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**Table of Contents**

**Kentucky's Criminal Justice System is in Need of Reform — Ernie Lewis** ..... 4

**Three New Members Appointed to DPA Commission** ... 10

**Kentucky Case Review — Erin Hoffman Yang** ..... 11

**Plain View — Ernie Lewis** ..... 16

**Capital Case Review — David Barron** ..... 27



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**Ky DPA's Journal of Criminal  
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Paid for by State Funds. KRS 57.375

**FROM  
 THE  
 EDITOR...**



*Jeff Sherr*

# KENTUCKY'S CRIMINAL JUSTICE SYSTEM IS IN NEED OF REFORM

By Ernie Lewis, Kentucky Public Advocate

**The national picture.** It is well known that the United States incarcerates more of its citizens than any other nation. In 1970, the US incarcerated 320,000 people. By 2006, that figure had grown to 2,245,189. 60% of those incarcerated are either African-American or Hispanic. The US has 5% of the world's population but incarcerates 25% of the overall population of those in jail or prison.

There is a growing consensus that incarceration rates in the United States are out of control. First came the *Kennedy Report* in 2004, named after Justice Anthony Kennedy in response to a speech he made at the American Bar Association. In his speech delivered at the ABA annual meeting on August 9, 2003, he said that “[w]ere we to enter the hidden world of punishment, we should be startled by what we see. Consider its remarkable scale. The nationwide inmate population today is about 2.1 million people. In California, even as we meet, this State alone keeps over 160,000 persons behind bars. In countries such as England, Italy, France and Germany, the incarceration rate is about 1 in 1000 persons. In the United States it is about 1 in 143.” A second point he raised was the effect of incarceration on racial minorities. “Nationwide, more than 40 percent of the prison population consists of African-American inmates. About 10 percent of African-American men in their mid-to-late 20s are behind bars.” He went on to say that the “cost of housing, feeding and caring for the inmate population in the United States is over \$40 billion per year... When it costs so much more to incarcerate a prisoner than to educate a child, we should take special care to ensure that we are not incarcerating to many persons for too long.”

In response to his speech, the *ABA Justice Kennedy Commission* was created, and a report was written making a series of recommendations that were approved in 2004 by the American Bar Association's House of Delegates. The report expressed two sentencing principles: “RESOLVED, that the American Bar Association urges states...to ensure that sentencing systems provides appropriate punishment without over-reliance on incarceration as a criminal sanction, based on the following principles: (1) Lengthy periods of incarceration should be reserved for offenders who pose the greatest danger to the community and who commit the most serious offenses. (2) Alternatives to incarceration should be provided when offenders pose minimal risk to the

community and appear likely to benefit from rehabilitation efforts.”

On December 5, 2007, the Bureau of Justice Statistics of the US Department of Justice announced that 1 in every 31 US adults was in a prison or jail or on probation or parole at the end of 2006. Incarceration was increasing at both the federal and state level.

Then came the *Pew Report* issued on February 28, 2008. It reported that for the first time in history, 1 in every 100 adult Americans was in a jail or prison. The report found that the incarcerated population had risen in America by 25,000 during 2007. Kentucky led the nation in the rate of growth of persons incarcerated—12%. Costs had risen at the state level to \$44 billion general fund dollars, up from \$10.6 billion in 1988. This increase in the prison population had little impact on the recidivism rate. The director of the Public Safety Performance Project stated that “for all the money spent on corrections today, there hasn't been a clear and convincing return for public safety... More and more states are beginning to rethink their reliance on prisons for lower-level offenders and finding strategies that are tough on crime without being so tough on taxpayers.” The *Pew Report* also noted the effect of incarceration on racial minorities. 1 in 9 African American males in the US from ages 20-34 is incarcerated. The report addresses one of the arguments for the increased level of incarceration, saying that the higher incarceration rates were not caused by an increase in crime or an increase in population but rather because of policy choices such as longer sentences and three-strike laws. And the report notes the tradeoffs being made by states. While inflation-adjusted general fund spending on corrections rose 127% over a 20 year period, it rose only 21% for higher education during the same time period.

**What is happening in Kentucky.** The best information available is contained in two law review articles written by University of Kentucky Law Professor Robert Lawson. The first is entitled *Difficult Times in Kentucky Corrections—Aftershocks of a 'Tough on Crime' Philosophy*. The second report is *Turning Jails into prisons—Collateral Damage from Kentucky's 'War on Crime.'* Both are highly recommended. The research is impeccable and unassailable. The recommendations are reasonable and data based.

I will recount just a few of the statistics from these articles. Professor Lawson states that in the early 1970's, Kentucky had 2,838 inmates. That increased to 3,723 by 1980, to 8,824 by 1990, and to 15,444 by 2000. Today, the prison population is over 22,000, and is expected to increase to over 30,000 by 2015. In 1970, Kentucky incarcerated 88 persons per 100,000, below the national average. By 2004, Kentucky was incarcerating 423 per 100,000, still below the national average. Professor Lawson also notes that the crime rate in Kentucky remains below the national average as well.

Professor Lawson also describes the exponential growth of the costs of corrections for Kentucky. In 1970, the corrections budget was \$7 million. Today, that figure is well over \$400 million.

**How did it happen?** My overall theory is that Kentucky remained an indeterminate sentencing state while assuming significant determinant features. Kentucky has long been an indeterminate sentencing state. One feature of that method of sentencing is a wide range of sentences for the jury and the judge, with attendant discretion for an executive branch agency to modulate the time spent in prison based upon performance and behavior. In other words, judges and juries could choose a sentence for trafficking in cocaine from the range of 5-10 years. A person sentenced to 10 years could be released anywhere from 2 years all the way to a serve-out depending upon his behavior while incarcerated. During the 1980's, as part of the so-called "truth in sentencing" trend, many states became determinate sentencing states. This involved the abolition of parole **and the lowering of sentences.**

Kentucky rejected attempts that were made to become a determinate sentencing state while at the same time assuming determinate features. Once the Penal Code was written, Kentucky began to make its sentencing laws harsher. Parole for violent offenses was lengthened from 20% to 50% in 1986 to 85% in 1998. The Parole Board began to serve out more people and to require longer prison sentences for most inmates. Probation was prohibited for many offenses. Concurrent sentencing was prohibited for many offenders. And as Professor Lawson explains, Kentucky created one of the nation's harshest 3-strikes laws, the persistent felony law. "It is hard to find the right words to describe this repeat offender law after these changes took effect, although the words 'brutally harsh' come readily to mind." Lawson, *Difficult Times*, at 339. Professor Lawson notes that while only 79 inmates were serving PFO terms in 1980, and 1,142 in 1984 that had grown to 4,187 by 2004.

Another change that occurred that has driven the incarceration rate has been the "War on Drugs." Starting in the 1980's, Kentucky had changed the laws effecting drug crimes while at the same time investing large sums of money from both the state and federal government in law

enforcement. Lawson quotes Gottschalk in stating that "the number and the proportion of drug offenders in prison have exploded. In 1980, the drug incarceration rate was 15 inmates in state and federal prisons per 100,000 adults. By 1996, the rate had increased more than ninefold to 148 per 100,000." Lawson notes that by 2003 there were more drug offenders in Kentucky prisons than there were total prisoners in 1970.

A final change has simply been the growth in penal statutes. The Penal Code when first enacted was based upon the Model Penal Code. It was relatively short and internally consistent. Since that time, the Penal Code has been amended constantly, and has become bloated, inconsistent, and harsh. A former chair of the House Judiciary Committee regularly lamented the practice of legislators bringing "crimes de jour" to his committee. Only once since I've been Public Advocate has a law passed that was in any way ameliorative—the theft limit was raised from \$100 to \$300. Otherwise, law makers have consistently created more and more crimes, sentences have grown progressively longer, and enhancers have been tacked onto most new laws.

**What do I recommend to dig our way out of this?** It has taken us three decades to be where we are. There have been several efforts to reform this system; all of those efforts failed. It will take political will and an agreement to set aside partisanship and ideology if we are to get to the place where we have a rational system once again. Here are some of the changes I believe should be considered:

- ◆ **Create a Class E felony classification for possession of and trafficking in low quantities of illegal substances.** At the present time, trafficking in a controlled substance is punishable by 5-10 years in prison as a Class C felony. That can include the selling of for example less than a gram of cocaine or one pill to an undercover agent. It makes little sense to put addicts into prison for 5-10 years for this offense. A Class E felony should be added that would set a sentencing range of no more than 1-2 years. For a first offense, the penalty of 1 year probated to treatment could be the only option available. The Department of Corrections (DOC) 2005 *Profile of Inmate Population* shows 4,563 inmates in prison on drug convictions. Any effort to address prison overcrowding/costs will have to look at this issue. A significant number of drug crimes involve trafficking in small quantities of drugs. Yet, at present a defendant who traffics in a tenth of a gram of cocaine is treated identically to one who traffics in several kilos of cocaine. A 5 year sentence, with its attendant \$100,000 in incarceration costs, is not needed for public safety reasons and unnecessarily burdens the taxpayers. I believe that a 1-2 year sentence for selling a small quantity of cocaine, or 1 pill, would be as effective in protecting public safety while at the same time preserving our resources for other priorities. It would also be sufficient to treat underlying addictions.

*Continued on page 6*

Continued from page 5

- ◆ **Establish the policy that imprisonment is to be reserved for someone who must be incarcerated—the violent criminal and the career criminal.** No one argues that there is not a purpose for incarceration. However, in recent decades, imprisonment has become the default for all violations of felony laws. We need to implement the policy choice recommended by the Kennedy Commission and articulated in HB 455 in 1998—that incarceration should be reserved for violent offenders and that alternatives to incarceration should be the default penalty for all others. This policy could be established by the Corrections Commission, the Kentucky Criminal Justice Policy, or by the Governor.

In 2007, DOC data demonstrates that there were 1,727 persons held on murder, and another 307 on manslaughter 1<sup>st</sup>. There were 513 held on assault 1<sup>st</sup> charges. 869 persons were held on rape 1<sup>st</sup>, and 1,053 were held on sodomy 1<sup>st</sup>. 382 persons were held on kidnapping, while 1,368 were held on burglary 1<sup>st</sup>. 37 persons were in prison on arson 1<sup>st</sup>, while 2,373 were held on robbery convictions. Together, this amounts to 8,629 persons who it can be argued should be held in prison. Virtually all others should be considered suitable for some other penalty than incarceration.

In 2007, Kentucky held numerous Class D felons at an enormous cost. There were 1,854 held on wanton endangerment (where no one was hurt), 2,475 were held for burglary of a building (not a dwelling), 5,259 were held on a variety of theft convictions, 2,776 were held on receiving stolen property, 528 on forgery 2<sup>nd</sup>, 2,336 on 2<sup>nd</sup> degree possession of a forged instrument, 795 on promoting contraband, 473 on bail jumping, 1,389 on tampering with physical evidence, 1,290 on possession of a firearm by a convicted felon, 1,034 on flagrant nonsupport, 75 on sex offender registration violations, 349 on DUI 4<sup>th</sup>, 4884 on possession of drugs, and 1,054 on fleeing the police. Many if not most of these people could be held outside of the prison setting in home incarceration, electronic monitoring, day treatment, halfway houses, etc.

- ◆ **Raise the felony theft and receiving stolen property limit to a minimum of \$1000.** When the Penal Code was written, the recommendation over 30 years ago was to place the threshold for felony theft at \$1000. Instead, it was set at \$100, and only in 1998 was it changed to \$300. As a result, far too many persons committing petty theft are in prison. It makes little sense to incarcerate a thief at \$20,000 cost to the taxpayer for a \$300 theft.

The Department of Corrections' raw data from 2007 indicates that there were 700 inmates in prison on theft by deception convictions, and another 3,818 on theft by unlawful taking. Together, there were 5,259 inmates in prison with theft convictions. That is just one category of Class D felons. While some of these are no doubt thefts of large amounts, it can safely be assumed that most of them are thefts of small amounts.

- ◆ **Shift felony classifications.** I believe that consideration should be given to ratcheting downward the sentencing ranges of our felony classifications. When the Penal Code was written, Kentucky was entirely an indeterminate sentencing state. However, over the last 35 years, many laws have been written restricting probation and parole. Many states during that time period moved from being an indeterminate to determinate sentencing. Most of them that did also reduced the overall length of their sentences. Kentucky has not made that adjustment, a fact that is partially responsible for the 1000-2000 new inmates that are coming into the system despite a flat crime rate that is below the national average. I would propose that the sentencing range remain largely the same for violent offenders, continuing the expressed policy shift that occurred with the Governor's Crime Bill (HB 455) in 1998. I would propose something like the following:

- Class A: 15-50 years with 70 being the most that anyone can receive under consecutive sentencing.
- Class B: 8-15 years
- Class C: 4-8 years
- Class D: 2-4 years
- Class E: 1-2 years

- ◆ **Reduce parole eligibility for nonviolent offenders.** If we reduce penalties to something like the above, in order to truly reduce the numbers of incarcerated persons, we will also have to make adjustments to our parole regulations and laws. Over the past 2 decades, the Parole Board has increased the amount of time incarcerated persons have had to spend in prison, often serving out many persons at a significant cost to the Commonwealth. Nonviolent felons should be eligible for parole in 10% to 15% of their time. Parole should be mandatory for Class E and Class D felons.

- ◆ **Reexamine the persistent felony offender laws.** Professor Lawson first made the suggestion to change significantly Kentucky's PFO laws, saying that they are among the harshest in the nation. In 2007, Corrections was holding 2,741 persons on PFO 1<sup>st</sup>, and another 1,532 on PFO 2<sup>nd</sup>. Professor Lawson recommended that PFO 2<sup>nd</sup> be eliminated entirely and instead that the higher range of penalty inside a class of felony be used when a person has a prior felony. In addition, I would recommend that the felony to be enhanced should be a violent offense, as is presently done in Louisiana.

- ◆ **Decriminalize nonsupport.** Flagrant nonsupport should not be prosecuted as a felony. It is bad public policy to be spending \$20,000 per year to house a person whose only crime is the failure to pay child support. Often, we are criminalizing behavior that is directly associated with either a custody or divorce dispute, or poverty, or all three. This should be decriminalized entirely and made a matter for family court. There are associated costs with incarcerating the father—the family gets no child support, the father no longer works or pays taxes, and the family often goes on welfare.
  
- ◆ **Look seriously at all of Professor Lawson’s proposals to the Sentencing Commission, including the following:** Professor Lawson’s ideas previously sent to the Sentencing Commission should be considered seriously. If implemented, these ideas would significantly reduce Kentucky’s overpopulated prisons. They include the following:
  - Create a Class E felony.
  - Create a Class C misdemeanor.
  - Restore the PFO law to the way it was at the time the Penal Code was written.
  - Eliminate the use of Class C and D felonies in the PFO law.
  - Prohibit double enhancement.
  - Eliminate PFO 2<sup>nd</sup>.
  - Eliminate the mandatory minimum of 10 years to the parole board on PFO 1<sup>st</sup>.
  - A wholesale rewrite of the penalty provisions for KRS 218A, including the elimination of all enhancements, lowering the penalty for possession of marijuana for personal use to a violation for a first offense, and other similar measures.
  - Raise the theft and receiving stolen property thresholds to \$1000 or higher, with \$500-\$1000 being a Class A misdemeanor, and up to \$500 being a Class B misdemeanor. Professor Lawson recommends altering many of the other provisions of KRS 514 (theft).
  - Raise criminal mischief threshold to \$2,500.
  - Eliminate the two-strikes provision of joyriding (KRS 514.100).
  - Address the crime of flagrant nonsupport and nonsupport. While Professor Lawson is not specific with this proposal, he states that “consideration should be given to the wisdom of this approach to dealing with the problem of providing needed support for children”, noting that at the time he wrote this, there were 733 inmates in prison for this crime.
  - Eliminate Assault 3<sup>rd</sup> (KRS 508.025) as a special offense based upon the status of the victim.
  - Study whether courts are using alternatives to incarceration.
  
- ◆ **Reduce some crimes from felonies to misdemeanors.** During recent years, numerous crimes were elevated from misdemeanors to felonies. A misconception has developed that jail time is not significant punishment. A review of the Penal Code should be conducted to determine what crimes can be punished in a county jail consistently with public safety. The benefit of keeping a crime a misdemeanor is that someone can be placed on work release, can maintain family connections, can pay for the cost of his incarceration, none of which can occur in a prison setting.
  
- ◆ **Lower parole eligibility.** There is little justification for 85% parole eligibility for violent offenders. Particularly for Class A felonies, this results in a large class of people who are held long after they are a danger to anyone. We should go back to the 50% parole eligibility as was in place from 1986-1998. This would help us deal with the geriatric prisoner issue. In addition, a reduction of 5-10% from present 20% eligibility for nonviolent offenders would allow the Parole Board to release more persons while exercising discretion to ensure public safety.
  
- ◆ **Revoke parole only for a new felony.** One of the most important reasons for prison overcrowding is that many former inmates are returned to prison for violations of parole. Some of these people are returned for a variety of technical violations, such as curfew violations or failing to report. While technical violations need to be taken seriously, they do not mandate returning parolees to prison. We need to start using a variety of step-up and step-down measures whereby someone who violates parole is required to spend a weekend in jail or similar facility. We should utilize our county jails more effectively as day-treatment entities where persons who are on parole can be placed temporarily while either in treatment or moving into treatment.
  
- ◆ **Reserve transfer of children into adult court for Class A felons above the age of 16.** All of the studies show that transferring children from juvenile court to circuit court is not an effective means for rehabilitating those children. Indeed, transfer has been shown to have the opposite effect—to increase criminality. Over a long period of time, keeping children in juvenile court and treating them is much superior criminal justice policy than transferring them into adult court and giving up on them.
  
- ◆ **Change significantly how pretrial release works.** Pretrial release was a wonderful concept when it first began, eliminating the bail bondsman from the criminal justice system. However, judges are reluctant to use pretrial release, despite the fact that high bonds punish poor people, and despite the fact that there is an

*Continued on page 8*

Continued from page 7

exceptionally low level of failure to appear throughout the state. We need to work with the court system and change both the statute and the criminal rules to ensure that the great majority of people are on pretrial release awaiting disposition of their cases. Steps are presently underway to reform bail.

- ◆ **Eliminate the ability of judges to hold persons in contempt for minor infractions.** The ability to hold adults and child in contempt of court is a closely guarded power of courts. In my view, it is over utilized, and is a costly power that Kentucky cannot afford. Every time a person is held in criminal contempt, an attorney must be appointed, a prosecutor must spend time prosecuting the contempt, and court time is used. Thereafter, the person resides in jail or a juvenile detention or treatment center.
- ◆ **Emphasize community corrections.** Community corrections allow local judges to utilize community services in order to avoid sending a person to prison. In Michigan, putting additional resources into community corrections led to a 14% recidivism rate compared to 48% for their traditional correctional system. In Colorado, the state devotes 11% of the corrections budget to community corrections. Minnesota also moved its corrections budget into community supervision, treatment, community corrections advisory boards, and restorative justice. Kentucky began community corrections back in the early 1990's as a pilot project, and this pilot was never expanded. Many states have saved a great deal of money in incarceration costs by spending it on community corrections. Kentucky has a good statute, it simply needs to put money behind it and get courts involved again.
- ◆ **Examine the feasibility of a Sentencing Commission that would have the authority to consider incarceration capacity in writing presumptive sentencing guidelines.** States that have Sentencing Commissions can control their prison populations easier than those without. Kentucky presently has a prison population the size of which no one controls. In contrast, Minnesota, with its Sentencing Commission, calibrates its prison population based upon capacity. As a result, Minnesota incarcerates 1/3 of the people Kentucky incarcerates with a higher overall population and a similar crime rate.
- ◆ **Eliminate the holding of Class C and Class D felons in county jails.** I am convinced that one of the reasons for prison overcrowding is that the Campbell County case of the Supreme Court has been by and large disregarded by allowing for housing Class C and D felons in county jails. *Campbell County v. Kentucky Corrections Cabinet*, 726 S.W. 2d 6 (Ky. 1988). We are second to

only Louisiana in the number of felons we house in county jails. This is bad policy for many reasons, mostly related to treatment and programming. I also believe that it creates an incentive to put people into prison in order to balance county budgets. I believe if this were eliminated, and the Campbell County case enforced, judges would be required to be creative in their sentencing practices.

- ◆ **Have the state take over the county jails.** Jails are a tremendous underutilized resource. We should be using them creatively as day treatment centers, halfway back centers, GED and job training centers, and drug treatment centers. However, as long as there is a patchwork of jails, with elected jailers setting their own correctional policies, the jail will not be functioning as it could be under the same correctional philosophy as the prison system at large.
- ◆ **Expand the use of home incarceration, electronic monitoring, day treatment, and intensive supervision.** Many inmates can serve their time in settings other than a high cost prison. A person who has been convicted of a Class D or even Class C felony can be legitimately punished by having their freedom restricted. Technology has developed rapidly, and Kentucky needs to begin utilizing it more effectively.
- ◆ **Decriminalize crimes that are not presently resulting in incarceration.** When a crime is punishable by incarceration, and the person is indigent, a public defender has to be appointed. Yet, there are crimes where incarceration is seldom imposed, and where it is imposed, the term of incarceration is short. We should examine the Penal Code for those crimes that are usually probated or diverted and decriminalize those, replacing jail time with a fine.
- ◆ **Move juvenile status offenses out of the criminal justice system.** These are cases involving runaways, truancy, etc., and are totally non-criminal. They are important and should involve the Cabinet for Families and Children but not the criminal justice system.
- ◆ **Replace the death penalty with life without parole as a cost saving measure.** Having been a public defender for 30+ years, and having represented 14 people charged with a capital offense, I am well aware of the attachment Kentucky has to this penalty. Yet, it must be recognized that the death penalty is a highly costly criminal justice policy. We must be willing to submit the death penalty to cost-benefit analysis. If that were to occur, it would be readily seen that Kentucky cannot afford the death penalty. I estimate that DPA spends \$3-4 million each year on defending capital crimes; a similar estimate is reasonable for prosecutors. Additionally, it costs more

money to house people on death row than it does to incarcerate them in the general population, and the court system spends more money on capital trials than it does other trials. A conservative estimate would be that \$6 million per year is now spent on capital punishment. Since 1976, Kentucky then would have spent over \$180,000,000 in order to execute two persons. Replacing the death penalty with life without parole would save us significant money.

