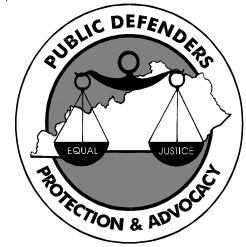


25th Anniversary of The Advocate

# The Advocate



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

Volume 25, Issue No. 3 May 2003

## A Promise within Reach: *Gideon's 40th Anniversary*



*Anthony Lewis*



*Commonwealth Attorney  
George Moore*



*Public Protection & Regulation  
Secretary Janie Miller*

- **DPA Avoids Further Budget Cuts**
- **Full Time System Near Completion**
- ***Miller-El*: Racial Discrimination in Jury Selection**
- ***Gideon* Resolution Passes the 2003 KY House of Representatives**
- **31st Annual Public Defender Conference, June 10-11, 2003:  
Celebrating 40 Years of *Gideon***

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- DPA Home Page** <http://Dpa.ky.gov/>
- DPA Education** <http://Dpa.ky.gov/train/train.htm>
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- The Advocate (since May 1998):**  
<http://Dpa.ky.gov/library/advocate/default.htm>
- Legislative Update:**  
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- Defender Annual Caseload Report:**  
<http://Dpa.ky.gov/library/caseload.html>

Please send suggestions or comments to DPA Webmaster  
100 Fair Oaks Lane, Frankfort, 40601  
or [webmaster@mail.pa.state.ky.us](mailto:webmaster@mail.pa.state.ky.us)

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**DPA'S PHONE EXTENSIONS**

During normal business hours (8:30a.m. - 5:00p.m.) DPA's Central Office telephones are answered by our receptionist, Alice Hudson, with callers directed to individuals or their voicemail boxes. Outside normal business hours, an automated phone attendant directs calls made to the primary number, (502) 564-8006. For calls answered by the automated attendant, to access the employee directory, callers may press "9." Listed below are extension numbers and names for the major sections of DPA. Make note of the extension number(s) you frequently call — this will aid our receptionist's routing of calls and expedite your process through the automated attendant. Should you have questions about this system or experience problems, please call Patricia Chatman at extension 258.

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- Capital Appeals** - Michelle Crickmer #134
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- Capital Trials** - Joy Brown #131
- Computers** - Ann Harris #130/#285
- Contract Payments** - Ruth Schiller #188
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- Juvenile Dispositional Branch** - Shannon Jones #220
- Law Operations** - Karen Scales #111
- Library** - Will Geeslin #120
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**You can stand tall without standing on someone. You can be a victor without having victims.**

**-- Harriet Woods**

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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.

*The Advocate* is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

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**FROM THE EDITOR...**

**Anthony Lewis** helped DPA celebrate the 30th Anniversary of Gideon with an *Advocate* article. We reprint it here. Anthony Lewis is speaking at the 2003 KBA Convention and will be presenting the annual award named in his honor at the 2003 DPA Annual Awards dinner in June. **House Resolution**. House Resolution 111 sponsored by Representative Kathy Stein passed the House on February 25, 2003 by a vote of 94-0. It recognizes March 18, 2003, as “Gideon Day” throughout the Commonwealth, in recognition of the decision of the United States Supreme Court requiring that counsel be provided to indigent criminal defendants. This follows the KBA’s resolution printed in the February 2003 *Advocate* and the Spring *Bench and Bar*. **DPA Celebrates Gideon Day**. On March 27th, over 120 DPA employees and other criminal justice professionals met in Frankfort to discuss the future of indigent defense in Kentucky for the next decade. The gathering was addressed by Chief Justice Lambert, Commonwealth Attorney George Moore and Public Protection & Regulation’s Cabinet Secretary Janie Miller and Public Advocate Ernie Lewis. We reprint the remarks of George Moore and Janie Miller in this issue and will print those of the Chief Justice and the Public Advocate in the next issue. There were members of the Public Advocacy Commission, clients, private criminal defense attorneys, and participants from the state of Minnesota’s Public Defender Office, Fred Freidman and Lenny Castro, Kentucky State Budget Office, Kentucky Bar Association, Bruce Davis and Ben Cowgill, Kentucky Medical Examiner’s Office, Kentucky Domestic Violence Association, Kentucky State Auditor’s Office, Kentucky Department of Mental Health, Access to Justice, Department of Corrections, Department of Criminal Justice Training, Kentucky Criminal Justice Council, Department of Criminal Justice Training, the Department of Juvenile Justice, Lincoln Village Youth Development Center, Administrative Office of the Courts, University of Kentucky, Kentucky State University, Northern Kentucky University, and the Governor’s Office of Policy Management.

**Funding for DPA and the Full-Time System**. The General Assembly spared DPA budget cuts. The completion of the full-time statewide public defender system is near. **Adam Kinney** is featured in this issue as one implementing the promise of *Gideon*. **Racial discrimination in jury selection** is a serious problem in the criminal justice system. It has been addressed by the US Supreme Court in *Miller-El*. It is reviewed in this issue. **31st Annual Defender Conference**: Don’t miss it. See page 39 for info. Come celebrate 40 years of *Gideon*.

**Correction**: *The Advocate*, Vol. 25, Issue No. 1, incorrectly listed the authors of the following article, “Prosecutorial Misconduct in Capital Cases in the Commonwealth of Kentucky: A Research Study (1976-2000).” The article was written by **Roberta M. Harding J.D.**, Wilburt Ham Professor of Law, University of Kentucky, and **Bankole Thompson Ph.D.**, Professor of Criminal Justice and Dean of Graduate Studies, Eastern Kentucky University. *The Advocate* apologizes for any confusion this caused.

**Ed Monahan**, Editor

## Living Greatly in the Law

*This article originally appeared in **The Advocate**, Vol. 15, No. 1 (1994) on the 30<sup>th</sup> Anniversary of Gideon. It is reprinted on the 40<sup>th</sup> Anniversary of Gideon with permission of Anthony Lewis.*

### Our Response to Gideon

When the *Gideon* case was decided, now more than 30 years ago, I thought this country would respond in the spirit of the Supreme Court's unanimous judgment. I believed that the states and the Federal Government would promptly and fully meet the obligation to assure counsel for all who faced criminal charges without the money to pay a lawyer.

How wrong I was. Today Congress often fails to appropriate sufficient funds for the defense of indigent Federal defendants, and many states and localities are trying to reduce funding as the caseload balloons.

### The Burden Falls on Lawyers Representing the Poor

The result is to put an increasingly heavy burden on lawyers who devote themselves to defense of the poor. They bear an extraordinary responsibility: not just to stand up for indigent defendants but really to maintain faith in our system of justice. The public does not always understand their role, as hardly needs to be said in this age of outcry for more jails, more punishment, more convictions. But the public's sense of justice will be diminished, in time, if people are railroaded to prison because no adequate defense was made on their behalf.

### Texas as an Example

An acute example of inadequate legal resources is the situation faced today by those on death row in Texas: 368 men and 4 women. As many as 70 of them have no lawyers to help them through the crucial final efforts to avoid execution. That is twice as many unrepresented as a year ago, despite repeated appeals to the Texas bar and help from out-of-state lawyers.

*Gideon* did not cover post-conviction remedies; in those processes there is no constitutional right to counsel. But no one who understands how capital cases work in this country can doubt the crucial importance of counsel at the final stages. It is, literally, a matter of life and death. Many convictions have been set aside in Federal habeas corpus proceedings because of grave constitutional errors, and a significant number of convicted persons have actually been found innocent. So it is a sad comment on the state of justice that not enough Texas lawyers are willing to volunteer for the representation of men and women on death row. And, of course, it is a comment on the state of Texas that, unlike other states with large death row populations, it provides neither money nor lawyers itself.

### Public Defenders Do Society's Work

Lawyers who volunteer or work at modest salaries to represent the poor are doing society's work. But I do not think that it should really be regarded as a burden. It is an honor that gives meaning to their professional lives.



Anthony Lewis

### Lawyers Redeem Us from Injustice

Again and again in American history lawyers have come forward to redeem our society from cruelty and injustice. Often it is only a few brave lawyers, but they bring honor to the profession. I think of those who defended witnesses before Congressional committees in the McCarthy days, or helped others facing charges of Communist associations. Or of Charles Evans Hughes, who during the Red Scare of the 1920's represented Socialists who had been elected to the New York Legislature but were being denied their seats. Or of Gilbert E. Roe and Walter Pollak and the others whose briefs informed the Holmes and Brandeis dissents in the early free speech cases that led, eventually, to the rights we now enjoy under the First Amendment.

### Kentucky Public Defenders Live Greatly in the Law

The lawyers who make Kentucky's indigent defense system work are in a great tradition. They prove what Justice Holmes said long ago: "It is possible to live greatly in the law."

**Anthony Lewis**  
***The New York Times* (Retired)**  
**1010 Memorial Drive**  
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**Anthony Lewis**, twice winner of the Pulitzer Prize, is a columnist for *The New York Times*. Resident in Boston, he travels widely in this country and abroad. He has also covered the Supreme Court for *The Times*, and been chief of its London Bureau. Mr. Lewis was born in New York City on March 27, 1927. He attended the Horace Mann School in New York and received his B.A. degree from Harvard College in 1948. From 1948 to 1952 he worked for the Sunday Department of *The Times*. In 1952 he became a general assignment reporter for the *Washington Daily News*. In 1955 he won his first Pulitzer Prize for national reporting, for a series of articles in the Daily News on the dismissal of a Navy employee as a security risk. The articles led to the employee's reinstatement. Mr. Lewis joined the Washington Bureau of *The Times* in 1955, to cover the Supreme Court, the Justice Department and other legal subjects. In 1956-57 he was a Nieman Fellow at Harvard, studying law. In the following years he reported on, among other things, the Warren Court and the Federal Government's responses to

the civil rights movement. He won his second Pulitzer Prize in 1963 for his coverage of the Supreme Court. He is the author of three books: *Gideon's Trumpet*, about a landmark Supreme Court case, *Portrait of a Decade*, about the great changes in American race relations, and (in 1991) *Make No Law: The Sullivan Case and the First Amendment*. He has published numerous articles in legal journals. Mr. Lewis was for fifteen years a Lecturer on Law at the Harvard Law School, teaching

a course on The Constitution and the Press. He has taught at a number of other universities as a visitor, among them the Universities of California, Illinois, Oregon and Arizona. Since 1983 he has held the James Madison Visiting Professorship at Columbia University. He has received a number of honorary degrees. In 1983 he was the Elijah Parish Lovejoy Fellow at Colby College. In 1987 he delivered the John Foster Memorial Lecture at University College, London. ■

## DPA Avoids Further Budget Cuts, Full-Time System Near Completion

The 2003 General Assembly has passed a budget that for the most part avoided raising revenue and cutting most state agencies' funding levels by 2.6%. The potential of 5.2% and even 9% cutbacks was avoided.

The Department of Public Advocacy was spared the 2.6% budget cuts. Along with prosecutors in County Attorneys and Commonwealth's Attorneys offices, DPA was not cut in FY03 or FY04. The specter of having to turn back cases, a very real possibility if DPA's budget had been cut further, was avoided.

### This Year's Budget Remains Consistent with the Spending Plan

DPA began the year with a budget outlined by the Governor's Spending Plan. The Spending Plan incorporated the 1% budget reduction of FY01 and the 3% budget reduction of FY02. As a result, the Spending Plan failed to fund 26 positions. Those 26 positions remain unfunded in House Bill 269, the budget bill. DPA will continue to implement House Bill 269 for this year.

The total budget for DPA for FY03 (the current year) is \$28,520,500. This represents the 3% budget reduction from FY02, and includes no new money. This includes \$23,925,300 in General Fund dollars, \$1,569,300 in federal funds (mostly to fund the Protection and Advocacy Division), and \$3,025,900 authorization to spend revenue collected from the DUI fee, the partial fee, and the court cost bill.

### The Budget for FY04 Includes 2 New Offices

DPA is funded for FY 04 at \$29,852,200. This mostly continues the existing FY03 budget. It includes raises for all merit employees of \$1080. Non-merit employees receive no raise in FY04. It also includes 11% increase to cover health insurance costs. 26 positions remain unfunded.

However, the General Assembly authorized DPA to open new offices in Boone and Harrison Counties to cover 5 additional counties. Included in the authorization are 11 additional positions. As of the end of FY04, 117 counties will be covered by a full-time office. Only Barren, Metcalfe, and Campbell Counties will remain as contract counties. I will be requesting authorization to cover these 3 counties from existing revenue sources to complete the full-time system before the end of FY04.

### DPA had Significant Support in the General Assembly

On the whole, DPA is fortunate to have received this budget for the remaining part of the biennium. While 26 positions remain unfunded, DPA avoided further budget reductions. More importantly, DPA will be able to move forward toward its primary policy goal, that of completing the full-time system.

The most important deficit remaining is the high caseloads being carried by staff attorneys. That will be the focus for the 2004 General Assembly. ■

**Ernie Lewis**  
**Public Advocate**  
[elewis@mail.pa.state.ky.us](mailto:elewis@mail.pa.state.ky.us)

### Counsel for the Poor

Reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, can-not be assured a fair trial unless counsel is provided for him.

- *Gideon v. Wainwright*, 372 U.S. 335 (1963)

## Remarks from the 40<sup>th</sup> Anniversary Celebration of *Gideon v. Wainwright* on March 27, 2003

### A Different Path, A New Mindset

**George Moore, Commonwealth Attorney**

I have a new-found appreciation for the fact that at trial I go first on voir dire. As I have listened to the comments of the other folks this morning, they echo some of the things that I wanted to say. Ernie told me that he wanted me to talk a little about the future of public defenders. It is good to be here.

I do have to tell you that it was a pleasure when Ernie asked me to come and speak to this group and to be part of this event. Clearly *Gideon* is one of the seminal cases of criminal law and our generation. I say our generation fully realizing as I look around that there are a number of you in this room who lack the ability to remember 40 years ago. Jerry Cox you do and I will pick on you too. Sadly I do remember 40 years ago and the times that have come. But those 40 years mark a time of societal change that has addressed most of the egregious forms of discrimination and oppression that are known to modern democracy. Now clearly we have a number of issues still to confront and we have a long way to go but it is not only appropriate, I think it is healthy and certainly fun to take time to celebrate the joys of successes that we have celebrated. I would hasten to add as I share comments with you and state proudly that Attorney General John Breckinridge of our beloved Commonwealth of Kentucky was one of 22 state's attorneys general who joined in an amicus brief with the United States Supreme Court calling on the court to overrule the lower court in *Gideon*. I mention that because I think as I contemplate the challenge to define the future of public advocacy it is crucial to remember that fact in the process. For many, and sadly I think it is true for some in Kentucky, there is a belief that the adversarial nature of prosecution and defense must define not only the trial process but also the entire relationship between these two key participants in the criminal defense system. I propose today as I did to a small group of my colleagues just recently and as I intend to our entire gathering in August, as I address a topic that I have been asked to address there, that we must indeed, we can find a different path.

This proposal involves a mutual commitment to a new mindset. I hope I don't step on toes but for some time I have observed a trend that promotes an attitude of distrust, suspicion, antagonism and even animosity toward prosecutors when I see public advocates come to practice. I will concede that there have been times when I feared that that might represent a policy decision. I don't think so because the reality is that it is not a universal perception but it was prevalent enough that it captured my notice and distressed me both professionally and personally. Now granted that position and that

thought process were not antithetical to the image of public defenders. As being bleeding heart dogooders who would find no devious tactic unsatisfactory in the representation of a client, that was often at least given passive acceptance when we as prosecutors would gather in the hospitality room following our conferences. But the reality is that the mutuality of stereotyping makes it no less unacceptable nor less counterproductive. It is also a caricature that even when engaged with humor is a mindset that we can no longer afford or countenance as a profession.

I am pleased to stand here today stating publicly that not only do I have the utmost respect for Ernie Lewis but I consider him a valued colleague and perhaps more importantly and it is important that I say that on a personal level I consider him to be a friend. We have developed a relationship that forges a crucial partnership in advocating for the needs of each other in the process of budgeting and resource allocation. The General Assembly session which was just concluded two days ago stands as testimony I believe to the wisdom and success of the paradigm that I would ask us to adopt. Many observers this year told me how impressed they were when advocating for funds for our respective agencies, each of us added with sincerity and conviction that the other must be fully funded for the justice system to function properly. You see we both feel passionately about the people we represent in this system.

Clearly *Gideon* proclaims that indigent defendants have a constitutional right to representation and a competent counsel. I would contend with equal sincerity that the same constitution offers protections to the basic rights of victims of crimes. Victims seek protection under the same sacred document, as do defendants. In the final analysis you see each of our groups represents and protects individuals who have no one else to speak for him or her. So often defendant and victim alike are members of our society who have no lobby group, who have no effective power base, and who do not have either the individual wealth or the power to compel respect and fair treatment. Absent dedicated men and women who are willing to sacrifice the lure of wealth and power and prestige that comes with practice in private law firms, these vulnerable members of society would be left without competent advocacy on their behalf from either side. That is one reason that Ernie and I are both committed.



Commonwealth Attorney  
George Moore

I appreciate Ernie’s words when he said as some of us look at the ends of our career. It was fun during this legislative session and you all need to know if you don’t how much work and effort Ernie puts into the legislative process and how effective he is in that venue on your behalf. One of the other things that often elicits humor is that when we are both in the building and I end up being here full time during legislative sessions, that when we are both in the building we generally have lunch together - but don’t tell anybody else outside of this room. This year we spent some part of that time talking about the fact that we are both able to see retirement.

But one of the things that both of us want to accomplish before we give it up is to have loan forgiveness for the newest people who choose to follow us in our respective fields of public service. That is also the reason that I call on you today, to do all in your power to protect the rights of you clients when the Commonwealth charges them with a crime, I would note - almost always correctly so.

I respect you for your commitment, your effort and for your dedication but at the same time I would ask you to join me in either a new or renewed sense of mutual respect. I would ask personally that each of you take the opportunity when you return to your community to tell your prosecutors that you value their dedicated public service because together we can fight like the dickens in the courtroom but we can work together in all of those other arenas for effective and fair administration of justice for all of the citizens of our Commonwealth and of our nation. That is after all why all of us decided to do what we do. I don’t know any of you who chose this because you really thought it was going to get you that Mercedes. I see John Rosenberg sitting here and I think of the career that John has spent in service to the public.

We have a right to be proud of what we do and I want to tell you that I am proud of the group sitting to my left that practices in my circuit and I am proud of each of you and I hope to get back to be with you this afternoon. Thank you

**“One man, One mission”**

**Secretary Janie Miller**

Thank you Ernie and thanks to all of you for being here today on this important celebration of *Gideon v. Wainwright’s* 40<sup>th</sup> anniversary.

The landmark U.S. Supreme Court decision in *Gideon v. Wainwright* occurred because Clarence Earl Gideon, a simple, penniless Florida man would not accept his fate after being denied counsel and sentenced to prison.

