davis, "the distance between the arrestee and the area to be searched is not dispositive…" The Court held that the "kitchen counter was within the immediate area where Davis might have 'gained possession of a weapon or destructible evidence'" and thus the search was reasonable and legal.

Baltimore v. Commonwealth
2003 WL 22462558, 2003 Ky. App. LEXIS 275 (Ky. Ct. App. 2003)

In April of 2002, Kelly Grandee had her credit cards stolen from her car. She contacted Officer Ray of the Fayette County Police Department and told him where her stolen cards had been used. Several days later, the loss prevention officer at K-Mart told Officer Ray that the same individual who had previously used the stolen cards had used them again, and that he had a videotape of the use. The police found the individual fitting the description riding his bike near K-Mart. Officer Ray obtained consent from Baltimore to search his person, and found a marijuana cigarette in his pocket and a K-Mart sales receipt from the earlier use of the stolen credit card. Baltimore was charged with the fraudulent use of a credit card and possession of marijuana. Baltimore's motion to suppress was denied, and Baltimore entered a conditional plea of guilty.

The Court of Appeals affirmed in a decision by Judge Huddleston, joined by Judges Emberton and McAnulty. The Court upheld the search, saying that Baltimore had consented to the search following the initial detention. The Court also affirmed the initial stop based upon the officer's identifying Baltimore as he rode on his bicycle as the same person who had been seen on the videotape. "Baltimore's appearance was consistent with all the physical characteristics, he was in the target are and he was riding a bicycle….Viewing these factors cumulatively rather than in isolation, we hold that the police presented sufficient specific and articulable facts to constitute reasonable suspicion to conduct an investigatory stop into Baltimore's potential involvement in the credit card offenses."

United States v. Bishop
338 F.3d 623, 2003 Fed.App. 0264P (6th Cir. 2003)

Wesley Bishop, a convicted felon, was sitting in a driveway in his car, with a loaded handgun, near the home of Tony Arnold. Officer Julian, of the Carter County, Tennessee, Sheriff's Office, appeared to serve an arrest warrant on Arnold. He talked briefly with Bishop at his car, and then went to the house to speak with Tony Arnold's girlfriend, who told him who was sitting in the car, a person the officer associated with a violent reputation. When he went back by the car, Bishop was no longer in his car. Officer Julian reached into the car and seized the loaded handgun, which resulted in a charge of felon in possession of a handgun. Bishop's motion to suppress was granted.

The Sixth Circuit reversed the decision in an opinion by Judge Kennedy, joined by Judges Cole and Williams. "[W]e hold that a police officer who discovers a weapon in plain view may at least temporarily seize that weapon if a reasonable officer would believe, based on specific and articulable facts, that the weapon poses an immediate threat to the officer or public safety." It did so under the reasoning that the gun, while not obvious contraband, could be seized based upon the officer's reasonable belief that it posed a threat to his safety. "Deputy Julian's concern for his safety was objectively reasonable: Julian had reason to assume that Bishop was a friend of Tony Arnold's, the man he had come to arrest. Julian could have reasonably inferred that Bishop, as Arnold's friend and a man with a reputation for violence, posed a confrontation risk. The presence of the handgun heightened the risk of violence in connection with a possible confrontation. Deputy Julian, who was surprised by Bishop's sudden and stealthy disappearance and had no clue as to Bishop's immediate whereabouts, was alone in a heavily wooded and sparsely populated area." The Court also found that Julian could seize the gun because it "posed a threat to public safety."

United States v. Boumelhem
339 F.3d 414, 2003 Fed.App. 0281P (6th Cir. 2003)

A number of federal agencies were investigating whether Boumelhem and his brother Fouad were attempting to send weapons to Lebanon. They began to focus on a 40-foot container that purportedly had engines in it. Once the container was deliver to a railroad yard, it was taken to Customs and searched, where numerous guns not listed on the bill of lading were found. Boumelhem was arrested and charged with violating numerous federal statutes. After his motion to suppress was denied, a jury convicted him, and he appealed.

The Sixth Circuit affirmed the Fourth Amendment issue. He argued first that a warrant was required to search the container. The Court rejected this contention, saying that border searches of materials or persons may be accomplished without a warrant, citing *United States v. Ramsey*, 431 U.S. 606 (1977). The Court rejected Boumelhem's argument that exports were subject to different border laws. Not only was the search authorized by statute, but it was conducted consistent with Fourth Amendment principles. "The border search exception generally provides that routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant…Further, every circuit that has considered the question has concluded, at least with regard to the circumstances before it, that the border search exception applies to 'exit searches' as well as searches of incoming persons and materials."

United States v. Patterson
340 F.3d 368, 2003 Fed.App. 0290P (6th Cir. 2003)

Officer Fair of the Memphis Police Department was given a "citizen complaint" regarding a "hot spot" for drugs in Memphis. The anonymous call had complained about drug sales earlier in the day. He went to the area and saw "'at least eight male blacks standing from the curb to the sidewalk to the top of the driveway.'" Patterson was in the group. The police approached the group of men, and they began moving away "while tucking their hands in their pockets." When one person was observed making a "throwing motion" all of them were ordered to stop and put their hands on a nearby car. Patterson was found with a handgun, and was arrested and charged with possession of a firearm by a felon. His motion to suppress was denied, and he was sentenced to 10 years in prison.

The Sixth Circuit reversed in an opinion by Judge Martin. The Court relied on *Florida v. J.L.*, 529 U.S. 266 (2000), a case in which "the anonymous tip was not enough, despite the inclusion of age, race, clothing type, and specific location of the defendant, to justify reasonable suspicion." Here, the anonymous tip did not rise to the specificity contained in the tip in *J.L.* The Court further placed little reliance upon the group's walking away from the officers. "Walking in the opposite direction from the police could be considered an indication of a person's fear of being caught participating in illegal activities, but it also could be purely innocent activity." Finally, the Court declined reliance upon someone in the group's throwing something away when the police arrived. "In order to search Patterson, the officers only could factor in Patterson's actions and the circumstances surrounding him alone in order to constitute reasonable suspicion."