- ◆ **Use Public Defender Social Workers.** In 2006, the Department of Public Advocacy proposed to Governor Fletcher the placing of social workers in every public defender office. Several other states were utilizing public defender social workers and saving their states large sums of money by avoiding incarceration. Governor Fletcher decided to fund a pilot project and the 2006 Kentucky General Assembly agreed. DPA was to report to the 2008 Kentucky General Assembly the results of the pilot project.

DPA hired four degreed social workers and placed them in the Morehead, Covington, Owensboro, and Bowling Green Offices. For one year, DPA used skilled, knowledgeable and professional social workers at every stage of a defendant's case - - - at arrest, initial detention, first court appearance, pretrial assessment in jail, sentencing, admittance into treatment, coming out of treatment, and reentry. The social workers worked with the client, the client's family, and the court system to develop a person-specific plan for keeping them out of jail or prison. In addition, the social worker followed up for 6 months after judgment to ensure compliance with treatment.

The goals of the Pilot were to help defense counsel and judges identify persons with mental illness and substance abuse as early as possible after arrest, with the goal of moving them into community treatment and out of the criminal justice system. Each social worker worked at the back end of the case after a guilty verdict in order to supply the sentencing judges with alternatives to incarceration. Each worked with juvenile

court judges to identify alternatives to detention and commitment to treatment facilities. Public defender social workers worked hand in glove with drug court and other social service providers and were not in competition with them. Data was gathered on each of the social worker's 65 to 70 clients. The social worker worked collaboratively with the Schools of Social Work, local Comprehensive Care Centers and local treatment providers.

Was the Pilot a success? In December, the University of Louisville released the findings of a study which showed the Pilot's overwhelming success. Each social worker saved 10,000 days of incarceration. 90% of the defendants working with DPA social workers accessed treatment and services that will prevent them from re-offending. Kentucky saved \$100,000 per social worker. Only 8 defendants were rearrested during the Pilot on new charges or for violating conditions. Between 15% and 18% recidivated during one year compared to 34% in Corrections. *The Savings to Kentucky was estimated to be 10,000 days of incarceration per social worker or 27 years each and \$290,508 net savings for three of the four social workers. Kentucky saved \$3.25 of incarceration costs for every dollar invested. DPA asked for funding to hire a social worker in each of its 30 offices based upon these results. While this was not funded in 2008, DPA remains hopeful that when the economy improves this promising idea will be funded fully.*

- ◆ **Begin law reform.** Kentucky has been moving toward harsher penalties, longer sentences, restrictions on parole and probation, increasing enhancements since the Penal Code was written in the early 1970s. The Penal Code is uniformly condemned now as bloated and inconsistent. A committee of the Kentucky Criminal Justice Council rewrote the Penal Code in the early 2000's under the leadership of a professor from Northwestern. The Justice Cabinet spent a great deal of money on this rewrite. Yet, it now sits on shelves across the Commonwealth gathering dust. I am pleased that SJR 80 and the Governor's call to the Criminal Justice Council are the beginning of such reform. ■

# THREE NEW MEMBERS APPOINTED TO DPA COMMISSION

Garland Hale “Andy” Barr, IV, Allison Connelly, and Brooke Parker have been appointed to the DPA Commission each for a three-year term.

**Garland “Andy” Barr** was appointed to DPA’s Commission by Governor Fletcher on December 10, 2007, representing At-Large Members. Mr. Barr is an attorney from Lexington, who works with the law firm of *Kinkead & Stilz, PLLC*. His practice focuses on litigation, real estate, energy, government entity



Andy Barr

defense, and government relations. Prior to joining *Kinkead & Stilz, PLLC*, Barr served a four-year term in former Kentucky Governor Ernie Fletcher’s administration, initially as Special Assistant to the Governor, then as General Counsel to the Governor’s Office for Local Development, and finally as Deputy General Counsel to the Governor. Mr. Barr also has experience working on Capitol Hill as a Legislative Assistant to United States Congressman Jim Talent (R-Missouri). Mr. Barr also staffed the Congressman’s service on Speaker Newt Gingrich’s Managed Care Reform Task Force. Mr. Barr is the President of the Board of Directors of Prevent Child Abuse Kentucky and serves on the 2010 World Equestrian Games Advisory Commission. His term will expire July 15, 2010.



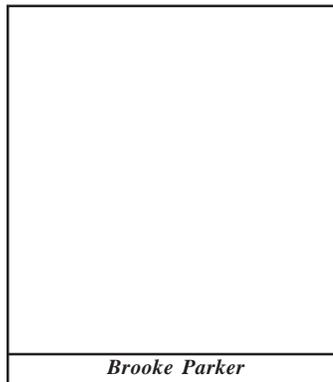
Allison Connelly

**Allison Connelly** replaces Allan W. Vestal on the DPA Commission, representing the University of Kentucky School Ex-Officio designation. She is an associate clinical law professor at the University of Kentucky College of Law. Prior to teaching, Connelly was a Kentucky public defender for 13 years, and was the first female Public Advocate. She

joined the UK faculty in 1996 as the first Director of the College’s Legal Clinic. She also teaches legal writing, litigation skills, criminal procedure and criminal trial process. Connelly is the coach of the College’s trial teams, one of which finished 5th in the nation in 2003. She has lectured locally and nationally on criminal justice issues, and received the Chancellor’s Outstanding Teaching Award in 2001. She

has over ten published appellate decisions to her credit. Connelly received her B.A. degree from the University of Kentucky and her J.D. degree from the University of Kentucky College of Law. Her term expires June 2009.

**Brooke Parker** serves on the DPA Commission pursuant to KRS 31, as the executive Director of the Office of Legislative and Intergovernmental Services of the Justice and Public Safety Cabinet. She was appointed to this position by Secretary Brown in December 2007. In this job, Parker focuses on



Brooke Parker

developing, implementing and coordinating policy and legislative initiatives among various departments of the Justice and Public Safety Cabinet, other criminal justice agencies, and all of state government. Prior to her appointment within the Justice Cabinet, Parker served as Assistant State Treasurer and Chief of Staff for the Kentucky State Treasurer, responsible for the day-to-day management of the Treasurer’s office, including General Administration & Support, Disbursements & Accounting, and Unclaimed Property Division. She oversaw a staff of 35 employees, and managed a more than \$3 million annual budget. In addition, Parker also served as Deputy Policy & Communications Director for the Treasurer’s Office.



## KENTUCKY CASE REVIEW

By Erin Hoffman Yang, Appeals Branch

*Grant Hatfield, Jr. v. Commonwealth*,  
2006-SC-333  
To be Published

### Affirming in Part and Reversing in Part Underlying Facts.

Grant Hatfield and co-defendants Eddie Joe Cobb and Brian Collins were convicted of attempted murder, kidnapping and intimidating a witness. The three defendants allegedly attacked Natisha Saylor in a church parking lot and forced her to go between the church buildings. Saylor was beaten, cut with a knife, and left for dead. Saylor was found alive but critically injured. The degree of brain damage suffered by Saylor was a point of contention throughout the trial.

**KRE 615 is Mandatory, but Violation of the Rule is Subject to Harmless Error.** The Court stated that separation of Witnesses was mandatory “in the absence of one the enumerated exceptions.” In Hatfields’ case, the trial court allowed the complaining witness’ grandfather, Charles Marcum to remain in the courtroom throughout trial and prior to testifying. The trial court relied on the exception found in KRE 615 (3), finding that the Marcum was “essential to the presentation of the party’s cause.” “However, there must be a showing that the witness is essential to the party’s cause.” The trial court erred because it failed to make a showing that Marcum met the criterion. Nevertheless, the Kentucky Supreme Court deemed the error harmless; characterizing his testimony as merely duplicative of other witness testimony.

**Hatfield qualified for the kidnapping exemption at KRS 509.050, thus his conviction for Kidnapping was reversed and vacated.** Kentucky law dictates that “[a] person is guilty of kidnapping when he unlawfully restrains another person and when his intent is...to accomplish or to advance the commission of a felony; or to inflict bodily injury or to terrorize the victim or another...”KRS 509.040(1)(b)(c). However, in certain qualified instances within KRS 509.050, kidnapping charges will be inapplicable. KRS 509.050 states that a person may not be charged with kidnapping or unlawful imprisonment “when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim’s liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose.” The Commentary to KRS 509.050 states that “[t]he provision seeks to express a policy against the

use of kidnapping to impose sanctions upon conduct which involves a movement or confinement (of another person) that has no criminological significance to the evil towards which kidnapping is directed...Before criminal behavior that is directed towards the completion of a robbery, rape or some other offense can constitute kidnapping, there must be an interference with liberty in excess of that which ordinarily accompanies the offense.”



Erin Yang

The Court applied a three prong test to determine if the exemption applies. First, the underlying criminal purpose must be the commission of a crime outside KRS 509. Appellant satisfied the first prong since criminal attempt to commit murder is outside the statute. To satisfy the second prong, the interference with the victim’s liberty must have been simultaneous with the commission of the underlying crime.

Prong two was satisfied since the restraint of Saylor was incidental to and contemporaneous with the attempt to take her life. The third prong requires that the interference with the victim’s liberty must not go beyond that which would normally be incidental to the commission of the underlying crime. It would appear that KRS 509.050 envisioned prong three be read in conjunction with prong two of the test. When read together it seems clear that the intent of prong two and three is to ensure that the restraint used in committing the underlying crime are such a nature that they are part of, or incident to, the act of committing the crime itself. The evidence indicates that the victim was restrained incident the attempt to take her life and as the assault was committed on her.

“While it is difficult to separate from a moral perspective to quantify such behavior as being appropriate in terms of restraint and interference with liberty, the law demands that justice separate raw emotion from reason. The movement and restraint of Saylor occurred in order to attempt to kill her, and did not go beyond what was necessary to achieve that objective.

*Continued on page 12*

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***Commonwealth v. S.K., M.M.F., and B.D.T.,*  
2006-SC-449  
Reversing**

The issue in this case was whether a juvenile court retained jurisdiction over an adult to enforce a restitution order entered by the juvenile court after that person turned eighteen. The appellees were juveniles at the time public offenses were committed. Two of the appellees, B.D.T. and M.M.F., were adjudicated before they turned eighteen. S.K. had an adjudication and disposition with an order of restitution after the age of eighteen. All three cases involved enforcing restitution orders through the court's contempt powers after the public offenders turned eighteen.

The juvenile code assigns the juvenile session of district court jurisdiction over "any person who at the time of committing a public offense was under 18 years." A person adjudicated guilty of a public offense is scheduled for a disposition (sentencing) where the court may order a public offender to be ordered to pay restitution, with no age limit.

There is no prohibition on adjudication, disposition, or even in ordering restitution or reparation in juvenile court on juvenile offenders who have turned eighteen before disposition. A contempt sanction in a contempt hearing for the violation of the court's order is distinguishable from a sentence set a dispositional hearing for a public offense. It stands to reason that if a court can order restitution by either a public offender, or his custodians regardless of age, the juvenile court can still use its contempt powers on a public offender after he turns eighteen years of age to enforce said order. Even if the juvenile code tried to restrict the juvenile court's power to enforce its order through contempt, it would be an unconstitutional attempt to hamper judicial action or interfere with the discharge of judicial functions.

Accordingly the juvenile session of the district court retains jurisdiction over a public offender after that person turns eighteen, in order to conduct adjudication and disposition hearings, and to order restitution.

Justice Abramson dissented in part, joined by Noble and Minton. According to the dissent, if a public offender has turned eighteen before the court orders restitution, he is no longer a "child" the plain language of the juvenile code precludes restitution as an option. Consequently, S.K.'s restitution order was not entered until after his eighteenth birthday, since it was a disposition not authorized by KRS 635.060(2).

***Vicki Monroe v. Commonwealth,*  
2005-SC-312 & 2005-SC-745  
Reversing**

**Background.** Monroe was charged with murder and complicity to commit robbery for the death of her husband, Gerald Monroe. The Commonwealth alleged that a year prior to the murder, Monroe was complaining to her son, Leslie Emerson, about her husband. Emerson suggested that Gerald could be gotten rid of for \$5000. Thereafter, Monroe gave Emerson \$3,000 dollars to catch up on bills. Emerson claimed that Monroe had also pressured him to find someone to kill Gerald. Emerson said he felt he needed to help kill Gerald because he could not pay her back.

Monroe moved to exclude hearsay statements made by Emerson to his friends. The trial court had ruled that there was a preponderance of the evidence that each statement was made in furtherance of the conspiracy between Emerson and Monroe.

**Reversible error occurred when impermissible hearsay tainted the proceedings.** KRE 805 (a) (b) (5) provides that "a statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement offered against a party is...a statement made by a co-conspirator of a party during the course of and in furtherance of the conspiracy." In order to fall within this exception, the proponent of the statement must show (1) the conspiracy existed, (2) the conspiracy involved the defendant, and (3) the statement was made in furtherance of the conspiracy.

In this case, the court had a sufficient basis to find that a conspiracy between Monroe and Emerson existed. The remaining question is whether the statements were made in furtherance of the conspiracy.

The Commonwealth relied on a Sixth Circuit decision which construed the "furtherance" requirement liberally, noting that any statement which identifies the participants and their role in the conspiracy was "in furtherance of the conspiracy." However, the Court found this interpretation of KRE 801 (a)(b) (5) far too broad. "the plain language of the statute requires not only that the statement be made during and about the conspiracy, but adds the conjunctive 'AND' in furtherance of the conspiracy." The federal view that "furtherance" should be interpreted broadly does not reflect the intent of the drafters and other federal courts have held that casual comments made to a confidant are not within the conspiracy exception.

Once these statements were admitted, defense counsel then invoked KRE 806 to offer statements that Emerson had made to police officers which served to impeach the hearsay statements, which in turn led to the Commonwealth arguing that the door had been opened to play the entirety of

Emerson's three statements made to police that had been recorded. Emerson was unavailable as a witness, having invoked his Fifth Amendment right not to incriminate himself. The defense argued that the entire statements should not be permitted pursuant to *Crawford v. Washington*. The trial court concluded that the rule of entirety of the evidence and fundamental fairness required that the Commonwealth be allowed to attack the impeachment, and allowed the statements to be played to the jury in their entirety.

The Court noted that if the impermissible hearsay had not been admitted, this chain of events would not have occurred, and large amounts of otherwise impermissible evidence would not have tainted the trial. The hearsay statements were not merely cumulative to statements placed before the jury by the defendant and Emerson's own statements. The error of admitting impermissible hearsay under the conspiracy exception could not be made harmless by the use of otherwise impermissible evidence it caused to be admitted, *i.e.*, Emerson's three taped statements.

Most of the statements admitted were nothing more than Emerson confiding in his friends or casual comments, and the admission of these statements was clear error. They certainly created a reasonable probability that they affected the verdict given their weight and the line of impermissible evidence they caused to follow. Monroe's conviction was reversed and remanded for a new trial.

***William Mark Bell v. Commonwealth,*  
2005-SC-963  
Reversing**

**Facts.** William Bell lived in a small trailer with his girlfriend, their daughter, and her two children from a previous relationship. His girlfriend's daughter, K.T., alleged that Bell would get her out of bed at night, give her pills to keep her awake, and sexually abuse her. K.T.'s credibility at trial was challenged by her numerous prior allegations of abuse. K.T.'s teacher and a guidance counselor testified that social services had been contacted on multiple occasions, following allegations made by K.T. against both Bell and her biological father. A social worker explained that no actions had been taken following these accusations since they were unsubstantiated due to K.T.'s changing stories.

As is frequently the case in sexual abuse trials, little physical evidence corroborated K.T.'s allegations. On one occasion, after K.T. made an allegation against her father, Bell and Despain took K.T. to the local hospital for a physical examination. The exam revealed that K.T.'s hymen was intact, and that there was no evidence of tears or lacerations. However, a later examination by another child abuse expert, Dr. Betty Spivak, revealed a slight healing tear to the hymen. The Commonwealth explained the discrepancy by pointing out that Dr. Spivak had conducted a more thorough

examination of K.T. with specialized equipment unavailable at the hospital.

The jury was instructed on five counts of rape, with five counts of sexual abuse as lesser-included offenses, and five counts of sodomy. The jury returned a verdict of guilt on five counts of sexual abuse in the first-degree and one count of sodomy in the first-degree. Bell was acquitted on the other charges. The jury recommended a sentence of five years as to each sexual abuse count and twenty-five years as to the sodomy count, to be run concurrently. The trial court imposed the jury's recommended sentence.

Bell argued that the trial court coerced the jury to reach a guilty verdict. At trial, the jury was instructed and began deliberations at 3:30 p.m. About three hours later, the trial judge brought only the jury foreperson into the courtroom, with all counsel and the defendant present. After first stating that he did not want to hear any details of what was going on in the jury room, the trial court asked the foreperson if the jury was deadlocked or having difficulty reaching a verdict. The trial court then asked if it would be necessary to order dinner, and the foreperson replied that it would be. An hour and a half later, absent any indication whatsoever that the jury was deadlocked, the trial court brought the entire jury into the courtroom and delivered an Allen charge pursuant to RCr 9.57. The jury was then sent back out to deliberate further.

One hour later, around 9:00 p.m., the trial court called the foreperson alone into chambers. Also present in chambers was the prosecution, defense counsel, Bell, the court's clerk, and a deputy sheriff. Initially, the trial judge reiterated that he did not want to hear any of the particulars of the deliberations. But the judge noted that the jury had been deliberating for six hours and asked whether further deliberations would be fruitful. The foreperson, visibly uncomfortable, replied that he thought the jury could use "just a little more time." He also explained that it was an "unusual situation for him," and that he was not used to "talking like this." He explained that the jury believed it was a "hard decision" involving "a lot of issues," but that they were making progress. Finally, the foreperson twice apologized for "how long it is taking us." The trial court replied that no apology was necessary and deliberations could continue if necessary. The foreperson again explained that he believed the deliberations were progressing well and that they would do their best. The foreperson returned to the deliberation room and a verdict was reached less than twenty minutes later.

**The trial court's actions were unduly coercive, resulting in palpable error.** Under the express terms of RCr 9.57, an Allen charge is properly delivered when "a jury reports to a court that it is unable to reach a verdict." Here, the jury

*Continued on page 14*

*Continued from page 13*

made no such report to the trial court. Furthermore, the circumstances of the deliberations in no way justified delivery of an Allen charge. Considering the complexity of the case, the conflicting testimony, and the fact that the jury was considering over ten possible criminal counts, there was no cause for concern that the jury was deadlocked after less than five hours of deliberation. The evidence against Bell, while certainly sufficient for a conviction, was not that overwhelming.

More egregious is the fact that the trial court brought the foreperson, alone, into chambers to inquire about the progress of deliberations. Bringing the foreperson into a small office with the defendant sitting a few feet away created an unduly coercive environment. The trial court should never isolate one juror from the rest of the jurors for questioning on a matter which pertains to them all. Though the trial judge repeated during the brief meeting that he did not want to know the details of the deliberations, the goal of the meeting was clear—to determine how much longer it would take the jury to reach a verdict. This being the trial court's third contact with the jury during its deliberations, any reasonable juror in this situation would have received the distinct impression that the trial court was troubled or surprised that deliberations had continued for as long as they had. A reasonable juror would have gotten the clear message from the judge that it was "time for a verdict." The character of the foreperson's responses and his repeated apologies made it equally apparent that he had received such a message.

When analyzing whether a trial court has coerced a jury verdict, the "ultimate test of coercion is whether the instruction actually forces an agreement on a verdict or whether it merely forces deliberation which results in an agreement."

Under the totality of the circumstances in the present case, the Court concluded that the trial court's behavior and statements to the jury amounted to coercion. The trial court's delivery of an Allen charge absent any indication of a deadlock was unwarranted. Such behavior leaves any reasonable juror with the impression that the trial court had expected a verdict already. Moreover, by engaging in the unacceptable behavior of bringing the foreperson alone into chambers, the trial court again sent the message that the verdict was taking too long. The foreperson stated that they were having trouble due to the complexity of the charges, but making progress. He gave every indication that further deliberations would be fruitful. Nonetheless, the jury returned a verdict shortly thereafter. This circumstance strongly indicates that the foreperson returned to the jury room and expressed his belief the trial court wanted a verdict promptly, and one was promptly reached.

The trial court's overall conduct and repeated interaction with the jury during deliberations constituted an improper invasion into the deliberations of the jury. When the province of the jury has been invaded, the validity of the verdict is completely undermined and such error cannot be deemed harmless.