**One** man caused the single biggest change in the history of the U.S. criminal justice system because he believed in the American justice system and knew his right to a fair trial had been violated.

**One** man changed the course of legal history by writing a letter from a prison cell petitioning the Supreme Court to retry his case.

**One** man’s action caused the Supreme Court to look into his petition and grant him counsel in a new trial.

When then Attorney General Robert F. Kennedy spoke to the New England Law Institute on November 1, 1963 he said “If an obscure Florida convict had not written the letter, and the Court not taken the trouble to look for merit in that **one** crude petition, the vast machinery of American law would have gone on functioning undisturbed.”

**One** man accomplished historic feat because of his unwavering belief in the American justice system. Fortunately, here in Kentucky another man shares Mr. Gideon’s convictions.

Since 1996, Ernie Lewis has worked tirelessly to improve the indigent defense system by providing public defenders to

people unable to afford an attorney.

In 2003, Ernie will have brought full time public defender offices to 112 Kentucky counties, from 47 counties when he became Kentucky’s Public Advocate. He hopes to complete the full time system by 2004.

Under Ernie’s leadership, salaries of defenders have improved by nearly 46%, improving recruitment and retention goals.

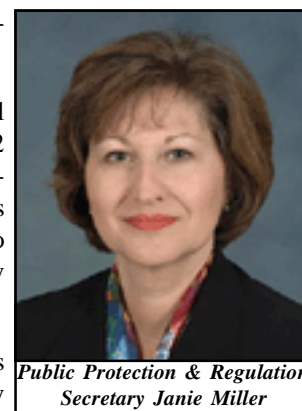
He’s also advanced a culture of professionalism and excellence by implementing American Bar Association and National Legal Aid and Defender standards at the trial level.

Ernie has a lot in common with Mr. Gideon. He was faced with an unacceptable situation when he became Public Advocate and he vowed to change things. But he knew it would take more than his lone efforts.

That’s why he’s articulated his vision to hundreds of people including legislators, the private and public sector, and all of you in this room.

But Ernie needs your help. Working together, we can continue to chart the course for indigent defense well into the future and keep Kentucky’s reputation as a leader and model for public defense in tact.

Thank you again for being here today and I hope you have a productive meeting as we work together to make the promise of *Gideon* a reality in Kentucky. ■



## House Resolution 111

A JOINT RESOLUTION recognizing March 18, 2003, as “Gideon Day” throughout the Commonwealth of Kentucky.

WHEREAS, Earl Gideon, a 51-year-old man with an eighth-grade education, was charged with breaking into a Florida poolroom on June 3, 1961, and stealing coins from a cigarette machine; and

WHEREAS, having plead innocent, Gideon’s request for counsel was denied by the State of Florida trial judge; and

WHEREAS, Gideon was forced to defend himself against the case presented by the state’s prosecuting attorney by attempting to cross-examine the witnesses against him, make legal arguments, and otherwise plead in a tribunal with procedures unfamiliar to lay persons; and

WHEREAS, Gideon was convicted of felony breaking and entering with intent to commit a misdemeanor, and was sentenced to five years in state prison; and

WHEREAS, Gideon submitted a handwritten petition to the United States Supreme Court from his Florida prison cell, arguing that the United States Constitution does not allow poor people to be convicted and sent to prison without legal representation; and his position was supported in an *amicus* brief filed by 22 state attorneys general; and

WHEREAS, on March 18, 1963, the Supreme Court unanimously ruled that Gideon’s trial and conviction without the assistance of counsel was fundamentally unfair and violated the Sixth and Fourteenth Amendments to the United States Constitution, stating as an obvious truth that, “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him”; and

WHEREAS, at his retrial with the assistance of counsel, Clarence Earl Gideon was found to be not guilty, partly as a result of appointed counsel’s cross-examination of the taxi cab driver upon whose testimony Gideon had been convicted at the first trial; and

WHEREAS, as a result of the *Gideon* decision, all states are now obligated to provide court-appointed counsel to persons who have been charged with a crime and who are too poor to afford an attorney; and

WHEREAS, later Supreme Court decisions have further expanded the states’ obligation to provide counsel to accused individuals who cannot afford to hire a private attorney including most recently misdemeanor defendants receiving a suspended sentence; and

WHEREAS; this obligation exists even as state budget revenues shrink and the pressure to cut expenditures grows; and

WHEREAS, 40 years after the Supreme Court’s decision, implementation of the right to counsel is uneven across the nation in terms of quality of representation, funding, staffing, training, caseloads, and timeliness of appointment; and

WHEREAS, the importance of the promise of the Supreme Court’s ruling in Gideon’s case of equal justice has been reaffirmed by recent exonerations of the innocent as a result of DNA evidence, and revelations of deficient and under-funded indigent defense systems; and

WHEREAS, Kentucky has long recognized the right to counsel in

Section 10 of the Kentucky Constitution and the decisions of our appellate courts; and

WHEREAS, Kentucky’s highest court in 1948 stated that “common justice demands” that an attorney must be appointed when a person charged with a felony cannot afford to hire his own counsel; and

WHEREAS, while members of the Kentucky Bar have long represented indigents accused of crimes at little or no fee for many years, Kentucky courts have held that forcing lawyers to represent poor persons charged with a crime without compensation is unconstitutional; and

WHEREAS, the Department of Public Advocacy was created in 1972, when House Bill 461 passed the General Assembly at the request of Governor Wendell Ford, in order to implement fully in Kentucky the mandates of the decision in Gideon’s case; and

WHEREAS, most recently in 1999, a Blue Ribbon Group of experts found that the Kentucky public defender system was the poorest funded system in the country in terms of defender salaries, funding per case, and funding per capita; and

WHEREAS, much progress has been made since 1999, but that recent budget reductions coupled with an increase in caseload threaten to undermine that progress; and

WHEREAS, the Department of Public Advocacy today represents over 108,000 persons each year who cannot afford to hire an attorney to represent them; and

WHEREAS, Kentucky’s public defenders, both public and private, number over 400 lawyers and staff, and include persons who have made representing the poor their career and vocation;

NOW, THEREFORE,

***Be it resolved by the General Assembly of the Commonwealth of Kentucky:***

Section 1. The General Assembly hereby recognizes March 18, 2003, as “Gideon Day” throughout the Commonwealth of Kentucky.

Section 2. Kentucky hereby rededicates itself to the principle of equal justice for all regardless of income.

Section 3. Officials of Kentucky, including representatives of prosecutors’ offices, public defenders’ offices, the bar, the courts, and the schools, are encouraged to engage in appropriate commemorative activities to educate the public about the importance of equal access to justice in our great democracy and the mandates of the Supreme Court’s decision in Gideon’s case even in the face of periodic budgetary constraints.

Section 4. The House of Representatives hereby salutes public defenders and their staff throughout the Commonwealth of Kentucky for their dedication to public service.

Section 5. The Clerk of the House of Representatives shall cause commemorative copies of this Resolution to be printed and made available to government agencies, schools, and the public, to promote ongoing understanding of, and commitment to, the fulfillment of Gideon’s promise. ■



## In The Spotlight. . . Adam Kinney

**“Fire is the test of gold; adversity, of strong men.”**

- Seneca (5 BC - 65 AD), Epistles

The brush fire burns out of control in 25 mile per hour winds. When flames reach the storage shed, equipment and gasoline ignite. Flames shoot outward turning the area surrounding three trailer homes into an inferno. The first firefighters realize help is desperately needed and call for backup. More trucks arrive and the teams battle a blaze that threatens not only the three homes, but the neighboring wooded area as well. If it gets to the woods, there will be real trouble.

*This case he was just handed is going to be a particularly difficult one. The young attorney grimaces at the photos of the horribly battered body of the 6 month old baby. He recalls a year ago staring at his own infant son, newly born and eagerly anticipated. In that moment, he was overwhelmed with love and joy and pride. Staring in horror at the tiny shattered body in the photos, he wonders how he can move forward on this case, defending the man accused of an unthinkable act of violence. He also knows this case is going to attract attention and once the media get their hands on it, there will be real trouble.*

Struggling with sixty pounds of equipment on their backs, oxygen masks strapped to their faces, they begin the arduous task of cutting the fire off before it can either hit the homes or the woods. They dig fire lines into the earth with their axes to separate the fire from its food supply. Sweat spills down their foreheads and into their eyes. As the wind shifts, they are engulfed in smoke, making it difficult to see and they must readjust their positions and continue the grueling work.

*Working with the young man accused of killing his girlfriend's infant son is not easy. The young man is defiant. He'd been in trouble consistently as a teenager and was labeled in his community as a "real bad kid." The attorney meets with him over and over again, digging to make some connection with his client. Still struggling with his own need to understand his client's motivation and to find some way to get this angry young man to trust him, he must simultaneously shield his client from the*



Adam Kinney

*glare of the media frenzy. The reporters are sharks smelling blood and he knows the outrage in the community could cause a serious backlash for his client. He can't completely cut off the information they receive, but perhaps he can get them to see his client not as a monster but as a battered human being. Despite his efforts to calm the community's reactions, he and his client begin to get death threats and it becomes necessary to transport his client to another jail. The move gives him time to work on his next strategic move.*

Fire is very much a living, breathing thing . . . dancing and shifting as if it anticipates a fighter's next move. In

high winds, the team's battle to stop it seems insurmountable. The firefighters must be swift despite the burden of their heavy equipment and the awkwardness of their turn out gear. Their job is dangerous and backbreaking. But in the intense heat and smoke with adrenaline rushing through their veins, they are in the very center of "The Golden Hour" - the time that begins when they first receive a call to the final moment of containing the last ember.

*Several meetings have transpired now between the young man and his attorney as they sit together for yet another conference. Their discussions are sometimes heated. The attorney realizes that he is no closer to understanding his client now than when he first looked at the photos of the battered infant's body. He feels the crushing weight of pressure from the media, the court and the community who all want to see this young man pay and pay dearly. But right now, he is fighting three battles. . . the one to defend his client, the one within himself to comprehend and connect with his client and another to get his client to trust him.*

*This meeting begins like all the others. . . the young man's face is stone as he glares at the attorney trying to understand him. Again, there are angry words. Again, the two of them face off across the table. Again, the young man is shutting out the one person who is truly trying to be on his side. But then something shifts in the young man's face.*

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*He stares at the attorney and he begins to crumble. Sobbing, he pours out his story of his anger and his fear and how he lost control in one horrible moment and how he can never take that moment back no matter how desperately he may wish it never happened. The long awaited moment has arrived for the exhausted attorney. He has connected. He understands. He is trusted.*

The blaze is finally under control. They will soon crush out the last flame and examine the area for smoldering embers or pockets of heat that may re-ignite. They survey the scene. There is considerable damage. The tool shed is completely destroyed and much of the ground is charred. But the three homes remain intact. Lives have been disrupted and they will have to rebuild and replant but their homes were spared. Every firefighter knows there will be damage. . . there always is. But it's their duty and their honor to protect and to salvage whatever can be saved.

*The case never goes to trial. Armed with his new understanding and growing compassion for his client, the attorney re-enters negotiations to fight for the young man's life. He opens his opponents' eyes to the life of his wounded and angry young client. An agreement is reached with everyone's approval. . .15 years. Yes, something horrible happened that can never be changed. Yes, lives have been damaged. Yes, there must be payment of some sort, but he has protected his client. He hopes he has salvaged a life.*

They remove their helmets and wipe the sweat from their soot-streaked faces. They are exhausted but victorious. There is a fellowship between them. Now they can begin to relax and laugh together. One young man turns to another and with a grin he asks, "They tell me you're an attorney. . .uhm. . . so, why are you out here?"

Adam Kinney smiles every time he's asked this question and he gets it pretty frequently. His decision to become a firefighter was a response to the events of 9-11-2001. He watched the events of those awful days and was deeply moved by the brotherhood of people who banded together to save lives. He began his training to become an EMT in night school. He became a Kentucky Basic Firefighter in the summer of 2002. Adam is still in training to become a fully Certified Firefighter by the summer of 2003.

Adam's decision to become an attorney, however, started much earlier. Growing up in a small town in North Carolina, which he likens to "Mayberry," Adam's mother worked at an insurance agency next door to a law firm. As a young man, Adam helped out in the attorney's office. He says that where he grew up, "attorneys were respected and there was a *To Kill a Mockingbird* type of feeling" in his community. He

knew as a young boy that he wanted to practice law because that's how you helped people back then.

His journey toward working full time for the Kentucky Department of Public Advocacy includes four years in the Army, receiving a law degree from Samford in 1992, working three years in the Commonwealth Attorney's office in Hardin County, one year with an investment banking firm in Louisville where he admits to being far too "southern and too blunt" to really fit in, two years in private practice in Elizabethtown and finally joining the newly opened, full-time Elizabethtown Public Defender Office in 1999.

He found his home with criminal defense work. As a prosecutor early in his career, he realized that he had become anesthetized to the horrible traumas he witnessed daily. One afternoon, he was eating lunch and sorting through the vivid photographs of an elderly woman who had been stabbed multiple times and all he was thinking about was which photos he could best use in court. He realized he felt nothing for anyone involved this case. He knew he had to leave.

Even though he still witnesses traumatic events, both as a firefighter and as a public defender, he is no longer anesthetized to it. The difference now is that instead of seeking revenge, he is protecting and salvaging lives, so that they can go forward to heal and mend. When working on the more difficult cases, he starts working on them early and he breaks the work down into pieces and focuses on them bits at a time while fitting in other cases. He is very organized in the way he schedules his days and weeks, but of course, there are still unforeseen sparks that flare up and must be quickly dealt with every day. He handles these small fires with efficiency and often with such a relaxed manner that he puts other people around him at ease.

In 1997, he married his wife, Lea Ann, a pediatric nurse practitioner in Elizabethtown, and began raising a family. A devoted husband and father, photos of his wife and two sons hang in front of his desk. Artwork created by Trevor, his 12-year-old stepson and Jackson, his 4-year-old, adorns his walls. When he talks about his wife or his boys, his face softens and the tone of his voice deepens with love and pride for his family.

Jackson adores his father and wanted to dress up as a fireman last Halloween. Adam laughs that Jackson has a pretty good handle on his work as a firefighter but has no idea what his daddy does during the day. It seems, though, that Jackson understands very well. If anybody were to ask him what his daddy does for a living, he would say, "My daddy fights fires and saves people!" ■

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*Miller-El*  
**A Near-Unanimous Supreme Court  
 Issues a Reminder That Prosecutors’  
 Use of Peremptory Challenges to Strike  
 African-Americans From Juries  
 Violates Equal Protection**



David Mejia

Good news. On February 25, 2003, in an 8 to 1 decision, *Miller-El vs. Cockrell*, 123 S.Ct., 1029 (Feb 25, 2003), written by Justice Anthony Kennedy, the United States Supreme Court admonished federal *habeas* courts reviewing state jury trials that the systematic exclusion of black jurors from capital cases is not only degrading and unworthy of prosecutors, it’s unconstitutional.

It has been seventeen years since the Court ruled in *Batson vs. Kentucky*, 476 US 79 (1986) that a state trial prosecutor’s use of preemptory challenges to exclude persons from the petit jury based on race, nationality or gender violates the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, in the time that has followed, Texas prosecutors apparently didn’t get it, as they continued to exclude blacks from capital murder cases without embarrassment and, perhaps, with prosecutorial pride. In the face of an astounding demonstration of prosecutorial misbehavior that would make even the most hardened Commonwealth Attorney blush, the United States Supreme Court condemned such action as unconstitutional. To drive home its point, the Supreme Court castigated the Fifth Circuit Court of Appeals for abdicating its judicial responsibility as a court of review by its failure to enforce the established dictates of *Batson vs. Kentucky*, 476 US 79 (1986). The effect of the Court’s holding was that in the context of federal *habeas corpus* review the federal courts failed to give sufficient consideration to Miller-El’s allegations and proof of racial discrimination in jury selection.

*Batson* established a three-step process for determining whether a prosecutor’s use of preemptory challenges is race-driven and thereby violative of equal protection.

*First*, The accused must allege purposeful discrimination and present evidence to indicate that the prosecution has deliberately excluded potential jurors during *voir dire* based on race. In addition to race (black or white), ethnicity, age or sex are cognizable. See, *Roman vs. Abrams*, 822 Fd 2<sup>nd</sup> 214, 227-228 (2<sup>nd</sup> Cir. 1987); *United States vs. Iron Moccasin*, 878 Fd 2<sup>nd</sup> 226, 229 (8<sup>th</sup> Cir. 1989). Circumstances that tend to buttress charges of discrimination are: (1) the number of racial group members in the venire; (2) the nature of the crime; (3) the race of the defendant and/or victim; (4) the pattern of strikes against members of a racial group; (5) the manipulating or

incitefull manner, tone or words used by prosecutors during *voir dire*. See *Batson*, 476 US at 96. The constitutional basis for the defendant’s objection to race-based preemptory challenges is the Equal Protection Clause irrespective of whether the defendant and excluded jurors are of the same race. *United States vs. Tucker*, 90 Fd 3<sup>rd</sup> 1135 at 1141 (6<sup>th</sup> Cir. 1996); *United States vs. Rodriguez*, 935 Fd 2<sup>nd</sup> 194, 195 (11<sup>th</sup> Cir. 1991). Additionally, the state may likewise challenge the defendant’s racial abuse of preemptory challenges on equal protection grounds. *Georgia vs. McCollum*, 505 US 42, 55-56 (1992).

*Second*, Once the aforementioned *prima facie* showing is made, the burden of proof shifts, as the prosecution must in response offer a credible race-neutral explanation for why they struck the excluded jurors. See *Hernandez vs. New York*, 500 US 352, 358-359 (1991). The defendant, in certain circumstances where, for example, pretext is suggested, may contest the credibility of the prosecutor’s neutral-based explanation. See *Davis vs. Balt. Gas and Elec. Co.*, 160 Fd 3<sup>rd</sup> 1023, 1026 (4<sup>th</sup> Cir. 1998); *United States vs. Thompson*, 827 Fd 2<sup>nd</sup> 1254, 1261 (9<sup>th</sup> Cir. 1987). The reliability of the prosecutors’ explanations, in light of the evidence, may likewise be challenged.

*Third*, in weighing and determining the merit of a *Batson* claim, that is whether purposeful discrimination has been proved, trial judges are advised in the third phase to consider any relevant information in deciding whether prosecutors systematically excluded a particular race of prospective jurors. The matter ultimately comes down to whether the trial court finds the prosecutor’s [race-neutral] explanations believable based upon his or her demeanor, the inherent plausibility of explanations given, whether the proffered rationalizations have some basis in accepted trial strategy. The weight given such factual findings on review was the procedural context in which the *Miller-El* case reached the United States Supreme Court. The evidence in the *Miller-El* trial: a common, cold-blooded armed robbery and murder, perhaps explains how it was that this rather ordinary case traveled from a Texas county court to the highest court in America.