Judge Kennedy dissented. Judge Kennedy believed that the factors dismissed by the majority were sufficient to constitute reasonable suspicion. "[T]he officers reasonably suspected that the men, Patterson included, were engaged in street drug sales because the men were loitering after dark in a location that was both generally known for street level drug sales and the subject of a recent drug sales complaint, the men attempted to evade police detection of their activity by concealing their hands and walking away, and one man in the group surreptitiously disposed of something in the bushes prior to concealing his hands."

United States v. Swanson
341 F.3d 524, 2003 Fed.App. 0289P (6th Cir. 2003)

Federal agents were investigating Daniel Rick for trafficking in illegal firearms. They obtained a warrant for his arrest and sought to execute it at a tattoo parlor. During the execution of the warrant, Swanson and others were asked to remove themselves. An agent talked with Swanson. Swanson told the agent that a Grand Am driven by Rick on occasion belonged to him. Swanson was released, but the Grand Am was seized. A search of the Grand Am revealed a firearm. Swanson was charged with being a felon in possession of a firearm. His motion to suppress was denied, and he was convicted at a jury trial.

The Sixth Circuit affirmed the conviction in an opinion by Judge Boggs. The Court held that the agents had probable cause or seizing the Grand Am under the automobile exception to the warrant requirement. They further found that there were exigent circumstances justifying the warrantless seizure and search. "First, the agents had probable cause to seize and search the vehicle. Rick had used the Grand Am to deliver an automatic weapon thirty days earlier to a confidential informant; thus, the vehicle was used as an instrumentality of the crime. The agents also had ample facts at their disposal to support their belief that there was further evidence of a crime inside the car."

United States v. Malveaux, aka Vinny the Shark
2003 WL 22738533, 2003 U.S. App. LEXIS 23728, 2003 FED App. 0411P (6th Cir. 2003)

You have to love a case with "Vinny the Shark" in the case title. Here, Malveaux was under investigation by the Chattanooga Police Department. They knew that he had sold cocaine on five occasions to a confidential informant when they were told that within the previous 72 hours he had sold cocaine out of his hotel room and that he was armed with a pistol and had lots of cash. Detective Noorbergen took this information to a "Judicial Commissioner," an office that appears to be similar to a trial commissioner in Kentucky. The Commissioner issued a search warrant for Malveaux's hotel room. The police rented a room near Malveaux' room and began to watch it. They saw a person enter and leave, and found out from him that he had just bought cocaine. They persuaded him to knock on the door again, and when the door opened, the officers entered and executed their search warrant, finding crack cocaine, a gun, and money. Malveaux

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moved to suppress the evidence obtained pursuant to the warrant, alleging that the Commissioner was not authorized to issue the warrant. The district judge found that the officers had relied in good faith on the Commissioner's warrant, and overruled the motion. After a conditional guilty plea was entered, Malveaux appealed.

Judge Siler authored the opinion affirming the conviction and search. The Court did not address the state law issue regarding whether the Commissioner was a proper magistrate under Tennessee law. Rather, the Court relied upon the good faith exception. "Commissioner Meeks was authorized to issue search warrants. The police officers properly obtained the search warrant because, premised upon their objective good faith, they had no reason to question whether Commissioner Meeks possessed the authority to issue the search warrant." 5 Cal.Rptr.3d 195

SHORT VIEW . . .

1. *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003). The United States Court of Appeals for the Ninth Circuit has held that requiring federal defendants, here a parolee, convicted of certain violent crimes to give blood for the purpose of creating a DNA Database violated the Fourth Amendment. The Court rejected the argument that this was a "special needs" search, because it had a law enforcement purpose. The Court weighed the interest of the government in preventing and solving crime with the parolee's reasonable expectation of privacy in his own body. The Court also rejected the government's argument that this was similar to the taking of fingerprints. Look for review by the US Supreme Court, as this holding conflicts with *United States v. Kimler*, 335 F. 3d 1132 (10th Cir. 2003).
2. *United States v. Bridges*, 344 F.3d 1010 (9th Cir. 2003). A warrant authorizing a search of a business for "evidence of crimes that includes but is not limited to: …records and documents…contracts, or correspondence …computer hardware …software …passwords …telephone toll records…all fax machines…all telephone answering machine… cassettes… typewriter ribbons…phone numbers contained in the memory of an automatic telephone dialer, and…Caller ID box…" was too broad to meet constitutional requirements. This warrant failed to meet particularity requirements mandated by the Fourth Amendment. The Court rejected the "permeated with fraud" exception, which allows for broad warrants where a business can be shown to be "a scheme to defraud or that all of the business's records are likely to evidence criminal activity." *United States v. Kow*, 58 F. 3d 423 (1995).
3. *State v. Goss*, 834 A.2d 316 (N.H. 2003). The New Hampshire Supreme Court has relied upon its own Constitution to hold that a defendant has a reasonable expectation of privacy in his garbage.
4. *Cooper v. State*, 587 S.E.2d 605 (Ga. 10/6/03). The Georgia Supreme Court has held that the Georgia implied consent statute violates the Fourth amendment because it authorizes a blood, breath, or urine seizure without probable cause. Further, the "special needs" doctrine does not allow for the seizure on a lesser standard. The statute read that any driver is "deemed to have given consent,…to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested [for DUI]…or if such person is involved in any traffic accident resulting in serious injuries or fatalities." Where probable cause exists based upon a DUI, the implied consent statute did not trouble the Court. However, it is where an accident occurs that the Fourth Amendment is violated because in such a case probable cause to believe the defendant was driving drunk was not necessarily present absent other circumstances.
5. *People v. Murphy*, 5 Cal.Rptr.3d 195 (Cal. Ct. App. 2003). Where the police violate knock and announce principles, evidence seized as a result is not admissible under the inevitable discovery exception unless the state can prove that a subsequent lawful search was going to take place. ■

Ernie Lewis
Public Advocate

Hope is a state of mind, not of the world. Hope, in this deep and powerful sense, is not the same as joy that things are going well, or willingness to invest in enterprises that are obviously heading for success, but rather an ability to work for something because it is good.