**Palpable error also occurred when Bell was denied a unanimous verdict.** The wording of the jury instructions in this case called into question the unanimity of the verdict. When evidence is sufficient to support multiple counts of the same offense, jury instructions must be tailored to the testimony in order to differentiate each count from the others. While the Commonwealth differentiated the offenses during its closing arguments, there is nothing in the written instructions to distinguish each count of rape, sexual abuse and sodomy.

The trial court erroneously delivered multiple instructions that failed to distinguish in some fashion each incident of rape, sexual abuse, or sodomy. The Court noted that a simple parenthetical notation within each instruction identifying the location of the offense, or the general time period of the offense, could have easily cured this problem. The trial court might also have used a heading or label for each instruction to differentiate the various counts.

The Court noted that the error in the sexual abuse instructions with respect to these convictions would have been harmless. The jury was instructed on five counts of rape, with sexual abuse as a lesser-included offense. The Commonwealth, in its closing, identified the five distinct incidents. Because the jury ultimately found Bell guilty of all five counts of sexual abuse, it can be rationally and fairly deduced that each juror believed Bell was guilty of the five distinct incidents identified by the Commonwealth.

However, the single conviction for sodomy presented a different scenario. The Commonwealth argued that, because the jury ultimately found Bell guilty of only one count of sodomy, they must have differentiated each instance and agreed upon one that had occurred. But satisfaction of Kentucky's unanimity requirement cannot be based on conjecture. It must be evident and clear from the instructions and verdict form that the jury agreed, that Bell committed one count of sodomy, and also on exactly which incident they all believed occurred. Thus, Bell was not only denied a unanimous verdict, but was also stripped of any realistic basis for appellate review of his conviction for sodomy. Without knowing which instance of sodomy is the basis of his conviction, Bell could not challenge the sufficiency of the evidence on appeal. Had Bell's sodomy conviction not already been reversed for judicial coercion, the error explained above would have constituted palpable, reversible error.

**Witnesses may not testify to an alleged victim's veracity.** The Court addressed the testimony of the investigating social worker, who interviewed K.T. concerning the sexual abuse allegations. Over objection by defense counsel, she was permitted to testify that K.T. was "spontaneous" and "unrehearsed" in telling her story, as opposed to alleged victims who sound "rehearsed" or "canned." Also, over objection, she was permitted to testify that K.T.'s demeanor during the interview was "consistent with sexual abuse victims."

This type of testimony in cases involving allegations of sexual abuse is inadmissible on a number of grounds. First, it is well settled that a witness may not vouch for the credibility of another witness. Clearly implicit in Cash's description of K.T. as "spontaneous" and "unrehearsed," as opposed to alleged victims who sound "rehearsed" or "canned," was her opinion that because of K.T.'s manner of speaking, she was being truthful. Thus, this testimony was improper vouching and inadmissible. Second, we have held that psychologists and social workers are not qualified to express an opinion that a person has been sexually abused. Third, we have consistently held as inadmissible, evidence of a child's behavioral symptoms or traits as indicative of sexual abuse on grounds that this is not a generally accepted medical concept. Accordingly, Cash's testimony that K.T.'s demeanor during the interview was "consistent with sexual abuse victims" was inadmissible as well. ■



### Overcoming Language and Cultural Barriers Using Evidence-Based Practices

The National Council of La Raza (NCLR), the largest national Hispanic civil rights and advocacy organization in the United States and National Resource Bank member for the Models for Change initiative, just released *Overcoming Language and Cultural Barriers Using Evidence-Based Practices*. NCLR is committed to educating the Latino community, policy-makers, juvenile justice systems personnel, and the public.

This monograph include expert panelists focused on the cultural and linguistic needs of Latino youth who have become clients of evidence-based practices and how changes in juvenile justice policies, practices, and programs could ensure fairness and improved outcomes. NCLR produced this monograph in collaboration with the John D. and Catherine T. MacArthur Foundation's Models for Change initiative.

Available at <http://www.nclr.org/content/publications/detail/52033/>



## PLAIN VIEW . . .

### *Virginia v. Moore* 128 S.Ct. 1598 (2008)

Justice Scalia posed the question simply: “We consider whether a police officer violates the Fourth Amendment by making an arrest based on probable cause but prohibited by state law.” The Court in a unanimous decision on April 23, 2008 answered in the negative.

The case began when two Virginia police officers stopped a car believing the driver, Moore, was driving on a suspended license, a crime punishable by one year in jail and a \$2500 fine. Virginia law required a summons rather than an arrest. A search incident to arrest revealed 16 grams of crack cocaine. Moore’s pretrial motion to suppress was denied, and he was sentenced to five years in prison. The Virginia Court of Appeals reversed Moore’s conviction, but an *en banc* Court reversed that decision. Ultimately, the Virginia Supreme Court held that Moore’s arrest and search violated the Fourth Amendment. The United States Supreme Court granted *certiorari*.

Justice Scalia wrote the opinion for a unanimous court overturning the decision of the Virginia Supreme Court. As he is wont to do, he first examined the state of things in 1791. His examination of history informed him that the Fourth Amendment was not tied to state or federal law, and thus history was of little help in addressing the question before the court.

Justice Scalia then turned to a more modern analysis. “When history has not provided a conclusive answer, we have analyzed a search or seizure in light of traditional standards of reasonableness ‘by assessing, on the one hand, the degree to which it intrudes upon an individuals’ privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’” Using this reasonableness standard caused the Court to rule against Moore. “[W]e have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable.” Thus, an arrest that is based upon probable cause comports with the Fourth Amendment even where state law regarding the lawfulness of an arrest is involved. “A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional.”



*Ernie Lewis, Public Advocate*

The Court also rejected Moore’s argument that even if it was legal to arrest him under the Constitution, it was not legal to search him. The

Court simply relied upon a classic search incident to lawful arrest rationale to reject the argument. “The interests justifying search are present whenever an officer makes an arrest. A search enable officers to safeguard evidence, and, most critically, to ensure their safety during ‘the extended exposure which follows the taking of a suspect into custody and transporting him to the police station.’...The state officers *arrested* Moore, and therefore faced the risks that are ‘an adequate basis for treating all custodial arrests alike for purposes of search justification.’”

Justice Ginsburg wrote alone in concurrence. She agreed that because Virginia did not allow for an arrest but also did not punish the violation of the statute with the exclusionary rule, that the failure to suppress did not violate the Fourth Amendment. “The Fourth Amendment, today’s decision holds, does not put States to an all-or-nothing choice in this regard. A State may accord protection against arrest beyond what the Fourth Amendment requires, yet restrict the remedies available when police deny to persons they apprehend the extra protection state law orders.”

### *Commonwealth v. Bishop and Sester* 245 S.W.3d 733 (Ky. 2008)

A Manchester Municipal Order stated that no city police officer could leave the city limits while on duty. KRS 95.010 gives city police officers located in fourth-class cities county-wide arrest powers. So when a Manchester Police Officer arrested Bishop and Sester outside the city limits, the trial court agreed with their lawyers that the arrest was illegal. The Court of Appeals concurred.

However, in a decision written by Justice Abramson, the Supreme Court of Kentucky overturned the decision of the Court of Appeals. The Court held that “Manchester’s 1987 Municipal Order is valid; does not expressly conflict with KRS 95.019; and does not affect a Manchester city police officer’s ability to arrest offenders outside of the city limits. Rather, the amendment to Section 8.1 simply modifies an internal, personnel policy for Manchester city police officers, the violation of which results in internal discipline, not in a declaration that the arrest itself is unlawful...In other words, having a personnel policy that requires city police officers

to remain within city limits does not mean that if those officers do go out into the county, even absent an emergency, their statutorily authorized arrest powers somehow dissipate or vanish. At most, the officers may have violated an employment regulation and be subject to appropriate discipline.”

***Meghoo v. Commonwealth***

245 S.W.3d 752 (Ky. 2008)

The Supreme Court granted discretionary review of this case in order to explore “the permissible scope of safety inspections by vehicle enforcements officers, and the authority of those officers to investigate and arrest for offenses that are not within the immediate scope of motor vehicle carrier safety statutes and regulations.” It arose after a DVE safety inspection of a truck revealed the presence of a large quantity of marijuana in a box. The search was conducted after a dog alerted during the safety inspection. Meghoo entered a conditional plea of guilty after losing his motion to suppress. The Court of Appeals sustained the trial court’s decision, although the Court held that the DVE officers had no right to arrest as law enforcement officers following the investigation of drug trafficking involving motor vehicle carriers, relying instead upon their citizen’s arrest powers.

Justice Lambert wrote the opinion for the Court. He upheld the right of the DVE officers to follow up their suspicions of drug activity that had been raised during a lawful safety inspection. “Once the vehicle enforcement officers established a reasonable suspicion based on the documents that other violations of law might be occurring, they were entitled to bring in the drug-sniffing dog for the exterior of the vehicle so long as there was not any unreasonable delay.” The Court found no unreasonable delay, with the inspection taking only 37 minutes, and the entire incident lasting only 1 hour. The Court further found that DVE officers were peace officers and thus they could arrest based upon their authority as peace officers and not just as citizens. “Once the vehicle enforcement officers had probable cause from the dog’s alert that Appellant had committed a felony offense, they were not required to look away just because their normal purview consists of traffic violations. We discover no limitations on the vehicle enforcement officers’ jurisdiction in KRS 281.765 limiting their authority to *arrest* when they have probable cause under KRS 431.005(1)(c). Under KRS 431.005(1)(c) the arrest was proper, and the courts below are affirmed.”

***Henson v. Commonwealth***

245 S.W.3d 745 (Ky. 2008)

Officer Larry Turner found a parked Grand Am in which Jacob Henson was a passenger after receiving an anonymous tip that Henson was carrying drugs and was a passenger in the car. Turner asked Henson to get out of the car and asked

him if he had drugs on him. After Henson said no, Turner asked him to empty his pockets, which resulted in finding cocaine and hypodermic needles. Henson entered a conditional plea of guilty after he lost his motion to suppress and was sentenced to five years of probation. The Court of Appeals affirmed in a 2-1 decision. The Supreme Court granted discretionary review.

In an opinion written by Justice Abramson, the Court reversed the Court of Appeals. The Court agreed that Henson had been seized when Turner asked him to step out of the car. Under the Fourth Amendment, such a seizure requires a reasonable and articulable suspicion. The Court found the facts of this case similar to *Florida v. J.L.*, 529 U.S. 266 (2000) in that the corroboration of the anonymous tip, as in *J.L.*, did little more than verify that the named individual would be found in the place where the tipster indicated he would be. Quoting from *J.L.*, the Court noted that an “accurate description of a suspect’s readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.”

The Court distinguished the case of *Alabama v. White*, 496 U.S. 325 (1990). “In finding that the tip was sufficiently reliable to justify the stop, the Supreme Court focused on the fact that the police were able to independently corroborate the details provided in the tip and that the anonymous caller was able to predict White’s future behavior.” In contrast, in this case the tip only stated that Henson would be a passenger in a particular car, without any more details, a “tip which might be readily observed by anyone traveling in Jackson that day.” The Court noted that the tip did not say where Henson would be going or what he would be doing. Accordingly, the taking of the drugs from Henson’s person following his “consent” was tainted by the illegal seizure of Henson and should have been suppressed.

***Commonwealth v. Brown***

250 S.W.3d 631 (Ky. 2008)

This is another case about an anonymous tip. Here, Detective Ford of the Lexington Police Department received tips from a woman saying that Brown was selling cocaine, that he lived at a particular address and drove a black car belonging to his wife, that he sold drugs during the early evening hours in three different areas of town. Det. Ford investigated the tips by obtaining a picture, verifying his address, car, and criminal record. On September 12, 2002, the caller said that Brown was leaving in the black car with cocaine and was going to a specific place. Det. Ford and other officers went to the place indicated by the caller. Sergeant Hart located

*Continued on page 18*

*Continued from page 17*

the car in a parking lot behind a Huddle House, and saw what he believed to be a drug transaction. Hart and Ford pulled their cars near the black car. They approached the car and found Brown in the driver's seat, his 15 year old stepdaughter in the passenger seat, and a Huddle House employee, York, talking to Brown through the window. The officers saw Brown pull something out of his pocket and put something into his mouth. They ordered him to spit it out, which he refused to do. As they handcuffed Brown, they observed a white paste around Brown's mouth. Brown continued to chew and swallow the substance he had ingested. Emergency medical personnel were called, and Brown told them that he had swallowed cocaine. York later told the officers he was purchasing \$200 worth of cocaine from Brown. Brown was charged with trafficking and PFO 1<sup>st</sup>. His motion to suppress was denied, and Brown entered a conditional plea of guilty. The Court of Appeals reversed under *Florida v. J.L.*, 529 U.S. 2667 (2000), finding that the "anonymous tip was not sufficiently corroborated to provide the requisite reasonable suspicion for the stop."

The Supreme Court reversed in a decision written by Justice Cunningham. The Court agreed that at the time Hart and Ford stopped their cars near Brown's, he was seized since in "view of all the circumstances surrounding the incident, a reasonable person would most likely not have felt free to leave." The Court held that the anonymous tip was reliable enough to constitute reasonable suspicion. The Court was particularly impressed that the tipster made numerous calls over several months. The Court also believed that there was sufficient corroboration of the tips. The Court also wondered what the officers should have done differently. "In examining this case as to the reasonableness of the officers' actions, we must pause and ask ourselves this question. What should the officers have done differently? After discovering the stop behind the Huddle House and observing what the officers reasonably concluded to be a drug transaction, it would have been totally unreasonable for them to have simply driven away at that point."

Justice Schroder wrote a dissenting opinion. In his view, the "anonymous tipster's knowledge, which had been corroborated only to the extent of Brown's address, the car he drove, and, on the day of the arrest, that he was out, does not lend 'indicia of reliability' to her claim that Brown was selling cocaine. These facts are readily observable, existed at the time of the call(s), and could be 'predicted' by anyone with some familiarity with Brown."

***Commonwealth v. Marr***  
250 S.W.3d 624 (Ky. 2008)

This case also began with an anonymous tip, received by the Louisville Police Department in April of 2001. The tipster said that meth was being sold from a body shop and that the

seller was an "older 'biker looking' man." The police began to watch the body shop and based upon what they saw concluded that the tipster was correct. At one point, the police pulled a car over and found two pounds of marijuana. Once that occurred, they decided to go to the body shop and speak with the owner. The owner told the officers no one was present, but the officers heard noises in the back of the shop. Marr came out when called. A pat-down of Marr revealed bags of meth and cash. Marr agreed to a search of his house, which then revealed more meth, weapons, and a lab. The trial court found that the police did not have a reasonable suspicion at the time of the pat-down search and ordered suppression. The Commonwealth appealed to the Court of Appeals, which affirmed the decision of the trial court.

The Supreme Court granted discretionary review, and in an opinion written by Justice Cunningham reversed the Court of Appeals. Justices Minton, Noble, and Scott joined in the majority opinion. The Court rejected comparisons to *J.L.*, noting that the officers had conducted surveillance of the body shop, they had observed drug activity, they had arrested someone with marijuana in their car, that Marr and the body shop owner were "nervous" when questioned by the police, and that the body shop owner had lied about whether Marr was present or not. These circumstances corroborated the anonymous tip, justifying the pat-down search of Marr.

Justice Abramson wrote a dissenting opinion, joined by Justices Lambert and Schroder. The dissent consists mostly of a lengthy quote from the Court of Appeals' decision. Particularly important is the following: "'Frisking a suspect during a *Terry* stop is strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. *Commonwealth v. Crowder*, Ky., 884 S.W. 2d 649 (1994), *citing Terry, supra*. Furthermore, in *Ybarra v. Illinois*, 444 U.S. 85, 62 L. #d 2d 238, 100 S. Ct. 338 (1979), the United States Supreme Court cautioned that the narrow scope of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place...The informant's tip merely advised the police that someone who matched Marr's description would be at the scene. The informant provided no predictive information about his conduct, nor did the police surveillance corroborate the tip that Marr was trafficking in methamphetamine... We agree with the trial court that these circumstances were insufficient to justify the pat-down search of Marr. Marr's presence in an area of expected criminal activity, standing alone, was not a sufficient basis for an investigatory stop...And while an individual's nervousness or suspicious behavior can contribute to the establishment of an articulable suspicion...Marr's nervousness alone was not sufficient to create a reasonable

inference that he was involved in criminal activity. Consequently the trial court properly granted Marr's motion to suppress..."

***Nash v. Commonwealth***  
2008 WL 465198, 2008 Ky. App.  
LEXIS 41 (Ky. Ct. App. 2008)

Police in Grayson County went to Nash's house to serve a warrant based upon Nash's indictment. He told them that he had two grams of meth hidden in an old house next door. The police obtained a search warrant for the residence as well as "any and all outbuildings and/or any and all vehicles, on the premises, including junk vehicles." The police executed the warrant, searching not only the old house referred to, but also a field nearby filled with junk cars. Hidden in the trunk of a car in the field was an air tank used in the manufacture of meth. Based upon this, Nash was convicted of possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine. After losing his motion to suppress, Nash was convicted and sentenced to 13 years in prison.

In an opinion written by Judge Henry and joined by Judges Keller and Taylor, the Court of Appeals affirmed. The Court relied upon *Maryland v. Garrison*, 480 U.S. 79 (1987) to hold that the search of the field was a reasonable mistake under the warrant. "Because a roadbed or path led directly from Nash's trailer to the field of junked cars nearby, and because the warrant noted the proliferation of junked cars on the premises and authorized a search of those vehicles, officers reasonably believed that they were searching within the delineated scope of the warrant."

***Stone v. Commonwealth***  
Not Reported in S.W.3d, 2008 WL 351669,  
2008 Ky. App. LEXIS 32 (Ky. Ct. App. 2008)

On August 8, 2004, Louisville police officers Green and Lankford saw Stone sitting in front of an apartment building in a car. The officers pulled in front and back of Stone's car, blocking it. As the officers approached, Stone tried to get out of the car, but was ordered back into the car. The officers saw a "baggie of an off-white powder substance in plain view on top of the middle console." Stone was ordered out of the car, after which he ran but was eventually caught. He was charged with a variety of offenses. His motion to suppress was denied, and Stone was convicted after a jury trial and sentenced to 6 years in prison.

In an opinion written by Judge Taylor and joined by Judges Combs and Nickell, the Court of Appeals reversed. The Court held that the "circuit court erred as a matter of law by concluding the officers possessed reasonable suspicion of criminal activity to justify appellant's seizure." The Court found that Stone was seized for Fourth Amendment purposes

when his car was blocked by the officers and when he was ordered back into his car. They also found that Stone was seated legally in his car in front of an apartment building at 8:30 p.m., the engine was not running, the brake lights were on, that Stone was not violating the law, that the apartment complex was in a high crime area, and that the officers saw no one approach Stone's car. "We are simply unable to hold that an individual merely sitting in a legally parked vehicle in front of an apartment complex in a high crime area for a few minutes is sufficient to create reasonable suspicion of criminal activity."

***Johnson v. Commonwealth***  
245 S.W.3d 821 (Ky. Ct. App. 2008)

This is an interesting case posing the question of "whether an illegal entry into a residence by a police officer renders evidence of a subsequent assault against the officer inadmissible under the exclusionary rule."

The case began when officers received information that Johnson, Deaton, and another were acting "suspiciously" in an area where a theft had occurred. The officers went to Deaton's house, where they shined a flashlight into a car. Deaton came out on the porch and yelled obscenities at the officers. Deaton refused to leave the residence and went back inside. One of the officers had been at Deaton's house before and believed that Deaton had threatened law enforcement previously. Both officers went into Deaton's house and "gained control" of Deaton. Deaton said that Johnson was also in the house, so the officers conducted a "security sweep." When the officers found Johnson, Johnson and an officer began to fight. Johnson eventually was charged with assault 3<sup>rd</sup> of a police officer. Johnson's motion to dismiss based upon the illegal entry was sustained by Judge Trude.

The Court of Appeals reversed in a decision by Judge Thompson joined by Judges Buckingham and Henry. Both parties agreed that the motion to dismiss was improper. The Court instead treated the motion as a motion to suppress. The Court joined other jurisdictions in holding that the exclusionary rule should not apply despite the illegality of the entry. The Court cited with approval *State v. Boilard*, 488 A. 2d 1380 (Me. 1985), stating in part that "[w]e decline to hold that after an unlawful entry evidence of subsequent crimes committed against police officers must be suppressed. Such a rule would produce intolerable results. For example, a person who correctly believed that his home had been unlawfully entered by the police could respond with unlimited force and, under the exclusionary rule, could be effectively immunized from criminal responsibility for any action taken after that entry. We do not believe that either the state or federal constitution compels such a result."

*Continued on page 20*

Continued from page 19

***Laterza v. Commonwealth***  
244 S.W.3d 754 (Ky. Ct. App. 2008)

The Boone County Sheriff's Department established "video and visual surveillance" of Laterza's house after receiving complaints about drug activity there. Twice thereafter officers conducted "trash pulls" resulting in the seizure of marijuana. Based upon these two trash pulls, the officers obtained a search warrant, resulting in more marijuana being seized. The trial court suppressed evidence of the video surveillance due to a discovery violation. The trial court declined the motion to suppress the marijuana seized pursuant to the warrant.