Its facts provide proof of the age-old maxim that a “bad” case, that is a criminal prosecution with facts demonstrating brutality in its commission, can set the course for creating

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bad law. Experience teaches that the more violent and wanton the alleged conduct of the accused; the more likely it is that law enforcement and prosecutors will be tempted to abandon fairness. "Convict at any cost" becomes the state's agenda and, from there, the momentum builds. In the course of the prosecution of the accused, as this fever-level pitch builds and accumulates, trial judges can get caught up in the identical waive of negative emotion, even loathing. When this happens, just like the trial prosecutor, judges too become unwilling or unable (it really doesn't matter which) to resist the urge to do whatever it takes to get the defendant tried, convicted and sentenced. It is the satisfaction of that base need that over-rides everything, even the Constitution itself. In the case of *Miller-El*, the evidence summarized was that Thomas Miller-El, an African-American, and his wife Dorothy, with a third person Kenneth Flowers, robbed a Dallas motel at gunpoint. The three emptied cash drawers and ordered Doug Walker and Donald Hall, two employees, to lie on the floor. Walker and Hall were also bound and gagged. After Flowers hesitated or refused to kill the two employees, Miller-El shot Walker and Hall. Walker died. Hall was paralyzed. After the prosecution indicted Miller-El for capital murder, they took him to trial and got a guilty verdict and death sentence in a year. To help assure this result, the Dallas prosecutors were allowed to strike ten out of eleven prospective jurors who, like Thomas Miller-El, were African-American.

Remarkably, the Supreme Court saw substantial proof of purposeful discrimination in the jury selection process that neither the Texas courts nor, sadly, the lower federal reviewing courts were able to discern. In the course of jury selection, the Dallas prosecutors, having already obtained cause strikes on nine African-American prospective jurors, exercised preemptory strikes to exclude ten out of the other eleven. Additionally, prosecutors exploited local court rules, by using a system of shuffling of the venire to minimize the chance of African-Americans in the venire from being called into the jury box. When questioning prospective jurors about the death penalty, prosecutors tailored their questions to illicit responses from whites that led to their remaining on the panel while conversely led to African Americans being stricken. For example, African-Americans were provided grizzly details of the death chamber (which made them react with revulsion, which due to their negative responses resulted in their being dismissed) while whites were merely provided general descriptions, which did not cause reactions of horror or revulsion. Evidence, in a *Batson* hearing conducted after Miller-El's jury trial, also established a history of the Dallas prosecutor's office willfully keeping African-Americans off juries. A prosecutor's training manual, that was used to educate the prosecutors of Miller-El actually instructed Dallas prosecutors in writing not to "take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or well educated." Former Dallas prosecutors

testified that it was the official policy of the Dallas prosecutor's office, when Miller-El was tried, to keep African Americans out of the jury box. Significantly, the only African American the prosecutors allowed to serve was the one who said "I think capital punishment is too easy" and that lethal injection is "too quick...pour some honey on them and stake them out over an ant bed". One can only wonder — was it simply Thomas Miller-El's guilt of a brutal murder and robbery, in the minds of the Texas courts, the federal district court, the United States Court of Appeals, that prevented them from overturning Miller-El's conviction and death sentence...even despite clear and undisputed evidence of jury manipulation based on race? Whatever the reason, Texas prosecutors, having successfully convinced Texas courts that jurors were not stricken because of race, were equally persuasive in convincing the federal reviewing courts. It was, finally, the Fifth Circuit's wholesale abject deference to such factual judgments or credibility findings of the Texas state courts, and declining to even hear the case, that jolted the Supreme Court into giving Miller-El the fairness all men accused of capital murder deserve.

After reviewing both the trial record and the Texas prosecutors' race-neutral explanations and egregious trial conduct, the *Miller-El Court*, with no difficulty, reversed the court of appeals, stating, "proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the result bespeaks discrimination." Citing *Batson*, 476 U.S. at 94. Notwithstanding the repeated denials of Texas prosecutors that their jury selection method wasn't race based, the Supreme Court ruled that federal appeals courts simply can not ignore substantial, to some even shocking, evidence of racial discrimination by a prosecution team. "[D]eference," said the Supreme Court, "does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." In requiring the Fifth Circuit to review Miller-El's appeal on remand, the Court issued the following directive, "A federal court can disagree with a state court's credibility determination...and ...conclude the (state court) decision was unreasonable." With that, the Supreme Court reversed the Fifth Circuit Court of Appeal's refusal to grant a certificate of appealability to Miller-El which in effect had affirmed the federal district court's denial of *habeas corpus* relief. The *Miller-El Court* ruled that to ignore such egregious prosecutorial race-based manipulation of death penalty juries can not stand. To do so, said Justice Anthony Kennedy, would render "...the Equal Protection Clause...vain and illusory." Citing *Norris vs. Alabama*, 294 U.S. 587 at 598.

Justice Clarence Thomas, the only African-American member of the Supreme Court, filed the lone dissent. ■

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## Additional Resources for Litigating Jury Discrimination Claims

Bruce Hackett's article "Illegal Discrimination In Jury Selection - It's Not Just Race and Gender Anymore," *The Advocate*, Vol. 24, No. 6, (September 2002), further discusses discrimination in jury selection. It can be found at: <http://dpa.state.ky.us/library/advocate/sept02/advframe.html>

It covers the following:

### I. IN GENERAL

### II. MAKING THE CHALLENGE

#### A. Pretrial Preparation

#### B. Timeliness of the Challenge

### III. SUBSTANCE OF THE CHALLENGE

Challenge the Prosecutor's Improper Use of Peremptory Strikes on the Basis of:

#### A. Race

#### B. Gender

#### C. Religion

#### D. Disabilities

#### E. National Origin/Language

#### F. Potential Grounds for Challenges in Kentucky

### IV. PRIMA FACIE CASE BY THE CHALLENGING PARTY

#### A. Procedure

#### B. Sheer numbers are not enough for a prima facie case

#### C. Doubts should be resolved in the accused's favor

#### D. Prosecutor's burden

### V. THE BATSON HEARING

#### A. Full Hearing

#### B. Limitations on the Hearing

#### C. What Kind of Hearing?

#### D. The Trial Court's Ruling

### VI. RELIEF

### VII. CHALLENGES TO YOUR USE OF PEREMPTORIES

### VIII. APPELLATE REVIEW

#### A. Standard

#### B. Trial Court's Findings

#### C. Remedy

Excerpts from the article:

"In the recent Washington decision, the Kentucky Supreme Court was critical of a prosecutor who used age as a neutral reason. Furthermore, the court had problems with prosecutors who rely on "hunches drawn from the juror's demeanor." Failing to examine a juror during voir dire or conducting a perfunctory examination are both signs that the prosecutor's reasons are pretextual or not supported by the record. Even a race-neutral reason such as the juror's previous service on a case that ended in acquittal is not good enough if it amounts to a "bare assertion" without details about the prior jury service. *Washington v. Commonwealth*, Ky., 34 S.W.3d 376, 379 (2000)."

"Based upon the recent case of we now know that the proper relief on appeal for a successful Batson challenge is a new trial. Neither the Kentucky Supreme Court nor the United States Supreme Court has set out the proper remedy for a Batson violation at the trial level. Batson did not articulate a particular remedy, but the Court suggested that discharge of the entire panel or placing the improperly discharged jurors back on the panel may be in order. 476 U.S. at 99, fn. 24." ■

## Evaluating our Objectives at Preliminary Hearings: Winning by a Different Standard

Whose heart does not leap when the jury, after an arduous trial, returns with the verdict: Not Guilty? An acquittal is a wonderful victory, and difficult enough to attain to make it precious. At the preliminary hearing (also known as the probable cause hearing) stage, however, we can incorrectly apply this same standard of success, chastising ourselves as we hear the judge repeatedly intone those ominous words: "I find probable cause, and bind this case to the grand jury." The objectives of defense counsel at the preliminary hearing are not identical to those at trial, and a different approach to obtaining success must be applied at the preliminary hearing.

What, then, should be our goals at the preliminary hearing? There are probably countless effects of, and thus purposes for, conducting preliminary hearings. For example, sometimes the systemic effect of conducting a series of good preliminary hearings is to show the Commonwealth that it must either agree to lower bonds or dismiss ridiculous charges rather than go to the extra effort of fighting you get again in another preliminary hearing. In addressing whether a person was entitled to counsel at the preliminary hearing, *Coleman v. Alabama* identified tasks of counsel at the hearing to insure against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail. *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 2003 (U.S.Ala. 1970).

As experienced commentators have noted, the preliminary hearing may serve to help prepare for search and seizure issues in Circuit Court, or awaken your client to the severity of his or her situation. George Sornberger and John Niland, "Preliminary Hearings," *The Advocate*, Vol. 18, No. 5, September 1996, 47-52; 47,48.<sup>1</sup>

Four purposes are examined here, which operate more as lenses through which to view our actions, or approaches to utilize, (perhaps all four at one time) rather than totally divergent paths. A fuller understanding of the purposes for, and

uses of, a preliminary hearing will deepen the utility of this surprisingly multifaceted pretrial tool.

### A. Testing Probable Cause

The first goal of a preliminary hearing is testing whether the Commonwealth can show the reviewing judge probable cause to believe that a crime has been committed, and that our client is the person who committed that crime. RCr 3.14 (1). This goal is the one most clearly resembling an acquittal at trial. It is also the one that, while we should not fail to consider it in every case, is realistically the objective that we are seldom going to attain. Probable cause is simply too easy a standard for the Commonwealth to meet.

The probable cause standard is further lowered by the admissibility of hearsay, and even unlawfully obtained, evidence at the preliminary hearing. RCr 3.14 (2) and (3). This can come as a shock to clients when their case is bound to the grand jury based on the hearsay testimony (admittedly inadmissible at trial) of what their third cousin's neighbor's roommate said happened six months ago at a drunken party.

One way to use this lowered standard to our client's advantage, however, is to submit some hearsay evidence of our own. During cross-examination, we can seek answers that would be inadmissible at trial. At a recent preliminary hearing, I solicited testimony from a friend of my client regarding reports she had heard of the alleged victim having threatened to kill my client (before and after the incident in which my client allegedly hurt the complaining witness). The judge sustained the Commonwealth's objection, stating the information was irrelevant, but what could be more relevant for showing bias of a witness than incidents prior to the given case in which the alleged victim threatened to kill your client? The main evidentiary hurdle to admitting our own hearsay testimony is relevancy. Bias and credibility of a witness, however, are never collateral matters. Each opens the door for the admission of all kinds of testimony, including hearsay, at a preliminary hearing. Such evidence also provides important context, "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

Also, consider whether the Commonwealth can show probable cause for some crime other than the crime charged. Per-



Robert Stephens

haps the evidence establishes probable cause for attempted burglary, but not burglary proper. By challenging which charge really fits the facts presented at the preliminary hearing, you can effect what charge your client is ultimately indicted upon by the grand jury.

### **B. Discovery and Locking-In Testimony to Conduct Proper Defense**

Although you will not find pretrial discovery listed in the Criminal Rules as one of the purposes for a preliminary hearing, it is nonetheless an important benefit to conducting one. We can learn a great deal about the Commonwealth's case in advance, just by having a preliminary hearing. Dates and times, locations, names of witnesses, a list of evidence seized, whether anyone (including our client) has given a statement, whether any statements are taped: All can be discovered during a preliminary hearing. Some judges will abruptly end what they perceive as mere fishing for discovery, while others seem to understand this legitimate goal of the preliminary hearing. Again, the key to any inquiry is relevancy.

A great mistake can be made at the preliminary hearing by confusing our methods therein with those at trial. At trial, we want to tightly control witnesses, especially during cross-examination. Certainly, even during a preliminary hearing, defense counsel wants to maintain control of the situation, to remain the one asking the questions. But, unlike at trial, from the perspective of obtaining information, there are no bad answers at a preliminary hearing. It is better to let the witness make ugly statements at the preliminary hearing, providing the bad information early, than to hear damaging material first at trial. I will regularly let an adverse witness ramble during a preliminary hearing because every word the witness says tells me more about the Commonwealth's case and further limits that witness' range of testimony at trial.

For example, if the lead detective testifies at the preliminary hearing that the alleged victim has not given a taped statement, and on the morning of trial we learn such a statement had been given before the preliminary hearing, that alone is grounds to object to the victim testifying. At the very least, your client is entitled to a continuance to allow you to deal with this surprise information. The point is, whatever the Commonwealth's witness says at the preliminary hearing is sworn testimony, and any later alteration of that testimony is automatically impeachable.

The other side to the discovery sword is that any witnesses we put on are similarly locked into their preliminary hearing testimony. It is for this reason that I will rarely put on my client's witnesses at a preliminary hearing. I have been put in the uncomfortable position of having had my client's alibi ("Mr. Client was in Toledo on Friday, February 1st") injured because the client's witnesses got the date or day of the week confused at the preliminary hearing. More fundamentally, the Commonwealth gains insight into possible defense strategy at trial as you disclose evidence at the preliminary

hearing. It is important in any adversarial situation to provide no more information than necessary to your opponent.

Consideration must be given to your purposes at the preliminary hearing. By unduly focusing on debunking the Commonwealth's showing of probable cause, you may endanger the client at trial, if your witness' testimony later alters in the slightest. In a case where probable cause is winnable, putting on witnesses may be considered. Where the judge is almost certainly going to find probable cause (you will have some idea by the time you are given the opportunity to call your own witnesses), the risk is probably too great to have your witnesses testify. Ultimately, as with most trial and pretrial decisions, discretion must be given to the attorney who knows his or her judge and who is "under fire" and "on the scene." I have learned, though, not to call witnesses at a preliminary hearing unless I have a very good reason for doing so.

### **C. Experimentation with Technique**

A third important purpose to consider in conducting a preliminary hearing is that it allows you to experiment with questioning techniques, manner of delivery, even the style of courtroom demeanor you wish to use (and under what circumstances) at trial. This purpose is especially good for, but is not limited to, new attorneys. I have used preliminary hearings to experiment with a number of techniques and styles: When to express disgust with a witness' stated actions, whether to be aggressive or pacifying in asking questions, how to use body movement in questioning (for example, standing and acting like someone putting a gun in a holster or using my own body to demonstrate the client's height was the same as mine where identification was at issue).

It is much safer to experiment with delivery techniques and styles of courtroom demeanor at a preliminary hearing than in a jury trial. And, unlike experimenting in front of your friends and co-workers, doing so at a preliminary hearing allows you to try out these techniques and styles in a real world situation, with real facts and a potentially critical audience.

### **D. Discovering Reasonable Doubt**

A fourth use for the preliminary hearing is uncovering reasonable doubt. This is related to using the hearing for testing probable cause and for discovery, but it is more focused than either on the outcome of the future jury trial. It involves listening to the witness' testimony when given, searching for holes in the Commonwealth's case, despite the fact the Commonwealth can show probable cause.

The discovery function is passive in nature: It serves to record statements made at the preliminary hearing for analyzing later. The testing of probable cause function is active, but limited in scope: It focuses merely on whether the Commonwealth can, at the present preliminary hearing, meet a

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very low standard of proof. By simultaneously attempting to uncover reasonable doubt, you can be active in nature and extensive in scope. By utilizing the uncovering of reasonable doubt function at a hearing, I have encountered persons, admittedly predisposed, before the preliminary hearing, to believe the guilt of the accused, who told me after a preliminary hearing that they now had a doubt regarding our client's guilt (despite the judge having found probable cause and binding the case to the grand jury). That is not just getting information for later review, nor is it requiring the Commonwealth to meet its low standard of proof, that is showing where to seriously consider focusing your assault at trial.

An added benefit to casting doubt on the Commonwealth's case at the preliminary hearing, even when the Commonwealth can readily show probable cause, is to effect the judge's ruling on bond. If you can show that the Commonwealth's case is weak, you may be able to get the judge to approve a much lower bond. Another benefit is, if nothing else, by conducting an offensive, hard-questioning preliminary hearing, you will let your client know that you take his or her case seriously, and are willing to put forth your best effort on his or her behalf.

#### **New Perspectives of Winning**

When evaluating our performance at preliminary hearings, our sole guide should not be whether the judge finds probable cause and binds the case up to the grand jury. That is but one consideration among many. While we cannot ignore

the goal of testing the Commonwealth's attempt to show probable cause, we similarly cannot fail to use every opportunity to discover more about the Commonwealth's case and to lock-in the testimony of adverse witnesses. We can use the preliminary hearing as a teacher, experimenting with various delivery styles and questioning techniques. Finally, we must consider, even as early as the preliminary hearing, actively seeking flaws in the Commonwealth's case and uncovering reasonable doubt for use at trial. Evaluating whether we have "won" at the preliminary hearing is a much more complicated endeavor than whether the judge dismisses the case in district court or sends it on to the grand jury. That evaluation can only be made with time, looking back on the preliminary hearing with the wisdom of hindsight and insight from the developing case. The best way to ensure a successful preliminary hearing is to keep in mind, while preparing for and conducting the hearing, the multiple purposes to which defense counsel can put the preliminary hearing tool.

#### **Endnote**

1. This is an excellent article on preliminary hearings, and should be read by anyone preparing to conduct preliminary hearings in Kentucky. Though its focus is slightly different from the current article, it makes many of the same points (and many excellent additional ones), from a very practical, "how-to" perspective. ■

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### **Poll: Most Oklahomans Wary of Teen Executions**

*Shawnee-News* (Friday, April 4, 2003) OKLAHOMA CITY (AP): Most Oklahomans oppose executing death row inmates who were younger than 18 at the time of their crimes if the option of life without parole was an alternative, a new poll shows. Poll results, released Thursday at a Capitol news conference, also showed almost half of Oklahomans favor a moratorium on executions in the state so that a study of capital punishment can be made.

The scientific survey of 400 Oklahomans was conducted statewide by the University of Oklahoma's Public Opinion Learning Laboratory, commonly referred to as the OU POLL.

It had a margin of error of plus or minus 4.9 percentage points.

Susan Sharp, professor of sociology, said 62.8 percent of those polled favored legislation banning the execution of juveniles if life without parole is an option, with 25 percent opposing such legislation. Others were unsure or had no opinion.

The poll showed 52.5 percent of Oklahomans still favored the death penalty, compared with 34.8 percent who favored life without parole.

Reprint permission granted, Shawnee News-Star, April 4, 2003. [www.news-star.com](http://www.news-star.com)



## PLAIN VIEW . . .

### *Adkins v. Commonwealth*

Ky., 96 S.W.3d 779  
(Jan. 23, 2003)

Bo Adkins was a suspect in a Pike County murder. The police began to search for Adkins' girlfriend's car, a blue Mustang, and found it in the back of the Colley Motel. The police saw a man fitting Adkins' description, and approached him. Adkins told the police his name was "Bo Jones" and that his girlfriend's name was "Ruth." When asked for identification, Adkins became "agitated" and began to swear. When Adkins began to go to his room to get his identification, the police asked him if he was armed and reached out to conduct a frisk for weapons. Adkins began to run; he was caught and arrested for disorderly conduct and resisting arrest. At the police station, he gave written consent to search his motel room, where evidence of his involvement in the murder was found. Adkins moved to suppress what the Court termed unspecified evidence found as a result of the *Terry* stop and frisk. His motion was overruled, and he appealed this issue among others.