-- Vaclav Havel

CAPITAL CASE REVIEW

SIXTH CIRCUIT COURT OF APPEALS

Bowling v. Parker, 344 F.3d 487 (6th Cir. 2003) (request for rehearing en banc still pending)

Majority: Moore (writing), Gilman, Gibbons

This case involves the shooting deaths of Eddie and Tina Earley in front of the Earley Bird Cleaners in Lexington. In Kentucky's first AEDPA case to emerge from the 6th Circuit, the district court's complete denial of relief is affirmed.

Extreme Emotional Disturbance. The Court refuses to infer from the fact that a car accident preceded the shootings that the accident could have triggered an uncontrollable rage, and finds insufficient evidence to support instruction on EED. "This type of minor car accident in itself does not create a reasonable explanation or excuse for a double homicide." And the catchall mitigation instruction was sufficient to allow the jury to consider Bowling's mental state in mitigation.

Ineffective Assistance of Counsel. The Court picks apart and dismisses all of Bowling's claims of IAC, criticizing his post conviction theory of defense, and his lack of evidence of prejudice. Despite Bowling's verified claim in his 11.42 that his attorneys spent no more than one hour with him prior to trial, the Court blames Bowling for failure to submit a personal affidavit verifying the figure. The Court criticizes the affidavits from trial counsel admitting they never interviewed Police Chief Walsh because they don't also admit they only met with Bowling for one hour. The Court posits reasons why trial counsel may have done this or that, and concludes no IAC.

Complete Denial of Evidentiary Hearing. The Court admits Bowling repeatedly sought an evidentiary hearing in state court. However, the Court denies a hearing because "bald assertions and conclusory allegations do not provide sufficient ground to warrant requiring the state to respond to discovery or to require an evidentiary hearing."" The Court concedes that Bowling argued he could not make more than bald assertions *because* he was denied an evidentiary hearing. However, the Court states that "[w]ithout some evidence in support of Bowling's implausible theory of the case…we cannot say that the district court's decision to deny an evidentiary hearing was an abuse of discretion."

Johnson v. Bell, 344 F.3d 567 (6th Cir. 2003)

Majority: Norris (writing), Boggs
Minority: Clay dissenting

This Ohio AEDPA case involves the brutal murder of petitioner's wife, whose body he conceded he helped dispose of. The sole issue concerns the performance of defense counsel during sentencing. The Sixth Circuit affirms denial of relief.

Ineffective Assistance of Counsel During Sentencing. Two lawyers who completely lacked any previous death penalty experience represented Johnson at trial. The sentencing phase consisted of testimony by Johnson, who denied he killed his wife, and blamed his co-worker, who was on work-release from prison, plus one other witness. The other witness was a minister who testified Johnson told him he knew that ultimately one day he would have to give an accounting of his life to God.

Post conviction counsel put on a hearing, where family members, trial counsel, and experts on capital sentencing testified. Still, the Sixth Circuit rules that even if the lawyers were ineffective, Johnson's counsel did not sink to the level of counsel in *Wiggins v. Smith*, —U.S. —, 123 S.Ct. 2527 (2003) because there was nothing to suggest they ignored known leads. Even more important, Johnson did not show that but for his counsel's ineffectiveness, the outcome would have been different.

Clay dissent. Clay would remand this case for an evidentiary hearing to develop the record as to counsel's investigation into the question whether Johnson's family, social or psychological history was adequate under an objective standard.

Smith v. Mitchell, 2003 WL 22435758 (rendered October 28, 2003)

Majority: Suhrheinrich (writing), Batchelder
Minority: Cole (concurring and dissenting)

In this Ohio pre-AEDPA case, the primary issue is ineffectiveness of trial counsel for failure to present adequate mitigation evidence at sentencing. The Sixth Circuit here affirms the district court denial of relief.

No *Wiggins* violation. When Smith withdrew his insanity plea, trial counsel chose to rely on the court appointed psychologist (who had already found Smith sane) for mitigation. She concluded Smith was functioning near average in terms of everyday activities, noted some substance abuse, and stated he was not organically impaired, but lacked em-

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pathy. Despite argument regarding failure to bring out Smith's history of mental hospitalization and shock treatment, the Sixth Circuit rules this was a good-enough job, as Smith failed to point to any evidence that was overlooked. The Court distinguished Smith's case from *Wiggins v. Smith*, — U.S. —, 123 S.Ct. 2527 (2003) and from *Powell v. Collins*,328 F.3d 268 (6th Cir. 2003)(counsel ineffective for failure to make reasonable investigative efforts). The Court notes there were five mitigation witnesses in Smith's case, and the psychologist based her report on a "comprehensive" picture of Smith's family, social, and psychological background.

Not Entitled to Independent Defense Mental Health Expert. The Sixth Circuit here limits *Ake v. Oklahoma*, 470 U.S. 68 (1985) to apply only to cases involving a plea of not guilty by reason of insanity, or where the state presents at sentencing psychiatric evidence of future dangerousness. Smith was not entitled to an independent defense psychiatrist because "*Ake* does not entitle him to the psychiatrist of his choosing, only a competent psychiatrist."

Cole's Dissent. Cole dissents on the *Ake* issue, only, concurring in the rest of the opinion. Cole asserts that Smith was entitled to the assistance of an independent defense psychiatric expert (as opposed to the court's expert), citing cases which have interpreted *Ake* to apply whenever the defendant's mental condition is at issue relevant to culpability or punishment.

***Frazier v. Huffman*, 343 F.3d 780**
(rendered September 8, 2003)

Majority: Gilman (writing), Clay
Minority: Batchelder (concurring and dissenting)

In this Ohio AEDPA case, the Sixth Circuit reverses and remands for a new penalty phase trial.

Ineffective Assistance of Counsel – Penalty Phase. Frazier introduced no mitigation evidence at the penalty phase. Yet the Ohio Court of Appeals rejected Frazier's ineffectiveness claim, stating that from the record it could reasonably be concluded that trial counsel were appraised of Frazier's brain injury, and as a matter of trial strategy deemed this avenue of defense unworthy of pursuit. Affidavits from post conviction experts indicated that Frazier's brain injury, from a fall from a ladder, resulted in impairment of the frontal lobe, the site of impulse control, social judgment, and reasoning. The reports also suggested a potential correlation between the injury and Frazier's criminal conduct.