The Court of Appeals affirmed in a decision written by Judge Thompson and joined by Judges Buckingham and Henry. The Court held that the exclusionary rule did not apply because the trial court sustained the motion to suppress the surveillance evidence based not upon a Fourth Amendment violation but rather as a violation of discovery. "Therefore, the surveillance videotapes were not obtained illegally and, thus, cannot be the basis for a 'fruit of the poisonous tree' claim." Further, the Court noted that Laterza had agreed that the trash pulls were legal.

***United States v. Gonzalez***  
512 F.3d 285 (6th Cir. 2008)

David Gonzalez was pulled over by Willoughby Hills Police Officer Shannon Vachet for minor traffic violations on May 27, 2004. Vachet issued Gonzalez a written warning, and was about to ask whether Gonzalez had any contraband in his van when Gonzalez invited Vachet to look in the van. Vachet saw a "piece of molding in the rear storage area that was slightly out of place." He "touched" the molding, it fell off, revealing "two plastic-wrapped packages." After narcotics dogs alerted to the van, a search warrant was obtained. The execution of the warrant revealed 7 packages of cocaine containing 7 kilograms. Gonzalez lost his motion to suppress, and after a trial was sentenced to life in prison.

The Sixth Circuit affirmed in an opinion written by Judge McKeague and joined by Judges Cohn and Boggs. The only search issue pertained to the scope of the consent to search. "[W]e agree that Gonzalez's consent to search could not be reasonably understood as authorizing Vachet to damage the van. Yet, the record does not support a finding that Vachet did any damage to the van during the consensual search. Instead...it appears that the subject piece of plastic molding became dislodged in response to the slightest exploratory touch or manipulation by Vachet and that its falling off created an opening through which suspicious-looking packages were readily visible."

***United States v. Caldwell***  
518 F.3d 426 (6th Cir. 2008)

Caldwell and Meyer checked into a hotel room in Covington on June 9, 2004. The hotel manager later called the Northern Kentucky Drug Strike Force and complained of the smell of marijuana coming from their room. The police went to the hotel and stopped Meyer and Caldwell as they were about to leave in a car. The police would later testify that Caldwell was frisked and 13 bags of marijuana was discovered, and that Caldwell declined to give consent to search the room saying "'You'll have to ask [Meyer]. It's her room.'" According to the police, Meyer agreed the room was hers and gave oral consent to search. A search revealed 212 grams of marijuana, and 3 grams of crack cocaine, 2 boxes of ammunition and 2 handguns. Caldwell would later testify that he was removed from the car, slammed to the ground, and that he denied permission to search the room.

The Sixth Circuit affirmed the trial court's motion to suppress, as well as the judgment sentencing Caldwell to 120 months in prison. In a decision written by Judge Sutton and joined by Judges Suhrheinrich and Griffin, the Court held that Meyer had indeed consented to the search of the room and that Caldwell had been silent. "So long as the consenting individual has actual common authority over the room...or apparent common authority over the room...officers may rely on the consent of one of the occupants in this setting."

***United States v. Smith***  
510 F.3d 641 (6th Cir. 2007)

This case arose after an extensive investigation, surveillance, the use of a confidential informant, numerous controlled buys, and the use of other investigatory techniques. The bottom line is that a warrant was issued for the search of Smith's residence, and that during the execution of the warrant a Pontiac was also searched that was located on the street off the premises described by the warrant. 1250 grams of powder cocaine and 256 grams of crack cocaine were found in the Pontiac. \$17,000 in cash as well as plastic bags with residue was found in the residence. Smith lost his motion to suppress and received a life sentence at trial.

The Sixth Circuit affirmed the judgment of the district court in a decision written by Judge Gibbons and joined by Judges Martin and Sutton. The Court sustained the search of the Pontiac under both the automobile exception and the inventory exception. The Court relied upon the fact that the officers knew that the Pontiac might contain contraband and that Smith transported drugs in and sold drugs out of his cars. "Because the officers were aware of Smith's use of vehicles in his drug-trafficking activities, and because they had information indicating that Smith stored cocaine at his residence, there was a 'fair probability' that contraband—in this case, the cocaine referenced by the tipster—would be found in the Pontiac."

The Court also found that the search of the Pontiac was justifiable as an inventory search. “Given that the officers had probable cause to believe that the Pontiac could be seized as forfeitable contraband and that Lewkowski testified as to the existence of the WEMET’s inventory policy, we hold that the vehicle was also validly searched pursuant to the inventory exception to the warrant requirement.”

***United States v. Purcell***  
526 F.3d 953 (6th Cir. 2008)

An agent of the Southern Ohio Fugitive Apprehension Strike Team received a tip that Frederick Purcell was an escapee from prison and that he was staying in a hotel in Kentucky. The police went to the hotel, identified Purcell standing outside and arrested him. The officers then went to his room and knocked. Crist opened the door and told the officers that there was no meth manufacturing occurring and gave her consent to look around the room. In their cursory review of the room, officers saw what they would later describe as suspicious matters indicative of meth manufacturing. Other officers were called in, and Crist gave permission for a more complete search. Crist told the officers about a gun in her duffel bag. The officer opened a duffel bag and found marijuana but no gun. That bag had in it only men’s clothes. Another officer found the gun in a nearby backpack. Purcell was indicted on a variety of charges. The trial judge granted Purcell’s motion to suppress the gun but denied the motion to suppress the marijuana. The government appealed.

Judge Moore wrote the opinion for the Sixth Circuit affirming the district court, joined by Judge Gilman and Judge Sutton, who also dissented in part. The Court held that the warrantless search of the backpack was not justifiable under the exigent circumstances exception to the warrant requirement. “[T]he government’s claims of exigency appear to be only a post hoc justification for the warrantless search because the agents searching Purcell’s room did not seem particularly concerned for their own safety or the safety of other hotel guests after they had conducted their sweep of Purcell’s room. If the officers were truly concerned about a dangerous condition, why did the agents twice ask Crist for permission to search the room? And if the agents were worried about a methamphetamine laboratory, why were they searching in the luggage for a firearm? The answers to these questions belie the government’s assertion that the agents were concerned about a possible methamphetamine lab in Purcell’s hotel room. We therefore hold that exigent circumstances did not justify the warrantless search of Purcell’s backpack.”

The Court also rejected the government’s position that Crist has given her consent to search Purcell’s luggage. “[W]e conclude that the discovery of the men’s clothing in the duffel bag that Crist claimed was hers created ambiguity sufficient to erase her apparent authority and necessitated

that the officers reestablish Crist’s apparent authority. Because the officers continued their search without reestablishing Crist’s apparent authority, the firearm was discovered as part of an illegal search, and the district court did not err when it suppressed the firearm.”

Judge Sutton believed that the officers “reasonably relied on Crist’s consent to search the pack for several reasons.” Judge Sutton particularly believed that Purcell’s status as a fugitive made Crist’s consent more reasonable despite the fact that men’s clothing was discovered in the backpack.

***United States v. Smith***  
526 F.3d 306 (6th Cir. 2008)

Rickey Smith stole a car in 1990 and was sentenced to 15 to 30 years as an “habitual offender.” After 14 years in prison, Smith was allowed to live in his sister’s home while being monitored by an ankle device. That same year, DOC received a tip that Smith had guns and drugs in the house. Officers forcibly entered the home, searched the basement and discovered two guns under a mattress. Smith pled guilty to one count of being a felon in possession of a firearm, and appealed to the Sixth Circuit on his search and seizure claim.

The Sixth Circuit affirmed the decision of the district judge overruling the motion to suppress. Judge Sutton wrote the opinion joined by Judges Batchelder and Barzilay. The Court noted that Smith had virtually no reasonable expectation of privacy. “Accounting for all of these circumstances—the tether, the need for authorization to leave the walls of his home and the officers’ authority to search his home at any time—Smith had little, if indeed any, reasonable expectation of privacy in being free from a suspicionless search of his residence.” The Court relied extensively on *Samson v. California*, 547 U.S. 843 (2006) in limiting the expectation of privacy for a parolee. Interestingly, the Court describes a “privacy continuum” whereby a free citizen has absolute liberty, a probationer has a lowered expectation of privacy, a parolee has a lesser expectation than a probationer, and an inmate has no expectation of privacy whatsoever.

The Court rejected Smith’s contention that the knock-and-announce rule had been violated by the officers’ breaking into his sister’s home to search for weapons. The Court noted that under *Hudson v. Michigan*, 547 U.S. 586 (2006), the exclusionary rule does not apply to violations of knock-and-announce.

***United States v. Martin***  
526 F.3d 926 (6th Cir. 2008)

On January 5, 2005, Agent Nathan Honaker of the Northern Kentucky Drug Strike Task Force was contacted by a confidential informant saying vaguely that there was illegal drug activity occurring at the house where Kenneth Martin

*Continued on page 22*

*Continued from page 21*

lived with his sister, Kim. Agent Honaker applied for a search warrant, saying that he had “received information from a confidential informant that there was drug activity at 1219 Greenup Street, Covington, KY [and] the confidential informant advised that Kenneth Martin resides at th[at] residence.” Honaker also said that the confidential informant had “provided reliable information in the past on multiple occasions that ha[d] resulted in seizure of illegal controlled substances.” Two other officers conducted a trash pull and found substances that tested positive for cocaine in a field test. Honaker found that Martin had been convicted of trafficking in controlled substances before and that he had been arrested twice on possession of marijuana charges. Judge Ruttle of the Kenton District Court issued the search warrant. In the execution of the search warrant officers found several weapons and ammunition, marijuana, and several other items. Martin was indicted for being a felon-in-possession of a firearm. After his motion to suppress was denied, Martin entered a conditional plea of guilty and was sentenced to 180 months in prison.

The Sixth Circuit affirmed the decision of the district court in an opinion by Judge Rosen joined by Judges Batchelder and Daughtrey. The Court held that the affidavit in support of the search warrant was sufficient to establish probable cause. The Court noted that the affidavit stated that the confidential informant was a known person and that the informant was reliable. The Court further relied upon the corroboration of the informant’s information following police investigation. “The confidential informant’s minimal facts here were bolstered when the trash pull yielded cocaine residue. Also, Martin’s criminal history revealed that he had been convicted of four counts of trafficking cocaine and possession of marijuana on two occasions.”

*United States v. Blair*  
524 F.3d 740 (6<sup>th</sup> Cir. 2008)

This is another case involving complicated facts coming out of an extensive narcotics investigation by the federal government. I won’t detail the facts. During an investigation Knoxville Police Officer Munday saw Blair stop in front of a house and talk with someone there and then engage in what Munday believed to be a drug transaction. Blair left in a car, and Munday saw Blair “roll through a stop sign.” He used his “walkie-talkie” to tell Officer Homes that Blair was coming his way. Homes followed Blair’s car and after 20 seconds pulled him over for a “tag-light” check. Blair’s license came back valid as did a criminal records check. Holmes and Munday continued to talk during the conversation between Holmes and Blair. Holmes asked Blair for permission to search the car and Blair refused. Holmes asked for a canine unit to come to the scene. Blair asked why he had been stopped, and Holmes told him it was for a tag light violation. Blair reached underneath the seat and toward his ankles, which

caused Holmes to ask for backup. A car video would later show that Blair’s tag-light was working properly. The canine unit arrived, and Blair was asked to get out of his car. He began to reach into his pockets, officers told him to stop, and then patted him down. Holmes felt a “large lump” in Blair’s pants, and found several baggies of crack cocaine. Blair was arrested and ultimately entered a conditional plea of guilty following a denial of his motion to suppress.

The Sixth Circuit reversed in a decision written by Judge Edmunds and joined by Judges Daughtrey and Gilman. The Court held that the traffic stop was without a reasonable suspicion of criminal activity and that the scope of the traffic stop was “unjustifiably extended” beyond a traffic stop. The Court assumed that the traffic stop for the tag light violation was supported by probable cause, although they expressed “serious doubt as to Officer Holmes’s justification for the stop, primarily because the video evidence shows that the tag-light was fully operational.”

The Court held that there was no reasonable suspicion of criminal activity, a pertinent issue because even if the traffic stop was valid, the scope of the stop was determined by whether it was just for a traffic violation or whether there was also a suspicion of criminal activity. The Court found that Officer Holmes did not know that Blair’s car had just left a house known for drug activity and that the late hour and high-crime area did not justify the stopping. The Court also found that Officer Holmes did not know at the time of the stop that Officer Munday had observed what he believed to be a hand-to-hand transaction between Blair and the home owner. The Court rejected the government’s argument that the collective knowledge of Munday and Holmes created a reasonable suspicion. “In the case at hand, however, Officer Munday never communicated why Blair should be stopped, or even that he should be stopped at all.”

The Court concluded that despite their assumption that the initial stopping for a traffic infraction was based upon probable cause, and because there was no reasonable suspicion for Holmes to stop Blair, the scope and duration of the **traffic** stop was excessive and thus violative of the Fourth Amendment. After checking the tag-light, “Officer Holmes then informed Blair that he believed drugs were in the car and that he would call a canine unit to the scene. This action extended the scope and duration of the stop beyond that necessary to issue a citation for a tag-light violation. Because Officer Holmes had not developed reasonable, articulable suspicion of criminal activity by that point, we hold that the remainder of the stop violated the Fourth Amendment.”

***United States v. Terry***  
522 F.3d 645 (6th Cir. 2008)

On October 14, 2004, AOL intercepted two e-mail messages containing images of child pornography and forwarded those images and other information to the National Center for Missing and Exploited Children, which in turn forward the information to ICE. Ultimately ICE found out that the images were sent by Brent Terry from an account owned by Roy Terry. ICE ultimately obtained a search warrant for Brent Terry's house and executed the warrant, finding a laptop computer, 3 hard drives, 123 images and 8 videos of minors. Terry was charged, had his motion to suppress denied, and entered a conditional plea of guilty.

The Sixth Circuit affirmed in a decision written by Judge Boggs and joined by Judges Rogers and Shadur. The Court held that the affidavit in support of the search warrant established a nexus between the child images and Brent Terry's home computer. "[W]e are satisfied that the use of Terry's personal e-mail account in the wee hours of the morning, combined with information that Terry used his home computer to access that account, established at least a 'fair probability' that the computer used to send the messages was, in fact, the one in Terry's home. Ergo, there was at least a fair probability that the illicit image (or similar images) would be found there." The Court did acknowledge that they were troubled by the fact that the content of the child images had not been preserved, and by the possibility that Terry could have been merely responding to spam saying "do not to send" such images again. "Although we recognize that the government ultimately has the burden of demonstrating probable cause, absent *any* evidence that innocent persons frequently receive and reply to unsolicited child pornography spam ... this court cannot say that the magistrate judge arbitrarily exercised his discretion in issuing a search warrant for Terry's home."

***United States v. Luqman***  
522 F.3d 613 (6th Cir. 2008)

Two police officers in Akron, Ohio, were patrolling an area known for prostitution when they saw two women on a street corner followed by one of them approaching a car driven by Luqman. (As noted in Judge Clay's dissent, the prosecutors acknowledged during oral argument that the area was not in fact an area with a high level of prostitution). One of the officers turned his car around, after which the woman left Luqman's truck, and Luqman began to drive off. Officer Donohue stopped Luqman and asked him whether he was soliciting a prostitute. Luqman denied doing so. Luqman, however, did have a suspended driver's license. Donohue arrested Luqman for driving on a suspended driver's license; during the "pre-tow inventory" of the truck, a handgun was found. Luqman was indicted for possession of a firearm by a convicted felon. After his motion to suppress was denied, he appealed his conviction.

The Sixth Circuit affirmed in a decision written by Judge Siler joined by Judge Cook. The Court held that there was a reasonable suspicion that Luqman was violating the law at the time of the stopping. "First, the officers were patrolling a known prostitution area...Donohue suspected the two women were prostitutes when he saw them standing on the street corner in North Hill, and then saw one of the women approaching a truck. His suspicions were further piqued when the woman who had approached the truck ran back to the corner, and Luqman's truck moved forward, as the police vehicle approached."

Judge Clay wrote a dissenting opinion. His primary reason for dissenting is the majority's reliance upon the testimony of the police officer that the arrest occurred in an area known for prostitution. Judge Clay notes that only 6 arrests had occurred in the vicinity of the arrest during the previous year. The arrest was made near a number of residences and across the street from a Rite-Aid pharmacy. Neither woman was dressed "provocatively." "Based on the entirety of these circumstances surrounding Luqman's arrest, the district court abused its discretion in concluding that reasonable suspicion existed to stop Luqman's vehicle." "The decision the majority hands down today is completely contrary to the courts' longstanding approach to suppression motions filed pursuant to the Fourth Amendment. By essentially adopting an un rebuttable presumption that an officer's description of the circumstances surrounding a *Terry* stop is accurate, the majority delegates the judiciary's fact-finding role to the arresting officers, who themselves have a stake in the outcome of the suppression proceedings. I cannot conclude that it is proper to so limit the courts' fact-finding function."

***United States v. Simpson***  
520 F.3d 531 (6th Cir. 2008)

Officer Ratcliff of the Cleveland, Tennessee Police Department saw a black Nissan Maxima going northbound on I-75. The car "caught his eye" and he decided to follow it. He ended up pulling the car over after following it for several miles, with the purpose of checking to see whether the license tag was sufficiently legible. The officer shined his light on an exceptionally worn tag and could see that the tag was not expired. The officer went to the passenger side of the car and could smell marijuana. The officer asked to search the car and Simpson declined. The officer then just happened to have a canine with him and his dog alerted. A search revealed 3 kilograms of cocaine in the trunk. Simpson's motion to suppress was denied, and he entered a conditional plea of guilty.

The Sixth Circuit affirmed in a decision written by Judge Boggs, joined by Judges Batchelder and Griffin. The Court determined that Tennessee law applied to how the license plate needed to be displayed. The Court also attempted to

*Continued on page 24*

*Continued from page 23*

resolve the question of whether reasonable suspicion or probable cause was required for the stopping of a traffic violation, holding that at least for ongoing traffic violations, reasonable suspicion would suffice. The Court held that the “officer had at least a reasonable suspicion that Simpson was engaging in an ongoing violation of a misdemeanor traffic offense, thereby justifying an investigatory stop under *Terry v. Ohio*, 392 U.s. 1 (1968). Once he had stopped the vehicle, the officer immediately developed reasonable suspicion of the presence of drugs, permitting additional detention, and developed probable cause to search the vehicle upon the alert of a trained narcotics-detection dog.”

***United States v. West***  
520 F.3d 604 (6th Cir. 2008)

William David West was a suspect in the disappearance of his girlfriend. The police obtained two search warrants for a search of his van. The second warrant was executed, resulting in the finding of ammunition in the console of the van. The affidavit for the second warrant application left out a significant amount of information regarding the execution of the first warrant. West was charged with being a felon in possession of ammunition. After losing his motion to suppress, West was tried and convicted and sentenced to 188 months in prison. West was never prosecuted for the disappearance of his girlfriend.

The Sixth Circuit reversed in a decision written by Judge Martin and joined by Judges Greer and McKeague. The Court held that the first affidavit of Detective Pelphey was a bare bones conclusory affidavit that did not establish probable cause to search. “The affidavit provides no factual circumstances that would allow an issuing magistrate to make a reasoned determination regarding the veracity, reliability, or basis of knowledge of Pelphey’s handwritten statements...Additionally, because the affidavit is ‘bare bones,’ the *Leon* good faith exception does not apply to rescue it.”

The Court also held that the second affidavit was likewise faulty. “Not only is the December 2 affidavit ‘bare bones,’ it also indicates a clear reckless disregard for the truth.” “The fact that the affidavit prepared by Steger did not accurately reflect the facts known to him at the time the affidavit was sworn evinces a reckless disregard for the truth...When the affidavit is viewed as a whole, taking in the totality of the circumstances and the omitted information, it is not probable cause that is depicted, but rather it is a picture of unreliable and uncorroborated hearsay statements of a federal prisoner hoping to garner favor with the government before being sentenced. Accordingly, we find that the affidavit is insufficient to support a finding of probable cause.” The Court likewise held the good faith exception not to apply.

Judge McKeague wrote a dissenting opinion. He agreed that the first affidavit was barebones. However, he believed that the *Leon* exception should save the second affidavit. “In my opinion, the Steger affidavit, whether supported by a sufficient showing of probable cause or not, is not ‘bare bones.’ Therefore, the *Leon* good faith exception should be deemed applicable and the district court’s denial of defendant’s motion to suppress the seized ammunition should be upheld.”

***United States v. Pearce***  
2008 WL 2607895, 2008 U.S. App. LEXIS 14187,  
2008 FED App. 0240P (6th Cir. 2008)

The Cleveland Police Department began surveillance in an area near a deli where a shooting had occurred recently and where an increased amount of narcotics activity was ongoing. On January 14, 2005, Pearce and Johnson were in a white Ford Taurus across from the Deli. Officer Shaughnessy pulled his car onto the street behind the car. Johnson leaned over and then got out of the car on the passenger side, put something behind his back and began backing away from Shaughnessy. Shaughnessy drew his gun. Other officers began to arrive, guns drawn. Johnson finally put his hands in front of him. Shaughnessy frisked him and recovered nine bags of marijuana. Another officer looked in the Taurus and found a clip from a gun on the floorboard. A search of the Taurus revealed two 9mm pistols, 19 rounds of ammunition, and crack cocaine. Johnson admitted to owning one of the guns. Both Pearce and Johnson were charged with being felons in possession of firearms and ammunition. Both filed motions to suppress and lost. Both were convicted at a jury trial and appealed.