The Kentucky Supreme Court, in an opinion by Justice Cooper, affirmed the trial court on the *Terry* issue. The Court posed the question as "whether Welch [the officer] had reason to believe that Appellant might be armed and dangerous." The Court noted that when an officer is investigating a murder, "he has presumptive reason to believe that he is dealing with an armed and dangerous person." The Court also found substantial evidence that Adkins was a legitimate suspect when approached by the police. He had been at the victim's house on the day of the murder, he was living in poverty and the crime had been a robbery/murder, the victim was expecting Adkins to visit on the day of the murder. Adkins gave the officer a false name. "Welch had reason to believe he was dealing with the only suspect to a brutal murder. Appellant's behavior accentuated this suspicion. In addition to giving a false name and address, Appellant responded with loud profanities when requested to produce further identification. In addition, Appellant appear to be nervous and searching for an escape route." Based upon this, the Court found that the officer had a reasonable and articulable suspicion at the time of the *Terry* stop and frisk.

### *United States v. Helton*

314 F.3d 812 (6<sup>th</sup> Cir. 2003)

Germaine Helton lived with his girlfriend, Jimmia Green, at 723 N. Harrison Street in Saginaw, Michigan. The police were investigating a "drug trafficking scheme" involving Peterson, Swain, and Liddell. The police sought a warrant to search

723 N. Harrison as part of this "scheme." Allegations were included in the affidavit, including that 31 calls had been made between Peterson, Swain, and Liddell to the phone at 723 N. Harrison, there were stacks of money at 723 N. Harrison, Green was storing money for Peterson, and that Green was the desired holder of the money because she had no criminal record. Based upon the allegations, the judge issued a warrant to search Helton's residence. \$14,310 in cash, crack cocaine, weapons, and other evidence was seized. Helton was charged with possession with intent to distribute cocaine base. He entered a conditional guilty plea after his motion to suppress was denied.

In an opinion written by Judge Cole and joined by Judge Clay, the Sixth Circuit reversed the decision by the district court. The Court looked at each of the allegations in the affidavit, and found that together they had not been "meaningfully corroborated. As a result, their impact does not rise much beyond their minimally persuasive inherent values." The Court further concluded that added together the allegations did not rise to the level of establishing probable cause.

The Court next held that the warrant could not be saved by applying the good faith analysis of *United States v. Leon*, 468 U.S. 897 (1984). Helton argued that the good faith exception did not apply because the affidavit was "devoid of information that would support a probable cause determination making any belief that probable cause exists completely unreasonable." The Court evaluated this exception by asking two questions: "(1) whether a reasonable officer would believe that the anonymous tipster's statements, without more corroboration, were trustworthy and reliable and (2) whether a reasonable officer would believe that the Howard affidavit established probable cause to search the 723 N. Harrison Street residence." The Court answered these questions in the negative. "A reasonable officer knows that evidence of three calls a month to known drug dealers from a house, a description of that house, and an allegation that a drug dealer stores drug proceeds with his brother and his brother's girlfriend (neither of whom live at or are known to visit that house), falls well short of establishing probable cause that the house contains evidence of a crime. Moreover, because FBI-A's statements are heavily discounted due to their minimal trustworthiness and reliability, they add little to the probable cause determination. Thus, a reasonable officer would recognize that without more corroboration, the Howard affidavit came well short of establishing probable cause. For that reason, the third exception to the *Leon* rule applies...."

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*Ernie Lewis, Public Advocate*

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Judge Siler issued a dissenting opinion. He would have found that *Leon* applied even if the affidavit for the search warrant was not supported by probable cause. He cautioned the majority that a grudging or negative attitude toward warrants, or excessive scrutiny of the details of affidavits, would only lead to more warrantless arrests. Based upon his review of the totality of the circumstances, he believed that a reasonable police officer could have found probable cause existed.

***United States v. Carter***  
315 F.3d 652 (6<sup>th</sup> Cir. 2003)

The police in Lexington, Kentucky were using a confidential informant to purchase cocaine from an alleged “crack house” when the informant told the police that Carter and Holliday were leaving the house to obtain more cocaine. The police followed the car to the Red Roof Inn and saw Carter and Holliday go to room #119. Shortly thereafter, Holliday left the room, got in his car, and began to leave. The police stopped the car, smelled marijuana and saw marijuana in the car. They arrested Holliday, and found seventeen grams of crack cocaine during the search incident to the arrest.

The attention of the police then went to Carter, still in the hotel room. They knocked on the door of room #119, and when Carter opened the door, they saw a “blunt” sitting on a nearby table. Carter gave the police permission to enter, at which point Officer Hart picked up the “blunt” and determined that it had marijuana in it. Carter was arrested, and twelve grams of cocaine was found on his person. Carter was charged with trafficking in cocaine. After his motion to suppress was denied, he entered a conditional plea of guilty.

The Sixth Circuit affirmed in a decision written by Judge Krupansky and joined by Judge Boggs. The Court justified the search under the plain view doctrine, stating that if “during an initial intrusion, law enforcement officials plainly view incriminating evidence, it may be admitted into evidence pursuant to the plain view doctrine.” The Court also relied upon *United States v. Radka*, 904 F.2d 357, 362 (6<sup>th</sup> Cir. 1990), stating that the “law is well settled that a warrantless entry will be upheld when the circumstances then extant were such as to lead a person of reasonable caution to conclude that the evidence would probably be destroyed within the time necessary to obtain a search warrant.”

Judge Lawson wrote a dissenting opinion. In Judge Lawson’s opinion, exigent circumstances had not been proven, and thus entry into the hotel room was illegal. Judge Lawson believed that the officers should not have created exigent circumstances by making contact with Carter, thereupon using that exception to the warrant requirement to enter the room. “[W]e should be evaluating the officers’ decision to forego the warrant process when they decided to gain entry into private quarters in which contraband would likely be found, and an exigency would likely arise from their own making. One might legitimately inquire: is it reasonable to

find that although the officers had time to remain in their vehicle and summon a narcotics-detecting dog and handler, they were too pressed by circumstances to contact a magistrate for a warrant?”

***United States v. McLevain***  
310 F.3d 434 (6<sup>th</sup> Cir. 2002)

When Gary Cauley failed to return from work release to the Daviess County Detention Center in Owensboro, Kentucky, Jailer Harold Taylor obtained a search warrant for the home of Roger Dale McLevain. The affidavit stated that Cauley’s girlfriend, Lydia Bell, had been staying at McLevain’s house, and that she had been picked up there on the night Cauley failed to return. No information about McLevain, other than that he was friends with Cauley, was contained in the affidavit. The warrant was issued; it included the authorization to seize McLevain. Taylor and the Sheriff executed the warrant by forcing their way into the house. McLevain was seized. Suspected drug paraphernalia was photographed and otherwise identified. This was used to obtain a second warrant. The execution of the second warrant resulted in a seizure of 85 grams of methamphetamine and \$5710 in cash. McLevain was charged with a federal drug offense, and filed a motion to suppress the evidence obtained in the first search. His motion was denied.

The Sixth Circuit reversed in an opinion written by Judge Martin, joined by Judges Moore and Wiseman. The opinion explores the plain view exception in some detail. The Court relies upon *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) and *Horton v. California*, 496 U.S. 128 (1990) to establish that a plain view search requires it to be immediately apparent that evidence of a crime is before the police, that the police be legally present when they observe the object, that the item actually be in plain view, and that the police have a “lawful right of access to the object itself.” In evaluating the case based upon these four factors, the Court found this search wanting. The Court found the evidence to have actually been in plain view, and further found the officers to have been legally present in McLevain’s house.

The Court further found, however, that the evidence was not “immediately apparent.” This requirement was evaluated using 3 additional factors, including “1) ‘a nexus between the seized object and the items particularized in the search warrant,’ 2) ‘whether the “intrinsic nature” or appearance of the seized object gives probable cause to believe that it is associated with criminal activity,’ and 3) whether ‘the executing officers can *at the time* of discovery of the object on the facts then available to them determine probable cause of the object’s incriminating nature.’” There was no nexus between the object seized and the items authorized to be seized in the search warrant. Nor was the object obviously incriminatory. “[W]hen an item appears suspicious to an officer but further investigation is required to establish probable cause as to its association with criminal activity, the item is not immediately incriminating.”

***United States v. Pinson***  
321 F.3d 558 (6<sup>th</sup> Cir. 2003)

A Nashville police officer named Mackall petitioned state court for a search warrant to search 2713 Torbett Street. The affidavit was based upon information given by a confidential informant who had purchased cocaine at the address while being monitored by the police. The warrant was executed by calling out to the residents, waiting 5-10 seconds, and knocking down 2 doors with a battering ram. Cocaine and guns were found during the search. Pinson was charged with felony possession of firearms, possession with intent to distribute cocaine, possession of firearms in furtherance of a drug trafficking crime, possession of a destructive device in furtherance of a drug trafficking crime, and knowing receipt and possession of a destructive device. After Pinson lost his motion to suppress, he entered a conditional plea of guilty.

The Sixth Circuit affirmed in an opinion written by Judge Polster, joined by Judges Gibbons and Gilman. Pinson alleged on appeal that the affidavit failed to show probable cause, that it was bare bones, that it lacked information about the confidential informant and his reliability, that it lacked information regarding the purchase of cocaine, and that it lacked information regarding the drug trafficking going on at the residence. The Court found that the confidential informant was shown to be someone who was reliable, that he had personal information from purchasing cocaine at the residence, and that the affidavit demonstrated the officer's personal observations. The Court found that the affidavit linked the evidence to the location to be searched, based upon the evidence of the purchase 72 hours before. The Court rejected Pinson's allegation that the affidavit was lacking because it did not name the person from whom the cocaine was purchased. "Therefore, an affidavit in support of a search warrant does not need to name or describe the person who sold the drugs or name the owner of the property. As the Supreme Court has stated, '[s]earch warrants are not directed at persons; they authorize the search of "place[s]" and the seizure of "things," and as a constitutional matter they need not even name the person from whom the things will be seized.'

The Court also rejected Pinson's knock and announce argument. The Court noted that there is no particular magic period of time required between the knock and the use of force. The touchstone is one of reasonableness. "The fact-specific inquiry needed to determine the reasonableness of the interim between announcement and entry mandates consideration of a number of factors, including the object of the search, possible defensive measures taken by residents of the dwelling to be searched, time of day, and method of announcement." Based upon these factors, the Court found no violation of the knock and announce rule. "The Fourth Amendment questions only whether the officers' overall actions were reasonable, not how much time officers must wait to infer a constructive refusal of admittance... Given the testimony of the officers found credible by the district court, the

time of day when the officers executed the warrant, the commotion on the porch, and the knowledge that the residents would not respond to a knock on the door unless they received a telephone call first, we conclude that the time which elapsed between the announcement and entry was sufficient under the circumstances to satisfy the reasonableness requirement of the Fourth Amendment."

Judge Gilman wrote a concurring opinion. He stated that his concurrence on the warrant issue was "a reluctant one, compelled by this court's controlling precedent in *United States v. Allen*, 211 F. 3d 970 (6<sup>th</sup> Cir. 2000) (en banc). He believed the affidavit was lacking in stating that the informant had observed large quantities of cocaine at the residence which could in turn be expected to be present at the time of the execution of the warrant. Further, he found the knock-and-announce issue "close to the line." There were special circumstances in this case making its precedential value limited. "This case, therefore, should not be cited for the general proposition that five seconds is a sufficient time for police officers to wait before forcing their way into a residence."

***United States v. Pennington***

2003 WL 1561320, 2003 FED App. 0092P, 2003 U.S. App. LEXIS 5832

Judge Sargus wrote this opinion of the Sixth Circuit, joined by Judges Kennedy and Gilman. The Court first rejected Pennington's challenge to the magistrate who had issued the search warrant. A Shelby County Judicial Commissioner, appointed by the Shelby County Commission, who was not a lawyer, had issued the search warrant. Relying upon *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), the Court rejected Pennington's contention. "[A]n issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search." There is no requirement that a lawyer or judge be the neutral and detached magistrate.

The Court also rejected Pennington's knock-and-announce argument. Here, 8-10 seconds elapsed between the knock and the use of force. The Court noted that the warrant was executed in the afternoon, and that the officer had heard footsteps leading away from the door after the initial knock. "Under the analysis in *Spikes* and *Pinson* (see above)... eight to ten seconds was a reasonable period of time for the officers to wait before forcing entry into the home. Our conclusion is bolstered by the fact that, unlike the circumstances in *Spikes* and *Pinson*, the officer who knocked on the door testified that he heard a person running away from the door after he knocked and announced the presence of the police. Under such circumstances, an eight-to-ten second wait by the police is objectively reasonable under the Fourth Amendment to justify a forced entry into the residence based upon a search warrant."

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## SHORT VIEW . . .

1. *United States v. Rhiger*, 315 F.3d 1283 (10<sup>th</sup> Cir. 2003). This case features two interesting holdings. First, the 10<sup>th</sup> Circuit holds that a social guest has standing to challenge the search of a home in which he is visiting, relying upon *Minnesota v. Carter*, 525 U.S. 83 (1998). Second, the smell of methamphetamine cooking can provide exigent circumstances sufficient to allow a warrantless entry into a home. This was based upon the danger that meth cooking poses to surrounding houses.
2. Law Professor David Moran of Wayne State University argues in the January 2003 issue of the *Search and Seizure Law Reporter* that the United States Supreme Court has developed a new and "simple" doctrine related to automobile searches: "the police may, in their discretion, stop and search any vehicle at any time." He bases this on *Whren v. U.S.*, 517 U. S. 806 (1996), *Knowles v. Iowa*, 525 U.S. 113 (1998), and finally *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), and *Arkansas v. Sullivan*, 532 U.S. 769 (2001). The doctrine is completed in *United States v. Arvizu*, 122 S. Ct. 744 (2002). Based upon these cases, it "is now clear that the police have complete discretion to stop any vehicle at any time, even if the driver is so skillful that he or she is able to avoid commit-

ting a single traffic or equipment violation. While the police will not be able to use *Atwater* and *Sullivan* to automatically search a car stopped on reasonable suspicion, the police will, in most cases, be able to search the stopped car by developing probable cause to believe the car contains criminal evidence or contraband, by arresting the driver or another occupant, or, as in *Arvizu* itself, by obtaining consent." He concludes: "It is difficult to be optimistic that the Court will reverse course any time soon and restore the right of average American drivers to be left alone. Automobiles will continue to be obvious targets for police scrutiny so long as the war on drugs continues to rage. The terrorist attacks of September 11, 2001, may well inspire even more intrusive measures designed to prevent terrorists from using vehicles to transport weapons of mass destruction. It appears, therefore, that the Supreme Court's new vehicle doctrine is here to stay. In practice, many Americans, particularly those who are not members of racial minorities or other groups likely to be singled out for police harassment, may never realize that their rights have been diminished. But as Gail Atwater's case demonstrates, even privileged and law-abiding members of our society have, in fact, lost their right to be secure in their vehicles against pretextual stops, arrests, and car searches. The casualties in the drug war continue to mount." ■

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## 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:

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## KENTUCKY CASELAW REVIEW

***Harold Joe Mills v. Commonwealth of Kentucky,*  
Ky., 95 S.W.3d 838 (2003)  
(Reversing and remanding)**

Two men robbed Brandon Gray, a gas station attendant, while he was servicing a car around 10:00pm on July 27, 2000. Subsequently, Gray identified Harold Joe Mills and his brother, co-defendant Ricky Mills, from a photo line-up prepared by the police. Also, Gray's school friend, Richard Honeycutt, showed Gray photos of the Mills brothers, who, it turned out, were Honeycutt's uncles. The Mills brothers were thereafter indicted for first-degree robbery and tried together in Knox Circuit Court.

In addition to Gray, the Commonwealth's witnesses at trial included: Jack Ketchum, the owner of the gas station; Ronnie Rhodes, a convicted felon who informed the police that Harold Joe had bragged that he and Ricky Mills had committed the robbery; and Officer Bill Swafford, the lead investigator on the case. Although Harold Joe elected not to take the stand in his own defense, Ricky Mills testified that he and Harold Joe were at Ricky's girlfriend's apartment playing card games at the time of the robbery. Similarly, Ricky's girlfriend testified that both men were at her apartment the entire evening. Ultimately, the jury convicted both Harold Joe and Ricky of first-degree robbery. Ricky was sentenced to 10 years imprisonment. Harold Joe was sentenced to 20 years enhanced to 50 years imprisonment as a result of the second-degree persistent felony offender conviction.

**Separation of witnesses – it was reversible error to allow Gray to remain in the courtroom throughout the Commonwealth's case.** At trial, prior to opening statements, the Commonwealth moved to invoke RCr 9.48 for the separation of witnesses, but requested that both lead investigating Officer Swafford and Gray be allowed to remain at the prosecution's table throughout the trial. Over defense objection, the trial court granted the motion. On appeal, Mills argued that it was prejudicial error for Gray to be present in the courtroom during the testimony of the Commonwealth's witnesses, particularly Officer Swafford. Swafford's testimony contained a detailed description of Gray's statement to the police, including the specific events of the robbery and a description of the perpetrators. In addition, Swafford testified to the exact height and weight information taken from Harold Joe's driver's license and provided details concerning the photo line-up from which Gray identified the Mills brothers. The Supreme Court agreed, holding that Gray did not fall within the three exceptions set forth in KRE 615 [exclusion of witnesses] and should not have been allowed to remain in the courtroom. The Court found that the trial court's failure could not have been harmless in Mills' case because

by the time Gray took the stand, his memory was completely refreshed as to the details of the robbery and the description of the perpetrators. Since Gray was the only witness to the robbery who testified at trial, his overall credibility was crucial. "As such, he should not have been permitted to hear the testimony of the Commonwealth's other witnesses."

**Brady violation required reversal for a new trial.** In addition, the Court held that the trial court should have granted, at a minimum, a continuance upon the discovery during trial that Officer Swafford had failed to turn over some of his investigation notes, which contained exculpatory evidence. The notes indicated that a woman named Faye Hopper had informed the police that she was on the premises at the time of the robbery and that she believed that she could identify the two men who committed the crime. In addition, several days after the robbery, Hopper was shown the photo line-up and could not identify either of the Mills brothers. By the time defense counsel became aware of Hopper, she had moved and was not available.

**No error in failing to excuse former police officer for cause.** The Court found no error in the trial court's failure to excuse a former police officer for cause. Despite the fact that the former officer indicated during voir dire questioning by the defense that he had never arrested anybody that was later determined to be innocent and that everyone he arrested was guilty, as far as he knew, the Court found no error. According to the Court, "[t]he juror did not say that he believed everyone who is arrested is guilty, rather that he had not arrested anyone that he later found out was innocent." "Further, he affirmatively stated that he could be fair and impartial."