The Sixth Circuit rules that "[w]e can conceive of no rational trial strategy that would justify the failure of Frazier's counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on the hope that the jury would spare his life due to any 'residual doubt' about his guilt." The state court's determination that Frazier's counsel performed in a competent manner during the penalty phase was not simply erroneous, but unreasonable.

Batchelder dissent. Batchelder dissents on the ground that Frazier's claim of IAC is procedurally defaulted, because the Ohio Court of Appeals never reached the merits due to *res judicata*. ■

Susan Jackson Balliet
Capital Post Conviction
Frankfort

The idea that the sole aim of punishment is to prevent crime is obviously grounded upon the theory that crime can be prevented, which is almost as dubious as the notion that poverty can be prevented.

— H.L. Mencken

MENTAL HEALTH ISSUES: THE HEART OF THE MATTER

Thinking Comprehensively and Consistently About Mental Health Issues

1. Prior to and independent of current offense
- Prior convictions
- Prior aggravating acts
- Prior attempts to obtain services

2. Prior to and related to current offense
- Crime derives from mental illness
- Crime occurs while client's behavior structured by illness

3. During current crime
- Ability to form specific or general intent, premeditate, implement a plan, have malice
- NGRI/Sanity
- Affirmative defenses (coercion, duress, domination by others)
- Self-defense and imperfect self-defense

4. Immediately following current crime
- Waivers of rights, consent to search
- Behavior alleged to be inculpatory, including statements or admissions to non-law enforcement

5. Interrogations
- Waiver of right to counsel
- Voluntariness of confessions or statements
- Reliability (8th amendment right) of confessions or statements

6. Custodial Behaviors
- Medication
- Custodial adjustment

7. Working with defense counsel/defense team
- Competence to assist counsel
- Ability to assist in defense
- Ability to understand

8. Entering plea
- Competence to enter a plea

9. Behaviors in court during trial
- What jury/judge sees
- Responding to witness testimony
- Client's Testimony
- Keep pace with courtroom proceedings

10. During sentencing
- Allocution

11. Post-conviction

What We Need to Know and Do To Consider and Utilize Mental Health Issues

1. We need to know something about relevant mental impairments

2. Those that compromise intellectual functioning
- mental retardation
- brain damage
- mental illness – psychosis, dissociation, physical illness

3. Those that produce loss of contact with reality
- psychosis – schizophrenia, depression, mania, bipolar, schizoaffective, PTSD
- dissociation – PTSD
- physical illness – fevers, diabetes, stroke, tumors

4. Those that produce a multitude of intellectual, emotional, and physical problems
- trauma – PTSD
- chronic maltreatment and neglect

5. We need to know the major risk factors that can produce mental illness and disorder
- Multigenerational mental illness and disorder
- Multigenerational exposure to trauma, maltreatment, and neglect
- Exposure to trauma, maltreatment, and neglect
- Closed head injuries
- Prenatal conditions – exposure to alcohol and drugs, maternal malnutrition and disease, maternal injury
- Perinatal conditions – loss of oxygen in birth process, head trauma from delivery process
- Exposure to environmental toxins
- Serious physical illness

6. We need to be attentive and perceptive in interactions and communications with the client

7. We need to investigate sufficiently to determine whether mental health assessment is warranted
- medical history and records
- mental health history and records
- social welfare agency records
- employment/military records
- school records
- prior criminal, prison, juvenile records
- history of family mental illness
  - multigenerational genetic history
  - diagnosed and undiagnosed illness and disorders
  - family dynamics
- interviews with family historian(s)

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It Is Our Duty to Assure Reliable Assessment

1. Understanding the elements of reliable forensic mental health assessment
- psychosocial history, obtained from and independent of client
- medical examination
- mental status evaluation
- additional diagnostic procedures

2. Undertaking the investigation necessary for reliable assessment
3. Obtaining necessary investigative assistance
4. Obtaining necessary expert assistance
5. Working with investigators and experts

The Common Pathway:
Maltreatment and Neglect

1. Maltreatment deprives child of
- Important relationships
- Raw materials of self esteem
- Socialization necessary to become competent workers, parents, and citizens

2. Abuse and neglect impair the child
- Cognitively
- Emotionally
- Socially
- Physiologically

3. Maltreatment causes children to
- Be helpless
- Have no sense of self
- Be dominated by negative feelings
- Develop self defeating styles of relating to others
- Devote energy to managing danger rather than learning through love and play
- Have arrested and stunted development
- Develop either-or perspective
- Have difficulty concentrating
- Not understand the motives of others
- Have depressed verbal abilities
- Show increased arousal and insecurity

4. Lack of attachment due to chronic neglect
- Prevents child from developing a safe base from which to grow
- Dysregulates physiological and emotional states
- Causes child to be disoriented and confused
- Prevents children from learning how to interpret or express their own emotions and use emotions as guides for appropriate action
- Keeps children from forming secure attachments
- Makes children overreact to internal and external cues of terror & arousal

5. Children's responses to trauma depend on
- Source, nature and duration of the trauma
- Age when the trauma occurs
- How much social support is available
- How many other problems the child faces
- The presence of wise, caring adult
- Presence of mental illness in family
- Educational level of caretakers
- Supportive educational climate
- Early intervention
- Intelligence
- Good self esteem

Presenting and Defending Mental Health Issues

Mental health as mitigation:
In what manner did the client's mental and emotional functioning influence him in the commission of the crime?

Goals of the presentation
- To describe the experiences and disorders of the client that are relevant
- To use these experiences and disorders to explain why the crime was purposeful for the client – why, from the client's perspective, it happened
- To describe what could have prevented the crime from happening

Direct Examination of the Defense Expert
1. Credentials and experience – highlight those things that explain why this person's expertise will provide helpful information

2. Method of forensic evaluation and how followed here
- Focus of the evaluation
- Did you follow a particular methodology in conducting the evaluation?
- What are the steps that you followed?
- Why did you … [take each step]?
- How did you reach your conclusion?