The Sixth Circuit affirmed in an opinion written by Judge Clay and joined by Judges Daughtrey and McKeague. The Court found that Pearce did not have standing to challenge Shaughnessy’s stop of Johnson. Pearce had standing to challenge his arrest and the search of the Taurus but failed to challenge those.

The Court also found that Johnson’s challenge should fail. The Court found that there was a reasonable suspicion that Johnson was involved in criminal activity. “When Officer Shaughnessy entered a high-crime area in his marked police cruiser, he observed Johnson exit a vehicle, glance towards him, hunch over, place his right hand in the small of his back, and start backing away. Based on his “own experience and specialized training...Officer Johnson reasonably suspected that Johnson had a weapon and was getting ready to fire.”

***Brannum v. Overton County School Board***  
516 F.3d 489 (6th Cir. 2008)

The Overton County School Board thought it was a good idea to install video equipment in the boys' and girls' locker rooms and to view and retain the recorded images. Visiting girls' basketball teams even had their images captured while they were undressing. 34 middle school students disagreed with this practice and sued. After the district court overruled the motion for summary judgment, the school members and other defendants appealed to the Sixth Circuit. The Court, in an opinion written by Judge Ryan and joined by Judges Griffin and Hood, affirmed the district court's denial of a summary judgment.

The Court held that the students' privacy rights under the Fourth Amendment were violated by the actions of the defendants. The Court explained that in the Sixth Circuit the right to privacy is contained in the Fourth Amendment rather than the due process clause of the Fourteenth Amendment. The Court concluded: "Given the universal understanding among middle school age children in this country that a school locker room is a place of heightened privacy, we believe placing cameras in such a way so as to view the children dressing and undressing in a locker room is incongruent to any demonstrated necessity, and wholly disproportionate to the claimed policy goal of assuring increased school security, especially when there is no history of any threat to security in the locker rooms. We are satisfied that both the students' expectation of privacy and the character of the intrusion are greater in this case than those at issue in *Vernonia* and *T.L.O.* We conclude that the locker room videotaping was a search, unreasonable in its scope, and violated the students' Fourth Amendment privacy rights."

## SHORT VIEW . . .

1. *State v. Jessen*, 177 P.3d 139 (Wash. Ct. App. 2008). A police officer violated the Fourth Amendment when he opened a gate marked "no trespassing" and walked down a long driveway in order to talk to a witness to a crime. Thus, when he saw a marijuana operation in plain view, that evidence could not be used.
2. *State v. Louthan*, 744 N.W.2d 454 (Neb. 2008). The Fourth Amendment is implicated when the police hold a person for just a few minutes beyond the traffic stop in order to have the person's car sniffed by a narcotics dog. This was a question left open in *Illinois v. Caballes*, 543 U.S. 405 (2005). "[T]here is a constitutionally significant line of demarcation between a routine traffic stop and one in which a dog sniff is conducted after the investigative procedures incident to the traffic stop have been completed."

3. *State v. Bryant*, — A.2d —, 2008 WL 820197, 2008 Vt. LEXIS 38 (Vt. 2008). The Vermont Supreme Court demonstrated the importance of its own state constitution when it ruled that it was illegal for the police to hover over the curtilage of property in a helicopter for 15-30 minutes at altitudes of as little as 100 feet. As a result, the warrant obtained using the information obtained from the surveillance was illegal and the evidence should have been suppressed. "When we declined to adopt the federal open-fields doctrine..., we recognized that Vermonters normally expect their property to remain private when posted as such. We have also recognized that Vermonters normally have high expectations of privacy in and around their homes... Therefore, we think it is also likely that Vermonters expect—at least at a private, rural residence on posted land—that they will be free from intrusions that interrupt their use of their property, expose their intimate activities, or create undue noise, wind, or dust... a defendant's subjective expectation that he would be free from this intrusion—an aerial surveillance that targeted defendant's home and curtilage, was highly intrusive, and was in violation of laws governing helicopter flight—was legitimate..."
4. *York v. Wahkiakum School District No. 200*, 178 P.3d 995 (Wash. 2008). There is no special needs exception to the warrant requirement in Washington State, according to the highest court there. Under Article I, Section 7, "no person shall be disturbed in his private affairs, or his home invaded." Thus, random and suspicionless drug testing of student athletes violates the Washington Constitution. This provision protects the citizens of Washington more extensively than the Fourth Amendment protects US citizens.
5. *State v. Pruss*, 181 P.3d 1231 (Idaho 2008). A person in a backpacking tent on public land has a reasonable expectation of privacy in his tent. "We hold that a person using a temporary shelter on public lands as his or her living quarters has a reasonable expectation of privacy in that shelter and that the government may not intrude into the shelter without a search warrant, absent an exception to the warrant requirement."
6. *Buhrman v. Commonwealth*, 659 S.E.2d 325 (Va. 2008). Seeing a person with hand-rolled cigarettes does not constitute probable cause to believe the person is smoking marijuana.
7. *McCain v. Commonwealth*, 659 S.E.2d 512 (Va. 2008). In another opinion by the Virginia Supreme Court, the Court held that seeing two people in a car at 3:00 a.m. leaving a house where months before drug transactions had occurred did not give the police the reasonable suspicion required to permit them to frisk the passenger despite the lawful stopping of the car for a traffic violation.
8. *United States v. Reeves*, 524 F.3d 1161 (10th Cir. 2008). A person has been arrested without a warrant by the police actions of calling him repeatedly as well as knocking on his door during the early morning hours. The fact that

*Continued on page 26*

Continued from page 25

- after 20 minutes he came out of his motel room did not vitiate the need for a warrant. “[W]hen Reeves answered his door he did so in response to a show of authority by the officers and he was seized inside his home.”
9. *State v. Reid*, 945 A.2d 26 (N.J. 2008). The New Jersey Supreme Court has held that under the state constitution customers of internet service providers have a reasonable expectation of privacy in their subscriber information. “Users make disclosures to ISPs for the limited goal of using that technology and not to promote the release of personal information to others. Under our precedents, users are entitled to expect confidentiality under these circumstances.”
  10. *Commonwealth v. Lora*, 886 N.E.2d 688 (Mass. 2008). Racial profiling used to stop motorists can be challenged under the state constitutional right to equal protection resulting in suppression of evidence seized as a result of the illegal stop. “[T]he application of the exclusionary rule to evidence obtained in violation of the constitutional right to the equal protection of the laws is entirely consistent with the policy underlying the exclusionary rule, is properly gauged to deter intentional unconstitutional behavior, and furthers the protections guaranteed by the Massachusetts Declaration of Rights.” However, the use of the “census benchmarking” method failed to reveal statistically significant discrimination. This case utilized also the case of *State v. Soto*, 734 A. 2d 350 (N.J. Super. Ct. 1996).
  11. *State v. Setterstrom*, 183 P.3d 1075 (Wash. 2008). Appearing to be under the influence of meth does not create a reasonable suspicion justifying a frisk. Thus, where the defendant was at a social services agency and was frisked due to his appearance, resulting in meth being found in a back pocket, the trial court erred in failing to suppress the evidence. Being “fidgety” does not constitute reasonable suspicion.
  12. *State v. Smith*, 184 P.3d 890 (Kan. 2008). The Kansas Supreme Court has decided that the law did not change in *Muehler v. Mena*, 544 U.S. 93 (2005) and *Illinois v. Caballes*, 543 U.S. 405 (2005) regarding questioning during traffic stops. Some courts around the country have viewed those decisions as backing off previous law that required a traffic stop to be limited in scope and duration. The Kansas Court held the line. “Kansas appellate courts have defined the Terry test to mean that a law enforcement officer may request the motorist’s driver’s license, car registration, and proof of insurance; conduct a computer check; issue a citation; and take those steps reasonably necessary to protect officer safety. The stop can last only as long as necessary to complete those tasks, and those tasks must be diligently pursued...If no information raising a reasonable and articulable suspicion of illegal activity is found during the time period necessary to perform the computer check and other tasks incident to a traffic stop, the motorist must be allowed to leave without further delay.”

13. *State v. Eisfeldt*, 185 P.3d 580 (Wash. 2008). The Washington Supreme Court has under its state constitution rejected the private search exception. “The individual’s privacy interest protected by article I, section 7 survives the exposure that occurs when it is intruded upon by a private actor. Unlike the reasonable expectation of privacy protected by the Fourth Amendment, the individual’s privacy interest is not extinguished simply because a private actor has actually intruded upon, or is likely to intrude upon, the interest. The private search does not work to destroy the article I, section 7 interest, unlike the Fourth Amendment’s, because the Fourth Amendment’s rationale does not apply to our state constitutional protections.” Thus, the fact that a repairman initially saw marijuana in a house did not mean that the police could go to the house with him and look at the evidence and use their observations for a more extensive warrant.
14. *State v. Neil*, 2008 WL 2390057, 2008 Vt. LEXIS 79 (Vt. 2008). The Vermont Supreme Court upheld its state constitutional provisions in not allowing the search of a container seized from a person they had arrested. “We see no reason why a container seized from the pocket of an arrestee should be less protected than one seized from his vehicle.”

This will be my last *Plain View* article. I have been doing this column since shortly after becoming the first editor of *The Advocate* back in 1978. That’s a lot of search and seizure columns. A lot has changed since I first began writing. I can safely say that the 4<sup>th</sup> Amendment has shriveled considerably since that time. Back then I could never have imagined how the federal government would be invading privacy right and left in the name of “the war on terror.” One of the big disappointments was the good faith exception under *Leon*, which seemed to me at the time, and still does, to gut the 4<sup>th</sup> Amendment. I still cannot figure out how the Court believes the 4<sup>th</sup> Amendment will be enforced if the exclusionary rule does not apply to the magistrate. A second major disappointment has been the decline of Section 10 of the Kentucky Constitution. Kentucky has a long tradition of enforcing Section 10, particularly during the time of prohibition. And it makes sense to have a vigorous right to privacy in a place like Kentucky that still has certain pioneer characteristics and is primarily rural in nature. But, in recent days Section 10 simply mirrors the 4<sup>th</sup> Amendment. Another major disappointment is the Court’s unwillingness to use pretextual searches in their analyses. The Court has turned a blind eye, particularly in *Whren* and its progeny, to what is really happening between the police and minorities. This is taking place in minority communities and on the highways, in particular, as the police use *Terry*, *Whren*, and other cases to search almost at will. It is time, though, to turn this column over to someone younger, someone who believes as I do in the right to a robust Fourth Amendment and Section Ten. Happy suppressing! ■

## CAPITAL CASE REVIEW

By David M. Barron, Capital Post Conviction

### Supreme Court of the United States

**Green v. Johnson, 2008 WL 2137107 (May 27)** (*Stevens, J., joined by, Ginsburg, J., dissenting from the denial of a stay of execution*)

Although the deadline for filing a petition for a writ of certiorari was a month away, Virginia intended to carry out Green's execution that night. Because of that, the Court was forced "either to enter a stay or to give petitioner's claims less thorough consideration than we give claims routinely filed by defendants in noncapital cases." Justice Stevens would have granted Green a stay of execution "[i]n order to ensure petitioner the same procedural safeguards available to noncapital defendants."

**Emmett v. Johnson, 2008 WL 2078624 (May 19)** (*Stevens, J., joined by, Souter and Ginsburg, JJ., dissenting from Court's ruling to vacate the stay of execution*)

Emmett had a lethal injection challenge pending in the United States Court of Appeals for the Fourth Circuit when the Court granted certiorari in *Baze v. Rees*. With Emmett's execution date approaching and the Fourth Circuit having not rendered a final decision on Emmett's lethal injection appeal, the Court granted Emmett a stay of execution "pending final disposition of the appeal by the United States Court of Appeals for the Fourth Circuit or further order of this Court." On April 16, 2008, the Court decided *Baze*. The next day, the Fourth Circuit requested additional briefing in Emmett and held oral argument on May 14, 2008. Nonetheless, in light of *Baze*, Virginia filed a motion to vacate the stay of execution, which the Court granted. Noting that "factual disputes [exist] concerning Virginia's execution protocol, including whether it is substantially similar to the Kentucky protocol [the Court] declined to strike down in *Baze*," Justice Stevens believed that the Court should have left the stay "in place until the Fourth Circuit has an adequate opportunity to render a decision on the merits" that would be based on a review of the trial record and aided by the benefit of extensive briefing and argument -- factors that place the Fourth Circuit "in a significantly better position than [the Court] to make factual judgments when it rules on the merits of Emmett's appeal." Justice Stevens also noted that the parties are free to request a stay of execution from the Fourth Circuit, but the parties should not be required to "shoulder the additional burden of filing superfluous papers when simply leaving [the Court's] stay in place until final disposition by the Court of Appeals would also give the Fourth Circuit an opportunity to consider these important issues in the regular course."

**Frazier v. Ohio, 553 U.S. \_\_\_, No. 07-9052 (April 21, 2008)** (*Stevens, J., respecting the denial of the petitioner for certiorari*)

Although agreeing with the Court's decision to deny certiorari in this direct appeal case challenging lethal injection, Justice Stevens noted that "it is appropriate to emphasize . . . that the denial of certiorari express no opinion on the merits of the underlying claim."



David M. Barron

**Velazquez v. Arizona, 553 U.S. \_\_\_, No. 07-8946 (April 21, 2008)** (*Stevens, J., respecting the denial of the petitioner for certiorari*)

Although agreeing with the Court's decision to deny certiorari in this direct appeal case challenging lethal injection, Justice Stevens noted that "it is appropriate to emphasize . . . that the denial of certiorari express no opinion on the merits of the underlying claim."

**Baze and Bowling v. Rees, et al., 128 S.Ct. 1520 (2008)** (*Roberts, C.J., for the plurality, joined by Kennedy and Alito, JJ.; Alito, J., concurring; Stevens, J., concurring in the judgment; Scalia, J., concurring in the judgment, joined by, Thomas, J.; Thomas, J., concurring in the judgment, joined by Scalia, J.; Breyer, J., concurring in the judgment; Ginsburg and Souter, JJ., dissenting*) (DISCLAIMER - - Author was counsel of record for Baze and Bowling)

Petitioners, Baze and Bowling, filed a declaratory judgment action in state court seeking a declaration that, although lethal injection was constitutional on its face, the chemicals and procedures Kentucky uses to carry out executions create a risk of pain and suffering that violates the Eighth Amendment to the United States Constitution. In that action, they argued that an Eighth Amendment violation exists where the level of pain is severe and unnecessary because it can be alleviated by less risky alternatives. Lethal injections are carried out by injecting three drugs -- the first, sodium thiopental, is a barbiturate that is intended to render the inmate unconscious to the point where he or she cannot feel pain; the second, pancuronium bromide, is a paralytic agent that inhibits all muscular-skeletal movements; and, the third, potassium chloride, interferes with the electrical signals that

*Continued on page 28*

*Continued from page 27*

stimulate the contractions of the heart, inducing cardiac arrest. Although conceding that a person sufficiently anesthetized by sodium thiopental would be unable to feel pain, Petitioners argued that there is a significant risk that the sodium thiopental will not be properly administered to achieve its intended effect - - resulting in severe pain from the other chemicals. After granting Bowling a stay of execution, after denying the State's motion to dismiss, and after denying the State's motion for summary judgment, the trial court held a bench trial on the issue in which both sides presented expert testimony on the severity of the pain, the likelihood that it would occur under the procedures that existed, and the safeguards that could be implemented to lessen the risk. In support of their argument, at trial, Petitioners presented undisputed evidence that the second and third chemicals used to carry out lethal injections would create an excruciatingly agonizing and painful death if the inmate was not first sufficiently anesthetized to prevent the inmate from feeling pain. As support for the risk that this would be the case in Kentucky, which has carried out only one execution by lethal injection, Petitioners argued that the individuals who insert the I.V. are not properly trained or otherwise qualified to do so and that the execution team does not employ adequate means of monitoring for consciousness throughout the execution. As for evidence that the risk of pain could be alleviated, Petitioners argued that pancuronium bromide is not necessary to cause death and only serves the purpose of making the execution look more aesthetic to the witnesses while making it significantly more difficult to determine if the inmate was conscious and in pain during the execution. Petitioners further argued that executions could be carried out without the use of pancuronium bromide and that the final chemical, potassium chloride, could be replaced by a less painful chemical to stop the heart. Petitioners also contended that executions could be carried out solely by a continuous injection of a barbiturate. In the first trial on the merits of the constitutionality of the chemicals and procedures used to carry out lethal injections, the Kentucky trial court applied a "substantial risk" standard and "upheld the [constitutionality] of the protocol, finding there to be minimal risk of various claims of improper administration of the protocol." The Supreme Court of the United States granted certiorari to decide the applicable Eighth Amendment standard to the type of claim brought by Petitioners and to determine whether Kentucky's lethal injection protocol satisfies the Eighth Amendment. After laying out the legal standard, the Court held that, on the "facts of this case," "the risks of maladministration [Petitioners] suggested . . . cannot remotely be characterized as 'objectively intolerable.'" As a result, the Court affirmed the lower court by upholding the constitutionality of Kentucky's lethal injection protocol.

### **Plurality Opinion (3 Justices):**

#### **The Eighth Amendment legal standard for deciding whether a method of execution or a particular aspect of how that method of execution is implemented violates the Eighth Amendment prohibition against cruel and unusual punishment:**

Petitioners argued, before the Supreme Court, that the Eighth Amendment prohibits procedures that create an "unnecessary risk" of pain. Specifically, they argued that the Eighth Amendment standard requires an assessment of "a) the severity of the pain risked, b) the likelihood of that pain occurring, and c) the extent to which alternative means are feasible, either by modifying existing execution procedures or adopting alternative procedures." Petitioners further argued that the "quantum of risk necessary to make out an Eighth Amendment claim will vary according to the severity of the pain and the availability of alternatives, but that the risk must be 'significant' to trigger Eighth Amendment scrutiny." Kentucky, in contrast, argued that the "unnecessary risk" standard is tantamount to a requirement that States adopt the least risk alternative and urged the Court to adopt the "substantial risk" standard applied by the lower courts. Rejecting both of these standards, the Court acknowledged that its "cases recognize that subjecting individuals to a risk of future harm – not simply inflicting pain - - can qualify as cruel and unusual punishment," but held that, to prevail on such an Eighth Amendment claim, a petitioner must establish a "substantial risk of serious harm, an objectively intolerable risk of harm." But, an isolated mishap, as opposed to a series of abortive attempts to carry out an execution, does not give rise to an Eighth Amendment violation because it does not create a "substantial risk of serious harm." Likewise, the Court held that a "condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." Instead, "the proffered alternatives must effectively address a 'substantial risk of serious harm.' To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment."

#### **Carrying out an execution without the inmate first being anesthetized to the point where the inmate would not feel pain violates the Eighth Amendment:**

The Court held that "failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride."

**Petitioners failed to show that the risk of an inadequate dose of sodium thiopental is substantial:** Petitioners argued that there is a “risk of improper administration of thiopental because the doses are difficult to mix into solution form and load into syringes; because the protocol fails to establish a rate of injection, which could lead to a failure of the IV; because it is possible that the IV catheters will infiltrate into surrounding tissue, causing an inadequate dose to be delivered to the vein; because of inadequate facilities and training; and because Kentucky has no reliable means of monitoring anesthetic depth of the prisoner after the sodium thiopental has been administered.” As for the risk that the sodium thiopental would be improperly administered, the Court found no reason to conclude that the trial court’s finding that “if the manufacturers’ instructions for reconstitution of Sodium Thiopental are followed, . . . there would be minimal risk of improper mixing” was clearly erroneous. Likewise, in light of “several important safeguards” Kentucky has put in place to ensure an adequate dose of sodium thiopental is delivered to the condemned inmate, the Court held that the asserted problems related to the IV lines “do not establish a sufficiently substantial risk of harm to meet the requirements of the Eighth Amendment.” “The most significant of these [safeguards] is the written protocol’s requirement that members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman. . . . Moreover, these IV team members, along with the rest of the execution team, participate in at least 10 practice sessions per year. These sessions, required by the written protocol, encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers. In addition, the protocol calls for the IV team to establish both primary and backup lines and to prepare two sets of the lethal injection drugs before the execution commences. . . . The IV team has one hour to establish both the primary and backup IVs. . . . The qualifications of the IV team also substantially reduce the risk of IV infiltration. In addition, the presence of the warden and deputy warden in the execution chamber with the prisoner allows them to watch for signs of IV problems, including infiltration. . . . Kentucky’s protocol specifically requires the warden to redirect the flow of chemicals to the backup IV site if the prisoner does not lose consciousness within 60 seconds.” “In light of these safeguards,” which “ensure that if an insufficient dose of sodium thiopental is initially administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected,” the Court held that it “cannot say the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation.”

**Kentucky’s failure to adopt a barbiturate-only protocol does not constitute cruel and unusual punishment:** Because “no other State has adopted the one-drug method and petitioners proffered no study showing that it is an equally effective

manner of imposing a death sentence,” the Court held that Kentucky’s “continued use of the three-drug protocol cannot be viewed as posing an ‘objectively intolerable risk.’” In so ruling, the Court noted that the “comparative efficacy of a one-drug method of execution is not so well established that Kentucky’s failure to adopt it constitutes a violation of the Eighth Amendment.”