The Court refused to address Mills' argument that the trial court failed to allot the correct number of peremptory challenges because defense counsel "neither objected to the trial court's interpretation of RCr 9.40 nor offered a contrary interpretation."

The Court also refused to address Mills' argument that the trial court erred in failing to allow defense counsel the opportunity to cross-examine Ronnie Rhodes, the confidential informant, regarding his probationary status at the time he gave his statement to the police implicating the Mills brothers. Since defense counsel did not offer the testimony by avowal, the issue was not properly preserved for appellate review. However, the Court did note that upon retrial, if sufficient evidence was presented to prove that Rhodes was on probation at the time he implicated the Mills brothers in the robbery, defense counsel should be permitted to cross-examine him about his probationary status.

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Justice Wintersheimer dissented. In his view, the majority's application of KRE 615 "is unfair, and the victim of a crime should be allowed to confront his attacker."

***George H. Burchett, Jr. v. Commonwealth,*  
Ky., \_\_ S.W.3d \_\_ (2003)  
(Final on 03/20/03)  
(Reversing and remanding)**

**Habit evidence inadmissible in Kentucky.** As a result of a fatal automobile accident, Burchett was convicted of reckless homicide after a jury trial, for which he received a five-year sentence. At trial, over Burchett's objection, the trial court permitted testimony regarding Burchett's daily use of marijuana. Burchett appealed his conviction to the Kentucky Court of Appeals and that court affirmed. The Supreme Court of Kentucky granted discretionary review to consider the only issue raised on appeal: whether evidence that Burchett smoked marijuana on a daily basis was admissible to prove that he smoked marijuana on the day of the collision.

In a plurality opinion, the Court reaffirmed that evidence of a defendant's habit is not admissible in Kentucky. Therefore, evidence that Burchett smoked marijuana on a daily basis should not have been admitted to prove that he had smoked marijuana on the day of the collision. Justices Johnstone, Stumbo and Chief Justice Lambert held that habit evidence should remain inadmissible in Kentucky because the introduction of such evidence violates KRE 403. KRE 403 requires the exclusion of relevant evidence on grounds of prejudice, confusion of the issues, or considerations of undue delay. Proof of a defendant's habit requires numerous collateral inquiries that are likely to lead to confusion of the issues and undue delay of the proceedings.

Justice Keller concurred in the result only, because of the long line of precedent holding habit evidence inadmissible in Kentucky. However, Justice Keller recommends that the Court follow the procedures outlined in KRE 1102 and amend the adopted Kentucky Rules of Evidence to permit the introduction of habit evidence in Kentucky.

Justice Cooper dissented, joined by Justices Graves and Wintersheimer. Justice Cooper is of the view that if the adoption of the Kentucky Rules of Evidence abrogated all common law evidentiary rules, then KRE 402 governs the issue of habit evidence. Under KRE 402, all relevant evidence is admissible unless excluded by "the Constitutions of the United States and the Commonwealth of Kentucky, by acts of the General Assembly of the Commonwealth of Kentucky, by [the KRE], or by other rules adopted by the Supreme Court of Kentucky." If the common law evidentiary rules are not abrogated, then "this Court has the authority to change the direction of the common law by overruling those precedents that are inconsistent with modern (and virtually unanimous) legal thought."

***Kalton Adkins v. Commonwealth of Kentucky,*  
Ky., 96 S.W.3d 779 (2003)  
(Affirmed)**

On November 6, 1999, Richard Roberts, age sixty-eight, was beaten to death in his home in Pike County, Kentucky. His family discovered his body the next morning. The body was found lying near the front door clad only in underwear. Missing from the residence were a .410 pump shotgun and the victim's wallet, in which he was known to keep large sums of money. There were blood stains on the front porch and steps and smeared blood stains leading from the door to the victim's body, indicating the body had been pulled away from the door so that the door could be shut. There was no sign of forced entry. The following day, Kalton Adkins was arrested for disorderly conduct in the parking lot of the Colley Motel after he attempted to flee when the police attempted to question him about the murder. Cocaine and drug paraphernalia was found in the room that he and his girlfriend, Ruth Caudill, had rented. Adkins and Caudill were both charged with possession of a controlled substance and possession of drug paraphernalia. Adkins was subsequently charged with Roberts' murder, first-degree robbery, and first-degree burglary.

Adkins was well acquainted with Roberts, as Adkins' mother has previously cohabited with Roberts some 20 years before. During that time Adkins and his family lived in a mobile home on Roberts' property. After the cohabitation ended, Adkins had no contact with Roberts until a few months before Roberts' death, when Adkins contacted Roberts for various reasons (i.e., rental property, selling of meat). After a jury trial, Adkins was convicted of murder, first-degree robbery and first-degree burglary. He was sentenced to a total of 70 years in prison.

**Habit evidence inadmissible, but not properly preserved for appellate review.** At trial, the Commonwealth introduced evidence of the victim's habits of sleeping in his underwear on the recliner in the living room, always keeping the doors locked at night, and always ascertaining a visitor's identity before unlocking the door. The Court noted that the admission of such habit evidence was error, citing *Burchett v. Commonwealth*, Ky., \_\_ S.W.3d \_\_ (2003) (discussed directly above). "However, the error was not preserved for review by contemporaneous objection."

**Evidence sufficient to overcome motion for directed verdict.** The Court found sufficient evidence to overcome Adkins' motion for directed verdict on all of the charges where: (1) Roberts knew Adkins well and would not have opened the door clad only in underwear unless the visitor was a male with whom he was well acquainted; (2) a neighbor testified that Roberts was expecting Adkins on the night of the murder; (3) Adkins admitted being on Roberts' property that night; (4) Adkins' girlfriend, Caudill, testified that Adkins was not at home for two to three hours on the night of the murder; (5) Adkins had cocaine and funds to rent a hotel room when he

returned home that night; (6) the jeans Adkins was wearing that night were stained with Roberts' blood; (7) a piece of Adkins' military-style brass belt was missing and a similar piece that appeared to match was found at the crime scene; (8) Roberts' shotgun and wallet were missing and the wallet was found discarded along the route Adkins admitted traveling on the night of the murder and the morning after, and (9) Adkins told his brother after his arrest that "[he] might have done it." *Commonwealth v. Benham*, Ky., 816 S.W.2d 186, 187 (1991).

**Terry stop and frisk for weapons justified by Adkins' behavior.** On appeal, Adkins argued that the trial judge erred in failing to suppress evidence obtained when Adkins was stopped and frisked for weapons in the parking lot of the Colley Motel. While the Court noted that Adkins did not specify what evidence was actually obtained as a result of the stop, the Court held that the police had sufficient "reasonable articulable suspicion" to stop and frisk Adkins for weapons. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Court noted that *Terry* established two principles applicable to Adkins' case. First, "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." *Id.* at 22, 88 S.Ct. at 1880. This is true even when, as in Adkins' case, the felony has already been committed. *United States v. Hensley*, 469 U.S. 221, 229, 105 S.Ct. 675, 680, 83 L.Ed.2d 604 (1985). Second, an officer may conduct a frisk for weapons where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to make an arrest. *Terry, supra*, at 27, 88 S.Ct. 1883. Moreover, when a police officer believes he is confronting a murder suspect, he has presumptive reason to believe that he is dealing with an armed and dangerous person. *Collier v. Commonwealth*, Ky. App., 713 S.W.2d 827, 828 (1986). The Court noted that Adkins' own behavior – giving a false name, acting nervous, looking around for an escape route, and shouting profanities when asked for identification – justified the stop and the attempted frisk for weapons. Thus, the trial court properly overruled Adkins' motion to suppress the "unspecified evidence allegedly obtained as a result of the *Terry* stop and frisk."

**Adkins not denied right of confrontation by Caudill's invoking the Fifth Amendment on cross-examination.** At trial, the Commonwealth called Ruth Caudill to testify, knowing she would invoke her Fifth Amendment privilege on any questions regarding any activity relative to her pending drug charges. Adkins immediately moved to suppress any testimony from Caudill, arguing that the Commonwealth could not call Caudill knowing that she intended to assert her Fifth Amendment privilege on cross-examination. The trial court overruled Adkins' motion. When asked if she took cocaine on the morning of the murder, Caudill did not answer the question. On appeal, Adkins argued that he was denied his

right of confrontation under the Sixth Amendment and Section 11 of the Kentucky Constitution. The Court disagreed, finding that a witness who will testify as to some matters but not others should ordinarily be allowed to take the stand. *Combs v. Commonwealth*, Ky., 74 S.W.3d 738, 742-43, 745 (2002). If a prosecution witness refuses to answer questions on cross-examination, the defendant's proper remedy is to move to strike all or part of the witness's direct testimony. The Court noted that the ruling in *Combs* is a two-way street – just as the Commonwealth cannot prevent the defendant's alibi witnesses from testifying because a witness may take the Fifth Amendment on cross-examination, the defendant cannot prevent the Commonwealth's witnesses from testifying.

**Questioning of Adkins in jail by Adkins' brother not "state action" for *Miranda* purposes.** The Court held that the trial court did not err by failing to suppress a statement made by Adkins to his brother (*i.e.*, "I might have done it") after Adkins had invoked his *Miranda* rights. Although Adkins' brother worked for the Department of Juvenile Justice and went to talk with Adkins in jail in an attempt to find out what happened, the Court found no "state action" implicating Adkins' right to remain silent and right to counsel.

Adkins also asserted that his motion to suppress evidence regarding crack cocaine possession, operating a motor vehicle on a suspended license, and his attempt to conceal his identity from the police at the Colley Motel, should have been granted because such evidence is improper character evidence under KRE 404(b). The Court held that the above evidence was not probative of a propensity to commit homicide and was therefore not barred by KRE 404(b). Also, the Court found that evidence that Adkins drove on a suspended license was "inextricably intertwined" with his explanation of his presence on Roberts' property on the night of the murder. Adkins told the police that he drove in to Roberts' driveway when he saw a police cruiser coming down the road because he did not have a valid driver's license.

The Court found no error where the trial court admitted photos of Roberts while living and testimony about his good health. Nor was there error in admitting photos of Roberts' corpse. Pictures of the corpse were necessary to prove the nature of the injuries.

Finally, Adkins alleged that one of the jurors was very good friends with Roberts' daughter and lied about the relationship during voir dire. Finding no proof to support the allegation, the Court found no error.

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**Michael A. Schoenbachler v.  
Commonwealth of Kentucky,  
Ky., 95 S.W.3d 830 (2003)  
(Affirmed)**

Schoenbachler was convicted on flagrant nonsupport and was sentenced to one year in prison. Schoenbachler appealed to the Court of Appeals of Kentucky, claiming that the trial court should have directed a verdict of acquittal because the Commonwealth failed to introduce sufficient evidence that Schoenbachler reasonably could have provided the ordered support. The panel affirmed the circuit court's judgment, but was divided as to the basis for that holding. The majority held that the Commonwealth was not required to introduce evidence of Schoenbachler's ability to pay his child support because "the burden of proving inability to pay rests with the defense." Schoenbachler moved for discretionary review in the Supreme Court of Kentucky. The Court granted review to resolve the issue of which party bears the burden of proof as to the defendant's ability to pay child support.

**Commonwealth bears burden of proving ability to pay child support.** The Court held that the Commonwealth bears the burden to prove that a defendant has the ability to provide child support in flagrant nonsupport cases. In Schoenbachler's case, the Court found that the Commonwealth met its burden by offering evidence that Schoenbachler's former employer allowed him to work "light duty" at a construction site and that Schoenbachler's son had assisted him with odd jobs like mowing the lawn, painting the house, and small engine repair. The Court found nothing "clearly unreasonable" about the verdict and found no error in the trial court's failure to direct a verdict of acquittal.

**Robert E. Thomas v. Commonwealth of Kentucky,  
Ky., 95 S.W.3d 828 (2003)  
(Affirming)**

Thomas entered a plea of guilty in Daviess Circuit Court to possession of a controlled substance in the first degree. He requested placement in the Drug Court Diversion Program. However, before the Daviess Circuit Court could rule on Thomas' request, he was arrested and charged with possession of a handgun by a convicted felon in Muhlenberg County, which was based upon his guilty plea to the drug charge. Subsequently, the Daviess Circuit Court approved Thomas' participation in the Diversion Program. When Thomas was indicted in Muhlenberg County on the firearm possession charge, he moved to dismiss the charge on the grounds he was not a convicted felon because at the time of his arrest he was under consideration for the drug court program. As such, Thomas argued that he had not been "convicted" on the Daviess County drug charge. The Kentucky Court of Appeals affirmed Thomas' conviction and the Supreme Court of Kentucky accepted discretionary review.

**"Conviction" was established at the time Thomas entered guilty plea.** The Supreme Court held that "[w]hen [Thomas] freely, knowingly, and intelligently entered a plea of guilty to first-degree possession of a controlled substance, he acknowledged the fact of having committed a crime and accepted legal responsibility for a criminal act. Thus, [Thomas'] status as a 'convicted' felon was established, and all that remained was the imposition of a sentence." *Grace v. Commonwealth*, Ky. App., 915 S.W.2d 754 (1996).

**Commonwealth of Kentucky v. Jeffrey A. Isham,  
Ky., \_\_S.W.3d \_\_ (2003)  
(Final on 03/13/03)  
(Reversing and remanding)**

Isham was employed as a truck driver with ABF Freight Systems. On January 8, 1999, Isham had a verbal altercation with his supervisor during which he stated that he would "have his lawyers sue us and he would fire on everyone here." As a result of the verbal altercation, Isham was fired. In addition, the manager of ABF Freight Systems filed a complaint against Isham for terroristic threatening. On Isham's motion, the district court dismissed the complaint with prejudice, finding that the statement was "nothing more than a threat to retain an attorney and commence legal action, and that as a matter of law, did not constitute terroristic threatening." The Commonwealth appealed to Circuit Court, which reinstated the charge against Isham. Isham sought discretionary review in the Court of Appeals of Kentucky, which was granted. The Court of Appeals reversed holding that "a trial court has the authority to determine whether a criminal complaint properly charges an offense." Also, like the district court, the Court of Appeals found that the statement did not constitute terroristic threatening as a matter of law. The Commonwealth moved for discretionary review in the Supreme Court of Kentucky.

**District court lacked authority to dismiss complaint.** The Court held that the district judge acted prematurely in dismissing the complaint. The proper time to determine whether Isham's alleged statement constitutes terroristic threatening is only after a trial on the merits has been held. RCr 3.13 was designed to allow the Commonwealth to remedy a defective complaint. While the trial judge must allow the Commonwealth permission to amend a criminal complaint, nothing contained in RCr 3.13 grants the trial judge the ability or authority to dismiss or amend a complaint on his or her own. Only the Commonwealth had the ability, with the permission of the trial court, to dismiss the complaint against Isham. RCr 9.64. The complaint was valid on its face. Dismissal of the complaint was an abuse of discretion on the part of the district judge. ■

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## 6th Circuit Review

*Matthews v. Abramajty*  
319 F.3d 780 (6<sup>th</sup> Cir. 2/10/03)

### Writ of Habeas Corpus Granted: Ineffective Assistance of Counsel

Matthews was convicted in Michigan state court of 3 counts of first-degree murder and one felony firearm count. Matthews was alleged to have participated in the triple homicide of Bruce Baxter, his wife Marilyn Baxter, and their neighbor Robert Williams (who happened upon the crime scene). The motive was apparently robbery as Baxter had an extensive jewelry collection. Rev. James Ellison, another neighbor, saw a man who was not Matthews, wearing a light blue “puffy jacket” leaning over Williams after he was shot. Several boys also saw 3 men running from the scene, and 6 of them testified at trial. Their descriptions varied to an extent but a common thread was that one man wore a gray and blue “Georgetown” jacket; another was wearing a red “Sixers” jacket; and one was hooded. At trial the prosecution introduced a mug shot of Matthews, taken 11 months earlier, wearing a dark blue “Georgetown” jacket. Ms. Marilyn Price testified she saw 3 men running near the crime scene, and she thought one of them might be Matthews, whom she said went to Cody High School with her nieces.

Matthews had met with Baxter at Baxter’s home 2 days before the murders. On the morning of the murders, Matthews was seen walking in the direction of the Baxter residence wearing a “dark” jacket. Matthews’ girlfriend testified she saw Matthews with a distinctive “Mercedes Benz” ring that had belonged to Baxter, but said he showed it to her in an effort to get her to loan him money so he could buy the ring from someone else. A jeweler testified that in the days following the Baxter murder, Matthews sold him the ring and a gold chain.

### Counsel Failed to Develop Defense Theory During Trial

At Matthews’ bench trial, the defense theory was that there was no positive identification of Matthews at the crime scene and no evidence tied him to the murders. His attorney, Daggs, briefly cross-examined Ms. Price, and did not cross-examine any of the child witnesses. Matthews is 6’4”, and the children’s description of the height of all of the men was inconsistent with this. While Daggs mentioned this discrepancy in closing argument, he failed to do so during the taking of proof. Daggs never got witnesses to “state in a positive way that the people they saw *could not have been* Matthews, relying instead on their inability to be sure that it *was* Matthews.” (emphasis in Opinion)

### Only Witnesses Called on Defendant’s Behalf Were Recalled Government Witnesses

Daggs never called as a witness one of the children who actually participated in a photo show-up of Matthews and said that Matthews was not one of the men he saw on the day of the murders. Daggs also did not call several family members of Matthews who had told Daggs that they had seen him during the time the murders were committed. In fact, at the close of the Commonwealth’s case, when Daggs indicated that he was not going to put on a defense, the trial court indicated to Daggs at the bench that this was probably not a wise idea. Daggs then recalled 3 of the government’s witnesses. He presented a “rambling” closing argument. Daggs was convicted and sentenced to LWOP.

The 6<sup>th</sup> Circuit grants the petition for writ of habeas corpus on the ground of ineffective assistance of counsel. “Fundamentally, the lawyer in this case, at best, occupied a space next to his client but did not assist him.” Daggs failed to present the alibi witnesses, evidence of the height discrepancy, the fact that witnesses had not ID’ed Matthews in a show-up, and the fact he never attended Cody High School as alleged by witness Price. “In short, not only did Daggs not affirmatively assist his client, he appears to have furnished a net negative to the defense. Under the standard of *Strickland v. Washington*, 466 U.S. 668, 687-691 (1984), this is a sufficient judgment to meet the standard for incompetence. . . the evidence was not overwhelming, so that there is a reasonable probability of a different outcome with effective counsel.”

### Equitable Doctrine of Laches Does Not Bar This Habeas Petition

The state also contended that the equitable doctrine of laches precludes review of Matthews’ petition. The Court dismisses this claim, noting that only one district court case, out of the 2<sup>nd</sup> Circuit, has used laches to dismiss a petition as time-barred. The Court also states that the burden of proving laches is a heavy one for the state, and that it would require proof of prejudice, caused by the petitioner having filed a late petition, and evidence that the petitioner has not acted with reasonable diligence. *Rideau v. Whitley*, 237 F.3d 472, 477 (5<sup>th</sup> Cir. 2000).