Did you reach a conclusion concerning the effect of the client's emotional and mental functioning on the commission of the crime?

3. What is your conclusion …
- Concerning the client's mental and emotional functioning?
- And its effect on him at the time of the crime?

4. Explore the factual bases of the conclusions deriving from the client's life history, medical examination, clinical interview/mental status examination, and diagnostic studies
- Break into small questions and answers
- Testify in lay-friendly language
- Tie into lay testimony

- Explain the significance of each fact and how it links to other facts in supporting
- Bring out and explain contradictory facts as you go
- Use demonstrative evidence as much as possible – charts, videos of client, x-rays, CT scans, MRI's, excerpts from historical records, excerpts from movies showing the subjective experience of mental illness

5. In light of the client's mental and emotional functioning, explore whether anything could have been done to prevent the crime from happening

Cross Examination of the State's Expert

1. Investigation
- Credentials and experience
- Who s/he has worked for in other cases – conclusions
- Review prior testimony – learn style, biases, misconceptions, views on relevant issues
- Conduct thorough pretrial interview concerning information available, what considered significant, methodology, reasoning in support of conclusions

2. Develop strategy for cross
- Where is the expert vulnerable, where not vulnerable
- What can be accomplished to aid the defense case – don't overreach
- How to accomplish this

3. Go after the expert in terms that make sense to the fact finder

4. Don't engage in theoretical debates

5. Focus on fact-based matters as much as possible
- Relevant information known, not known
- Misinterpretation of information
- Use of diagnostic measures that do not support conclusions

Lay Witnesses – Direct Examination

- Establish relationship between client and witness – show how that provided good opportunity to come to know client
- Focus on events and incidents – tell the story of each in light of overarching themes
- Evoke emotional as well as narrative content
- Put into humanizing context – the witness's other experiences with client, impressions of client, knowledge of what kind of person client is

Lay Witnesses – Cross Examination of State's Witnesses

1. Investigate
- relationship with client
- biases toward client
- deals/favors
- content of testimony
- others who know the same content and can contradict

2. Limit the significance of the testimony
- not know much else about client
- embellishing what do know

I claim to be no more than an average man with less than average ability. Nor can I claim any special merit for such non-violence or continence as I have been able to reach with laborious research. I have not the shadow of a doubt that any man or woman can achieve what I have, if he or she would make the same effort and cultivate the same hope and faith. Work without faith is like an attempt to reach the bottom of a bottomless pit.

— Mahatma Ghandi ■

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The doors we open and close each day decide the lives we live.

-- Flora Whittemore

MORE TIPS TO CONSIDER IN THE REPRESENTATION OF GIRLS: PART II OF A SERIES ON THE REPRESENTATION OF GIRL CLIENTS

A Common Scenario

As noted in our first article, many girls enter the judicial system as a result of status behavior. There is national evidence that girls are detained for status offenses, violations of probation, and minor offenses at greater rates than are boys.[1] Because the initial charge does not seem serious, an attorney may be tempted to take shortcuts. Often, in those early offenses, the child is very glad to abet the attorney because the client just wants to put this behind her and to get out of detention. In such a case, a girl will often be willing to say what she thinks the attorney or the court wants to hear or take an easy plea offer with conditions that can not possibly be met just to get out of the courtroom and return home.

Often, a very short pre-hearing meeting between the client and the attorney ensues with little substantive information passed. Then, a 30-60 second hearing occurs where the client makes promises she cannot possibly keep. Subsequently, the client leaves the courtroom and everybody is happy — for the moment. However, if an attorney takes that path, they are likely to soon see that client again. This next meeting might be tense because the client is now detained or under a "show cause" order for contempt. The client may very well blame the attorney for letting her plead to such "outrageous conditions" at the first hearing. The attorney's duty to effectively represent that client has now been compromised.

How can an Attorney Avoid This Situation?

Attorneys must establish relationships based upon trust. Communication is a vital element in the attorney-client relationship. Rule 1.4 of the Kentucky Supreme Court Rules directs attorneys to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.[2] Further, the attorney should explain a matter to the extent necessary to enable a client to make informed decisions.[3] This process takes time, especially with adolescent, female clients. When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of [minority] age, mental disability or for some other reason the lawyer is obligated to put more effort into the relationship in order to maintain as normal a client-lawyer relationship with the client as is possible.[4]

For most adult clients, trust is usually established when the client believes that the attorney explains what measures need to be taken, takes them and an expected result follows. Simple actions such as, returning phone calls promptly or being polite to family members also help foster the attorney-client relationship. It often does not take a great deal of time to win the confidence of an adult client. However, the case is much more complicated when dealing with young, female clients. The attorney will accomplish much more if she becomes involved with the client at as early a stage as possible. You can do more for a child who is in court for their first run-away charge than a child in court for the fifth time for a public offense. Foremost, the court will be more receptive at the start of a youth's trouble than after multiple violations and appearances. Secondly, early intervention saves the child needless trauma. Thirdly, the child may be more likely to trust if the initial relationship is established on good terms, rather than after several negative experiences through the court system.

Communication is Key

Age and maturity appear to be factors in the type of information an attorney can elicit from a client.[5] Maturity directly affects a person's understanding of cause and effect, consequences of actions and understanding of circumstances surrounding one's behavior. Often an attorney may be able to extract the information he needs from an adult client without forming a relationship or understanding the totality of events based on adults ability to convey important facts and details. This can seldom be said of young, female clients. Much more information and interaction is necessary to develop rapport and extract important information.

An additional challenge for the male attorney, will present itself if the client has been abused by older males.[6] Unfortunately, as noted in our first article, such is often the case with these vulnerable clients.

How do I Build Trust with a Young Female Client?