**Kentucky’s use of a paralytic agent does not constitute cruel and unusual punishment:**

Petitioners argued that pancuronium bromide should be omitted because it serves no therapeutic purpose while suppressing muscle movements that could reveal an inadequate administration of sodium thiopental. The trial court, in rejecting this argument, noted that pancuronium bromide serves the dual purposes of “preventing involuntary physical movements during unconsciousness that may accompany the injection of potassium chloride,” which “preserv[es] the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress,” and stopping respiration, hastening death. The Court, also rejecting Petitioners’ argument, noted that their argument “overlooks the States’ legitimate interest in providing for a quick, certain death” particularly “where convulsions or seizures could be misperceived as signs of consciousness or distress” and that the Netherlands uses a neuromuscular blocking agent for assisted suicide. The Court also noted that because veterinarians are allowed to stun an animal to death or to sever its spine, “veterinary practice for animals is not an appropriate guide to humane practices for humans”

**Kentucky’s protocol employs sufficient methods of monitoring for consciousness to comply with the Eighth Amendment:**

Petitioners argued that Kentucky’s protocol is unconstitutional because it lacks a “systematic mechanism for monitoring the ‘anesthetic depth’ of the prisoner,” such as using a blood pressure cuff or an EKG to “verify that a prisoner has achieved sufficient unconsciousness before injecting the final two drugs. The visual inspection performed by the warden and the deputy warden, they maintain, is an inadequate substitute for the more sophisticated procedures they envision.” Rejecting this argument, the Court said “it is important to reemphasize that a proper dose of thiopental obviates the concern that a prisoner will not be sufficiently sedated. All the experts who testified at trial agreed on this point. The risks of failing to adopt additional monitoring procedures are thus even more ‘remote’ and attenuated than the risks posed by the alleged inadequacies of Kentucky’s procedures designed to ensure the delivery of thiopental.” The Court also noted that the State’s expert testified that a blood pressure cuff “would have no utility in assessing the level of the prisoner’s unconsciousness following the introduction of sodium thiopental” and that the “medical community has yet to endorse the use of a BIS monitor, which measures brain

*Continued on page 30*

*Continued from page 29*

function, as an indication of anesthetic awareness.” The Court also rejected the argument that the protocol must require the execution team to monitor for consciousness by calling the inmate’s name, brushing his eyelashes, or presenting him with strong, noxious odors, because these tests would only detect a “level of unconsciousness allegedly sufficient to avoid detection of improper administration of the anesthesia under Kentucky’s procedure, but not sufficient to prevent pain. There is no indication that the[se] basic tests . . . can make such fine distinctions,” and “the record confirms that the visual inspection of the IV site under Kentucky’s procedure achieves [the] objective [of determining whether the sodium thiopental has entered the inmate’s bloodstream.]”

*Note: The plurality’s opinion was limited to the constitutionality of an execution protocol as written, not as carried out, and limited to the facts before the Court in this case. On numerous occasions, the plurality made statements, such as that on the record before the Court, while also acknowledging that maladministration of an otherwise constitutional execution protocol can violate the Eighth Amendment. By so stating, the plurality recognized that even a protocol that is constitutional as written can become unconstitutional when implemented. Seemingly, to determine if that is the case, discovery of the execution team would be necessary. Thus, it can be argued that the plurality’s decision requires discovery of the execution team before a lethal injection challenge can be dismissed. Similarly, by repeatedly referring to the record before the Court (on the “facts of this case”) as the deciding factor in this case, the plurality, further supported by the concurring opinions of Justice Stevens (“The question whether a similar three-drug protocol may be used in other States remains open, and may well be answered differently in a future case on the basis of a more complete record.”) and Justice Breyer (“cannot find . . . in the record in this case..., sufficient evidence. . .”), also recognized that the outcome could be different if a death-sentenced inmate comes forward with more persuasive evidence than that presented by Petitioners. Finally, the plurality discussed, in detail, safeguards that it believed ensures the constitutionality of Kentucky’s execution protocol, as written. As the plurality acknowledged, a protocol that is not “substantially similar” to Kentucky’s protocol could violate the Eighth Amendment. If a death-sentenced inmate can show a legally cognizable risk, under whichever of the plurality’s or dissent’s legal standard applies (see Note *infra*), that he or she will be able to feel pain during his or her execution, the inmate must prevail under *Baze*, for the plurality and the dissent ruled, in no uncertain terms, that “failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.”*

#### **Standard for stay of execution:**

The Court held that “[a] stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State’s lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.”

**Alito, J., concurring:** Justice Alito joined the plurality decision but wrote separately to explain his view of how the holding should be implemented. He believes that “[o]bjections to features of a lethal injection protocol must be considered against the backdrop of the ethics rules of medical professionals and related practical constraints.” To Justice Alito, “a suggested modification of a lethal injection protocol cannot be regarded as “feasible” or “readily” available if the modification would require participation - - either in carrying out the execution or in training those who carry out the execution - - by persons whose professional ethics rules or traditions impede their participation.” Alito also believes “an inmate should be required to do more than simply offer the testimony of a few experts or a few studies. Instead, an inmate challenging a method of execution should point to a well-established scientific consensus. Only if a State refused to change its method in the face of such evidence would the State’s conduct be comparable to circumstances that the Court has previously held to be in violation of the Eighth Amendment.”

**Stevens, J., concurring in the judgment:** Justice Stevens thought, when the Court granted certiorari, that its “decision would bring the debate about lethal injection as a method of execution to a close.” But, according to him, the plurality opinion does the opposite: “The question whether a similar three-drug protocol may be used in other States remains open, and may well be answered differently in a future case on the basis of a more complete record.” Focusing on the second drug used in lethal injections, Justice Stevens noted that “[b]ecause it masks any outward signs of distress, pancuronium bromide creates a risk that the inmate will suffer excruciating pain before death occurs. There is a general understanding among veterinarians that the risk of pain is sufficiently serious that the use of the drug should be proscribed when an animal’s life is being terminated. As a result of this understanding among knowledgeable professionals, several States - - including Kentucky - - have enacted legislation prohibiting use of the drug in animal euthanasia. It is unseemly - - to say the least - - that Kentucky may well kill petitioners using a drug that it would not permit to be used on their pets.” Stevens continued by saying, the [u]se of pancuronium bromide is particularly disturbing because - - as the trial court specifically found in this case - - it serves ‘no therapeutic purpose.’ The drug’s primary use

is to prevent involuntary muscle movements, and its secondary use is to stop respiration. In my view, neither of these purposes is sufficient to justify the risk inherent in the use of the drug.” Rejecting the plurality’s belief that preventing involuntary muscle movement is a legitimate justification for using pancuronium bromide, Stevens concluded that “[w]hatever minimal interest there may be in ensuring that a condemned inmate dies a dignified death, and that witnesses to the execution are not made uncomfortable by an incorrect belief (which could be easily corrected) that the inmate is in pain, is vastly outweighed by the risk that the inmate is actually experiencing excruciating pain that no one can detect. Nor is there any necessity for pancuronium bromide to be included in the cocktail to inhibit respiration when it is immediately followed by potassium chloride, which causes death quickly by stopping the inmate’s heart.” Justice Stevens also noted that “there is no nationwide endorsement of the use of pancuronium bromide that merits any special presumption of respect. While state legislatures have approved lethal injection as a humane method of execution, the majority have not enacted legislation specifically approving the use of pancuronium bromide, or any given combination of drugs. . . . In the majority of States that use the three-drug protocol, the drugs were selected by unelected Department of Correction officials with no specialized medical knowledge and without the benefit of expert assistance or guidance. As such, their drug selections are not entitled to the kind of deference afforded legislative decisions.” By contrast, Stevens concluded, discussing in detail New Jersey’s history with the lethal injection chemicals in which a doctor with the state department of corrections expressed concern about the chemicals New Jersey intended to use in lethal injection, that the decisions to adopt a three-drug protocol “are the product of administrative convenience and a stereotyped reaction to an issue, rather than a careful analysis of relevant considerations favoring or disfavoring a conclusion.” As a result, he concluded that “States wishing to decrease the risk that future litigation will delay executions or invalidate their protocols would do well to reconsider their continued use of pancuronium bromide.” Despite his condemnation of the use of pancuronium bromide, Stevens concurred in the judgment of the plurality because “[u]nder [the] precedents, whether as interpreted by THE CHIEF JUSTICE or Justice GINSBURG,” he was “persuaded that the evidence adduced by petitioners fails to prove that Kentucky’s lethal injection protocol violates the Eighth Amendment.”

More than thirty years after casting a key vote to uphold the constitutionality of the death penalty, the plurality and dissent in this case persuaded Justice Stevens that the death penalty is unconstitutional and that “current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risk of

administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty.” In *Gregg v. Georgia*, 428 U.S. 153, 183 (1976), the Court recognized three societal purposes for the death penalty: incapacitation, deterrence, and retribution. While, at the time of *Gregg*, Stevens believed that the death penalty served these purposes, this case convinced him that it no longer does. First, Stevens concluded that “the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty.” Second, after noting “there remains no reliable statistical evidence that capital punishment in fact deters potential offenders,” he concluded that “in the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment.” With regard to retribution, Stevens noted, “our society has moved from public and painful retribution towards ever more humane forms of punishment. State-sanctioned killing is therefore becoming more and more anachronistic. In an attempt to bring executions in line with our evolving standards of decency, we have adopted increasingly less painful methods of execution, and then declared previous methods barbaric and archaic. But by requiring that an execution be relatively painless, we necessarily protect the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim. This trend, while appropriate and required by the Eighth Amendment’s prohibition on cruel and unusual punishment, actually undermines the very premise on which public approval of the retribution rationale is based [- - eye for an eye, murderer deserved it beliefs].” For these reasons, Justice Stevens concluded, “[t]he time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived.”

Justice Stevens also discussed specific areas of death penalty law that concern him. “Of special concern to me are rules that deprive the defendant of a trial by jurors representing a fair cross section of the community. Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a ‘death qualified jury’ is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction. The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive.” Stevens also expressed concern that “the risk of error in capital cases may be greater than in other cases because the facts are often so disturbing that the interest in making sure the crime does not go unpunished may overcome residual doubt concerning the identity of the offender. Our former emphasis on the importance of ensuring that decisions in death cases be adequately supported by reason rather than emotion has been undercut by more recent

*Continued on page 32*

*Continued from page 31*

decisions placing a thumb on the prosecutor's side of the cases. . . . the Court [has] upheld a state statute that requires imposition of the death penalty when the jury finds that the aggravating and mitigating factors are in equipoise. And . . . the Court [has] overruled earlier cases and held that 'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crime on the victim's family is admissible despite the fact that it sheds no light on the question of guilt or innocence or on the moral culpability of the defendant, and thus serves no purpose other than to encourage jurors to make life or death decisions on the basis of emotion rather than reason." Another "significant concern" to Justice Stevens is the "risk of discriminatory application of the death penalty." Although acknowledging that the risk has been "dramatically reduced," he noted that "the Court has allowed it to continue to play an unacceptable role in capital cases." Finally, Stevens concluded, "given the real risk of error in this class of cases, the irrevocable nature of the consequences is of decisive importance to me. Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses. The risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive." For these reasons, Stevens concluded that the death penalty "represents the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes," and, therefore, is "patently excessive and cruel and unusual punishment violative of the Eighth Amendment."

**Scalia, J. (joined by Thomas, J.), concurring in the judgment:** Justice Scalia wrote separately solely to attack Justice Stevens conclusion that the death penalty is unconstitutional. Although saying he takes no position on the desirability of the death penalty, Scalia made it clear that he believes the death penalty is constitutional, especially because, in his opinion, "it is explicitly permitted by the Constitution." Justice Scalia also noted that whether the death penalty should exist as a punishment in this country is not a matter that should be decided by the judicial branch of government.

**Thomas, J. (joined by Scalia, J.), concurring in the judgment:**

Justice Thomas wrote separately because he believes that the plurality opinion's formulation of the governing legal standard "finds no support in the original understanding of the cruel and Unusual Punishments Clause or in our previous method-of-execution cases; casts constitutional doubt on long-accepted methods of execution; and injects the Court into matters it has no institutional capacity to resolve." Tracing the history of the cruel and unusual punishments

clause of the Eighth Amendment from the time it was debated by the Founders through the Court's previous method of execution cases, Justice Thomas concluded that the history of the Constitution makes clear that the Eighth Amendment does not require only one method of execution or an anesthetized death. Rather, to Thomas, "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain." Justice Thomas also noted that the plurality did not adopt a bright-line rule; instead, adopting a standard that will "embroil the States in never-ending litigation concerning the adequacy of their execution procedures" that will impede the States' "significant interest in meting out a sentence of death in a timely fashion." Finally, Thomas expressed his belief that the plurality's legal standard "require[s] courts to resolve medical and scientific controversies that are largely beyond judicial ken." For these reasons, Thomas "reject[ed] as both unprecedented and unworkable any standard that would require the courts to weigh the relative advantages and disadvantages of different methods of execution or of different procedures for implementing a given method of execution." He then concluded that "[t]o the extent that there is any comparative element to the inquiry, it should be limited to whether the challenged method inherently inflicts significantly more pain than traditional modes of execution such as hanging and the firing squad." "Because Kentucky's lethal injection protocol is designed to eliminate pain rather than inflict it," Justice Thomas found this to be an easy case in which Petitioners' challenge must fail.

**Breyer, J., concurring in the judgment:**

With regard to the governing legal standard, Justice Breyer agreed with the dissent that the relevant question is "whether the method creates an untoward, readily avoidable risk of inflicting severe and unnecessary suffering," and that "the degree of risk, the magnitude of pain, and the availability of alternatives are interrelated and each must be considered." But, he believed that "the legal merits of the kind of claim presented must inevitably turn not so much upon the wording of an intermediate standard of review as upon facts and evidence." Applying that factually intensive standard to this case, Justice Breyer could not "find, either in the record in this case or in the literature on the subject, sufficient evidence that Kentucky's execution method poses the 'significant and unnecessary risk of inflicting severe pain' that petitioners assert." Breyer also commented that in light of the critiques of the highly publicized Lancet article, which Petitioners decided not to rely upon, the Lancet article cannot be given significant weight. He further concluded that the "botched" lethal injections described in Professor Deborah Denno's 2002 law review article "may well provide cause for concern about the administration of the lethal injection[,b]ut it cannot materially aid the petitioners here . . . because, as far as the record here reveals, and as the Kentucky courts found, Kentucky's use of trained phlebotomists and the presence of observers should prevent the kind of 'botched'

executions that Denno's Table 9 documents." Finally, Justice Breyer noted that medical literature casts uncertainty upon the ready availability of eliminating pancuronium bromide, as demonstrated by the fact that in the Netherlands, "the use of pancuronium bromide is recommended for purposes of lawful assisted suicide." Although expressing that Petitioners' best argument is that "Kentucky should require more thorough testing as to unconsciousness," Justice Breyer concluded that "[t]he record provides too little reason to believe that such measures, if adopted in Kentucky, would make a significant difference." For those reasons, Breyer "[could not] find, either in the record or in the readily available literature, that [he has] seen, sufficient grounds to believe that Kentucky's method of lethal injection creates a significant risk of unnecessary suffering."

**Ginsburg, J., (joined by Souter, J.) dissenting:**

Ginsburg began her dissent with the premise that "[i]t is undisputed that the second and third drugs used in Kentucky's three-drug lethal injection protocol, pancuronium bromide and potassium chloride, would cause a conscious inmate to suffer excruciating pain," and thus, as the plurality recognizes, "would be 'constitutionally unacceptable.'" From that premise, she concluded that "[t]he constitutionality of Kentucky's protocol therefore turns on whether inmates are adequately anesthetized by the first drug in the protocol, sodium thiopental." Given that "Kentucky's protocol lacks basic safeguards used by other States to confirm that an inmate is unconscious before injection of the second and third drugs," she "would vacate and remand with instructions to consider whether Kentucky's omission of those safeguards pose an untoward, readily avoidable risk of inflicting severe and unnecessary pain."

Specifically, she "agree[d] with petitioners and the plurality that the degree of risk, magnitude of pain, and availability of alternatives must be considered[, but] part ways with the plurality, however, to the extent its 'substantial risk' test sets a fixed threshold for the first factor. The three factors are interrelated; a strong showing on one reduces the importance of the others. . . . Given the opposing tugs of the degree of risk and magnitude of pain, the critical question here, as I see it, is whether a feasible alternative exists. . . . But if readily available measures can materially increase the likelihood that the protocol will cause no pain, a State fails to adhere to contemporary standards of decency if it declines to employ those measures." Applying that standard to the facts of this case, Justice Ginsburg expressed significant concerns that she believed should have required the case to be remanded for further proceedings.

According to Ginsburg, "[o]ther than using qualified and trained personnel to establish IV access, Kentucky does little to ensure that the inmate receives an effective dose of sodium thiopental. After siting the catheters, the IV team leaves the execution chamber. From that point forward, only

the warden and deputy warden remain with the inmate. Neither the warden nor the deputy warden has any medical training. The warden relies on visual observation to determine whether the inmate 'appears' unconscious. In Kentucky's only previous execution by lethal injection, the warden's position allowed him to see the inmate at best from the waist down, with only a peripheral view of the inmate's face. No other check for consciousness occurs before injection of pancuronium bromide. Kentucky's protocol does not include an automatic pause in the 'rapid flow' of the drugs, or any of the most basic tests to determine whether the sodium thiopental has worked. No one calls the inmate's name, shakes him, brushes his eyelashes to test for a reflect, or applies a noxious stimulus to gauge his response. Nor does Kentucky monitor the effectiveness of the sodium thiopental using readily available equipment, even though the inmate is already connected to an electrocardiogram (EKG). A drop in blood pressure or heart rate after injection of sodium thiopental would not prove that the inmate is unconscious, but would signal that the drug has entered inmate's bloodstream. . . . Use of a blood pressure cuff and EKG, the record shows, is the standard of care in surgery requiring anesthesia. A consciousness check supplementing the warden's visual observation before injection of the second drug is easily implemented and can reduce a risk of dreadful pain. Pancuronium bromide is a powerful paralytic that prevents all voluntary muscle movement. Once it is injected, further monitoring of the inmate's consciousness becomes impractical without sophisticated equipment and training. Even if the inmate were conscious and in excruciating pain, there would be no visible indication. Recognizing the importance of a window between the first and second drugs, other States have adopted safeguards not contained in Kentucky's protocol. Florida pauses between injection of the first and second drugs so the warden can 'determine, after consultation, that the inmate is indeed unconscious.' The warden does so by touching the inmate's eyelashes, calling his name, and shaking him. If the inmate's consciousness remains in doubt in Florida, 'the medical team members will come out from the chemical room and consult in the assessment of the inmate.' During the entire execution, the person who inserted the IV line monitors the IV access point and the inmate's face on closed circuit television. In Missouri, 'medical personnel must examine the prisoner physically to confirm that he is unconscious using standard clinical techniques and must inspect the catheter site again. The second and third chemicals are injected only after confirmation that the prisoner is unconscious and after a period of at least three minutes has elapsed from the first injection of thiopental.' In California, a member of the IV team brushes the inmate's eyelashes, speaks to him, and shakes him at the halfway point and, again, at the completion of the sodium thiopental injection. In Alabama, a member of the execution team 'begin[s] by saying the condemned inmate's name. If there is no response, the team member will gently stroke the condemned inmate's eyelashes. If there is

*Continued on page 34*

Continued from page 33

no response, the team member will then pinch the condemned inmate's arm.' In Indiana, officials inspect the injection site after administration of sodium thiopental, say the inmate's name, touch him, and use ammonia tablets to test his response to a noxious nasal stimulus." Justice Ginsburg believes that "[t]hese checks provide a degree of assurance - - missing from Kentucky's protocol - - that the first drug has been properly administered. They are simple and essentially costless to employ, yet work to lower the risk that the inmate will be subjected to the agony of conscious suffocation caused by pancuronium bromide and the searing pain caused by potassium chloride. The record contains no explanation why Kentucky does not take any of these elementary measures." Kentucky's argument that these precautions need not be undertaken because "[t]he risk that an error administering sodium thiopental would go undetected is minimal . . . because if the drug was mistakenly injected into the inmate's tissue, not a vein, he 'would be awake and screaming' ignores, according to Justice Ginsburg, "aspects of Kentucky's protocol that render passive reliance on obvious signs of consciousness, such as screaming, inadequate to determine whether the inmate is experiencing pain. First, Kentucky's use of pancuronium bromide to paralyze the inmate means he will not be able to scream after the second drug is injected, no matter how much pain he is experiencing. Kentucky's argument, therefore, appears to rest on the assertion that sodium thiopental is itself painful when injected into tissue rather than a vein. The trial court made no finding on that point, and Kentucky cites no supporting evidence from executions in which it is known that sodium thiopental was injected into the inmate's soft tissue. Second, the inmate may receive enough sodium thiopental to mask the most obvious signs of consciousness without receiving a dose sufficient to achieve a surgical plane of anesthesia. If the drug is injected too quickly, the increase in blood pressure can cause the inmate's veins to burst after a small amount of sodium thiopental has been administered. Kentucky's protocol does not specify the rate at which sodium thiopental should be injected. The executioner, who does not have any medical training, pushes the drug 'by feel' through five feet of tubing. In practice sessions, unlike in an actual execution, there is no resistance on the catheter; thus the executioner's training may lead him to push the drugs too fast." Because of this and noting that the Kentucky Supreme Court did not address Petitioners' argument that "'the easiest and most obvious way to ensure that an inmate is unconscious during an execution' . . . 'is to check for consciousness prior to injecting pancuronium bromide[.]" Justice Ginsburg would "remand with instructions to consider whether the failure to include readily available safeguards to confirm that the inmate is unconscious after injection of sodium thiopental, in combination with the other elements of Kentucky's protocol, creates an untoward, readily avoidable risk of inflicting severe and unnecessary pain."