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**Lancaster v. Adams**

**2003 WL 1524231 (6<sup>th</sup> Cir. 3/26/03)**

### **Writ of Habeas Corpus Granted: *Batson* Violation**

This is another victory for our clients as *Batson v. Kentucky*, 476 U.S. 79 (1986), is further strengthened. Lancaster was convicted in Michigan state court of first-degree premeditated murder and possession of a firearm during the commission of a felony after he shot and killed his girlfriend Toni King in the parking lot of a shopping plaza. He was sentenced to LWOP.

During jury selection, venireperson Jackie Bowden, an African-American, told the Court that he would be fair to both sides and would be a good juror. Neither the prosecution nor defense had any questions for Bowden. The prosecution then exercised 3 peremptory challenges, striking 2 white venirepersons, Hassinger and Bednaris, and Bowden.

A *Batson* challenge was made to the removal of Mr. Bowden. The prosecutor stated he removed Bowden because his “responses were not ‘strong enough’ to satisfy the prosecution.” The prosecution noted that 3 African-Americans had already been called to sit on the jury, although one of those had been removed for cause and another was Mr. Bowden. The prosecutor then stated that his investigator was African-American, and he agreed Bowden should be excused. Defense counsel argued Bowden’s responses indicated he would be fair and there was no reasonable basis to strike Bowden. The trial court ruled that the prosecution was impermissibly using race to strike an African-American and kept Bowden on the jury.

Voir dire resumed. A half-hour later another African-American was seated. The prosecution requested a bench conference, the transcript of which was not included in the record. After the bench conference concluded, the judge excused Bowden. The next day the trial court put on the record that it had reversed its ruling because the prosecutor’s subsequent conduct in not challenging the next African-American led him to believe that his reason for challenging Bowden was not racially motivated.

*Batson v. Kentucky*, *supra*, holds that a prosecutor cannot exercise his peremptory challenges to exclude jurors on the basis of race. A three-step analysis is used to examine *Batson* challenges: (1) the defendant must establish a *prima facie* case of racial discrimination, *i.e.* the defendant is in a cognizable racial group and the prosecutor used peremptory challenges to removed people of that race from the venire panel; (2) the state must give a race-neutral explanation for the use of the peremptory challenge; and (3) the defendant must demonstrate that the prosecution’s explanation is a pretext for racial motivation.

The 6<sup>th</sup> Circuit focuses its attention on whether the decisions

of the Michigan states courts in finding no purposeful discrimination were unreasonable applications of *Batson*, *supra*, and *Hernandez v. New York*, 500 U.S. 352 (1991), which held that the question of whether a *prima facie* case has been established is moot once a court rules on the ultimate question of whether there has been purposeful discrimination.

### **Fact that Prosecution Keeps Some African-Americans in the Jury Pool Does Not Cure Other Improper Challenges for Cause**

The trial court’s ruling that Lancaster had failed to establish a *Batson* violation was based solely on the prosecution’s decision not to use a peremptory challenge to remove the subsequent African-American. This, according to the 6<sup>th</sup> Circuit, “flies in the face of the spirit and purpose of *Batson*.” The prosecution’s decision not to use a peremptory challenge to remove a subsequent African-American does not cure the excluding of Bowden solely because of his race. “Where purposeful discrimination has occurred, to conclude that the subsequent selection of an African-American juror can somehow purge the taint of a prosecutor’s impermissible use of a peremptory strike to exclude a venire person on the basis of race confounds the central teachings of *Batson*.”

### **Doyle Claim Not Reviewable as Defense Counsel Failed to Object at Trial**

The *Doyle v. Ohio*, 426 U.S. 610 (1976), claim is based on Detective Cischke’s, the officer who interrogated Lancaster after his arrest, testimony that Lancaster refused to speak to police. No objection was made to this line of questioning. The 6<sup>th</sup> Circuit finds that this claim is procedurally defaulted. *Greer v. Mitchell*, 264 F.3d 663, 672-73 (6<sup>th</sup> Cir. 2001). Michigan has a procedural rule, that it enforces, requiring a contemporaneous objection. Defense counsel failed to object at trial. This was an adequate and independent state ground that the Michigan appellate courts relied on to foreclose review of this claim. Lancaster argues that his trial counsel’s ineffective assistance of counsel is cause for the procedural default of this claim. “[A]n ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted [although] that procedural default may be excused if the petitioner can satisfy the cause-and-prejudice standard with respect to that claim.” *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). Lancaster has failed to show cause-and-prejudice with respect to the IAC claim.

***Moss & Kohn v. U.S.***  
**2003 WL 1524448 (6<sup>th</sup> Cir. 4/25/02)**

### **Conflict of Interest of Defense Counsel Does Not Render Trial Unfair**

Kohn and Moss argued that joint representation by defense counsel created an actual conflict of interest, resulted in inef-

fective assistance of counsel. In March 1989, Moss learned that the government was investigating his involvement in an alleged conspiracy to import marijuana from Mexico into the U.S. He contacted a criminal defense attorney, David Morreale, who enlisted the services of Timothy Murphy, a more experienced federal criminal defense attorney. Morreale told Moss that he and Murphy would both be representing him. Murphy informed the U.S. Attorney's office that he was Moss' attorney and began to actively work on the case.

In March 1991, Moss and Kohn were both indicted by a federal grand jury for conspiracy to import marijuana. At arraignment, Murphy entered an appearance on behalf of both Kohn and Moss. A few days later, by letter, Morreale entered an appearance on behalf of Moss. Later in March, Jaegar, another co-conspirator, was indicted in connection with this case. Jaegar's attorney Kappleman immediately began to work with the U.S. Attorneys office to secure a deal for Jaegar in which he would testify against Moss and Kohn. At the same time, Murphy and Kappleman were exchanging information about the case. At one meeting, Moss and Jaegar met privately and Jaegar agreed to bribe a potential witness against Moss for \$25,000. In April, 1991, during a meeting between Murphy and the Assistant U.S. Attorney Janice, Janice advised Murphy that Kohn should cooperate with the government. A few weeks later, Jaegar entered into a formal agreement with the government, and a Grand Jury issued a Superceding Indictment containing additional charges against Moss and Kohn. In August, 1991, a Second Superceding Indictment was returned, and it included a charge arising from Moss' request that Jaegar bribe a witness earlier in the year.

Trial commenced against Moss and Kohn in September, 1991. Moss was represented by Morreale and Kohn was represented by Murphy. A verdict of guilty was returned against both parties, and they both received lengthy prison sentences.

In IAC claims, a presumption of prejudice exists if the defendant demonstrates his attorney actively represented conflicting interests. *Cuylar v. Sullivan*, 446 U.S. 335, 350 (1980), *Mickens v. Taylor*, 122 S.Ct. 1237, 1241-45 (2002). When defendant or his attorney object to the conflict prior to or during trial, the trial court has a duty to inquire as to the extent of the conflict or any conviction is subject to automatic reversal. *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978). Where no objection is made, a showing of actual conflict and an adverse effect on his attorney's performance will void the conviction. *Mickens*, 122 S.Ct. at 1245.

**No Joint Representation at Trial of Co-Defendants  
Where Each Had Own Attorney Even Though One of the  
Attorneys Worked With Both Co-Defendants**

The Court finds that there was no joint representation of Moss and Kohn in the case at bar. Murphy testified at an evidentiary hearing that his intent was only to represent Kohn

as Moss was Morreale's client. Morreale testified that the only reason that Murphy entered an appearance for both parties at the arraignment was because Morreales could not attend. The Court also takes notice of Morreales's prior relationship with Moss. Attorneys Kappleman and AUSA Janice testified that it was clear to them, as outsiders, that Moss was represented by Morreale and Kohn was represented by Murphy. This separate representation was also obvious to the trial court.

While the Court looks with disfavor upon some meetings between Moss and Murphy, with Morreale's presence, there is no evidence in the record to support an inference that legal advice was given to Moss at these meetings. The Court finds there was no attorney-client relationship between Moss and Murphy during the post-arraignment proceedings.

**Successive Representation Claims:  
Sullivan Standard Applies**

The Court does find that Murphy developed an attorney-client relationship with Moss pre-indictment. Morreale told Moss that he and Murphy would be working together. Murphy also worked with the U.S. Attorney's office on Moss' behalf. This finding requires the Court to examine whether Murphy's successive representation of Moss and Kohn resulted in an actual conflict of interest. The 6<sup>th</sup> Circuit holds that the *Sullivan* standard rather than the *Strickland*, 466 U.S. 668 (1984), standard applies to successive representation claims.

The Court notes that this holding is buttressed by the fact that it appears that some, if not all, of the funds for Kohn's attorneys fees came from Moss. While "third-party fee arrangements are inherently suspect, particularly when a member of the alleged conspiracy is the source of the payment," the Court decides that in the case at bar it cannot find as a matter of law that this fee-paying arrangement created a conflict of interest.

The *Sullivan* standard requires the Court to first examine whether Murphy's successive representation created a conflict of interest. The petitioner's "must point to specific instances in the record that suggest an actual conflict or impairment of [their] interests." *Thomas v. Foltz*, 818 F.2d 476, 481 (6<sup>th</sup> Cir., 1987). The petitioners assert that a conflict of interest is suggested by Murphy's inability to negotiate a plea agreement with the government. The U.S. Supreme Court in *Holloway*, 435 U.S. at 489-490, requires that a defendant alleging that his attorney's conflict of interest prevented exploration of plea negotiations must prove that the government was willing to extend or consider an invitation to commence plea negotiations. This has been proven in the case at bar as the U.S. Attorney's office was willing to work a plea with Kohn, and in fact, extended an offer to Murphy to get Kohn to cooperate.

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While a conflict of interest has been proven, *Sullivan* requires the petitioners to demonstrate that successive representations adversely affected Murphy's performance. *Mickens*, 122 S.Ct. at 1243. The showing must be that "counsel was influenced in his basic strategic decisions by the interests [of the former client]." *Wheat v. U.S.*, 486 U.S. 153, 160 (1988).

**Attorneys' Failure to Explore Plea Negotiations Is the Result of Defendants' Desire to Pursue a Defense of Innocence, Not Conflict of Interest or Bad Advice**

Kohn argued that the conflict of interest affected Murphy's exploring of plea negotiations because a plea would require Kohn to testify against Murphy. Actually, the Court says, the unwillingness to explore plea negotiations derived from Kohn's desire of a defense of innocence. Kohn also said his unwillingness to plea was the result of Murphy's misadvice that his sentence exposure was the same whether he went to trial or plead. The Court examines this issue closely because what Kohn is alleging is that Murphy was ineffective in giving him misadvice because of a conflict of interest. The Court holds that "a petitioner alleging that a conflict of interest prevented his attorney from exploring plea negotiations must demonstrate (1) a conflict of interest and (2) that the conflict of interest prevented the attorney from exploring plea negotiations. In the case at bar, Kohn's claim fails because there was no nexus between the conflict of interest and the bad advice.

Moss argued that the conflict of interest adversely affected his counsel's performance in that Murphy failed to explore plea negotiations, failed to seek a severance, and failed to pursue a defense of multiple conspiracies. This argument fails because Murphy's attorney-client relationship with Moss was terminated right after arraignment.

The Court further dismisses Moss' claim that Morreale rendered ineffective assistance of counsel by misadvising him of his possible sentence exposure which in turn limited Moss' incentive to explore plea negotiations. Moss was also unwilling to enter into a plea agreement as he maintained he was innocent of all charges. Further Morreale never gave Moss misadvice.

**Unethical Behavior of Trial Attorney Does Not Mean Reversal is Required**

The Court concludes this Opinion by affirming both Kohn's and Moss' convictions, but noting "[o]ur decision should not be construed, however, as an approval of Attorney Murphy's conduct. His successive representations of the petitioner's, as well as his involvement in a suspect fee arrangement with a co-conspirator, strain to their very limits the boundaries of professional conduct."

**Short Takes:**

—*U.S. v. Wade*, 318 F.3d 698 (6<sup>th</sup> Cir. 2/11/03): In this case the 6<sup>th</sup> Circuit limits *Pinkerton* liability, *Pinkerton v. U.S.*, 328 U.S. 640 (1946), of a defendant who was convicted of firearm possession because a co-conspirator possessed a gun. In *Pinkerton*, 328 U.S. at 647-648, the U.S. Supreme Court held a defendant can be convicted for the criminal acts of a co-conspirator as long as the crime was foreseeable and committed in furtherance of the conspiracy. Wade had agreed to sell a CI 1 oz. of crack cocaine. Wade took 3 people along with him to the place where the buy was to occur. One of those people was Bobby Smith who it was later discovered had a pistol and street drugs worth \$1,100 on him. The Court first notes that while guns are often tools of the drug trade, evidence supporting an inference that a co-conspirator could foresee possession of a gun "must be more than a mere generalized presumption that drug transactions involve guns." Also, a "co-conspirator's firearm possession is foreseeable only when the quantity of drugs involved is so large that those involved would expect others to be carrying protection." \$1,100 worth of drugs is not a huge quantity of drugs. Furthermore there was no evidence that Wade "was very involved or experienced in the drug trade" to be aware of the link between guns and drugs. Finally, the gun was hidden in the back floorboard of a car Wade was driving so it was not clearly visible. In a separate issue, the Court also notes that the U.S. Supreme Court has now held, in *Harris v. U.S.*, 122 S.Ct. 2406 (2002), that *Apprendi v. N.J.*, 530 U.S. 466 (2000), is inapplicable to factors increasing the mandatory minimum sentence.

—*Rosales-Garcia v. Holland & Carballo v. Luttrell*, 2003 WL 742589 (6<sup>th</sup> Cir. 3/5/03): While not relevant to state court practitioners, this *en banc* Opinion is an important as it represents a victory for illegal aliens who have been incarcerated for long periods of time because their home countries refuse to take them. In *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001), the U.S. Supreme Court held that the provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") that authorizes the post-removal-period detention of removed aliens must be construed to contain an "implicit reasonable time limitation" because the indefinite detention of aliens who are removable on grounds of deportability "would raise serious constitutional concerns." The 6<sup>th</sup> Circuit extends the holding of *Zadvydas* to aliens removable on grounds of inadmissibility and also concludes that even if *Zadvydas* was inapplicable, indefinite detention is unconstitutional under the 5<sup>th</sup> and 14<sup>th</sup> amendments. The Court recognizes six months as a "presumptively reasonable period" for the post-removal detention of excludable aliens. When this six-month period has run, and the alien provides good reason to believe there is no significant likelihood of removal in the reasonable foreseeable future, the government must rebut that showing if it desires to keep the alien incarcerated. As both of these petitioners have been detained for over six months, and there is no significant likelihood of removal in the reasonable foreseeable future, a writ

of habeas corpus is granted as to both petitioners Judge Boggs dissents in a separate opinion in which Judges Krupansky and Batchelder join.

—*U.S. v. Dupree*, 2003 WL 1192464 (6<sup>th</sup> Cir, 3/17/03): Dupree was convicted of racketeering conspiracy, armed robbery, and unlawful possession and use of a firearm during a crime of violence. He was a loss prevention officer at Value City Department Store and helped plan a robbery of an armed guard for the Wolverine Armored Dispatch Service as he made his pick-up of cash and checks from the store. He also supplied a gun that was used during the crime. He argued on appeal that statements made to police after his arrest should have been suppressed. His attorney had an informal agreement with the government where counsel would be notified if and when Dupree would be arrested so he could turn himself in. Dupree was arrested and counsel was not informed. Dupree spoke with FBI Agent Gilligan, who knew Dupree was represented by counsel, for an hour and a half. Dupree signed 2 written waivers. The Court holds *Edwards v. Arizona*, 451 U.S. 477 (1981), is inapplicable as Dupree never asked for his attorney. The fact that the government is aware a defendant has an attorney does not assert the defendant's right to counsel during interrogation. *U.S. v. Suarez*, 263 F.3d 468, 483 (6<sup>th</sup> Cir. 2001), *cert. denied*, 535 U.S. 991 (2002).

—*U.S. v. Foreman*, 2003 WL 1477501(6<sup>th</sup> Cir. 3/25/03): Foreman was convicted of various crimes relating to a scheme to defraud banks using counterfeit checks. On appeal he argued trial counsel was ineffective by failing to call an alibi witness, Howard Clark, or other witnesses who would have corroborated an alibi defense and because he was laboring under a conflict of interest as he did not believe Foreman when he said he was not the perpetrator of the crime. Because of the incredulity of the alibi testimony Clark was going to offer at trial, “not calling Clark to testify was a reasonable trial strategy, especially given that Foreman has already offered this alibi on the witness stand.” The Court also holds trial counsel was not ineffective for failing to call 3 witnesses to testify as to the existence of “Jim Hunt,” the man Foreman alleged defrauded him and police officers who Foreman reported his alleged defrauding by “Jim Hunt.” Testimony about “Jim Hunt” would not have added anything to Foreman’s defense and would have probably made the jury even more suspicious of Foreman and his claims of fraud. Counsel was also not ineffective for not introducing photos of a building in Dayton, Ohio, that Foreman allegedly owned with “Jim Hunt” since there was no evidence that Foreman actually owned said building. Finally, the Court holds that “an attorney has no adverse interest simply because he or she entertains doubts about the veracity of the client.” ■

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## CAPITAL CASE REVIEW

### UNITED STATES SUPREME COURT

*Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003)

**Majority:** Kennedy (writing), Rehnquist, Stevens, O'Connor,

Scalia (concur), Souter, Ginsburg, Breyer

**Minority:** Thomas

When a petitioner seeks a Certificate of Appealability (COA) in his federal habeas case, Courts of Appeals must generally assess habeas claims on the merits and decide whether the outcome of the case was debatable among jurists of reason. *Miller-El v. Cockrell*, 123 S.Ct. 1029, 1039 (2003).

#### Deference Does Not Mean No Review

The state court failed to give full consideration to Miller-El's evidence of pattern and practice in the Dallas County District Attorney's Office, and of the conduct of the prosecutors assigned to his case. The federal courts simply deferred to the state opinion without examination. This is incorrect. The doctrine of federal deference to state opinions does **not** mean

that a district or appellate judge may abandon or abdicate her duty of judicial review. *Id.*, at 1041.

The clear and convincing evidence standard applies to state court determinations of the **facts** and to the grant of relief, not to a COA. *Id.*, at 1042, citing 28 U.S.C. §2254(d)(2) and (e)(1). Finally, the Fifth Circuit decided the merits of the *Batson* claim without first deciding it had jurisdiction—through a COA—to do so. *Id.*

#### Evidence of Racial Bias

Three of the state's reasons for striking African-American jurors applied equally to some white jurors who served on the jury. The evidence demonstrated disparate questioning of African-American and white jurors. In questions regarding personal views about the death penalty, a majority of African-American jurors were given a fairly graphic account of the execution process while white venirepersons were not. On the other hand, a majority of white venirepersons were told what the statutory minimum sentence was while African-Americans were not.