The quick answer is "time." Unfortunately, time is usually in short supply for an attorney, especially a public defender. The attorney must make the most of the time available and begin to develop trust from the initial contact with the client. This involves a great deal of active listening and asking lots

of open-ended questions. Multiple visits or sessions may be required to develop the depth of conversation needed to obtain the information necessary to investigate and prepare a juvenile females defense. Extra time may be required. For example, if a young girl is appearing in court for the first time, the attorney could explain this to the judge and either ask for more time to interview the client or ask that that case be heard at the end of the docket so that you have more time to speak to the client. Also, the court might be willing to continue the case so that you could have a meeting with the client and her family in your office without being under strict time constraints. This is often a most difficult task based on heavy caseloads and trial dockets.

To effectively represent young female clients, the attorney must understand the cause of the behavior. The reason they are in court is usually a symptom of a larger problem. For example, if the client is charged as a runaway, the attorney needs to find out why the girl ran. Such status offenses that bring girls into the system usually are indicative of a larger, systemic - family of origin problem. This vital information is rarely obtained quickly or easily, but if not acquired, the attorney can rest assured that she will see this client many times for some version of the same charge (new charge or contempt). If the child's home environment is not fully understood, defense counsel can do more harm than good in representing the child both in defense of the charges and in seeking the least restrictive disposition. When a child's real problems at home are not identified, her behavior often escalates to more serious charges.

Practical Suggestions for Interviewing Young, Female Clients

As with any child client, the family should be interviewed. The attorney may want to begin the interview with all family members present — to explain the basic premise of the court system and entertain questions. The attorney can observe interactions between family members. Pay close attention to body language. Note whether the client seems to be intimidated. Who does the client sit next to, who does she seem to avoid? How do they interact with one another? Does one person tend to stifle discussion? Is there a dominant person? How the family interacts will tell the attorney as much about them as any responses they make. These observations can provide important insight especially if your client is not forthcoming in that initial interview. While talking with the family may reveal important information, the attorney must talk to the client alone.

Record Review and Investigation

As noted above, to stop the cycle of court appearances, contempt and violations, the attorney must learn what is causing the behavior.[7] Often, a young girl on her first charge might not understand the seriousness of her situation, especially if she has more experienced street-wise friends. The attorney can counteract this misinformation by treating this case with the utmost seriousness and letting the client know that she expects her (client) to do the same. As noted in the first article, there are many possible causes including low intelligence, abuse, school failure and family fragmentation. A search for these causes should include a review of her records.[8] School records are often a good starting point. If the child has been in a special education program, the records should be very detailed with information about behavior and intelligence. Another source could be records on the family kept by social service agencies. Often the most crucial information must come from what the client herself is willing to reveal. For example, if she is being molested by a close family member, it may not be revealed by any of the available records. Then, if the attorney learns this information, what does she do with it? The information revealed is privileged. The attorney may intervene if she believes that the client will be seriously harmed. Many abuse victims do not initially want to leave their abuser. Can an attorney ethically ask the court to send a girl to the shelter if she does not want to go? As the attorney for the child, you are to represent her interests, not your determination of her best interests. If you cannot persuade the client to seek alternative shelter, you cannot argue against her wishes unless you are confident that she will suffer bodily harm. Even in that situation, you are not ethically obligated to reveal information learned from client confidences to the court. SCR 3.310, Rule 1.6 is permissive, not mandatory. Should you decide to reveal those concerns and argue against your client's express wishes, you have likely damaged the attorney-client relationship and it may be necessary for new counsel to be appointed. The child client is unlikely to share such information with any future lawyers now that the trust established previously was violated. The best practice is to work hard to persuade a client to act to protect herself with your help. This approach requires time, good listening skills, investigation of alternative placements and reasonable options for the client.[9] Try to find out where the client feels safe. If an alternative placement is a viable alternative, request the court to order a temporary change in custody instead of detention for the minor offenses. This minor request may save time and deter future legal problems. If placement out of the community is inevitable, try to prepare client for the experience by explaining the process.

Conclusion

As defense counsel we must protect our client's rights to due process of law. Some clients are more vulnerable than others when it comes to understanding the legal system and participating in their defense. The effort demanded to represent more vulnerable clients is often greater than that needed to represent a client who can truly aid us in his or her defense. The representation of adolescent girls presents real challenges and offers genuine rewards.

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Endnotes:

1. Francine T. Sherman, GIRL'S JUSTICE INITIATIVE, *Girls in the Juvenile Justice System: Perspectives on Services and Conditions of Confinement*, 2003.
2. Kentucky Supreme Court Rule 1.4(a).
3. Kentucky Supreme Court Rule 1.4(b).
4. Kentucky Supreme Court Rule 3.130(1.14) CLIENT UNDER A DISABILITY
5. American Bar Association Juvenile Justice Center, Juvenile Law Center, Youth Law Center, *Talking To Teens in the Justice System: Strategies for Interviewing Adolescent Defendants, Witnesses, and Victims*, June 2000. Th Foundation also launched the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice in 1997. The mission of the Network is to develop new knowledge regarding the assumptions on which the juvenile justice system functions, and to improve legal practice and policy-making with accurate information about adolescent development. More information can be found at their website: http://mac-adoldev-juvjustice.org.
6. Sandra Simkins and Sarah Katz, *Criminalizing Abused Girls*, VIOLENCE AGAINST WOMEN, Vol. 8 No. 12, December 2002,1474-1499.
7. DPA 2002-2004 Strategic Plan goal of providing holistic legal representation to clients.
8. IJA-ABA Juvenile Justice Standard 4.3, S*tandards Relating to Counsel for Private Parties*, emphasizes the affirmative obligation of the attorney to investigate a case promptly and fully.
9. SCR 3.130, Rule 1.14 ■

Resources Available

The Girls' Justice Initiative (GJI) is a national collaboration of organizations and individuals dedicated to promoting equity and justice for girls involved in the juvenile justice and related systems. GJI identifies areas for reform, develops policy recommendations through research, public education, and advocacy. Further, GJI promotes gender responsive policies and practices so that fewer girls enter the justice system and those in the system receive just treatment which is responsive to their needs and nurtures their strengths. Recently, GJI released the first of three reports exploring the impact of justice system practices and policies on girls. The report, *Girls in the Juvenile Justice System: Perspectives on Services and Conditions of Confinement*, is based on surveys of juvenile court judges and juvenile defense attorneys nationally, as well as, interview with system-involved girls in five states. The report concludes that:

- the justice system does not connect girls with effective, strength-based community services
- the three most significant gaps in community and probation services for girls are:
  1. education about sex, sexuality and services for pregnant and parenting girls;
  2. vocational training and education; and
  3. mental health services;

- the four greatest gaps in services for girls in placement are:
  1. diagnosis and treatment of mental health needs;
  2. overcrowding and inadequate physical space;
  3. inadequately trained staff; and
  4. inadequate treatment of physical and medical needs.