**Medellin v. Texas, 128 S.Ct. 1346 (2008)** (Roberts, C.J., for the Court, joined by, Scalia, Kennedy, Thomas, and Alito, JJ.; Stevens, J., concurring in judgment; Breyer, J., dissenting, joined by, Souter and Ginsburg, JJ.)

In *Case Concerning Avena and Other Mexican Nationals*, the International Court of Justice held that, regardless of any forfeiture of the right to raise Vienna Convention claims because of a failure to comply with generally applicable state rules governing challenges to criminal convictions, 51 Mexican Nationals on death row were entitled to review and reconsideration of their state court convictions and sentences because they were denied their rights to consular notification under the Vienna Convention. After the Court held, in a separate case, that the Vienna Convention did not preclude the application of state default rules, President Bush issued an executive order that the United States would "discharge its international obligations under *Avena* by having State courts give effect to the decision." The Court granted certiorari to determine if the International Court of Justice's judgment in *Avena* is "directly enforceable as domestic law in a state court in the United States" and to determine if the "President's Memorandum independently require[s] the States to provide review and reconsideration of the claims of the 51 Mexican nationals named in *Avena* without regard to state procedural default rules." The Court held that "neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions."

***Avena* does not constitute a binding obligation on the state and federal courts under the Supremacy Clause:** The Court defined the question before it as "whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts." A treaty is considered binding law when it "operates of itself without the aid of any legislative provision." By contrast, when "treaty stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect." Thus, while treaties "may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." Medellin argued that the Optional Protocol to the Vienna Convention, Article 94 of the United Nations Charter, and the International Court of Justice Statute made the *Avena* decision binding on state and federal courts. With regard to the Optional Protocol, the Court concluded that the United States being a signatory to it did nothing more than create a "bare grant of jurisdiction" without any agreement that a decision by the international court would be binding as evidenced by the fact that the Optional Protocol says nothing about the effect of an ICJ decision and does not itself commit signatories to comply with an ICJ judgment. With regard to Article 94, the Court held that the provision saying that each member of the United Nations "undertakes to comply with the decision of the [ICJ] in any case to which

it is a party” is only a “commitment on the part of U.N. Members to take future action through their political branches to comply with an ICJ decision” and its sole remedy for noncompliance - - referral to the nonjudicial diplomatic agency, the United Nations Security Council - - is evident that the ICJ judgments were not meant to be enforceable in domestic courts. The Court also noted that if ICJ judgments were intended to be automatically enforceable domestic law, there would be no need to proceed to the Security Council to enforce the judgment in this case. With regard to the ICJ statute, incorporated in the U.N. Charter, the Court noted that its “principle purpose” is to “arbitrate particular disputes between national governments” and says, through Article 59, that “the decisions of the [ICJ] has no binding force except between the parties and in respect of that particular case.” Medellin, not being a country, the Court concluded, could not be a party to the *Avena* judgment and thus *Avena* had no binding force with regard to him. Because the Optional Protocol to the Vienna Convention, the United Nations Charter, and the International Court of Justice Statute do not create binding federal law in the absence of implementing legislation and because it is undisputed that no legislation exists, the Court held that none of these treaty sources serve to make the *Avena* judgment automatically binding domestic law. Thus, the Court ruled that Medellin had no right to the benefit of the *Avena* judgment.

**The President’s Memorandum Order cannot make the ICJ decision in *Avena* enforceable in domestic courts:** “The President’s authority to act, as with the exercise of any governmental power, must stem either from an act of Congress or from the Constitution itself. . . . When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possess in his own right plus all that Congress can delegate. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. In this circumstance, Presidential authority can derive support from congressional inertia, indifference or quiescence. Finally, when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb,” and the Court can sustain his actions only by disabling the Congress from acting upon the subject.” Three arguments were presented in favor of the President’s authority “to establish binding rules of decision that preempt contrary state law.” First, “the relevant treaties give the President the authority to implement the *Avena* judgment and that Congress acquiesced in the exercise of such authority.” Second, there is an “independent” international dispute-resolution power wholly apart from the asserted authority based on the pertinent treaties.” Third, “the President’s Memorandum is a valid exercise of his power to take care that the law be faithfully executed.” Rejecting

these arguments, the Court noted that the President can execute law but not make them and the President’s Memorandum is not supported by a “particularly longstanding practice” of congressional acquiescence. The Court then ruled that the President does not have the authority to “unilaterally convert a non-self-executing treaty into domestic law.” For these reasons, the Court held that the President did not have that authority to unilaterally order state and/or federal courts to enforce the *Avena* judgment.

**Breyer, J., dissenting:** In a lengthy dissent that discusses the language of multiple treaties, Justice Breyer concludes that the United States treaty obligations under the Vienna Convention binds the courts “no less than would an act of the federal legislature.”

***Snyder v. Louisiana*, 128 S.Ct. 1203 (2008)** (*Alito, J., for the Court, joined by Roberts, C.J., Stevens, Kennedy, Souter, Ginsburg, and Breyer, JJ.; Thomas, J., dissenting, joined by Scalia, J.*)

The prosecution exercised peremptory challenges to excuse all five African-American prospective jurors. Considering the race-neutral justifications the prosecution provided for these strikes and the similarly situated jurors who were not excused via peremptory challenge, the Court held that the prosecutors’ reasons were pretextual and that a *Batson* violation took place; requiring reversal of Snyder’s conviction.

**The *Batson* standard:** Under *Batson*, “[f]irst a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties’ submissions, the trial court must determine whether the defendant has shown purposeful discrimination.” At the third step, “the trial court must evaluate not only whether the prosecutor’s demeanor belies a discriminatory intent, but also whether the juror’s demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.” In determining whether a *Batson* violation has taken place, “all of the circumstances that bear upon the issue of racial animosity must be consulted.” For example, if there is any “persisting doubts” as to whether a juror was struck because of the juror’s race, courts must consider strikes of other jurors for the bearing it might have on determining whether any other strike was based on a juror’s race. On appeal, “a trial court’s ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous.”

**Prosecutors’ race-neutral reasons for striking a juror were pretextual:** With regard to prospective juror Brooks, a college senior who was attempting to fulfill his student-teaching obligation, the prosecution offered two race-neutral reasons for the strike: 1) Brooks looked nervous throughout the

*Continued on page 36*

*Continued from page 35*

questioning; and, 2) he believed Brooks might vote to convict of a lesser offense so he could avoid the penalty phase because Brooks was a student teacher who would miss class to serve on the jury. Over defense objection and without making any findings of fact or explaining his reasoning, the trial judge allowed the peremptory challenge on Brooks to stand. Because the trial judge did not say which of the two reasons proffered by the prosecution his decision was based upon, the Court refused to presume that the trial judge credited the prosecutor's assertion that Brooks was nervous. With regard to the prosecutor's second alleged justification, the Court noted that it was highly speculative and that the trial was extremely brief as the prosecutor anticipated during voir dire. The record also contained no information suggesting that Brooks remained concerned about serving on the jury after the Dean at his school said that Brooks missing time to serve on a jury would not be a problem. The Court also found that "[t]he implausibility of [the prosecutor's justification] [was] reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks," even those alleged similarities were not raised at trial. For example, one juror said that serving on the jury would be a hardship because he was a self-employed general contractor whose wife just had a hysterectomy so he is taking the kids back and forth to school and he has no family in the area who could help. Rather than move to excuse this juror whose obligations seem "substantially more pressing" than Brooks,' the prosecution "attempted to elicit assurances that he would be able to serve despite his work and family obligations" and did not exercise a peremptory challenge on him. As the Court noted, "[i]f the prosecution had been sincerely concerned that Mr. Brooks would favor a lesser verdict than first-degree murder in order to shorten the trial, it is hard to see why the prosecution would not have had at least as much concern regarding Mr. Laws." By way of another example, the Court noted that another juror said that to serve on the jury, he would have to cancel "too many things, including an urgent appointment at which his presence was essential." Yet, the prosecution did not strike him. Based on the different treatment of similarly situated jurors and the brevity of the trial, the Court found that "[t]he prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent." Finding that there is nothing in the record showing that the trial judge credited the claim that Brooks was nervous and that there is no "realistic possibility that the subtle question of causation could be profitably explored further on remand . . . more than a decade after petitioner's trial" and noting that the prosecution described both of its proffered justifications as "main concerns" and the adverse inferences to be drawn from the disparate treatment of similarly situated prospective jurors, the Court held that the state could not meet its burden of showing that discriminatory intent was not the determinative factor in striking the juror. Thus, the Court

reversed the judgment of the Louisiana Supreme Court and remanded the case for further proceedings not inconsistent with the Court's opinion.

*Note: In non-Batson contexts, the Court has held that "once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative." The Court noted that it need not decide whether that standard applies to Batson claims because a peremptory challenge shown to have been motivated in substantial part by discriminatory intent cannot be allowed to stand based on a lesser showing by the prosecution. Thus, the Court has left open the door that the burden may be higher on the prosecution in the Batson context than in other areas of law.*

**Thomas, J., dissenting:** He believed that "when the grounds for a trial court's decision are ambiguous, an appellate court should not presume that the lower court based its decision on an improper ground." Applying that standard, Justice Thomas believed that the "nervousness" justification should have been credited as a race-neutral reason, noting that the record suggests that the trial judge was more influenced by that reason than the other one proffered by the prosecution. Finally, Justice Thomas believed that a comparative analysis between the prospective juror Brooks and other jurors who were not stricken should not have been undertaken because Petitioner did not discuss those jurors or make a comparative analysis before the trial court or on appeal to the Louisiana Supreme Court and the state supreme court did not conduct a comparative analysis on its own.

**Danforth v. Minnesota, 128 S.Ct. 1029 (2008)** (*Stevens, J., for the Court, joined by, Scalia, Souter, Thomas, Ginsburg, Breyer, and Alito, JJ.; Roberts, C.J., dissenting, joined by Kennedy, J.*) (*non-capital*)

The Court held that the *Teague* non-retroactivity doctrine, which, with limited exceptions not at issue in this case, prohibits federal habeas courts from applying a rule or law that went into effect after the petitioner's direct appeal became final upon the denial of certiorari or the expiration of the time for seeking certiorari if no certiorari petition was filed, was intended to limit the authority of federal courts to overturn state convictions - - not to limit a state court's authority to grant relief - - does not create a binding obligation on state court. Thus, states, as independent sovereigns, can provide a remedy for a violation for which federal habeas relief would be barred by the *Teague* Doctrine.

**Roberts, C.J., dissenting:** Roberts believes that whether a decision by the Court is retroactive is a matter of federal law for which the Court's ruling must trump the States. Roberts also expressed concern that of two criminal defendants with the exact same claim and whose convictions became final on the same day, one could be released while the other could be

executed - - solely based on whether a state court decides to provide a remedy for a known constitutional violation. Roberts would thus hold that the *Teague* Doctrine bars state courts from giving retroactive effect to new rules handed down after a petitioner's direct appeal becomes final upon the denial of certiorari or the expiration of time for seeking certiorari if certiorari was not sought.

### Supreme Court Grants of Certiorari

**Bell v. Kelly**, No. 07-1223, decision below, 2008 WL 59946 (4th Cir.) (cert. granted, 5/12/08)

"Petitioner asserted ineffective assistance of counsel at sentencing, and the district court found that he had diligently attempted to develop and present the factual basis of this claim in state court, on habeas, but the state court's fact-finding procedures were inadequate to afford a full and fair hearing. After an evidentiary hearing, the district court found deficient performance but no prejudice and denied relief. The Fourth Circuit affirmed."

"Did the Fourth Circuit err when, in conflict with decisions of the Ninth and Tenth Circuits, it applied the deferential standard of 28 U.S.C. §2254(d), which is reserved for claims 'adjudicated on the merits' in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing?"

**Jimenez v. Quarterman**, No. 07-6984, decision below, No. 06-11240 (5th Cir.) (cert. granted, 3/17/08) (non-capital) (pro se filed petition)

"Whether a Certificate of Appealability should have issued pursuant to *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 1604 (2000) on the question of whether pursuant to 28 U.S.C. §2244(d)(1)(A) when through no fault of the petitioner, he was unable to obtain a direct review and the highest State Court granted relief to place him back to original position on direct review, should the 1-year limitations begin to run after he has completed that direct review resetting the 1 - year limitations period?"

**Giles v. California**, No. 07-6053, decision below, 152 P.3d 433 (Cal.) (cert. granted 1/11/08) (non-capital)

"In *Crawford v. Washington*, 541 U.S. 36, 62 (2004), this Court recognized that the forfeiture by wrongdoing rule 'extinguishes confrontation claims on essentially equitable grounds.' The question presented by this case is: Does a criminal defendant 'forfeit' his or her Sixth Amendment Confrontation Clause claims upon a mere showing that the defendant has caused the unavailability of a witness, as some courts have held, or must there also be an additional showing that the defendant's actions were undertaken for the purpose of preventing the witness from testifying, as other courts have held?"

### Stays of Execution

Derrick Sonnier - - Texas—stayed by the Texas Court of Criminal Appeals apparently to determine if Texas' lethal injection procedures comply with *Baze*.

Samuel Crowe - Georgia - granted clemency by the Georgia Board of Pardons and Paroles

Edward Bell - - Virginia - - certiorari granted and stay of execution pending disposition.

### United States Court of Appeals for the Sixth Circuit

**House v. Bell**, 2008 WL 1943935 (6th Cir. May 5, 2008) (*Before Merritt, Norris, and Siler, JJ.*) (*per curiam*).

Without substantive discussion, for the reasons set forth in the district court's opinion, the Sixth Circuit affirmed the district court's denial of relief on *Brady* and *Giglio* claims and grant of relief on an ineffective assistance of counsel claim. The district court had ruled that, in a case such as this one, where the only evidence against petitioner was circumstantial and the theory of the defense was to shift suspicion from petitioner to the victim's husband, it was incumbent on counsel to discover and present all witnesses who could testify as to the husband's abuse of his wife and thus lend credence to the defense theory. *House* is about whether the victim was killed by House or by her husband, whom she was afraid of and who had been beating her. At least some witnesses who could have testified about the victim's husband's behavior did not testify at trial. Although noting that the failure to call witnesses whose testimony is cumulative generally does not constitute ineffective assistance of counsel, the district court held that "counsel was deficient in failing to discover the aforementioned witnesses and the petitioner was clearly prejudiced by counsel failure in that regard. Petitioner was denied a fair trial, a trial whose result was reliable, and thus has met both prongs of the *Strickland* standard." *House v. Bell*, 2007 WL 4568444 (E.D. Tenn. 2007).

**Johnson v. Bell**, 2008 WL 1862326 (6th Cir. April 29, 2008) (*Gibbons, J., for the Court, joined by, Batchelder, J.; Cole, J., dissenting*)

**No Brady violation from the failure to disclose evidence:** Johnson's *Brady* claim [failure to disclose material and exculpatory evidence] centered on the use of withheld material to impeach three witnesses. Although the undisclosed reports would have called into question one of the witness' ability to identify Johnson and his ability to recall the events of the evening of the crime, the benefit of the reports would have been limited because the reports were taken at a time when the witness could hardly be expected to describe the events of the evening with detailed clarity (witness in hospital and "in distress" with gunshot wounds in his neck

*Continued on page 38*

*Continued from page 37*

and hand) and because defense counsel was able to successfully impeach the witness about his identification of Johnson and his recollection of the events of the evening. In a highly factually based analysis, the Sixth Circuit addressed the value of the rest of the undisclosed evidence and held that, like the report discussed above, none of the undisclosed evidence was material in that there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. Thus, the Court found that no *Brady* violation had taken place.

**The prosecution did not interfere with Johnson’s right to compulsory process when it interrogated an alleged alibi witness who had been arrested on unrelated charged:** Because there was no evidence that the witness was prevented from testifying on Johnson’s behalf and because the witness chose of his own accord to testify for the government, the Sixth Circuit held that the state court’s ruling that Johnson’s rights were not violated when the prosecution interrogated the witness while he was detained on unrelated charges was not contrary to or an unreasonable application of clearly established law.

**Prosecutor did not improperly vouch for the credibility of a witness:** “Improper vouching occurs when a prosecutor supports the credibility of a witness by indicating a personal belief in the witness’s credibility thereby placing the prestige of the [government] behind that witness.” Because the majority of the allegedly improper comments were not mentioned by Johnson in state court until on appeal, the state court found that the “additional” allegations of improper vouching were defaulted and the Sixth Circuit agreed. With regard to the other statements, the Sixth Circuit ruled that the statements do not rise to the level of misconduct.

**Prosecutor improperly used inflammatory language and injected statements of personal interest in closing argument but the improprieties were not so egregious as to require reversal:** During closing argument, the prosecutor told the jury that he has a personal interest in the case because his child could have been the crime victim. The prosecutor also told the jury that any one of them could have been the victim if they were in the store at the time of the crime. According to the Sixth Circuit, “[c]losing arguments that encourage juror identification with crimes are improper,” as are statements that “call[] on the jury’s emotions and fears-rather than the evidence-to decide the case.” Because the prosecutor’s comments were “clearly calculated” to do so, the court found the comments improper. The court, however, found the comments not to be flagrant because the prosecutor did not intend to mislead the jury, the comments were made in the context of the prosecutor’s recitation of the facts of the case, the comments were isolated, and the evidence against Johnson was substantial. Because the

comments were not flagrant, the Sixth Circuit reverses only where the proof against the defendant was not overwhelming, opposing counsel objected to the conduct, and the trial court failed to give a curative instruction. Defense counsel never objected, the evidence was overwhelming, and a curative instruction was given. Thus, the court held that the prosecutor’s improper remarks were not “so egregious as to render the trial fundamentally unfair.”

**Defense counsel was not ineffective for failing to request a continuance and for failing to seek the recusal of the prosecutors in light of their involvement in interrogating one of the witnesses:** Because Johnson failed to show how a continuance would have been “productive” to his defense, the court held that he failed to establish prejudice from defense counsel’s failure to request a continuance. With regard to the recusal, having found no impropriety in the prosecutor’s conduct, the court ruled that counsel could not be ineffective for failing to challenge actions already found to be acceptable.

**Cole, J., dissenting:** Analyzing the withheld evidence collectively, Judge Cole believes that materiality has been established, thereby requiring the writ of habeas corpus be granted. He also disputed the argument in Judge Batchelder’s concurrence, which she wrote only to address Judge Cole’s dissent.

**Keene v. Mitchell, 2008 WL 1829671 (6th Cir., April 25, 2008)** (*Siler, J., for the Court, joined by, Merritt and Sutton, JJ.*) (*affirming denial of habeas relief*)

Noting that Keene had failed to offer any evidence specific to his own case that would support an inference that the prosecutor sought death because Keene was African-American, the court denied Keene’s Equal Protection selective prosecution claim which relied on the following facts: 1) African-Americans make up only 17% of the county’s population but account for 64% of capital indictments; 2) in a “factually similar case, which the court did not find similar because that case involved two murders not five, the prosecutor did not seek death; and, 3) the prosecutor did not seek death against the other adult defendant, a Caucasian woman. The court also found that if the pretrial lineup was unduly suggestive, the error was harmless because the identification related only to the robbery charge not the charges for which Keene was sentenced to death.

**Mahdi v. Bagley, 522 F.3d 631 (6th Cir. 2008)** (*Gibbons, J., for the Court, joined by, Boggs, C.J., and Moore, J.*) (*affirming the denial of habeas relief*)

**Trial counsel were not ineffective for failing to voir dire prospective jurors on racial and religious bias:** Noting that “[c]onducting a voir dire on racial and religious grounds could have emphasized the possible role of racial and religious animus in the commission of the crime” - - which defense counsel tried to convince the jury was an accident -

- the Sixth Circuit held that trial counsel's decision not to voir dire prospective jurors on racial and religious bias appears to be a reasonable tactical decision and, the state courts' rulings cannot be considered contrary to or an unreasonable application of clearly established law because the state court based its decision on a particular view of the factual record - - determinations that, according to the court, are presumed correct under 28 U.S.C. §2254(e)(1).

**Mahdi was not deprived of an appellate weighing of residual doubt when the state court of appeals applied a change in case law that retroactively forbade consideration of residual doubt as a mitigating circumstance even though Mahdi had relied on it at trial:** At the time of Mahdi's trial, residual doubt was a mitigating circumstance under Ohio law and one that Mahdi obtained a jury instruction on at trial. While his case was pending on direct appeal, the Ohio Supreme Court ruled that residual doubt was no longer a mitigating circumstance under Ohio law. As a result, the state court of appeals refused to consider residual doubt when independently determining whether the aggravating factors outweighed the mitigating factors in Mahdi's case. On direct appeal, however, the Ohio Supreme Court also concluded that residual doubt would be entitled to "very little weight" in Mahdi's case. Because the Ohio Supreme Court weighed residual doubt in Mahdi's case - - noting that the evidence that the shooting was accidental was unpersuasive and the eyewitness testimony negated the absence of intent to kill - - the Sixth Circuit held that it need not determine whether the Ohio Supreme Court unreasonably applied clearly established law by applying the change in law retroactively to Mahdi.