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Under Texas law, parties to a case may request a “jury shuffle”—a literal shuffling of the cards on which the names of prospective jurors are placed. In this case, the prosecution requested a shuffle when a majority of persons at the front of the pack were African-Americans (persons at the back of the group tend not to be called to serve as jurors), and delayed in objecting to a defense shuffle until it saw the racial makeup of the venire. As part of his support for this subclaim, Miller-El presented evidence that the Dallas County District Attorney’s Office had used “jury shuffles” in the past to affect the racial composition of juries.

The Court gave “some weight” to other historical evidence of racial discrimination. As a district judge testified, when he was a prosecutor in the late 1950s and early 1960s, he was told that he would be fired if he permitted an African-American to serve on a jury. Another district judge and a former staffer testified as to their beliefs that the office had a systematic policy of excluding African-Americans from jury service. Finally, a circular from 1963 instructed prosecutors “Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or well educated.” An article in a manual entitled *Jury Selection in a Criminal Case* outlined the reasons for excluding minorities from venires. The manual was written in 1968, but was in circulation at least until 1976—and available to at least one prosecutor who tried the Miller-El case. *Miller-El*, 123 S.Ct. at 1039.

In Kentucky, attorneys for Victor Taylor presented similar evidence in jury selection. Defense attorneys testified as to their experiences in Jefferson County. A former employee of then-Commonwealth’s Attorney Ernest Jasmin testified that she was specifically told to exercise peremptory challenges on veniremembers who were the same race as the defendant. Taylor also introduced sections of the Kentucky Prosecutors Manual stating that minorities should be stricken. Finally, a retired judge testified as to her experiences. Interestingly, Taylor was found to have presented no evidence of a systematic practice of racial bias in peremptory challenges of jurors. *Taylor v. Commonwealth*, Ky., 63 S.W.3d 151 (2001).

#### Thomas Dissent

Justice Thomas believed that Miller-El had not proven his claim by clear and convincing evidence and did not merit a COA.

#### *Clay v. United States*, 123 S.Ct. 1072 (2003)

**Majority:** Ginsburg (writing), Rehnquist, Stevens, Souter, Breyer, O’Connor, Kennedy, Scalia, Thomas

A federal prisoner who does not file a petition for *certiorari* must file his post-conviction action within one year **after** the period to seek *cert.* expires.

#### *Woodford v. Garceau*, 2003 WL 1477291 (2003)

**Majority:** Thomas (writing), Rehnquist, Stevens, Scalia, Kennedy  
**Concur:** O’Connor  
**Dissent:** Souter (writing), Ginsburg, Breyer

In this case, the Court held that the draconian review standards enacted in the Antiterrorism and Effective Death Penalty Act (AEDPA), applies to actions filed before April 24, 1996 if a habeas petition had not been filed prior to that date.

#### O’Connor Concurs

Justice O’Connor concurred in the result only because she believed the Court was caught in its own trap. Garceau had filed a pre-petition document setting forth non-frivolous claims in his case. The district court used that document in granting a stay of execution.

#### SIXTH CIRCUIT COURT OF APPEALS

#### *Davis v. Mitchell*, 318 F.3d 682 (6<sup>th</sup> Cir. 2003)

**Majority:** Merritt (writing), Moore  
**Minority:** Boggs

#### Sentence reversed; remanded for new penalty phase

The state court’s denial of a *Mills/McKoy* claim was contrary to clearly established federal law. Davis’ jury was instructed that it must unanimously reject the death penalty before it could consider a life sentence in combination with a general unanimity instruction.

After considering the instructions and the verdict form requiring twelve signatures for a life sentence, the majority found a reasonable likelihood that the jury believed it could not render a sentence less than death unless it was unanimous in its decision.

#### *Wickline v. Mitchell*, 319 F.3d 813 (6<sup>th</sup> Cir. 2003)

**Majority:** Martin (writing), Siler, Daughtrey

#### Ineffective Assistance of Counsel

Counsel’s failure to present evidence of Wickline’s mental health and his history, background and character was not ineffective assistance. The record contained a statement of counsel’s strategy in not presenting this information. Mental health evidence showed only a history of depression, not any condition relevant to two murders. Further, evidence pertaining to Wickline’s upbringing was a vague statement that his relationship with his father was “crucial” to the way he handled frustration and rage.

Other issues tilled no new soil in the court’s capital jurisprudence.

KENTUCKY SUPREME COURT

*Johnson v. Commonwealth*, 2003 WL 558504 (February 20, 2003)

**Majority:** Lambert (writing), Graves, Johnstone, Wintersheimer  
**Minority:** Keller (writing), Cooper, Stumbo

After Don Johnson pled guilty to murder and several other crimes, the prosecution agreed to judicial sentencing. The trial court sentenced Johnson to death.

**Guilty Plea Jurisprudence**

Johnson argued that his plea was not knowing, voluntary and intelligent because the court did not inform him that by pleading guilty, he gave up his rights 1) to be free from self-incrimination; 2) to appeal; 3) to jury determination of guilt and sentence; and 4) to the presumption of innocence.

The Court held that *Boykin v. Alabama*, 395 U.S. 238 (1969), does not require “separate enumeration” of the rights a person gives up when he pleads guilty. Rather, *Boykin* requires “full understanding” of the rights given up. The trial court’s asked Johnson twenty questions regarding those rights. His

answers proved he knew what rights he waived. *Johnson v. Commonwealth*, 2003 WL 558504, at 4.

*Boykin* also does not require that a person who wishes to plead guilty enter a written waiver of his rights.

Other issues covered no new ground.

**Dissent**

The trial court conducted an “abbreviated inquiry” during the plea proceedings. *Id.*, at 10. Notably absent from the questioning are the words “self-incrimination” or “jury.” Thus, there is no way to know that Johnson himself knowingly and voluntarily waived those rights.

The dissent thought “[p]erhaps the time has come to incorporate prevailing practice [of requiring written waiver of certain *Boykin* rights and written Motions to Enter Guilty Pleas] into our Rules of Criminal Procedure,” *Id.*, at 12, citing RCr 9.26(1) and AOC Form 491. ■

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**When Are Children Too Young To Be Prosecuted?**

Juvenile courts and their dockets are growing. Some of this growth is due to younger children being prosecuted. Without statutes limiting the age at which a child is too young to become a defendant to a criminal charge it is possible for very young children to be charged with offenses they are unable to inform the intent to commit and are unable to understand the legal system to be competent defendants. In Kentucky there are no statutes limiting the age at which a child can be charged with a status offense or a public offense.

Private citizens have the ability to go to the Court Designated Worker and file a juvenile petition and often these are filed against children too young to be criminally liable for the behavior complained of, to understand the juvenile justice system, and to be competent to stand trial. Schools are another culprit in bringing charges against very young children. In this age of zero tolerance, schools are sometimes the biggest of all culprits. Police officers appear to use more discretion in bringing charges against very young children, except when faced with the most serious offenses. Unfortunately, police often choose to charge very young children with sexual offenses wherein age and maturity play key roles in culpability and even capability.

**Status Offenses**

Status offenses are offenses that can only be committed by a person under the age of 18. In Kentucky there are three: runaway, beyond control of parent or school, and habitual truant. These are found in KRS 630.020. Some states also include curfew violations. Status offenses are handled in Family Courts in those jurisdictions with Family Courts. If the jurisdiction does not have a Family Court, the status offenses are adjudicated in District Court with the public offenses.

To be a runaway a child must be gone from his or her home without permission for 72 hours or more in a year’s time. Young children are generally not charged with this offense.

For a child to be beyond control of his or her parent the child must repeatedly disobey the reasonable directives of his or her parents and such behavior must be a danger to the child or others. Young children are frequently charged with this offense.

Quite often, once a child is adjudicated to a status offender, the child is placed under court orders for long periods of time, including until the child turns the age of majority. For a 10 year old this would mean approximately 8 years of being a

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perfect child. Not many 10 year olds, if any, are beyond their parent's control much less capable of being able to follow the court's strict orders requiring a child to be the equivalent of perfect.

Parents file charges for many different reasons. Some parents cannot parent their child and therefore believe that their child is beyond their control. If all the players in the juvenile court are paying attention the cases can turn into dependency or neglect against the parent. Further, some of the children have mental issues that have not been identified or treated, such as attention deficit hyperactivity disorder and bi-polar disorder.

Without reference to the requisite elements of the offense, many children are simply too young to be brought into the court system. Some do not understand the system and how it works, what the consequences are, the dynamics of a plea bargain, the role their attorney plays and how to defend themselves. Many children cannot see into the future, meaning that they cannot understand that if they are put under a court order to be of good behavior, they cannot see beyond tomorrow or next week. They may go home and act appropriately for a few days or a few weeks and then they forget there are consequences and they start the complained of behavior again. This may be drug usage, sneaking out of the house, hanging out with children their parents disapprove of, and anything else that can be dangerous or annoying to parents.

Beyond control of the school is a very popular status offense. Schools file charges against children whose behavior is against the lawful government regulations of the school as defined in KRS 158.150. Schools are no longer able to use corporal punishment. It seems that juvenile court charges have replaced the paddle. Unfortunately, this charge is used frequently for middle school students. Although preferable to a public offense, it is nonetheless overused.

Many children ages 11 to 13 are charged with this offense. Many of these children are special education students from an emotional and behavioral disability classroom. These children are not only too young to be adjudicated as a status offender but also possess mental disabilities which both contribute to their "mis"behavior and raise issues of incompetence. Despite the frequency of these issues, competency is rarely challenged on behalf of a status offender. Judges, prosecutors and defense lawyers should all be more aware of the need to evaluate the competency of these young children charged with status offenses, especially those with disabilities.

Status offenders are often put under court orders including but not limited to the following: be of good behavior at home, attend school without fail, be of good behavior at school, not use or possess alcohol, tobacco, or illegal drugs, not commit a crime, and get good grades. These orders remain in effect until the child turns the age of 18. An 11 year

old who misses a day of school without a doctor's note or gets a D as a grade in a class can conceivably be held in contempt of court and placed in juvenile detention, even six years later when the child is 17 years old. These children are ordered to be "perfect." No child can be perfect, especially when they're told to be that way from a young age, even if they are even able to comprehend what is expected of them and what the consequences will be.

### **Public Offenders**

Children were once allowed to be children and do the things that children do. Now, quite often, children are prosecuted for behaviors that are just being children. For example, children get mad at each other and make threats to hurt one another and even push and hit one another. In the past, the children's parents would discuss their children's problems and take care of the situations themselves. Today, the children's parents race to the Court Designated Worker's office and file juvenile petitions for terroristic threatening, assault, or even wanton endangerment. The really vindictive and creative parents will manage to get a felony charge out of ordinary childish behaviors. Hence, some children as young as 9 and 10 years of age earn a juvenile record. Regardless of whether the charge is informally adjusted, dismissed, or referred to diversion, that child has a juvenile case number and case history. Further, that child has made a court appearance and unfortunately been introduced to the juvenile justice system.

Schools and their lack of corporal punishment and their no tolerance policies make a lot of trips to the Court Designated Worker's office to file juvenile complaints as well. Terroristic threatening in the second degree has become very popular in some jurisdictions. Kids get mad at one another and make threats to each other, which they have no intention of carrying out, now get charged with felonies. Amazingly enough, many of these children have been picked on and harassed by the students they make the threats to but when the schools do not take action to correct the problem, the victim gets angry, says some words which constitute a threat, and becomes the delinquent child. Many of these students are at the middle school level and do not understand the wrongness of their actions, especially those who were only taking up for themselves when the schools could not protect them. These children do not need a juvenile record.

In Kentucky, a child below the age of 7 is not capable of committing a crime. This rule does not come from legislative enactment but from old common law. *Thomas v. Commonwealth*, Ky. App., 189 S.W.2d 686, 687 (1945) sets out the rule as follows: "The arbitrary age below which a child is incapable of committing a crime is 7. Between the ages of 7 and 14, a presumption of incapacity lies, which, however, may be overcome by evidence." This rule was followed by *Spurlock v. Commonwealth*, Ky. App., 223 S.W.2d 910 (1949). The foregoing common law rule has not been overruled or altered by either the courts or the legislature.



California has more recently cited a similar rule. "When a child under the age of 14 years is charged with criminal offenses, he may not be found guilty of those offenses unless the prosecution proves the child understood the wrongfulness of his conduct. The understanding of wrongfulness must be shown by 'clear and convincing' evidence." *People v. Jerry M.*, 59 Cal. App., 4<sup>th</sup> 289, 69 Cal. Rptr. 2d 148, 297, 152 (1997).

### Sex Offenders

Perhaps the most outrageous of all juvenile petitions filed are those sex offenses filed against young children. Children too young to know what sex is, many of whom are not physically capable of having sex or achieving sexual gratification, and who are simply exploring and playing doctor with other children. An 11 year old can be charged with sex abuse in the first degree or sodomy in the first degree and be facing up to three years in a Department of Juvenile Justice sex offender treatment program with 17-year-old boys who have forcibly raped others. This is not justice. This is taking a young child and placing him in harm's way. This practice is certainly not in the best interest of the child, which is the standard in Kentucky. This is not to say that there may not be young children out there in need of long-term residential treatment regarding sexual issues. However, many children that would be charged with sex offenses would be benefited by outpatient counseling or even education.

The age of consent is 16. Yet children who are too young to consent are often identified as perpetrators and charged with sex offenses. KRS Chapter 510 sets out an age chart for the age of a victim and defendant. However, the most serious sex offenses have no minimum age for the defendant. The commentary to KRS Chapter 510 from 1974 sets out the reasons that the minimum age of victims was chosen: "The critical ages for offenses prohibited by this chapter are 12, 14, and 16. Age 12 was chosen to protect pre-puberty victims. Sexual intercourse with a child less than 12 years of age indicates a considerable probability of aberration in the aggressor. Age 14 was chosen to protect children in the period of puberty when the child arrives at the physical capacity to engage in intercourse but remains seriously deficient in comprehension of the social, psychological, emotional and even physical significance of sexuality. It is still realistic to regard a child under 14 years of age as victimized. Age 16 was chosen to cover that period of later adolescence when the chief significance of sexual behavior is its contravention of the moral standards of the community." Pursuant to KRS Chapter 510, anyone under the age of 16 is considered a victim to some degree. Yet often children under the age of 16 are proceeded against in juvenile court as offenders. Children under the age of 12 are proceeded against as offenders on occasion as well. If a child under the age of 12 is pre-puberty then how can such a young child offend?

In a case where a 10 year old male was accused of sexual assault for touching two girls younger than him, the Wisconsin

Court of Appeals ruled that the state must prove intent for a specific intent crime such as the child was charged with, that the state must prove that the child touched the victim with the specific intent of getting sexual arousal or gratification, and that evidence of sexual immaturity is relevant when a defense is that the child is incapable of becoming sexually aroused or gratified. See *State v. Stephen T.*, 643 N.W.2d 151 (Wis. 2001). The *Stephen T.* court reasoned that "the law 'criminalizes' a child's sexual contact with another child only when the perpetrator possesses the intent to become sexually aroused in a manner that is *inconsistent* with childhood behavior. [I]t 'criminalizes' children when they behave like adults, not when they behave in a manner normative to their age." *Id.*, at 157. Emphasis in original.

Likewise, California, in the *Jerry M.* case, where an 11 year old boy was charged with sex offenses, stated that the age of the defendant is a factor to be considered and that there must be evidence that the child had reached puberty or was sexually aroused, especially where it appeared from the record that his conduct was to get attention and annoy. See *Jerry M.*, *supra*. The *Jerry M.* court held that "[a]t some age younger than 14 years. . . the minor cannot as a matter of law have the specific intent of sexual arousal." *Jerry M.*, *supra*, at 300, 154.

It is comforting to know that some courts across the country are recognizing that youth is a serious concern, at least in the area of sex offenses. It is unfortunate that these children are first dragged through the system, adjudicated to be sex offenders, and then subjected to appeal before such knowledgeable decisions can be made. Hopefully someday legislatures will put such age limits on the books.

### Youthful Offenders

KRS 635.020 sets out the requirements for the minimum age and for what class of offenses a child may be tried as an adult. The youngest a child can be and be tried in circuit court is 14. A 14 year old can only be tried in circuit court if he has been charged with a capital offense, a class A or B felony, or used a firearm in the commission of a felony. A 16 year old can be tried in circuit court if he is charged with a class C or D felony and has been previously adjudicated as delinquent on a separate felony charge.

Some states allow children younger than 14 be tried as an adult. Children are still growing and maturing and do not think and reason the same as adults and should never be tried as an adult except in the most extreme of cases.

The juvenile justice system is geared towards rehabilitation. A child can be kept in the juvenile courts and placed in juvenile facilities which can help them to rehabilitate and become responsible and law abiding adults. If, once they reach adulthood, they commit a crime the adult system has its realm of punishments to fit the adult crimes. Far too many children are tried and convicted as adults.

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### A Recent Study

The MacArthur Foundation has recently funded a study in which it was discovered that many juveniles below the age of 15 are not competent to stand trial. Children between the ages of 11 and 13 when compared to people aged 18 to 24 were found to be three times as likely to be "seriously impaired" when it came to competency, and children ages 14 and 15 were twice as likely to be "seriously impaired." The website where this study can be found is [www.mac-adoldev-juvjustice.org](http://www.mac-adoldev-juvjustice.org). Temple University Office of News and Media Relations released a news release on March 3, 2003 and the Associated Press released a story on the study as well on March 3, 2003. The study used a group of 1400 people from four different cities across the nation to develop its findings. Hopefully legislatures will take heed and conform state statutes so that we are not prosecuting young children who are incompetent as adults and imprisoning them. It is bad enough that we see young children in juvenile court, but for those old enough to be tried as adults, it is much worse.

### Guidelines

The legislature can and should make laws setting forth guidelines to be used in determining whether a child should be prosecuted in juvenile court.

The age of the child should be a serious consideration and guideline. Do we want 9 year olds to be adjudicated as a felon? No. A 9 year old is simply too young to be prosecuted.

The seriousness of the offense should be a guideline. If a 12 year old, or anyone for that matter, steals a piece of gum should that child be prosecuted? No. Give the gum back or pay for it. Did a 10 year old sexually abuse his 9 year old neighbor? Probably not. They were probably playing "show me yours and I'll show you mine."

Another guideline should be whether the complained of behavior or offense is just ordinary childlike behavior for a child of that age or whether the behavior is more delinquent.

Whether a child has any mental illnesses should be a factor to consider. Many children with mental disabilities who require special education come to court for bad behavior at school, such as fighting, being disorderly, saying inappropriate things, and not obeying at school. Such behaviors generally get the child qualified for special education and are many times related to their mental disabilities. Schools seem to think that judges can wave a magic wand and make the child normal and able to control behaviors.