The report can be cited in motions on behalf of alternative dispositions for girls. Often, the juvenile system functions separately from community organizations where both judges and attorneys are not even aware of programming and services for young females in their communities.

The full report and other valuable resources can be found at www.girlsjusticeinitiative.org.

Fall seven times, stand up eight.

— Japanese Proverb

PRACTICE CORNER
LITIGATION TIPS & COMMENTS


Misty Dugger

Avowal Testimony by the Witness, Not the Attorney, is Necessary to Preserve Error

In *Partin v. Commonwealth* Ky., 918 S.W.2d 219, 223 (1996), the Kentucky Supreme Court explained that **trial attorneys must offer avowal testimony from the witness himself or herself in order to preserve such an issue for appellate review**:

> "A review of the record discloses that appellant did not request that an examination be conducted outside the presence of the jury and offer the testimony by avowal under RCr 9.52. As stated in *Cain v. Commonwealth,* Ky., 554 S.W.2d 369 (1977), "without an avowal to show what a witness would have said an appellate court has no basis for determining whether an error in excluding his proffered testimony was prejudicial." Counsel's version of the evidence is not enough. A reviewing court must have the words of the witness. As a result, we find this issue has not been preserved."

More recently, the Court has refused to review these unpreserved issues under the palpable error standard when the witness's own testimony is not taken by avowal. In *Commonwealth v. Ferrell,* Ky., 17 S.W.3d 520 (2000), the Court specifically noted the trial attorneys duty under KRE 103 and RCr Rule 9.52 to properly preserve avowal testimony for appellate review. The Court went on to note,

> "Ferrell's argument that this Court should evaluate this issue pursuant to RCr 10.26 (palpable error) if we determine his failure to offer an avowal renders it unpreserved only magnifies the problem. Not only would we have to find prejudice, but we'd have to determine without knowing Ferrell's answer to his counsel's question, that "manifest injustice has resulted from" the trial court's ruling which did not permit Ferrell to answer." *Id*. at 525, n 11.

Preserve Exhibits for the Record on Appeal

All trial exhibits are not automatically transferred to the appellate court with the appeal. Civil Rule 75.07(3) provides:

> Except for (a) documents, (b) maps and charts, and (c) other papers reasonably capable of being enclosed in envelopes, exhibits shall be retained by the clerk and shall not be transmitted to the appellate court unless specifically directed by the appellate court on motion of a party or upon its own motion.

To insure that your exhibits are included in the record on appeal, make sure the exhibits comply with CR 75.07. First, pre-mark exhibits to keep track of your exhibits and to save time where there are many exhibits or a lengthy trial. Second, photograph large exhibits and include the original documents of any enlarged displays. By providing photographs of introduced exhibits, the Clerk is able to prepare the record and put all your trial exhibits with the appealed record. This will allow the appellate judges to get a complete look at all the exhibits introduced at trial and make a complete appellate record. This is especially important when a power-point presentation is used in trial that may not be clearly visible on the videotape record of the trial. Finally, conduct an exhibit count with the clerk at the end of the trial to make sure all exhibits are in the clerk's possession and the record sheet of exhibits correctly shows what was introduced and what was just marked for identification.

Take Advantage of Valuable Criminal Justice Resources Available on the Web

- KY Statutes: http://www.lrc.state.ky.us/KRS/TITLES.HTM
- KY Court of Justice page: http://www.kycourts.net/Supreme/SC_Main.shtm
- Ky Clemency information http://dpa.ky.gov/text/cj.html
- NLADA Litigation Performance Guidelines: http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines
- ABA Capital Performance Guidelines: http://www.abanet.org/deathpenalty/DPGuidelines42003.pdf
- The Sentencing Project: http://www.sentencingproject.org/
- DPA *The Advocate*, since 1997: http://dpa.state.ky.us/library/advocate/default.htm
- Evidence Manual: http://dpa.ky.gov/library/advocate/sept00/default.htm
- Preservation Manual: http://dpa.ky.gov/library/advocate/nov00/default.html
- Information on Kentucky's current inmate population is now available online at http://www.cor.stat.ky.us/~KOOL/. Or go to www.cor.state.ky.us and then click on the button for K.O.O.L.

Practice Corner needs your tips, too. If you have a practice tip to share, please send it to Misty Dugger, Assistant Public Advocate, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to Misty.Dugger@ky.gov. ■

COMMUTATION OF STANFORD'S DEATH SENTENCE MIRRORS KENTUCKIANS DESIRE TO NOT KILL 16 AND 17 YEAR OLD KIDS

Kentucky law now allows the death penalty for children 16 and 17 years of age who are convicted of a capital crime. KRS 640.040, but Kentuckians want that changed.

The people of Kentucky do not want those who commit crimes while they are 16 or 17 years old to be subject to the death penalty. Governor Patton's commuting Kevin Stanford's death sentence December 8, 2003 is consistent with what Kentuckians have clearly said they want.

The UK Survey Research Center has conducted two statewide polls asking in the Spring 2000 what sentence is preferred when an aggravated murder is committed by a 16 or 17 year old and in the Summer 2002 whether a bill to eliminate the death penalty in the 2003 General Assembly was favored or opposed.

In 2000, 79.5% of those polled in the state who gave an answer said that the most appropriate punishment for a juvenile convicted of an aggravated murder in Kentucky was a sentence other than death. Only 15.5% of Kentuckians believe that death is the most appropriate penalty for a juvenile who is convicted of an aggravated murder.