***Bies v. Bagley*, 519 F.3d 324 (6th Cir. 2008)** (*Clay, J., for the Court, joined by, Daughtrey and Moore, JJ.*)

Prior to the prohibition against executing the mentally retarded, Bies had been found retarded by the Ohio courts after the state conceded mental retardation. Once *Atkins* was decided, Bies filed a petition to vacate his death sentence, arguing that the state was estopped from contesting the fact of his mental retardation because it had already been determined by prior state court proceedings. Bies then filed a motion for summary judgment, arguing that the Double Jeopardy Clause bars the state from relitigating Bies mental retardation. When that motion was denied, Bies amended his already pending federal habeas petition to include an *Atkins* claim. The federal district court severed the Double Jeopardy *Atkins* claim from the rest of the habeas claims and granted the petition with regard to the Double Jeopardy claim. The Sixth Circuit affirmed.

**Bies exhausted his Double Jeopardy claim in state court even though he did not seek review through the entire ordinary state court process:**

The exhaustion doctrine requires a petitioner to present his or her claims throughout the available state court proceedings before seeking relief in federal court. That requirement,

however, does not apply when "there is an absence of available State corrective process," or when "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. §2254(b)(1)(B). Recognizing that the Double Jeopardy Clause protected against the adverse verdict and the mere "risk of hazard" of twice defending against the same claim, the Sixth Circuit held that a Double Jeopardy challenge must be reviewable before the subsequent exposure takes place. Thus, before bringing a Double Jeopardy claim in federal court, a petitioner need only exhaust "whatever procedures are available to him under state law for pre-exposure vindication of his rights." Bies filed a motion in the trial court to prohibit the prosecution from relitigating his mental retardation. Under Ohio law, the denial of that decision is reviewable by direct appeal at the conclusion of trial. Thus, after the trial court denied the motion, the only way for Bies to challenge the denial of his double jeopardy claim is for him to proceed to a full trial on the merits regarding his post conviction action. That trial, however, would force Bies to once again litigate the question of his mental retardation - - a procedure that itself violates the Double Jeopardy Clause. In order to avoid unconstitutionally requiring Bies to relitigate the issue of his mental retardation, the Sixth Circuit held that Bies "exhausted whatever procedures are available to him under state law for pre-exposure vindication of his rights," even though Bies may have other claims that must still be further litigated in state court.

**How the Double Jeopardy Clause applies to death sentences:**

The Double Jeopardy Clause bars the state from seeking death in a later proceeding when the judge or jury at the earlier proceeding "enters findings sufficient to establish legal entitlement to the life sentence."

**The collateral estoppel doctrine:** "Once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." To determine if collateral estoppel litigation bars litigation of an issue, four requirements must be satisfied: "the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; 2) determination of the issue must have been necessary to the outcome of the prior proceeding; 3) the prior proceeding must have resulted in a final judgment on the merits; and 4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding."

**Ohio is collaterally estopped from relitigating Bies mental retardation:**

The Sixth Circuit addressed each prong of the collateral estoppel test and held that it barred relitigating Bies' mental retardation. First, the court rejected the state's argument that the definition of mental retardation applied when Bies was found mentally retarded was not the same as the definition the Ohio Supreme Court created after *Atkins*.

*Continued on page 40*

*Continued from page 39*

Detailing the findings from the expert who testified in the proceeding in which Bies was found mentally retarded and noting that court applied the same clinical definition of mental retardation that the Ohio Supreme Court later adopted after *Atkins*, the Sixth Circuit found that the same definition of mental retardation was applied and litigated in prior proceedings. Second, “[b]ecause the Supreme Court of Ohio found that Petitioner is mentally retarded pursuant to a mandatory duty to weigh the aggravating circumstances in his case against any mitigating factors which could be found in the record, [the court held] that the determination of [Bies’ mental retardation] was necessary to the outcome of [Bies’] direct appeal.” Third, it was clear that the proceeding in which Bies was found mentally retarded was a final judgment on the merits -- it was rendered by the Ohio Supreme Court. Finally, noting that the issue of Bies’ mental retardation was a contested issue in the state proceeding in which he was found mentally retarded and there is no reason to doubt the fairness of those proceedings, the Sixth Circuit held that the state had a full and fair opportunity to litigate Bies’ mental retardation in the proceeding in which he was found mentally retarded. Finally, “as death is not a suitable punishment for a mentally retarded criminal,” the state court determination that Bies is mentally retarded is “sufficient to establish legal entitlement to the life sentence.” Thus, the Sixth Circuit held that the Double Jeopardy Clause prohibits the state from relitigating Bies’ mental retardation.

**The state court ruling that the government could relitigate Bies’ mental retardation was based on an unreasonable determination of the facts:** The state court found that the expert who diagnosed Bies with mental retardation provided no explanation for his diagnosis, and appeared to base it primarily on an IQ test. The Sixth Circuit found this conclusion to be based on an unreasonable determination of the facts because the expert testified not only about Bies’ IQ but also about his “limited functional academic skills, his significant limitations to his ability to communicate, his significant limitations to his social and interpersonal skills, and his significant limitations to his ability to care for himself, in addition to testifying that all of these signs of mental retardation manifested at an early age.” Further, in being unable to determine if the expert applied the clinical test for assessing mental retardation, the state court ignored the fact that the expert is a clinical psychologist. By suggesting that the expert may have used a different test, the state court “impliedly suggested that [the expert] may have committed malpractice without any basis in the record for such a suggestion.” In light of the overwhelming evidence that the expert applied the clinical test for determining mental retardation and no evidence to suggest otherwise, the Sixth Circuit concluded that clear and convincing evidence establishes that the state court’s ruling was based on an unreasonable determination of the facts.

**Collateral estoppel in a criminal case:** In rejecting the state’s argument that because Ohio law allows a death row inmate to relitigate the issue of his mental retardation, the same standard must apply when the government seeks to relitigate the same issue, the court joined the Third, Ninth, Tenth, and Eleventh Circuits in holding that, “in a criminal case, collateral estoppel may only be invoked by the accused.”

***United States v. Gabrion*, 517 F.3d 839 (6th Cir. 2008)**  
(Batchelder, J., for the Court; Moore, J., concurring in judgment; Merritt, J., dissenting)

Gabrion committed murder within the special maritime and territorial jurisdiction of the United States by drowning his victim in Oxford Lake, which lies within the Manistee National Forest. In a footnote on direct appeal, Gabrion raised the issue of whether the federal government established that when it acquired the land it gave proper notice of its acceptance of jurisdiction. The issue arose out of 40 U.S.C. §255, which says that the government must first give notice that it is asserting law enforcement jurisdiction before it displaces the State’s jurisdiction. Although the issue was not raised before the trial court and raised on appeal only in a footnote, the Sixth Circuit ordered supplemental briefing on the issue. Rather than brief the issue, the parties filed a joint motion to remand to the district court for a hearing on subject matter jurisdiction. The Sixth Circuit granted that motion and the district court held an evidentiary hearing after which it ruled the federal government had jurisdiction over the location of the crime and thus had jurisdiction to try Gabrion in federal court. Gabrion appealed and the Sixth Circuit’s opinion was limited to the issue of subject matter jurisdiction. In a complex and lengthy opinion that delves into detail about 40 U.S.C. 255, 16 U.S.C. 480, the Property Clause of the United States Constitution, and the Federal Enclave Clause of the United States Constitution, the Sixth Circuit affirmed the district court’s ruling that it had subject matter jurisdiction.

***Abdur’Rahman v. Bell*, No. 02-6548 (6th Cir., Jan. 18, 2008)**  
(Before Siler, Batchelder, and Cole, JJ.) (Order)

By a 2-1 vote, the panel ruled that Abdur’Rahman’s Fed.R.Civ.P. 60(b) motion premised on the fact that after the district court found a claim procedurally defaulted for failing to seek discretionary review in state court, the Tennessee Supreme Court promulgated a rule saying discretionary review need not be sought to exhaust a claim must be construed as falling with 60(b)(1)’s “mistake” provision because the Tennessee rule merely “clarified” rather than “changed” the law. Because Abdur’Rahman’s 60(b) motion was not filed within one year of judgment as required by 60(b)(1), the panel held that it was untimely and ordered the case dismissed. En banc review was granted and the full court referred the matter back to the original panel for further review. Upon that review, the panel reversed its previous ruling by finding that Abdur’Rahman’s 60(b) motion was

properly filed under 60(b)(6), which only has a reasonableness time requirement, and remanded the case to the district court to determine if the 60(b) motion should be granted.

### United States District Courts of Kentucky

#### ***Ronnie Bowling v. Haeberlin*, No. 03-28 (E.D.Ky, May 16, 2008)**

The district court stayed further proceedings pending resolution of Bowling's collateral attack on his convictions pending in the Kentucky Supreme Court for three reasons: 1) the difficulty of providing the state court record to the federal district court when the record is currently in the possession of the Kentucky Supreme Court; 2) the parties would not be able to consult the state court record for purposes of briefing the claims before the federal court until the Kentucky Supreme Court returns the record to the trial court; and, 3) a decision by the Kentucky Supreme Court in Bowling's favor would result in a new trial, thereby mooted Bowling's federal habeas petition.

#### ***Wilson v. Rees, et al.*, No. 3:07-CV-00078 (E.D.Ky. May 12, 2008) (Caldwell, J.)**

(DISCLAIMER: Author is counsel for the death-sentenced inmates in *Moore v. Rees*, the case in which Wilson sought consolidation).

Wilson filed a motion to consolidate his challenge to the chemicals and procedures with the one pending in *Moore v. Rees*, which was filed more than two years earlier. Where cases before a court involve a common question of law or fact, Fed.R.Civ.P. 42 allows the court to join the actions for a hearing or trial on any or all matters at issue in the actions; consolidate the actions; or, issue any other orders to avoid unnecessary cost or delay. In deciding whether to consolidate, a court may consider "whether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on the parties, witnesses, and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives." The court noted that *Moore* and *Wilson* "present an apparently identical legal claim regarding the constitutionality of Kentucky's lethal injection protocol. However, each plaintiff presents some unique factual aspects to their claim, including whether he properly and timely exhausted administrative remedies as required by 28 U.S.C. § 1997e(a), and whether the claim was timely asserted before the running of the statute of limitations. While it is true that each of the existing plaintiffs in the *Moore* case presents his own unique factual circumstances on these issues, it is also true that these issues have already been raised and briefed by the existing parties as that case enters its third year. In addition, the plaintiffs in that case have raised the question of the extent to which their claims

may survive the Supreme Court's recent decision in *Baze v. Rees*, 07-5439, Supreme Court of the United States." The court, however, noted that "[t]his is not to say that some degree of coordination or consolidation between the cases would not be beneficial. . . . For example, an order coordinating discovery under Rule 42(a)(3) or consolidating hearings on a common issue under Rule 42(a)(1) may be entertained as circumstances warrant. But, because wholesale consolidation under Rule 42(a)(2) would be potentially disruptive and unnecessarily complicate issues between two cases at decidedly different stages of development," the court denied Wilson's motion to consolidate with *Moore*.

### Supreme Court of Kentucky

#### ***Fugett v. Commonwealth*, 2008 WL 1849616 (Ky., April 24, 2008) (Scott, J., for the Court, joined by Lambert, C.J., Minton, Noble, and Schroder, JJ.; Cunningham, J., dissenting; Abramson, J., not sitting because she was the trial judge) (non-capital) (final)**

In this capital case where the jury decided not to impose death, one of the jurors who was excused via a peremptory challenge stated on voir dire that he believed "the punishment should be based only on what occurred on the day of the killing, rather than consideration of a person's past." He also "did not believe that a person's use, or abuse, of alcohol should have any effect on his actions, and so those factors should not be considered." Further, "he believed that only a person's history of violence should be considered on the issue of punishment. When asked by the prosecution as to whether he would, in his sentencing decision, consider factors like a defendant's age, IQ, or the kind of home in which he was raised, he responded that he could consider age, if the person were 10, 11, or 12 years of age. Moreover, he stated in general he could consider other factors, but they would not have much effect on his opinion." When pried by the trial court about whether he could consider the mitigating evidence that had been described to him during voir dire, the juror said, "I would consider it." The court held that, despite the juror's express statement that he would consider the mitigating evidence presented, "the totality of the juror's responses form a reasonable basis to conclude that he could not consider all the mitigation evidence that the law demands." Noting United States Supreme Court law holding that "[a]ny juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis and the evidence developed at trial," the Kentucky Supreme Court held that the failure to excuse this juror was an abuse of discretion.

*Note: Fugett establishes that a juror saying he or she can follow the law or consider mitigating evidence is insufficient, in itself, to make a juror qualified to serve in a capital case when other statements by the juror suggest reason to question the juror's ability to consider particular mitigating*  
Continued on page 42

Continued from page 41

evidence. *Fugett* also establishes that to be qualified to serve on a capital jury, a prospective juror must not only be able to consider mitigating evidence generally but also must be able to consider the particular type of mitigating evidence that defense counsel intends to offer under the circumstances of the particular case, which includes considering the mitigating evidence as a basis to impose less than death despite the depravity of the crime. Finally, *Fugett* suggests that defense counsel must be able to question prospective jurors about their ability to consider, under the circumstances of the case, the particular type of mitigating evidence defense counsel intends to offer for a juror who would not consider that evidence must be excused for cause and there must be a way for counsel to find out if a prospective juror should be excused for cause on that basis.

***Windsor v. Commonwealth*, 2008 WL 1848448 (Ky., April 24, 2008)** (Schroder, J., for a unanimous court) (final)

Shawn Windsor entered an unconditional guilty plea to two counts of murder and requested a death sentence, which the judge promptly imposed. The trial court's judgment of conviction and sentence said Windsor "has the right to appeal and that, if he is unable to pay the costs of appeal or employ counsel for appeal, the Court will appoint counsel and will grant the [Appellant] the right to file his appeal *in forma pauperis*." When Windsor filed a motion to proceed *in forma pauperis* on appeal, the Commonwealth objected on the ground that Windsor waived his right to a direct appeal by pleading guilty. The trial court amended its judgment "to reflect that [Windsor] has no right to appeal but the Judgment will receive the mandatory review by the Kentucky Supreme Court as provided by statute." Windsor argued that the trial court erred by ruling that Windsor had no right to appeal his convictions and death sentences. The Kentucky Supreme Court agreed.

The court ruled that "[w]hile an unconditional guilty plea waives the right to appeal many constitutional protections as well as the right to appeal a finding of guilt on the sufficiency of the evidence, there are some remaining issues that can be raised in an appeal. These include competency to plead guilty; whether the plea complied with the requirements of *Boykin v. Alabama*; subject matter jurisdiction and failure to charge a public offense; and sentencing issues." The court also noted that a trial court must allow an indigent defendant to proceed *in forma pauperis* even when the trial court believes an appeal is frivolous because, otherwise, the "result would be the trial court deciding the appeal for a poor person whereas a person paying the filing fee would have another court, an appellate court, review the issue." For these reasons, the court remanded Windsor's case for reinstatement of the original judgment of conviction and sentence that said Windsor had a right to appeal and noted that further appeals should be taken from that judgment.

***Soto v. Conrad*, No. 2006-SC-000924 (Ky. March 20, 2008)** (unanimous order granting writ of mandamus) (DISCLAIMER: Author is counsel for Soto)

Soto filed a writ of a mandamus arguing that he is entitled to funds for expert assistance to support known grievances pled with specificity in his RCr 11.42 motion to vacate convictions and death sentences and that the trial court has discretion to authorize funds for expert assistance when it will aid the court in deciding whether to grant an evidentiary hearing, particularly when the issues involve matters for which attorneys generally do not have expertise. The Kentucky Supreme Court characterized Soto's writ as "request[ing] funds for expert assistance to prove various mitigating circumstances that he never presented at trial due to alleged ineffective assistance of counsel." Citing its recent decision in *Hodge and Epperson v. Coleman* [involving funds for travel expenses of witnesses at a post conviction evidentiary hearing and discussed in detail in the previous issue of the Capital Case Review], the court noted that *Hodge and Epperson* held that a "post-conviction petitioner may be allowed funding for necessary evidentiary expenses upon the finding by 'a court of competent' jurisdiction that 'the post-conviction petition sets forth allegations sufficient necessitate an evidentiary hearing' regarding a particular issue." Noting that "it would be unnecessary for a petitioner to raise the funding issue for the first time on direct appeal after the post-conviction proceeding because if the petitioner was found to be entitled to funding, the entire proceeding would be held again and the administration of justice would be delayed," the Kentucky Supreme Court granted Soto's petition for a writ of mandamus and remanded the matter to the circuit court "for a hearing according to our opinion in *Hodge* for Soto to present evidence that he is entitled to an evidentiary hearing based on his allegations. If the court finds that he is entitled to an evidentiary hearing, then the court has discretion as to what funds, or state services, Soto may receive."

***Haight v. Commonwealth*, 2007 WL 2404494 (Ky.)** (Memorandum Opinion) (final)

After Haight's RCr 11.42 motion to vacate his conviction and sentence had been denied by the trial court, Haight filed, on the same day, a CR 59.05 motion to alter or amend and a notice of appeal. Haight then filed a motion to abate the appeal pending the outcome of the trial court's ruling on the CR 59.05 motion, which was denied and followed shortly thereafter by the Kentucky Supreme Court's affirmance of the denial of Haight's RCr 11.42 motion. After the Kentucky Supreme Court's opinion became final, Haight filed a motion in the trial court seeking to amend and supplement his RCr 11.42 and CR 59.05 motions. The trial court denied that motion on the basis that, by virtue of the Kentucky Supreme Court affirming the denial of Haight's RCr 11.42 motion, it was without jurisdiction to hear additional evidence concerning Haight's motions. Citing a recent Kentucky Supreme Court decision, which has since been abrogated

by court rule, holding that a CR 59.05 motion did not toll the clock for filing a notice of appeal, Haight argued that the Kentucky Supreme Court did not have jurisdiction to decide Haight's RCr 11.42 appeal while his CR 59.05 motion was pending. The court distinguished Haight's situation from one where applying the non-tolling interpretation of CR 59.05 would prevent an appellant from having an appeal and held that Haight was not harmed because his RCr 11.42 appeal was decided by the Kentucky Supreme Court, albeit before the CR 59.05 motion was ruled upon.

The court also denied Haight's claims that he was denied his right to counsel in post conviction proceedings because of conflicts of interest within the Department of Public Advocacy, that he should have been granted leave to amend and supplement his RCr 11.42 motion, that he was denied effective assistance of counsel at trial, and that he should have received a Wanton Murder and Theft instruction. The court held that these claims were either raised in Haight's RCr 11.42 motion and the appeal from the denial of that or should have been raised in those pleadings. The court also noted that "a party cannot invoke CR 59.05 to raise issues that could have been presented in the proceedings prior to entry of the judgment." ■

## Kentucky Association of Criminal Defense Lawyers

### 22<sup>nd</sup> Annual Seminar

**Speakers include:** John Wesley Hall, President- Elect of NACDL; Judge Stan Billingsley; Justice Mary Noble, Kentucky Supreme Court

**Place:** Caesar's Palace Convention Center, 11999 Avenue of the Emperors, Elizabeth, Indiana (about 30 minutes from downtown, Louisville, Kentucky)

**Date:** November 7, 2008, 8:00 a.m. to 5:15 p.m.

If you are interested in attending the Seminar, please contact Charolette Brooks at (606) 677-1687 or by email to [kacd12000@yahoo.com](mailto:kacd12000@yahoo.com); and check online at [www.kacd1.net](http://www.kacd1.net).

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## Department of Public Advocacy

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Frankfort, Kentucky 40601

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### Upcoming DPA, NCDC, NLADA & KACDL Education

**\*\* DPA \*\***

**Litigation Practice Institute**  
Kentucky Leadership Center  
Faubush, KY  
October 5-10, 2008

**NOTE: DPA Education is open only to  
criminal defense advocates.**

**For more information:  
<http://dpa.ky.gov/education.php>**

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**A comprehensive listing of criminal  
defense related training events can be  
found at the NLADA Trainers Section  
online calendar at:  
[http://www.airset.com/Public/  
Calendars.jsp?id=\\_akEPTXAsBaUR](http://www.airset.com/Public/Calendars.jsp?id=_akEPTXAsBaUR)**

**For more information regarding KACDL  
programs:**

**Charolette Brooks, Executive Director**  
Tel: (606) 677-1687  
Fax: (606) 679-3007  
Web: [kacdl2000@yahoo.com](mailto:kacdl2000@yahoo.com)  
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**For more information regarding NLADA  
programs:**

**NLADA**  
1625 K Street, N.W., Suite 800  
Washington, D.C. 20006  
Tel: (202) 452-0620  
Fax: (202) 872-1031  
Web: <http://www.nlada.org>  
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**For more information regarding NCDC  
programs:**

**Rosie Flanagan**  
NCDC, c/o Mercer Law School  
Macon, Georgia 31207  
Tel: (478) 746-4151  
Fax: (478) 743-0160  
Web: <http://www.ncdc.net/>

**\*\* KBA \*\***

**New Lawyer**  
Covington, KY  
January 15-16, 2009

**\*\* NLADA \*\***

**Annual Conference**  
Washington, DC  
November 19-22, 2008

**\*\* KACDL \*\***

**Annual Seminar**  
Elizabeth, IN  
November 7, 2008