### Age Limits

Due to a variety of reasons there should be a limit to what ages a child can be tried. For instance, they are not competent to stand trial. They do not understand the system and how it works. They do not understand or appreciate the consequences. Children think differently, they do not think to the future. Children cannot always assist in their defense.

Children below the age of 13 should not be prosecuted. If a child below the age of 13 commits an offense and it is serious enough there are appropriate ways to handle the matter short of court. For instance, social services could be involved and get the child the help he or she needs, such as counseling.

A child age 13 or 14, if prosecuted, should be automatically evaluated by a licensed psychologist for competency. A 15 year old should be considered for evaluation. The system should take care to make sure we are not prosecuting children who are too young or incompetent to stand trial.

Many children, especially young children, do not understand that their behavior is criminal. Kids fight, it does not mean they need to be in court for assault. Kids make threats, it does not mean they should be prosecuted for terroristic threatening. Kids are going to misbehave in school, it does not mean they should be prosecuted for abuse of teacher or beyond control of school. There needs to be more discretion in the bringing of juvenile complaints. As it is the juvenile courts are a floodgate for anyone who wants to prosecute. ■

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### Additional Recommended Reading

*MacArthur Juvenile Adjudicative Competence Study*. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice at [www.mac-adoldev-juvjustice.org](http://www.mac-adoldev-juvjustice.org).

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## JUVENILE CASE REVIEW

### Capacity to Commit Offense

#### Kentucky

*Gabbard v. Commonwealth, Ky.*, 887 S.W.2d 547 (1994)

Defendant appeals conditional guilty plea to charges of first-degree rape and first-degree assault, events that occurred when he was 17 years old. Defense claimed defendant was mentally ill, and court ordered competency hearing. Through several hearings, doctors noted that defendant was hard of hearing, had a speech impediment, and had mild mental retardation. Doctors disagreed with whether the defendant could appreciate the difference between right and wrong, which is the primary requirement in determining whether one is competent to stand trial. Defense counsel moved to dismiss indictment because twice defendant was found to be incompetent and it was unlikely that his mental condition (retardation) would improve. After defendant was furnished with a hearing aid, the trial court ordered another competency hearing. Trial court found defendant competent to stand trial, relying solely on the written report of the examining psychiatrist. Defense counsel argued that this finding violated due process because the defense had no opportunity to cross examine the doctor on his findings. Nevertheless, defendant was scheduled for trial. Prior to trial, defendant made a conditional plea of guilty but mentally ill to the charges.

Following the trial, the defense appealed the trial court's finding of competence. The prosecution suggested that because burden to prove incompetence falls on defense, it was the responsibility of the defense to bring in, subpoena, question, etc. the examining psychiatrist. However, once the issue of competency is called into question enough to warrant examination, Kentucky statute mandates that the "...examining psychiatrist or psychologist *shall* appear at any hearing on defendant's mental condition..." (emphasis added) KRS 504.080 (4). The failure of the trial court to comply with this statute constituted a violation of due process. Thus, the trial court's finding of competency and the subsequent conditional plea of guilty but mentally ill were vacated and case remanded for a proper competency hearing.

*Spurlock v. Commonwealth, Ky.*, 223 S.W.2d 910 (1949)

17-year-old convicted of malicious shooting and wounding. Juvenile argued that 8 year sentence was excessive. The Supreme Court of Kentucky held that where individual was of average intelligence and there was nothing to suggest that he was incapable of forming the requisite intent the sentence was not excessive. The court noted the common law rules for determining the capacity of juveniles: under the age of 7, a juvenile is *conclusively* presumed incapable of committing an offense, and between the ages of 7 to 14 a rebuttable presumption of incapacity exists in which the strength of the presumption decreases as age increases.

*Thomas v. Commonwealth, Ky.*, 189 S.W.2d 686 (1945)

Defendant, 11 years old, was convicted of detaining a child, 5 years old, against her will with intent to have carnal knowledge and he appeals. No rule defines any particular age as conclusive of incapacity as a witness. Where a child offered as a witness is so young as to preclude a presumption of competency, court should inquire into witness' qualifications. Whether a child offered as a witness has sufficient intelligence and other essentials to qualify as a witness is for the court to determine. A child below the age of 7 is incapable of committing a crime and there is a presumptive incapacity between the ages of 7 and 14, which may be overcome by evidence. The jury should be charged that presumption is that defendant did not know that the act charged was wrong, which entitled defendant to acquittal unless jury believed from the evidence that defendant was aware of the wrongful character of the act and his legal responsibility.

*Watson v. Commonwealth, Ky.*, 57 S.W.2d 39 (1933)

Boys aged 13 and 11 were convicted of manslaughter and sentenced to 2 years in the penitentiary, but because of their age the judgment directed that they be taken to Juvenile Reform House and be confined until they both reach 21. The court held that to seize one unable to swim and against his will, take him intentionally into deep water where he drowns, constitutes homicide. But that boys between 7 and 14 should be acquitted, unless they had guilty knowledge that they were doing wrong when they pulled the victim into the river. There is a rebuttable presumption that boys between 7 and 14 are innocent of evil intent. Furthermore, jurisdiction of juvenile court over children is exclusive, and, until it was waived and boys transferred to circuit court, circuit court had no power to try boys for homicide.

#### Other States

*In re Devon T.*, 584 A.2d 1287 (Md. Ct. Spec. App. 1991)

Children under 7 years of age are considered incapable of forming criminal intent (the *mens rea* element of a crime). Children between the ages of 7 and 14 are given this *presumption* as well; however, the presumption may be rebutted through evidence indicating capacity (burden on state). The capacity that must be shown is a basic version of the *M'Naghten* test, that the evidence indicates that at the time of the incident, the defendant knew what he was doing, and that it was wrong. Capacity was shown in the instant case by juvenile's actions—secretive behavior, knowledge to keep drugs hidden, avoiding authorities, etc. Thus, juvenile was held competent for trial because the state was able to demonstrate that he had the capacity for criminal intent.



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*Fire Insurance Exchange v. Diehl*,  
520 N.W.2d 675 (Mich. Ct. App. 1994)

No dispute that boy's acts were intentional. In insurance case, issue was whether insurer had duty to provide coverage to insured (parents and son) who were being sued by defendant. For coverage to be required, acts also had to be occurrences, *i.e.* "neither expected nor intended by the insured." Boy neither expected nor intended to cause bodily injury to girl. Case quotes examination of boy (age 7 to 9 at time of offenses) to demonstrate that boy did not understand that "mating" hurt. They ask him if he had seen mating on TV. "Did it look like they were having fun?" "No," "Did you ever think in watching that they were hurting each other?" "No." The boy testified that he did not mean to hurt the girl in any way. The abuse in this case was oral sodomy. Psychologist testified that 8 to 9 year old children display limitation in the capacity to develop empathy for others thus boy could not recognize emotional damage to girl. In prior insurance cases, Michigan courts have held that "engaging in sexual contact with a child is an intentional act and that the intent to injure or harm can be inferred as a matter of law from the sexual contact itself." "Because the perpetrator of the sexual assault was a child, we find that such an inference is improper." Trial court applied reasonable man standard. Appellate court found that to be in error. Mixed objective/subjective reasonable child standard to determine whether the results of those acts were reasonably foreseeable. Based on the record before it, the appellate court found that an average 7 to 9 year old child could not reasonably foresee that his or her sexual acts could cause harm to another child.

*State v. J.P.S.*, 954 P.2d 894 (Wash. 1998)

Juvenile, an 11-year-old, was charged by information with first-degree rape of child. The Court found that juvenile had the capacity to understand the act charged and its wrongfulness. Discretionary review was granted, prior to any determination of guilt. The Supreme Court, held that: (1) it was not necessary for state to prove that the juvenile understood the illegality or the legal consequences of his act, and (2) evidence did not establish the juvenile's capacity to commit the charged crime.

*State v. T.E.H.*, 960 P.2d 441 (Wash. Ct. App. 1998)

Juvenile's understanding of legal prohibition and legal consequences of his or her conduct is not indispensable requisite for determining whether juvenile appreciates wrongfulness of conduct. It is not necessary for the state to prove that child understands illegality or legal consequences of act in order to prove capacity to commit crime; rather, relevant inquiry is whether child appreciated quality of his or her acts at time act was committed. For purposes of determining child's capacity to commit crime, the more intuitively obvious the wrongfulness of the conduct, the more likely it is that child is aware that some form of societal consequences will attach to act. Sexual gratification is not essential element of crime of child molestation, but is definitional term clarifying meaning of essential and material element of sexual contact

*State v. J.B.*, 958 P.2d 368 (Wash. Ct. App. 1998)

In juvenile proceeding, Court found juvenile guilty of first-degree robbery. Juvenile appealed. The Court of Appeals held that trial court had jurisdiction in juvenile proceeding to find juvenile guilty of the charged crime, though trial court had not first determined whether juvenile had capacity to commit the crime, where neither state nor defense counsel had alerted trial court to capacity issue before the fact-finding hearing and where trial court stayed entry of order of disposition and ordered capacity hearing before different judge.

*State v. K.R.L.*, 840 P.2d 210 (Wash. Ct. App. 1992)

Where 8 year old convicted of residential burglary, state did not meet its burden to rebut by clear and convincing evidence that child was incapable of committing crime in light of fact that no expert testimony was offered indicating that at time of action child understood conduct was wrong and no evidence presented showing child's state of mind when he entered house or showing child previously engaged in bad acts unusual for child of similar age or that child received treatment for such acts.

### Competency

#### U.S. Circuit Courts

*Rhode v. Olk-Long*, 84 F.3d 284 (8th Cir. 1996)

After her convictions for felony murder and child endangerment were affirmed, juvenile sought federal habeas corpus relief. Although competency was first raised at the trial level, the U.S. District Court for the Southern District of Iowa held that a post-conviction competency hearing held on remand 2 1/2 years after trial was sufficient compliance with due process requirements.

#### Other States

*Golden v. State*, 21 S.W.3d 801 (Ark. 2000)

The Supreme Court held that: (1) juvenile had a due process right to have his competency determined prior to adjudication, and (2) neither due process nor equal protection afforded juvenile the right to an insanity defense.

*In re K.G.*, 2002 WL 31898185 (Ind. Ct. App. 2002)

Four juveniles deemed incompetent to stand trial. Juveniles committed to Department of Mental Health and Addictions (DMHA). The DMHA filed motion for relief from judgment. The Court of Appeals held that adult competency standards are applicable to juvenile proceedings.

*In re Carey*, 615 N.W.2d 742 (Mich. Ct. App. 2000)

The Court of Appeals held that: (1) as matter of first impression, due process requires that court make competency determination before questionably competent juvenile is subjected to adjudicative phase of delinquency proceeding, and (2) in the absence of other applicable rules or statutes, provisions of Mental Health Code applicable to determinations of adult competency for criminal trials should be used as a guide in determining juvenile's competency.

*In re Staten*, 2001 WL 1647286 (Ohio Ct. App. 2001)\*Slip Copy  
In a settlement agreement, the prosecution offered to keep the case in juvenile court and drop charges 2 and 3 in return for the defendant's pleading of guilty to count 1. The defendant changed his plea to "guilty" re: charge 1. However, the court failed to reiterate defendant's rights (especially re: challenging witnesses and evidence against him, right to remain silent), and failed to inform him of the consequences he faced with a guilty plea.

On appeal, juvenile claimed that he should not have been adjudged delinquent because he was incompetent. Held: when there is a "sufficient indicia of incompetence," it is a violation of due process to fail to hold a competency hearing. Should defense counsel not request one, it is the duty of the court to order a competency hearing *sua sponte*. Thus, competency hearing should have been held. After a finding of competence, a guilty plea must be made "knowingly, intelligently, and voluntarily." Remanded for competency hearing.

*Hidalgo v. State*, 983 S.W.2d 746 (Tex. Crim. App. 1999)

(1) juvenile's right to counsel was not violated by state's failure to inform counsel of psychological examination until after it had taken place, and (2) psychological exam did not exceed the scope of its intended purpose.

#### **Individuals with Disabilities Education Act (IDEA)/Special Education**

##### **Sixth Circuit**

*Morgan v. Chris L.*, 927 F. Supp. 267, aff'd, 106 F.3d 401 (6<sup>th</sup> Cir.), cert. denied 117 S.Ct.2448 (1997)

Unpublished disposition, yet can be found at above citation. Questions before Sixth Circuit were whether the Administrative Law Judge at the state board of education had jurisdiction to order the school district to move to dismiss public offense charges school had brought against Chris L (child diagnosed with attention deficit hyperactive disorder) and whether the procedural requirements of the IDEA must be met before school brings a petition. Court found that ALJ had jurisdiction and that school district violated IDEA by not following appropriate procedures for initiating a change in placement when it filed a juvenile court petition against Chris L. Under the IDEA, a "change in placement" is defined as a fundamental change in, or elimination of, a basic element of a child's educational program.

IDEA amended in 1997 to read "Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the applica-

tion of Federal and State law to crimes committed by a child with a disability." 20 U.S.C. Section 1415(k)(9)(A).

*Commonwealth v. Nathaniel N.*,  
54 Mass. Ap. Ct. 200, 764 N.E.2d 883 (2002)

Court reviewed *Morgan v. Chris L.* and the amendments to IDEA in case involving juvenile with behavior problems qualifying as a disability under IDEA in the context of an appeal of a juvenile court finding of delinquency. Child adjudicated delinquent for possession of two bags of marijuana. Court instituted test requiring proof by an IDEA qualifying juvenile that school is engaging in an "end run" to avoid requirements of IDEA. Additionally, court requires finding of prejudice to the juvenile court proceedings in case where school fails to turn over IDEA required documents to law enforcement. Note that 20 U.S.C. Section 1415(k)(9)(B) requires that "An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reported the crime." Significant to note that *Chris L.* remains the law in the Sixth Circuit.

*East Islip Union Free School District v. Anderson*,  
615 N.Y.S.2d 852 (N.Y. Sup. Ct. 1994)

School district sought preliminary injunction for student to be suspended from school and placed on home-bound instruction pending a psychiatric evaluation and review by District Committee on Special Education. Suffolk Co. Supreme Court held that equitable powers of court not limited by IDEA. However, school bears burden of showing that maintaining child in his or her current placement is substantially likely to result in harm to child or others.

*State ex rel. Support of Robert H.*, 653 N.W.2d 503 (Wis. 2002)  
Child needed special education program for emotionally disturbed students and suffered from mental problems which required various treatment programs. Child given protection under children in need of protection or services (CHIPS) order. Child's individualized education program (IEP) required by Individuals with Disabilities Act (IDEA) determined that child's IEP be implemented at residential treatment facility. Father moved for relief of child support payments (paid \$170/week pursuant to CHIPS order). IDEA implemented to ensure that disabled children have free public education. Held: Father not required to pay for IDEA education-related expenses; however, no evidence suggested that his CHIPS payment was being used for education expenses. Therefore, father not entitled to relief from payments. ■

**Rebecca Ballard DiLoreto**  
**Post Trial Division Director**  
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At approximately 6:25 p.m. April 3, 2003 the United States Supreme Court voted 5-4 to lift the stay of execution for Scott Hain, convicted and sentenced to death as a youth who had not yet reached the age to vote. The Supreme Court's decision cleared the way for Oklahoma to proceed with the execution. At 8:39 p.m. April 3, 2003 youthful offender Scott Hain was executed by the state of Oklahoma despite a last minute personal appeal by Bishop Desmond Tutu to the governor of Oklahoma and despite the hard work of his attorney, Steve Presson.

## PRACTICE CORNER

### LITIGATION TIPS & COMMENTS



*Misty Dugger*

#### Preserve Extreme Emotional Disturbance Instruction Request

In a case where EED is at issue, the mention of EED should be in four places: (1) absence of EED in the intentional murder instruction (REQUIRED); (2) presence of EED in the first degree manslaughter instruction (though the Courts have not specifically said this is required, it is a good idea); (3) a separate definition of EED (REQUIRED) and (4) EED in the instruction on reasonable doubt (REQUIRED). In *Commonwealth v. Hager*, Ky., 41 S.W.3d 828, 831-832 (2001), the Kentucky Supreme Court held that “[a]lthough not mentioned in RCr 9.56, [instructing the jury on reasonable doubt with respect to the issue of extreme emotional disturbance] is *required* when there is evidence authorizing an instruction on extreme emotional disturbance.” (citations omitted). Counsel must affirmatively request these instructions, as well as tender proposed instructions to be certain this issue is adequately preserved for appellate review.

Karen Maurer  
Appeals Branch, Frankfort

#### Witness’ Testimony About The Truth of Another Witness’ Testimony Is Not Permitted

It is improper for the prosecutor to ask a witness, especially the defendant, to comment on the truthfulness of another witness, such as the complainant or a police officer. A witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony. Counsel should be sufficiently articulate to show the jury where the testimony of the witnesses differ without resort to blunt force.

*Moss v. Commonwealth*, Ky., 949 S.W.2d 579, 583 (1977). If the prosecutor asks your client, or one of your witnesses whether another witness lied when s/he testified to such and such, or was witness so and so lying when s/he testified to such and such, object and cite the trial court to *Moss v. Commonwealth*, which says such tactics are prohibited.

Julie Namkin  
Capital Appeals Branch, Frankfort

#### Always Notify Attorney-General When Challenging the Constitutionality of a Statute

When challenging the constitutionality of a statute, you must give notice to the Attorney General pursuant to CR 24.03. The rule states that “When the constitutionality of an act of

the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney General.” The Attorney General has a right to intervene in the case to argue regarding constitutionality. Following this procedure ensures challenges to the constitutionality of a statute are properly preserved for appellate review.

Shelly R. Fears, Appeals Branch, Frankfort and  
Donna Boyce, Capital Appeals Branch, Frankfort

#### Challenge Blanket Refusals to Accept *Alford* Pleas

The refusal of a trial judge to accept an *Alford* plea may be either unconstitutional or an abuse of discretion. While failing to reach the issue of unconstitutionality, an Ohio appeals court found a blanket policy by a trial judge of refusing to accept *Alford* pleas to be an abuse of discretion. *State v. Carter*, 706 N.E.2d 409, 413 (Ohio App. 2Dist 1997).

We find that the trial court’s policy of not accepting no-contest pleas constituted an abuse of discretion in that the trial court arbitrarily refused to consider the facts and circumstances presented, but instead relied on a fixed policy established at its whim. Although the trial court has the discretion to refuse to accept a no-contest plea, it must exercise its discretion based on the facts and circumstances before it, not on a blanket policy that affects all defendants regardless of their situation. In short, the trial court must exercise its discretion in each case.

When a trial court claims to have exercised discretion in refusing to accept an *Alford* plea in a particular case, it would be appropriate to request specific finding of fact from the court to preserve the issue for appeal.

Richard Hoffman  
Appeals Branch, Frankfort

**Practice Corner needs your tips, too. If you have a practice tip to share, please send it to:**

**Misty Dugger**  
Assistant Public Advocate  
[Mdugger@mail.pa.state.ky.us](mailto:Mdugger@mail.pa.state.ky.us) ■

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