In 2003, the poll indicated that Kentuckians supported a bill to eliminate the death penalty for 16 and 17 year olds by a 2 to 1 margin. 63% of the respondents said they favored such a bill. 32% said they opposed such a bill. 5% said they had no opinion/did not know. While 21% strongly opposed such a bill almost twice as many Kentuckians, 37%, strongly favor it.

Nationally, support is low for the death penalty for juveniles. The Gallup Poll conducted from May 6-9, 2002 with 1,012 adults nationwide found that 26% favored it while 69% opposed it. The trend in this country is away from juvenile death penalties, Indiana recently passed a law doing away with the death penalty for those under 18, the Missouri Supreme Court recently ruled the death penalty for those under 18 unconstitutional in Missouri, and the federal government does not have the death penalty for 16 and 17 year olds.

Representative Robin Webb and Senator Gerald Neal filed bills in the 2003 General Assembly to eliminate the death penalty for 16 an 17 year olds but neither were called for a vote in Committee.

"The juvenile death penalty is a time when two wrongs don't make a right. The crime Stanford committed was clearly wrong. But implementing the death penalty for a crime committed by a juvenile is wrong too. Medical research tells us the brains of juveniles are not yet fully developed - which means we can't expect them to act like adults. We shouldn't treat them like adults," said Debra Miller, Executive Director of Kentucky Youth Advocates.

Public Advocate Ernie Lewis stated that "the days of allowing for the death penalty for children in America are numbered. The majority of states do not allow it. The federal government, while having a death penalty for adults, does not allow it for juveniles. 4 members of the United States Supreme Court have given a clear indication that they believe it to be unconstitutional. The Missouri Supreme Court recently indicated that the death penalty for one who is a child at the time of the killing is cruel and unusual punishment in violation of the 8th Amendment to the United States Constitution. The question is not whether this punishment will end, but when. Hopefully now that Kentucky no longer has anyone on death row who was a child when he committed his crime, we will pass legislation abolishing the penalty prior to the US Supreme Court declaring it unconstitutional."■

KATIE WOOD IS ELECTED KACDL PRESIDENT

Kathryn G. Wood (Katie) was elected November 21, 2003 as President of the Kentucky Association of Criminal Defense Lawyers for a two year term beginning January 1, 2004. She is a partner in the firm of Stanziano & Wood, P.S.C., 310 West Columbia Street, Somerset, Kentucky 42501, (606) 678-4230. KACDL is a statewide Association of criminal defense attorneys and public defenders that provides education, assistance for attorneys facing sanction and through **Robert W. Lotz** of Covington, Ky. a presence at the General Assembly to promote laws that advance a balanced approach to assuring justice.

Katie said, "We would like for KACDL to be an association for and dedicated to all of the lawyers in Kentucky who maintain the strength and stay motivated to continue to diligently defend our clients. Likewise, KACDL needs each and every one of you. Please contact the KACDL Membership Co-Chairs, **Dan Goyette** at 200 Advocacy Plaza, 719 West Jefferson Street, Louisville, Kentucky 40202, (502) 574-3720; Fax (502) 574-4052; or Email: goyette@thepoint.net or **Jerry J. Cox**, Clontz and Cox, LLC, 115 Richmond St., P.O. Box 1350, Mount Vernon, Ky. (606) 256-5111, Fax: (606) 256-2036, or any KACDL member in your area to become a member of KACDL."

Katie has practiced since her admission to the Kentucky State Bar in 1996 in Somerset. She received her JD from Salmon P. Chase College of Law in 1995 following her obtaining a Bachelors of Arts degree from Eastern Kentucky University in 1992.

She practices in both State and Federal Courts, with the vast majority of her practice centering upon the representation of those accused of crimes. She handles cases ranging from juvenile court through federal court - and ranging from trial to appellate litigation.

Katie has been an active member of the Kentucky Association of Criminal Defense Lawyers since 1996, then under the leadership of Past President, David Steele. She has served as a board member from 1998 through 2001; under the leadership of past-president Mark J. Stanziano; and past-president Rebecca DiLoreto; and then from 2001 through 2003 as First Vice-President under the leadership President, Sam Manly. Katie has served as the KACDL representative to the Criminal Justice Council's Juvenile Justice Committee from 1998 through 2003. In addition to local, state, and national bar associations, Katie also serves as a board member for the Kentucky Bar Foundation. She devotes many hours each year to her own education and training in effort to better represent her clients.

Katie Wood

Katie has enjoyed practicing in Somerset, the place which is her home. She graduated from Somerset High School in 1988. She is the oldest of the three children in the family (learning early to defend accusations) with her sister, and her brother, very close in age. Jennifer Gregory Cothron, sister, is a pharmacist and also lives in Somerset. Thomas Allen Gregory, her brother, has his masters degree and Rank I in secondary education and teaches biology and chemistry in Louisville. Her parents, Dr. Allen H. Gregory and Mrs. Joyce M. Gregory also live in Somerset and are very supportive. Without a doubt the very most important part of Katie's family, even above her devotion to her work, is her son, Tyler Gregory Wood, who is now already 3 ½ years old. He, too, already has some courtroom stories of his own!

Public Advocate **Ernie Lewis** said, "I am delighted that Katie Wood has been elected the new President of KACDL. She is an outstanding trial attorney, and brings new energy and vision to this significant organization of criminal defense lawyers. I pledge to work with Katie to help KACDL achieve its potential as the voice of criminal defense lawyers in Kentucky." ■

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Thoughts to Contemplate

If there is anything the nonconformist hates worse than a conformist, it's another nonconformist who doesn't conform to the prevailing standard of nonconformity.

— Bill Vaughan

Learning is not compulsory... neither is survival.

— W. Edwards Deming (1900 - 1993)

For the things we have to learn before we can do them, we learn by doing them.

— Aristotle (384 BC - 322 BC), Nichomachean Ethics

Leadership and learning are indispensable to each other.

— John F. Kennedy (1917-1963), speech prepared for delivery in Dallas the day of his assassination, November 22, 1963